

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL NO. E065 OF 2023

MARY WANGARI MWIKA & AGNES WAIRIMU

Suing on their behalf and as personal representatives of the estate of

MICHAEL NGURE MAINA

APPELLANT

VERSUS

WACHIRA IKUHA..... 1ST

RESPONDENT

JOSEPH MOKONOH MOKAYA 2ND

RESPONDENT

JOSEPH KARUMI MUNDIA 3RD

RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. V.S. Kosgei, SRM given on 17.1.2023 in Karatina MCCC No. E088 of 2021. Leave was granted to file the same out of time on 26.09.2023. The memorandum of appeal was filed on 27.09.2023.
2. The memorandum of appeal dated 14.02.2023 is against liability only. The Appellants posited that the lower court erred in dismissing the suit in spite of the appellant having proved the case on the required standards. They set out the following grounds:

- a. That the learned trial magistrate erred in law and fact in failing to consider adequately, or at all, the totality of the evidence that was tendered on liability and in so doing she arrived at an erroneous finding on liability.
 - b. That the learned trial magistrate erred in law and in fact in the manner that she analysed the facts by stating that the accident occurred on 17th February, 2018 and that the deceased was a passenger in motor vehicle registration number KBD 697K and that the accident occurred along the Nyeri-Karatina road.
 - c. That the learned trial magistrate erred in law and fact in dismissing the plaintiff's case on the basis of the police abstract which indicated that the matter was still pending under investigation.
 - d. That the learned trial magistrate erred in law and in fact in holding that the plaintiff was not at the scene of the accident whereas she was.
 - e. That the learned trial magistrate erred in law and in fact in failing to consider the Appellant's submission on liability and in so doing she arrived at an erroneous decision.
3. In essence, the Appellant argued that the learned magistrate misunderstood the evidence, misstated key facts about the accident, relied improperly on an inconclusive police abstract, incorrectly found that the appellant was not at the scene, and failed to consider the Appellant's submissions, thus leading to a wrongful conclusion on liability.

4. The court has had considerable difficulties comprehending the appeal from the perspective of the appellant. Appeals are not decided on basis of submission but on concrete evidence. The idea of basing liability on submissions is not only otiose but obnoxious. Parties must not only plead their cases but prove the same on evidence. Mwera J, posited as follows when postulating on what is the role of submissions. He stated that they are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim. In the case of **Nancy Wambui Gatheru vs. Peter W. Wanjere Ngugi Nairobi HCCC No. 36 of 1993**, it was stated:

“Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case.”

5. Submissions are not, strictly speaking, part of the case, the absence of which may do no prejudice to a party. Their presence or absence does not in any way prejudice a case as

held in **Ngang'a & Another vs. Owiti & Another** [2008] 1KLR (EP) 749, that:

“As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court’s focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.”

6. The Court of Appeal was more succinct in that submissions cannot take the place of evidence when they addressed the question in the case of **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another** [2014] eKLR:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ *“marketing language”*, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without

hearing submissions but based only on evidence presented.”

Submissions

7. The first Respondent submitted that the appellant did not discharge the burden of proof. Only the 1st appellant testified and did not know how the accident occurred. Reliance was placed on the case of **Kamau v Matunda (Fruits) Bus Services** (Civil Appeal E316 of 2022) [2024] KEHC 4829 (KLR) (Civ) (24 April 2024) (Judgment), where DAS Majanja posited as follows:

It is clear therefore that in a formal proof, the plaintiff still bears the burden of proving its case in accordance with the normal rules of evidence. Turning to the facts of this case, did the Appellant prove her case to the required standard? Liability does not attach to the vehicle as an item, but rather to the owner of the motor vehicle. The question as to who is liable rather than what is liable flows from this assumption. Section 8 of the Traffic Act (Chapter 403 of the Laws of Kenya) provides that, “the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

Prima facie proof of ownership is thus a copy of records at NTSA. However, that is a rebuttable presumption. In certain circumstances, a police abstract is sufficient to prove ownership of a motor vehicle where there is no evidence to the contrary (see *Samuel Mukunya Kamunge v John Mwangi Kamuru* [2005] eKLR).

