REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL NO. E165 OF 2024

JANET SIRO ERRA ..... APPELLANT

VERSUS

PHILIP OTIENO OTIENDE ..... 1ST RESPONDENT

PETERSON OMBACHI ..... 2ND RESPONDENT

1. This is an appeal from the Judgment and decree of Hon. C.A. Ocharo (SPM) dated 8.08.2024 arising from Kisii CMCC No. E278 of 2022.

2. The Memorandum of Appeal dated 06.09.2024 is against the award of liability, wherein the appellant's suit was dismissed.

3. The Appellant averred that on 3.03.2020, , the 1st Respondent, as the registered owner of motor vehicle registration number KBQ 623F, and the 2nd Respondent, as the owner in possession, user, and/or equitable owner of the said motor vehicle, caused or permitted the said vehicle to be driven in a careless manner. Consequently, it collided with motor cycle registration number KMEX 107S (Honda), on which the Appellant was a pillion passenger along the

Kisii–Suneka road. As a result of the accident, the Appellant sustained the following injuries:

a. Head injury with loss of consciousness
b. Chest contusion
c. Blunt trauma to the lower back
d. Blunt trauma to the upper limbs
e. Bruises on the left hand

4. Special damages of Ksh 14,940 were awarded. there is no factual dispute except on the date of accident. the motorcycle is not party to the suit. the court will thus deal with the two interrelated questions, that is:
   a. whether the appellant was involved in the accident on 3.02. 2020; and
   b. who is to blame for the accident?
   c.
5. Incidental to this is a question of damages. The court said she will have awarded damages of Ksh 600,000/= as proposed. Aggrieved by the finding of the lower court, the Appellant lodged the appeal herein, and advanced the following grounds. The appellant was aggrieved by the decision on liability and filed the following grounds of appeal:
   a. That the learned trial magistrate erred both in fact and law by holding that the injuries sustained by the Appellant were as a result of an accident of 03.03.2020 and not on 03.02.2020 as this earlier date (of

03.03.2020) was an innocent mistake indicated on some of the medical documents which innocent mistake was in any case explained by the Appellant/Plaintiff and the Appellant's/Plaintiff's witness and the Respondent's/Defendant's only witness agreed with the explanation proffered; hence the decision to dismiss the Appellant's suit on that account alone was legally unjustifiable and ought to be set aside.

b. That the learned trial magistrate erred in fact and in law in failing to consider the Appellant's testimony, evidence and submissions in totality and as a result arrived at an unjustified decision not supported by law and facts.

Evidence

6. The Appellant testified that she sustained injuries on 03.02.2020 and subsequently received treatment. She produced supporting medical documents, although some indicated that she was treated on 03.03.2020. A police officer testified regarding the occurrence of the accident and the issuance of the P3 form and police abstract. He confirmed that the Appellant was injured on 03.02.2020.

Daniel Nyameino stated that the patient was treated on 03.03.2020, but declined to comment on the possibility that the patient may have been treated on 03.02.2020.

7. The appellant proceeded that he was injured and received bruises. And was still in pain. Dr peter Morebu testified and produced the medical report involving a female adult aged 57 years. He relied on the P3 and discharge summary.

8. On cross examination, he stated that an appointment card is not supposed to contain treatment notes. PW3 CPL Aquinata Shiroli testified that the appellant was involved in an RTA on 3.2.2020 at 2000 hours. He could not tell which vehicle was to blame but confirmed the accident was reported. on enquiry from court, the witness stated that he could not trace the OB number.

9. Daniel Nyameino testified that the treatment occurred on 3.2.2020 and was followed up on 3.3.2020 and seen on 9.3.2020. he stated that there was an error on history taking.

10. On defence hearing Dr Jeniffer Kahotho testified that the appellant had general conditions and no complaint. The treatment notes were for 9.03.2020, and was indicated to have taken place 5 days earlier. The injuries were said to

have been sustained in march not in February. On cross examination, she stated that it is true that an accident occurred ON 3.2.2020 involving the appellant. She stated that there could be human error regarding dates.

