REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. E120 OF 2024

WILLIAM MAIKO OMBATI…… ……. APPELLANT

(Suing as the legal representative of the estate of the late Douglas Gwako Moenga)

-VERSUS-

OMOCHA ENTERPRISES…… ……. RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. C.A Ocharo Chief Magistrate dated 7.2.2024 arising from Kisii CMCC No. 419 of 2019.

2. The Memorandum of Appeal of Appeal dated 5.11.2024 is against the award of liability and general damages. The Appellant posited that the lower court erred in dismissing the Appellant's case for want of prove of negligence on the part of the Respondent.

3. The Plaint dated 3.8.2016 claimed damages for an accident that occurred on 1.8.2015 when the deceased was said to be a passenger on motor vehicle reg. no. KBJ 357G ZC 8104

along Nairobi-Mombasa Road and the Respondent's driver or agent negligently and dangerously drove the said motor vehicle that it lost control and collided with Motor vehicle Registration No. KBX 480P ZD 9056 as a result of which the deceased suffered fatal injuries.

4. The Appellant set forth particulars of negligence for the accident motor vehicle and pleaded Special Damages as well as General Damages under the Law Reform Act and Fatal Accidents Act.

5. The Respondent entered appearance and filed Defence dated 15.8.2016, amended on 24.7.2017 and further amended on 2.11.2018 denying the particulars of negligence and injuries pleaded in the Plaint. It was averred that it was the deceased who was driving motor vehicle reg. no. KBJ 357G ZC 8104 at the material time and he so drove the motor vehicle negligently and caused the accident.

6. The lower court heard the parties and proceeded to render the impugned judgement in which the Court dismissed the Appellant's case on the ground that the Respondent proved that the deceased was driving the motor vehicle and therefore the court could not find negligence on the part of the Respondent. the court however, proceeded awardable general damages for loss of expectation of life at Ksh.

100,000, loss of dependency at Ksh. 4,928,000/= and pain and suffering at Ksh. 10,000/=.

7. Aggrieved by the finding of the lower court, the Appellant lodged the appeal herein.

Evidence

8. During the hearing, PW1 was William Maiko Ombati. The Deceased was his son. He was 30 years old and was married with one child who was in PP2 and was 5 years old. He was involved in a motor accident when he was a passenger. He used to work with the Respondent as conductor and not driver. He had worked for 10 years. On cross examination, it was his case that he did not witness the accident as he went to Voi only to find the deceased in the mortuary. The police abstract showed that the matter was pending under investigations.

9. PW2 was No. 52061 PC Benard Mwangi of Voi police station. He produced the police abstract and confirmed the occurrence of the accident.

10. It was his case that motor vehicle reg. no. KBJ 357G ZC 8104 lost control and collided with Motor vehicle Registration No. KBX 480P ZD 9056. According to him the deceased died on the spot while the driver of motor vehicle

reg. no. KBJ 357G ZC 8104 sustained injuries. he however contradicted himself on cross examination that the deceased was the driver of motor vehicle reg. no. KBJ 357G ZC 8104.

11. The Respondent called DW1 Duncan Atandi. He testified that he knew the deceased to be his fellow driver. They were both employed by the Respondent. on the material day and time, he testified that he was asleep. He had handed over the car to the deceased who was his co driver. He found himself in the hospital and learn that an accident had occurred. In cross examination, it was his stated case that the deceased was a driver and also a casual. He learnt of the accident two days later.

Submissions

12. The Appellant filed submissions dated 20.5.2025 and submitted that the Appellant proved negligence against the Respondent.

13. It was also submitted that there was no witness or evidence from the defendant to support the fact that the deceased was driver of the accident motor vehicle. No authorities were cited.

14. On quantum, it was submitted that an award of Ksh. 5,103,850 would have been given to the Appellant. No authorities were cited.

15. The Respondent filed submissions dated 10.9.2025. It was submitted that the evidence of PW1 and PW2 were at variance, as was the evidence of PW1 and his own pleadings, which meant that the appellant pleaded one case but by his evidence attempted to prove a different case altogether. Reliance was paced on Section 107 of the Evidence Act.

16. On the burden of proved, the Respondent relied among others on James Muniu Mucheru Vs. National Bank of Kenya Ltd (2019) eKLR where the Court of Appeal stated thus:

> "Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the courts will make a finding based on which party's version of the story is more believable."

17. Based on above, it was submitted that the Appellant did not prove his case on the balance of probabilities.

18. It was also submitted for the Respondent that the appellant did not adduce any evidence on how the accident occurred and did not testify on the alleged negligence

leading to the accident, therefore there was no proof of negligence against the respondent and we reliance placed on Stephen Kinini Wang'ondu Vs. The Ark Limited [2016] eKLR and Palace Investment Ltd Vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR.

Analysis

19. 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.

20. 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…"

21. Bearing in mind that the court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet this court 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..."

22. Bearing in mind that the court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet this court must reconsider the evidence, evaluate it itself and draw its own conclusions.

23. The Appellant urged the court to find that the lower court erred in finding the Appellant had not proved his case on the balance of probabilities. 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."**

24. 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."

25. The Respondent herein was the registered owner of motorvehicle registration number KBJ 357G ZC 8104. The accident occurred at Ndii area along Nairobi – Mombasa Highway. There was no eye witness.

