Momanyi v Nyamwange & another (Suing as the Legal Representatives of the Estate of the Late Maurice Omambia Nyamwange) (Civil Appeal E026 of 2024) [2025] KEHC 15531 (KLR) (30 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15531 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E026 OF 2024

DKN MAGARE, J

OCTOBER 30, 2025

BETWEEN

ENOCK MOMANYI ..... APPELLANT

AND

VICTOR MAGETO NYAMWANGE ..... 1ST RESPONDENT

SARAH MUTHOMI MAINDA ..... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE MAURICE OMAMBIA NYAMWANGE

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. C.A. Ocharo (SPM) dated 13.2.2024 arising from Kisii CMCC No. E293 of 2022.

2. The Memorandum of Appeal dated 1.3.2024 is against the award of liability and general damages. The Appellant posited that the lower court made an award of general damages under pain and suffering, loss of expectation of life and loss of dependency that was inordinately high. The appeal also challenged the finding on liability of 100%.

3. The Plaint dated 19.4.2022 claimed damages for an accident that occurred on 27.10.2021 when the deceased was walking along Kisii-Migori Road at Denmark area when the Appellant, his driver or agent negligently and dangerously drove motor vehicle Registration No. KCB 257P causing it to violently hit the deceased hence the accident.

4. The Respondents set forth particulars of negligence for the accident motor vehicle and pleaded special damages of Ksh. 149,000/= as well as general damages under the *Law Reform Act* and *Fatal Accidents Act*. The appeal is not on special damages.

5. The Appellant entered appearance and filed a defence dated 25.7.2022, in which he denied the particulars of negligence and the injuries as pleaded in the plaint. He further set out ten particulars of negligence attributed to the deceased pedestrian. There was a reply to defence filed in respect thereof on 08.08.2022.

6. The lower court heard the parties and proceeded to render the impugned judgment in which the Court allowed the liability of 100% against the Appellant and awarded Ksh. 30,000/= for pain and suffering, Ksh. 2,164,211.20/= for loss of dependency, and Ksh. 100,000/= for loss of expectation of life. Special damages were awarded at Ksh. 139,000/=.

7. Aggrieved by the finding of the lower court, the Appellant lodged the appeal herein, and advanced the following grounds.

    a. That the Honourable court erred in law when the same entered judgment on liability, in favour of the respondent as against the appellant at 100% whereas un-rebutted evidence and material were present demonstrating that the respondent was solely responsible.

    b. The learned trial magistrate erred in law when she awarded excessive general damages in the circumstances.

    c. That the learned trial magistrate grossly erred in law when the same disregarded the appellant's written submissions which properly addressed her on the principles and law applicable in respect of the claim falling for determination before her.

    d. The learned trial magistrate erred in law and in fact by failing to properly evaluate the evidence on record thus reaching to an erroneous decision.

Evidence

8. At the hearing, PW1 was Sarah Muthoni. The deceased was her husband. He provided medical expenses, school fees and food to the household. On cross examination, it was her stated case that she had 2 children, Edin and Zacharia. They were in school. The deceased was a businessman operating a shop and earned Ksh. 30,000 per month. Her husband was 44 years and he died on the same day.

9. PW2 was No. 82476 PC Acqinata Shiholi of Nyanchwa Police Station. The matter was investigated by PC Chumo who was on leave. She produced the police abstract. It was her case that the accident in which the deceased died occurred on 27.10.2021 at 5.30 pm. On cross examination she stated that the matter was reported and the Appellant blamed. He was charged with causing death by dangerous driving in Traffic Case No. 114/2020. The case was ongoing after he pleaded not guilty. She testified that the Appellant was carrying 140 bags of coffee and he lost brakes and rammed into the deceased who was walking off the road.

10. PW3 was Boniface Nyamweya. It was his case that he witnessed the accident. He was 40-50 metres from the scene of the accident. He blamed the accident motor vehicle. The driver of the motor vehicle was driving at high speed, lost control and hit the deceased.

11. DW1 was Nemwel Oroko Momanyi. He was the driver of the accident motor vehicle. He relied on his witness statement in his evidence in chief. On cross examination, it was his case that the deceased was on a bike heading to Kisumu direction. A Nissan was overtaking a bike and realizing it could not make it, swerved and hit the bike. He was driving at 60 km/h. He denied that the motor vehicle had a problem with brakes, or had any mechanical or brake failure.