8. They further submitted that the mix-up in paragraph 2 of the judgment does not change the substance of the case.

9. The appellants submitted that the court got facts related to the vehicle wrong. They also stated that this court had held in the case of **Warutumo v Kinyua & another** (Civil Appeal E058 of 2022) [2024] KEHC 16257 (KLR) (20 December 2024) (Judgment), that:

A police abstract, really does not show who is to blame. It is the police officer's preliminary view on the cause of accident. A sketch plan gives a more succinct view of the accident.

10. Further reliance was placed on the case of **Evans Otieno Nyakwana v Cleophas Bwana Ongaro** [2015] KEHC 8440 (KLR), where DAS Majanja held as follows:

17. The Court of Appeal in Jennifer Nyambura Kamau **Humphrey Mbaka Nandi** [2013] eKLR considered the applicability of these provisions as follows;

We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.

11. They also relied on the case of **Linus Nganga Kiongo & 3 Others V Town Council of Kikuyu**, [2012] eKLR, Odunga, J (as he then was), citing Motex Knitwear Limited V Gopitex Knitwear Mills Ltd, HCCC No. 834 of 2002 and Autar Singh Bahra and Another V Raju Govindji, HCCC No. 548 of 1998, that:

Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence to the 1st plaintiff's case stand unchallenged, but also that the claims made by the defendant in his defence and counter-claim are unsubstantiated. In the circumstances, the counterclaim must fail.

12. They submitted that it was demonstrated that the respondent's driver was to blame.

Analysis

13. 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. In the case of Mbogo and Another vs. Shah [1968] EA 93 the court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

14. The duty of the first appellate Court was settled by Clement De Lestang, VP, Duffus and Law JJA, in the *locus classicus* case of **Selle and another Vs Associated Motor Board Company and Others [1968]EA 123**, where the Judges in their usual gusto, held as follows;-

“.. 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 re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

15. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed

the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

16. In the case 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...”

17. 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.”

18. 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 proposition 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.”

19. 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 than 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.”

20. 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.....”

21. 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;-

“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.

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.”

22. This is a single issue appeal, that is, whether the court erred in its finding on liability. To its credit, the court indicated the amounts it will have awarded. This is in line with the decision in the case of **Lei Masaku versus Kalpama Builders Ltd [2014] eKLR**, where the court noted as follows: -

It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs

to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum.”

23. The matter herein proceeded by way of formal proof. The appellant contends that they are not bound to prove liability. The court relied on a binding decision of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another** [2014] KECA 642 (KLR), where the court of appeal [Mwera, Musinga & Ouko JJA] stated as follows:

It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.

24. This then brings us to the question of what formal proof is. It is not a carte blanche as the appellant wants the court to believe. In the case of **Samson S. Maitai & Another - vs- African Safari Club Ltd & Another [2010] eKLR**, the High Court in defining Formal Proof stated thus:

“..... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to **Halsbury's Laws of England, Vol. 15, para, 260**, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.”

25. The appellant testified that the deceased was lawfully riding motor cycle registration number KMDU 970 P along Kerugoya- Karatina road. Motor vehicle registration number KBD 692 K encroached to its lane causing his death. She produced an abstract showing the deceased was to blame. It may well be false. However, there is no sketch plan to refute this aspect.

26. One difficult aspect of the evidence was that the witness was not cross examined. Her evidence was as if she was an eye witness. It is true that in the case of **Warutumo v Kinyua & another (Civil Appeal E058 of 2022) [2024] KEHC 16257 (KLR) (20 December 2024)** (Judgment) the high court addressed the question of the abstract as follows:

31. However, in the absence of the evidence of the sketch plan, the court must make do with available evidence. In the case of *Techard Steam & Power Limited v Mutio Muli & Mutua Ngao* [2019] eKLR, Odunga J held as follows in relation to proving negligence.

“ Negligence can be proved notwithstanding the fact that the accident in question was never reported to the police since there is no nexus between a report of an accident to the police with proof of negligence. While such report and the steps taken thereafter may be proof of the occurrence of the accident in question, where there is independent evidence proving that an accident took place and that it was caused by the negligence of the defendant, the failure to call the investigations officer is not necessarily fatal in accident claims. In *Peter Kanithi Kimunya v. Aden Guyo Haro* [2014] eKLR it was held:

“A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was ‘reported’ at a particular police station.