11. The court after perusing submissions and analyzing the case, dismissed the suit with costs hence this appeal.

12. The appellant filed submissions dated 9.9.2025nd stated that the appellant was injured save for the error in dates. The date of 3.3.2020 was said to be an honest mistake. She submitted that PW2 confirmed occurrence of the accident on 3.20.2020. It was their case that there was history of omission on part of history taking on the re-visit of 3.30.2020. It was their case that on. 9.3. 2020 was a revisit for CT scan which was remarkable. the appellant prayed that the court awards Ksh. 600,000/= as awarded by the court below together with special damages of Ksh. 14,940 for the special damages.

13. On the part of the respondents, it was submitted that the respondent the appellant did not prove their case and the appeal be dismissed with costs.

Analysis

14. 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.

15. 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…

16. 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...

17. The Appellant urged the court to find that Respondent was 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.**

18. 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 as held in the case of **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.**

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 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.**

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;-
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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.

22. There is no dispute that the accident did occur. There is also concurrence between the parties that the accident involved the appellant. This was confirmed bydw1. And all the witnesses. The involvement of the plaintiff in that accident was thus proved. What the court below did not deal with is to separate liability and the extent of the injuries. Indeed from the proposed award, it is clear that the court did not have regard to the injuries that may have been suffered.

23. It is thus imperative, to deal with the three distinct questions I order to avoid crowding the issues for determination. the Respondent’s driver did not testify at all. consequently, there was no disputation as to who was to blame for the accident of 3.2.2020 qua accident. had the respondent wished to have someone else liable, they should have joined that someone else as a third party. the

Respondent set out the negligence of the plaintiff and the rider of motor cycle registration number KMEX 107S. However, the appellant was a passenger and was not in control of the said motor cycle. She cannot be liable for the rider's negligence .The court cannot apportion liability to an unknown rider who is not a party to the case. it is a time held principle that 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.

24. The question that arises is how to apportion liability between the Respondents and nonparties? There were no third-party proceedings against the rider of motor cycle registration number KMEX 107S. 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.*

25. In the absence of the third party, the trial magistrate could not apportion liability in the manner, to the rider of motor cycle registration number KMEX 107S. 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.**

26. if the Appellant was able to prove their case to the required standard, it was the duty of the Respondent to prove contributory negligence which in my view he failed by failure to testify. 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.*

27. 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 to the rider of motor cycle registration number KMEX 107S. In the

circumstances, I find that the Respondent was 100% liable for the accident. Respondent 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.

28. Due to failure to join a third party for the to the rider of motor cycle registration number KMEX 107S, there were no directions on apportionment of liability. Contributory negligence could not be shifted to a third party who was not a party to the proceedings. 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.*

29. The evidence of the Appellant was the Respondent was negligent. This was not rebutted. Therefore I agree with the Appellant that the Respondent was 100% liable for the accident. The Court of Appeal addressed a similar question in the case of *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).

30. The third party that 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.*

31. Therefore, the Appellant proved want of care on the part of the driver of the accident motor vehicle for which the Respondent vicariously liable. 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:
>
> ……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.

32. The question is whether the appellant was injured in the said accident or not. Does the treatment on 3.32020 and 9.3.2020 vitiate the alleged injuries of 3.2.2020? The first demand notice was issued on 28.2.2020. *Ipso facto* the claim cannot be for the period after. It was clear that the

treatment of 3.3.3030 and 9.3.2020 was not a typographical error but follow up treatment for the headaches. The CT Scan was unremarkable. The police confirmed the appellant was involved in the accident. Doctor Morebu stated that the appellant suffered head injury with loss of consciousness, chest contusion, blunt trauma to the lower back, blunt trauma to the upper limbs and bruises on the left hand.

33. The P3 contained his injuries. It was not impeached during the hearing. Documents related to 9.3.2020 are not primary documents. The card gotten on the same day does not help much. The CT scan was signed on behalf of Dr orina. It is not a legitimate as it is not known who signed it. Though indicated by Dr Morebu that there were grievous head injuries, he says otherwise in the P3. The court will thus use the P3 to hold and find that the appellant suffered soft tissue injuries amounting to harm. In order to decide which report to rely on, the court will have to look at the general evidence.