Submissions

12. The Appellant filed submissions dated 28.8.2025 by which he submitted that the court ought to have apportioned liability as he proved that the deceased jumped off the moving bike hence the accident. He submitted that the witness did not witness see the speedometer.

13. On quantum, it was submitted that Ksh. 10,000/= ought to have been awarded for pain and suffering as the deceased died on the same day. He cited Moses Koome Mithika & another v Doreen Gatwiri & another (Suing as the legal representative and administrator of the Estate of Phineas Murithi (deceased) [2020] KEHC 4679 (KLR).

14. On loss of dependency, it was also submitted that the minimum wage ought to have been capped at Ksh. 8,000/= and a multiplier of 12 years would be appropriate. Therefore, according to him, Ksh. 768,000/= was adequate compensation and the award by the lower court ought to be set side. Reliance was placed on the case of Regina Chelimo Magut & another v Linear Coach Limited [2020] eKLR - Civil Suit 84 of 2004.

15. There was no any logical explanation for capping the minimum wage at 8,000/=. Reliance was placed on the case of Regina Chelimo Magut & another v Linear Coach Limited [2020] eKLR - Civil Suit 84 of 2004. Incidentally, the cited decision supports the Respondent's position. In that case, a 45-year-old man was awarded a multiplier of 15 years, while the deceased herein, one year younger was granted 16 years, thereby affirming the reasonableness of the multiplier awarded in this matter.

16. The appellant proposed the court to reduce from the amount awarded to Ksh. 768,000/=. There were no submissions in any other limb.

17. On the part of the Respondents, it was submitted that the Respondent proved liability of 100% against the Appellant. Further, that the award on general damages was commensurate and ought not to be disturbed. They relied on the case of Southern Engineering Company Ltd v Mutia [1985] KECA 49 (KLR), where the court of appeal stated as follows:

> .. the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and to prior decisions which are relevant to the case in question. This is shown by a passage from an English case in the House of Lords to which reference has often been made in this Court, but which I think illustrates Mr. Gautama's point that it is the quality and calibre of the judgment in question which is its most important factor, and that the reference to other and possibly to outside decisions is, in a sense, incidental to that. The passage is from Lord Morris' speech in H West & Son v Shephard, [1964] AC 326 at page 353, and reads as follows:-
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> "The difficult task of awarding money compensation in a case of this kind is essential a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment..

Even more definite regarding the upward trend was the statement made by Madan JA twenty-one months later in Ugenya Bus Services v Gachoki Civil Appeal 66 of 1981, where there was a hand injury but also the amputation of the right leg, as follows:-

> " I also know that the days of small and stingy awards are gone. They were decidedly miserly in any event, like Kshs. 20,000.00 for the loss of a forearm or Kshs. 50,000.00 for the loss of an eye. Even without the curse of inflation they were niggardly. I remember but ignore them. We have inflation with us. We all have to live with the exorbitance which inflation has brought into our lives."

The foregoing was further reinforced, if such reinforcement were needed, Mr. Gautama said, by the citation of the words of Sachs LJ in the 4th Edition of Kemp & Kemp on Damages, Volume I, where he said: in Dimmock v Miles [1969] CA No 436:

> " the notional scales applied by judges when assessing damages in personal injury cases are nowadays apt to change with ever-increasing rapidity. One, but only one, of the causes of such changes is the ever-decreasing worth of monetary units.

18. Further reliance was on the case of Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others [1986] KECA 42 (KLR), where the court of appeal (Kneller, Hancox & Nyarangi, JJA), posited as follows, per Kneller JA:

    This court, I remind myself, is only entitled to increase an award of damages by the High Court if it is so inordinately low it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the judge:

    (a) proceeded on a wrong principle; or

    (b) misapprehended the evidence in some material respect.

19. On liability they submitted that the court is being invited to make assumptions not borne out of evidence. Reliance was placed inter alia on the case of Kansa v Solanki (1969) EA 318. On the basis of the said case, he submitted that there was a presumption which was proved in evidence that the driver of the accident motor vehicle was negligent. In that case the court of appeal held as follows:

> " Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (See Bernard V Sully [1931] 47 TLK 557. This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver.

20. They submitted that direct, circumstantial, oral, as well as documentary evidence showed that the vehicle was driven at high speed and reeled off the road and hit a pedestrian off the road. She blamed the accident on the recklessness of the appellant. They submitted that DW1's evidence was unreliable, since he alleged that an unknown vehicle hit an unknown motorcycle. She submitted that there was no credible evidence to explicate the appellant from liability.