27. The abstract indicated the deceased was to be charged. That could not be true since he was already deceased. Unfortunately, the appellants’ evidence is somewhat subject of what I can call lexical ambiguity. This means that from her evidence, in absence of cross examination, it is not possible to state whether, she was or was not an eye witness. Though the court asserted that she

was not an eye witness, this could not be ascertained from the proceedings. The witness asserted a fact, whether it was hearsay or not it is not possible to discern the same from the record.

28. She then left the evidence in a state of animated limbo. One cannot dismiss her as an eye witness nor assert, she was not. The evidence was given positively as from her knowledge. The truth or otherwise of her assertion will be ascertained, in the likely event that the Respondents apply to set aside the *ex parte* proceedings. For now, the appellant's evidence is unrebutted.

29. There were no pleadings to the contrary to enable the court to award contributory negligence. The threshold for formal proof is slightly lower since once a prima facie case is raised, the burden to rebut shifts. The burden of proving contributory negligence lay with the Respondent. Unfortunately, in a formal proof, such luxury is not there. There can be no liability without fault. No fault is pleaded and proved against the deceased. 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.

30. On the aspect of contributory negligence, California Supreme Court, stated as follows in the case of **MacDrugall App V Central Railroad Co. Rbr 63 Cal 431:**

“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”.

31. In the comparative jurisprudence in the case of **Calvin Grant V David Pareedon** et al Civil Appeal 91 of 1987, Theobalds J enunciated as follows; -

“Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence, as is nearly always usually the case, seeks to put the blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious. By physical evidence, I refer to such things as the point of impact, drag marks (if any), location of damage to the respective vehicles or parties, any permanent structures at the accident site, broken glass, which may be left on the driving surface and so on. This physical evidence may well be of critical importance in assisting a tribunal of fact in determining which side is speaking the truth.”

32. The error by the court below arose from the mischief, in the lexical ambiguity in the appellant's evidence. In the circumstances, the said judgment is set aside. In lieu thereof, I substitute with a finding of 100% against the Respondent.

33. There is no appeal on the issue of quantum. Although certain figures are indicated, they appear abstract and cannot be adopted by this court. The question of quantum must therefore be remitted to the lower court for proper determination. This is necessary to afford the respondents an opportunity to challenge or make submissions on the same. Moreover, the award as it stands is incomplete, as it is not clear whether special damages were allowed or dismissed.

34. Before departing, it is important to address a more fundamental and ethical problem in this matter. When testifying at formal proof level, it is important to be candid and take all precautions to have all possible evidence. The case succeeded because of the language used by the appellant in her evidence. If it turns out that she was not an eye witness, it will be a reputational hazard to have a witness testify to equity. Due to the foregoing, the court finds that it will not be edifying to have the appellant awarded costs. The mistakes were theirs and all ambiguities arose from their action and deliberate omissions. Therefore each party will bear their costs for the appeal.

35. 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.

36. 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.

37. 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.

38. The circumstances of this matter, require that each party bears their own costs as this was essentially an ex parte proceedings though, the 1st Respondent, participated. However, they did not have primary pleadings.

Determination

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

- a) The appeal is allowed. The judgment and decree of the lower court is set aside. In lieu thereof, I make the following orders:
 - (i) Judgment is entered for the appellant against the respondents on liability at 100% liability for the formal proof.
 - (ii) The question of quantum must therefore be remitted to the lower court for proper determination.
 - (iii) Costs of the suit in the court below to the Appellant.
- b) Each party shall bear their own costs in this appeal.
- c) For avoidance of doubt, this decision is not a bar to setting aside ex parte judgment, since it remains exparte.
- d) The file is closed.

DELIVERED, DATED and SIGNED at NYERI on this 12th day of November, 2025. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Mwangi for the Appellants

Lucy Mwai for the 1st Respondent

No appearance for the 2nd and 3rd Respondents

Court Assistant - Michael