34. This Court appreciates that courts have impressively expressed the extent of application of an expert opinion in judicial proceedings and the general trend is that such evidence is not necessarily conclusive and binding. As was held in **Shah and Another vs. Shah and Others [2003] 1 EA 290**:

> ***"The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so."***

35. Further, the Court of Appeal, on its part in **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139** held that:

> ***"... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."***

36. Courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them as stated in **Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29,** it was held that:

> **"It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of** *Elizabeth Kamene Ndolo vs. George Matata Ndolo*, **Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-**
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> "*The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it.*"

37. Having divergent reports from the same expert raises serious doubts as to the fidelity of those reports. However, the P3 form closely corresponds to the injuries sustained. Consequently, I find and hold that the accident did occur and that the appellant suffered the injuries stated in the P3 form. It appears that the medical report was due

exaggeration to enhance damages. The first report in time represents the correct assessment.

38. The court now turns to quantum of damages. There is no appeal on quantum of damages. However, the court based its proposal on a report that this court has since found to be doubtful allowing the amount that was the basis for dismissal to stand will be anathema to good conscience and the administration of justice. The only authentic report has harm as the injuries. On the other hand, the discredited report that covers injuries not suffered has grievous harm. Happily, the parties submitted on this matter in the lower court. The matter is provided for under Order 42 Rule 4 as follows:

> The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:
>
> Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

39. The court cannot address new grounds. However, the court cannot award damages that are not due and owing. Under order 42, rule 25, the appellate court has power to determine a case finally, where evidence on record is sufficient. The said rule provides as follows:

> Where the evidence upon the record is sufficient to enable the court to which the appeal is preferred to pronounce judgment, the court to which the appeal is preferred may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the court to which the appeal is preferred proceeds.

40. 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. only the Respondent submitted in the lower court. the court did not consider any authority. considering the injuries, a sum of Ksh 600,000/= does not relate to the case herein.

41. The claimant sustained multiple injuries, including a head injury accompanied by loss of consciousness, a chest contusion, blunt trauma to both the lower back and the upper limbs, as well as bruises on the left hand. in the case of Nanyuki Express Cabs Savings and Credit Cooperative Society v Ikungu (Civil Appeal 67 of 2020)

[2023] KEHC 23652 (KLR) (17 October 2023) (Judgment), the court upheld a sum of Ksh 150,000 awarded for a claimant who sustained lacerations and muscle contusion on the left forearm and the dorsum of the hand, a deep laceration on the right anteromedial aspect of the shin, and several small lacerations on the scalp.

42. In Daniel Gatana Ndungu & Another v Harrison Angore Katana [2020] eKLR, the High Court set aside the trial court's award of Kshs. 350,000/= and substituted it with an award of Kshs. 140,000/= for injuries consisting of a cut on the head, a blunt injury to the right knee, multiple bruises on the upper limbs, and bruises on the right knee. Therefore, I set aside the proposed Kshs. 600,000/= and award the sum of Ksh 200,000/=.

43. The net effect is that the appeal is merited and consequently allowed. The next issue is who is to bear costs. 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.**
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> **(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.**

44. 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.**

45. 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.

46. The case arose of unexplained discrepancies in the documentation by the appellant. Consequently, in exercise of my discretion, I do not find them deserving of costs. Each party shall therefore bear their own costs in the appeal.

Determination

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

a. The appeal is merited and is allowed.

b. Judgment of the lower court is set aside. In lieu therefore i enter judgment for the appellant for the respondent as follows:

    a. Liability against the Respondents at 100%.

    b. Special damages of Ksh. 14,940/=.

    c. General damages of Ksh. 200,000/=.

    d. The appellant shall have costs in the lower court.

    e. Each party to bear costs in the lower court.

c. 30 days stay of execution.

d. The file is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **19th** day of **November, 2025**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the Respondent

No appearance for the Appellant

Court Assistant – Michael