21. On quantum they submitted that the appeal is based on no evidence as the award was standard, in all aspects. They submitted that an award of between 10,000/= to Ksh. 100,000/= is still sufficient. Reliance was placed on the case of Mercy Muriuki & another v Samuel Mwangi Nduati & Anor (Suing

as the Legal Administrators of the Estate of the late Robert Mwangi) [2019] KEHC 9014 (KLR), where F. Muchemi, J, stated as follows:

22. Under the *Law Reform act*, In Rose vs Ford, (1937) AC 826 it was held that damages for loss of expectation of life can be recovered on behalf of a deceased's estate. Further, in Benham vs Gambling, (1941) AC 157 it was further held that only moderate awards should be granted under this head for the following reasons:

> "In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not f loss of future pecuniary prospects."

23. The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs 100,000/- while for pain and suffering the awards range from Kshs 10,000/= to Kshs 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.

22. On damages for loss of expectation of life, reliance was placed on the case of Alexander Okinda Anangwe vs Reuben Muriuki Kahuha & Others (2015) eKLR and Nairobi HCCC No 1638 of 1998 Beatrice Wangui Thairu v Ezekiel Barngetuny & Another. She submitted that the award was proper.

23. On the issue of loss of dependency, the Respondent relied on The Regulation of Wages (General) (Amendment) Order, 2020, though the applicable regulation containing the relevant wage figures is the Regulation of Wages (General) (Amendment) Order, 2018, for the category of a shop assistant. Reliance was further placed on the decision in Naomi Momanyi v G4S Security Services Ltd & another [2018] eKLR, where the court held that inflationary trends must be taken into account; otherwise, the resultant awards would cease to be compensatory. It was also submitted that the claim for special damages had been strictly proved and was therefore payable as pleaded.

Analysis

24. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

25. This court's the jurisdiction to review the evidence should be exercised with caution. In the cases of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

26. It must be borne in mind that the court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet it must reconsider the evidence, evaluate it itself and draw its own

conclusions. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

27. The Appellant urged the court to find that the lower court erred in finding the Appellant 100% liable. The court is asked to establish whether the lower court erred in finding, on a balance of probabilities that the Appellant failed to prove his case. The legal burden of proof lies upon the party who invokes the aid of the law and asserts an issue based thereon. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

28. It follows that the initial burden of proof lies on the Plaintiffs, but the same may shift to the Defendant, depending on the circumstances of the case. In Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

29. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

30. The balance of probabilities is also about what is likely to have happened than the other. Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent

is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

31. Furthermore, the standard of proof in civil cases must carry a reasonable degree of probability, but not so high as is required in a criminal case for such standard is based on a preponderance of probabilities. In Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
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> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
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> This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

32. The Appellant's driver herein was driving motor vehicle registration No. KCB 257P along Kisii-Migori road. The evidence of the eye witness, PW3 was that he was overspeeding, while the Appellant testified that he was driving at 60 km/h. PW2's testimony was that the motor vehicle had faulty brakes and it then veered off the road and overran the deceased off the road. DW1 in his testimony thus disputed over speeding, however, he testified that there was a Nissan which tried to overtake but as it could not manage, it swerved back to the left and hit the motorbike which the deceased was on. This was a clear admission that he lost control of the motor vehicle.

33. The first question is whether the court should deal with the defence raised by the appellant. Reading though the defence evidence, it is my hope that the culture of lies can be curtailed. Parties and their advocates ought to accord the courts due credit; courts are not institutions to be misled by incredible or fanciful narratives lacking any evidential foundation. It is such unfounded allegations that tend to unnecessarily cloud the real issues for determination and waste valuable judicial time. The court recalls the words of Madan, J (as he then was) when in N vs. N [1991] KLR 685 expressed himself in the following terms:

> I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."

34. What is the essence of asking a pedestrian whether he saw a speedometer? The creation of a motion cycle and unknown Nissan at this stage makes mockery of common sense. Parties cannot just blatantly lie and deviate from their pleadings and expect to get away with it. The court cannot apportion liability to an unknown Nissan, which is a phantom of imagination.

35. The courts cannot apportion liability with non-parties. In Stapley –v- Gypsum Mines Limited (2) (1953) A.C 663 at P. 681 Lord Reid reasoned that:

> To determine what cause an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law, this question must be decided as a properly instructed and reasonable jury would decide it..... The question must be determined by applying common sense to the fact of each particular case. One may find that a matter of history, several people have been at fault and that if anyone of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes, it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly cause the accident. I doubt whether any test can apply generally.