26. The Appellant's case on liability was that the Respondent proved liability as he demonstrated that the deceased was a conductor in the accident motorvehicle in which DW1 who was the driver drove negligently hence the collision with Motorvehicle registration No. KBX 480P ZD 9056.

27. On my reevaluation of evidence, I find difficulty agreeing with the learned magistrate that the Appellant pleaded a case and proved a different one. The Appellant's case as can be discerned from the Plaint was clear that the deceased was aboard motorvehicle registration number KBJ 357G ZC 8104 as a passenger.

28. It is the Respondent who alleged that deceased was the one driving the motorvehicle and amended the defence two more times to make clear this fact. 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. PW2 contradicted himself by testifying that the deceased suffered fatal injuries while his drover suffered injuries but on cross examination, that the deceased was the driver. However, PW2 was not a witness to prove how the accident occurred. He was a police officer who confirmed that the accident occurred on the material date. He did not

investigate the matter as the matter was pending under investigations. Therefore, a conclusion based on the evidence of P2 on who the driver was could not be proper. Traffic Police Officers as civil servants need not necessarily find for the Plaintiff in a case. They may testify in court as witnesses of the Plaintiff but produce a report that does not support the Plaintiff's case. They may also testify in court for the Defendant but produce a report that does not support the Defendant's case. That is their role. Their duty is to conform that the accident occurred and where available to present as accurately as possible a report on the circumstances that led to the accident. It does not matter that the report will support one or the other case. The report might as well find no one to blame.

30. Further, the evidence of DW1 was that he did not witness the accident since he was asleep and remained asleep until two days after the accident when he realized that he was in the hospital. Therefore, in my view, the case of the Appellant that the Respondent's driver caused the accident was more believable and probable. I say because it was not a disputed fact that the deceased worked with the Respondent for 10 years. The Respondent did not deny this fact and did not avail contrary information that the deceased was a conductor as opposed to driver.

The balance of probabilities is also about what is likely to have happened than the other. In **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. Contributory negligence could not be found. The Respondent had the duty to prove contributory negligence against the Deceased or the alleged driver of KBX 480P ZD 9056. 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".

32. On the totality therefore, the Appellant proved on a balance of probabilities that the driver of the Respondent was negligent. In the absence of contributory negligence, I find the Respondent 100% liable for the accident that its agent caused. 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 loose because the requisite standard will not have been attained."

33. The accident can therefore not be said to have occurred by magic. Or unidentified flying object. In a court room situation, we deal with empirical evidence on what is more probable than the other. The court can possibly get it wrong but if better still 50.01:49.99, there can be no better equal chance. 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; -

"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).*

34. The appeal against liability is allowed and liability entered at 100% in favour of the Appellant.

35. On the damages the lower court awarded of Ksh. 10,000/- under the head 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).*

36. The above case law points to the fact that the ward 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 die later on. In this case, the deceased passed away on the spot. The amount that the court award of Ksh. 10,000/= was low but not inordinately low and also as the Appellant did not appeal, I uphold it.

37. On loss of expectation of life, 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."

38. 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 30 years and was married. He had one child. There no prove of income. There was however, no prove of income even though the Appellant's testimony was that the deceased earned Ksh. 28,000/= per month which the court adopted. The lower court erred as Ks. 28,000/= was not proved. Minimum wage approach was most ideal since the Respondent did not deny that the deceased was its employee. In Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held 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 Deceased died at 30 years old and would be expected to work until the retirement age of 60 years. Regarding the vicissitudes of life, the multiplier of 25 years would be appropriate in the circumstances. The Court in Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported), Ringera J, as he then was, 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."

39. The deceased died on 1.8.2015 and was in the category of turnboy. Per the Regulation of Wages (General) (Amendment) Order, 2015, the monthly earning was Ksh. 6,752.50.

40. I also find that the award of dependency based on the ratio of 2/3 was not erroneous and did take into consideration that the deceased was married and had 1 child. I will not interfere with it. As was held by Odunga J (as he then was) in J W N v Kassam Hauliers Limited [2020] eKLR

> *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.*

41. The award would therefore be computed as flows: 6,752.50 X 25 X 12 X 2/3 = 1,350,500/=.

42. As there was no appeal against the award on special damages. The Respondent pleaded Ksh. 65,850/= and which the court awarded as the amount that was proved. In the absence of basis to question the receipts produced in evidence which I note the court's award arose from, I will not disturb this finding.

Determination

56. In the upshot, I make the following orders: -

i. The Appeal is merited and allowed.
ii. Judgment of the lower court on liability is set aside and substituted with liability 100% against the Respondent.
iii. The Appellant is awarded general damages for loss of dependency of Ksh. 1,350,500/=
iv. The Appellant is awarded damages for pain and suffering of Ksh. 10,000/=
v. The Appellant is awarded damages for loss of expectation of life of Ksh. 100,000/=
vi. The Appellant shall have costs of the Appeal assessed at Ksh. 125,000/=
vii. 45 days stay of execution.

DELIVERED, DATED and **SIGNED** at Nyeri Virtually 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 Appellant

Ms Asuna for the Respondent

Court Assistant- Michael