36. The question that arises is how to apportion liability between the Appellants and nonparties? There were no third party proceedings against the unknown Nissan. In the case of Abbay Abubakar Haji Patuma Ali Abdulla Vs Freight Agencies Ltd [1984] KECA 14 (KLR) it was held that:

> The trial judge rightly applied to the facts before him the relevant law enunciated by Spry, V P in Lakhamshi v Attorney General, (1971) E A 118, 120 for such cases which -
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> "It is not settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident.

37. Further, in the case of EN v Hussein Dairy Limited & 3 others [2020] KEHC 5366 (KLR), P.J.O. Otieno, J stated as follows in regard to the attribution of negligence to a nonparty, like the unknown Nissan herein:

> 17) I agree with the Appellant's submissions that this point was moot and given that in the absence of the third party, the trial magistrate could not apportion liability in the manner he did. This position was similarly adopted in the case of Pauline Wangare Mburu v Benedict Raymond Kutondo NKU HCCC No. 210 of 2003 [2005] eKLR where the court observed as follows,
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> [T]he defendant did not deem it necessary to issue a third party notice to enjoin the owner of motor vehicle registration number KAH 129 V to this suit. In the circumstances therefore, it

would be moot for this court to apportion liability to a person who is not a party to this suit. The defendants shall therefore bear 100% liability.

38. Where the Respondents in the lower court proved their case to the required standard, it was the duty of the Appellant to prove contributory negligence which in my view he failed.

39. There could be no liability against an alleged third party driving the alleged Nissan matatu who was not party to the proceedings as no fault was established against him. In the case of Kiema Muthuku v Kenya Cargo Handling Services Ltd (1991) 2 KAR 258, the court of appeal posited as doth:

> There is, as yet, no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.

40. It was the duty of the Appellant to take out Third Party Proceedings against a party he wished to take up liability. The Appellant did not issue a Third Party Notice. I have no basis to interfere with the reasoning of the lower court. The Appellant ought to have invoked the provisions of Order 1 Rule 15 of the Civil Procedure Rules as follows:

(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)-

(a) that he is entitled to contribution or indemnity; or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them.

41. Due to failure to join a third party for the alleged Nissan matatu, there were no directions on apportionment of liability. It was thus the duty of the Appellant to prove contributory negligence which in my view they failed. Contributory negligence could not be shelved to a third party who was not a party to the proceedings and the presumption remained that the Appellant was the registered owner of the motor vehicle whose driver was an agent of the Appellant. In the case of Mac Drugall App V Central Railroad Co. Rbr 63 Cal 431 the court held that:

> " In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence".

42. The evidence of the Appellant was not inconsistent with his negligence for the accident. This is the rule in Embu Road Services V Riimi (1968) EA22 and 25 Mzuri Muhhidin V Nazzar Bin Seif (1961) EA 201, Menezes Stylianicers Ltd CA No.46 of 1962 in which the courts held inter alia that; -

> " Where the circumstances of the accident gave rise to the inference of negligence, the defendant, in order to escape liability, has to show that there was a probable cause of the accident, which does not create negligence or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a

question of fact, that is whether the explanation given by the Respondent shows that the probable cause of the accident was not due to his negligence or that it was consistent only with absence of negligence". See also Odungas Digest on Civil case law and Procedure 3rd Edition Vol 7 page 5789 at paragraph (D).

43. The third party that the Appellant alleged, was not a party to the proceedings and no adverse finding could be made against them. In Kenya Commercial Bank v Suntra Investment Bank Ltd (2015) eKLR, the court observed that:-

> " The defence does not even allude to the said third party; the issue has just propped up in the submissions by the Defendant. In any case, the said third party is not a party in the suit and no claim has been laid against it by the Plaintiff or the Defendant. In law, a third party is enjoined in a suit at the instance of the Defendant and through the set procedure under (Order 1 rule 15 - 22 of the Civil Procedure Rules. And, liability between the Defendant and the third party is determined between the Defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the Defendant, and has given directions under Order 1 rule 22 of the Civil Procedure Rules."

44. It is only after the alleged third party was served and failed to enter appearance that directions on judgment against them would apply. It is this rationale of the law that is imbedded in Order 1 Rule 17 of the Civil Procedure Rules as follows:

> If a person not a party to the suit who is served as mentioned in rule 15 (hereinafter called the "third party") desires to dispute the plaintiff's claim in the suit as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party must enter an appearance in the suit on or before the day specified in the notice; and in default of his so doing he shall be deemed to admit the validity of the decree obtained against such defendant, whether obtained by consent or otherwise, and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third party notice.

45. Therefore, the Respondents proved want of care on the part of the driver of the accident motor vehicle for which the Appellant was clearly vicariously liable. I am in consonance with the reasoning of the court in the case of Mombasa Maize Millers & another v Elius Kinyua Gicovi [2021] eKLR where Nyakundi J referred to Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan, and held as follows:

> " In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In Nance v British Columbia Electric Rly [1951] AC 601, at page 611, Lord Simon said:
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> ".....When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

46. More fundamentally, the question of the liability of the alleged Nissan was not an issue before the trial court. The Appellant changed his version of events during the hearing, and that new narrative was not supported by any evidence. Such evidence, lacking both foundation and relevance, serves no useful purpose. Evidence must be supported by pleadings, for without proper pleadings, a party labours in vain. The oft-cited adage that parties are bound by their pleadings was aptly discussed in the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] KEHC 5465 (KLR) as follows:

> 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
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> ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
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> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."
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> In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -
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> As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

47. The net effect of the foregoing is that the appeal on liability has no merit and is accordingly dismissed.

48. The court now turns to quantum of damages. This is dealt with in three aspects; general damages, pain and suffering and loss of expectation of life. The protestation by the appellant was that these awards were excessive and amounted to erroneous estimate of damages.

49. On the damages the lower court awarded of Ksh. 30,000/= under damages for pain and suffering. For pain and suffering, in Civil Appeal No. 42 of 2018 Joseph Kivati Wambua vs SMM & Another (suing as the Legal Representatives of the Estate of EMM-Deceased) paragraph 21 the Hon. Odunga J (as he then was) observed: -

> " The Appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the Respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes place some times after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal." (emphasis mine).

50. The above case law points to the fact that the award of pain and suffering depends on whether the deceased died on the spot or after some time. That is, damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. Where a deceased died on the spot, courts have taken the approach that minimal damages should be granted unlike in a case where a deceased dies later on. In this case, the deceased passed away on the same day of the accident. There is no evidence that he was taken to any hospital prior to his death. I find no reason to disturb the award of Ksh. 30,000/= as it was not inordinately high.

51. On loss of expectation of life, considering that the deceased was 44 years old and his life was cut short at that age, I do not think Ksh. 100,000/= was excessive award. There was no evidence that the deceased was of ill health. In Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Mwangi) [2019] eKLR it was observed that:

> " The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the award range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

52. Under dependency ratio, to interfere with the finding of the lower court on loss of dependency, this court has to find basis. The deceased herein was 44 years and was married. He had two children who were described to be in school. There was however, no proof of income even though the Respondents' case was that the deceased earned Ksh. 30,000/= per month from the business and had a shop. The lower court adopted the minimum wage bill method and applied Regulation of Wages (General Amendment Order), 2020 which I find applicable.

53. The Appellant contended that the trial court erred in adopting the wage applied and urged thatthe proper wage should have been Kshs. 8,000/= per month. However, no basis for this figure was disclosed. There was equally no evidence adduced by the Appellant to disprove the Respondent's assertion that the deceased was engaged in business. The capping of the wage at Ksh. 8,000/= was not

shown to have any logical or evidential basis. In the present case, there was no justification advanced for disregarding the wage applied by the trial court.

54. In the circumstances, the court was correct in applying the minimum wage. Indeed, the court correctly acted on its discretion and awarded the said amount. There was no error in that respect. The Court of Appeal held in the case of Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, that:

> " In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

55. The award of Ksh. 16,907.90/= was the minimum wage of a general laborer and far below that of a shop owner. The deceased was a businessman and his income must have been higher than the minimum wage. However, there is no cross appeal. The court will thus not interfere with the discretion of the lower court, which was exercised judiciously. The court will as well have applied a global sum. In the case of China Civil Engineering & another v Mwanyoha Kazungu Mweni & another [2019] KEHC 359 (KLR), the court, R. Nyakundi stated as follows;

> On review of the evidence it may be just on the facts of this particular case to adopt the global sum assessment approach. Where the trial court considers that a particular case justice would be better served by applying a global sum approach instead of a multiplier to substantially dispose off the assessment of damages. There can be no misdirection for that procedure. To put simply one cannot even rule out that the deceased income generating activities entitled him to monthly income of Kshs.18,000 per month. Had the deceased continued for longer he was to provide for the dependents. I find no reason to take a different view of from the learned trial magistrate with regard to an assessment on loss of dependency under the *Fatal Accidents Act*.

56. Looking at the circumstances of this case, where the deceased's source of income was ascertainable though the exact amounts were not proved, the trial court was correct in adopting the minimum wage and applying the multiplicand approach, as opposed to resorting to a global sum assessment. Ringera J, (as he then was) in Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993 stated as follows on the debate of the multiplicand approach, and global sum assessment:

> ...The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."

57. There was no dispute regarding the application of the dependency ratio of two-thirds (2/3). The same was conventional, taking into account that the deceased was married and had two children. I find no reason to interfere with that assessment. As was held by Odunga J (as he then was) in J W N v Kassam

Hauliers Limited [2020] eKLR, the dependency ratio is a question of fact to be determined from the evidence on record and the circumstances of each case. He stated:

> 17. Conventionally Courts have taken married persons more so with children to spend more on their families than themselves and apportioned a dependency ratio of 2/3. On the other had they have taken unmarried people to spend more on themselves more than their dependants more so parents hence have apportioned a dependency ratio of 1/3 which has over time been enhanced to 1/2. In this case it was submitted that as the deceased was married with 3 children he spent more on his family than self hence a dependency ratio of 2/3 would suffice.

58. The deceased died at 44 years old and would be expected to work until the retirement age of until biblical age of 70 or 80 years. The dependents were under 18 years. Unfortunately, we were not given the age of the widow. She will have depended on him for a long period. The award of multiplier is not dependent on employment but active life and the age of the dependents. The period of 16 years is within range. It is neither too high nor too long.

59. The appellant relied on the case of Regina Chelimo Magut & another v Linear Coach Limited [supra]. Incidentally, the cited decision supports the Respondent's position. In that case, a 45-year-old man was awarded a multiplier of 15 years, while the deceased herein, one year younger was granted 16 years, thereby affirming the reasonableness of the multiplier awarded in this matter.

60. The court had vicissitudes of life and could not place a businessman to age of retirement. There is thus no undue error requiring intervention of the court. The request to reduce the same to 12 years, is not arbitrary but substituting the court's discretion with mine. Ringera J in Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported), held at page 248 that:

> The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.

61. There was no error on the exercise of discretion on part of the court below. No appeal against the award on special damages. I will not disturb this finding.

62. On pain and suffering, the award of Ksh 30,000/= is the very minimum the court could award. The court cannot substitute discretion in award of such nominal damages. Dying on the same day, is not a ground for awarding Ksh. 10,000/=. This amount is out of tune and may not be awardable in this time and age.

63. The damages for pain and suffering were awarded at 30,000/=. This was after some hours of excruciating pain. The court awarded nominal damages. The award is actually low. The death certificate show that death was on the same day. An award between Ksh. 30,000/= to Ksh.70,000/=, is within range. In Francis Odhiambo Nyunja & 2 others v Josephine Malala Owinyi (Suing as the legal administrator of the estate of Kevin Osore Rapando (Deceased) [2020] eKLR, the court, Justice W. Musyoka stated as doth; -

13. In Sukari Industries Limited vs. Clyde Machimbo Juma Homa Bay HCCA No. 68 of 2015 [2016] eKLR, where the deceased had died immediately after the accident and the trial court awarded Kshs. 50,000.00 for pain and suffering, the appellate court captured the spirit of the law on the issue when it stated:

> (5) On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable.

64. The net effect is that the appeal as a whole has no merit and is accordingly dismissed. The next issue is who is to bear costs.

65. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

> (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
>
> (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

66. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

67. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows:

> 18. It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

68. The subject matter was an award of Ksh. 2,433,211.20. The same was defended. The appeal lacked merit from the beginning. Costs must thus follow the event. The event is the dismissal of the appeal, and the Respondent is entitled to costs. A sum of Kshs. 125,000/= shall suffice.

Determination

69. In the upshot, I make the following orders:

a. The appeal is not merited and is dismissed with costs of Kshs. 125,000/=.

b. 30 days stay of execution.

c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 30TH DAY OF OCTOBER, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Opondo for the Appellant

Mr. E.N. Omandi for the Respondents

Court Assistant – Michael