REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. E050 OF 2022

HAXOR ENTERPRISES LIMITED ……

1st APPELLANT

DONALD KIMUTAI SIRMA ……

2nd APPELLANT

VERSUS

SAFIA ASILLAH WORQU *(Suing as the Administrator of the Estate of the late ABEL M. MWANDEGO Deceased))*……RESPONDENT

(An appeal against the Judgment and Decree of the Chief Magistrates Court at Makueni by Honorable A. Ndungu (SPM.) dated 25th August 2022 in the Chief Magistrate's Court at Makindu Civil Case No. 181 of 2019)

JUDGMENT

1. This appeal arises from the Judgment of the Senior Principal Magistrate's Court at Makindu delivered on 15th November, 2022 in **Makindu CMCC No. 171 of 2020.**

2. By a plaint dated and filed on 17th July, 2020, the Respondent, suing as the administrator of the estate of the late Abel M. Mwandego (deceased), instituted a claim against the Appellants seeking damages under the **Law Reform Act** and the **Fatal Accidents Act**.

3. The claim arose from a road traffic accident which occurred on 9th February, 2019 along the Mombasa–Nairobi Highway at the Pipeline area. The accident involved motor vehicle registration number KCP 463C/ZF 5086, owned by the 1st Appellant and driven by the 2nd Appellant, and motorcycle registration number KMCT 891D on which the deceased was riding as a pillion passenger.

4. The Respondent pleaded that the accident was solely caused by the negligence of the Appellants and/or their authorised driver, particulars whereof were set out in the plaint. The Respondent further pleaded reliance on the doctrine of *res ipsa loquitur*, the **Traffic Act**, and the **Highway Code**. It was contended that as a result of the accident, the deceased sustained fatal injuries and died shortly thereafter.

5. The Appellants filed a statement of defence dated 21st December, 2020 in which they denied liability and put the Respondent to strict proof. Without prejudice to that denial, the Appellants pleaded that if the accident occurred as alleged, then it was wholly caused by the negligence of the rider of motorcycle registration number KMCT 891D. Although leave was sought in the defence to institute third-party proceedings, none were commenced.

6. At the hearing, the Respondent called three witnesses, including a medical doctor who produced the post-mortem report, the Respondent herself, and a police officer who produced the police abstract and testified as to the occurrence of the accident and the subsequent traffic proceedings. The Appellants closed their case without calling any witnesses.

7. In its judgment, the trial court found the Appellants 100% liable for the accident. It awarded damages under the heads of pain and suffering, loss of expectation of life, and loss of dependency, together with costs and interest. No award was made for special damages on the ground that they had not been specifically pleaded.

8. Aggrieved by that decision, the Appellants lodged the present appeal, faulting the trial Court both on the finding of liability and on the assessment of damages.

Ssubmissions:

9. The Appellants submit that the learned trial Magistrate erred in law and in fact in holding them 100% liable for the accident in circumstances where the Respondent failed to discharge the burden of proof as required under **Sections 107** and **108** of the **Evidence Act**. They contend that negligence was pleaded but never proved on a balance of probabilities.
10. In this regard, the Appellants submit that none of the witnesses called by the Respondent gave direct evidence as to how the accident occurred. The Respondent herself conceded that she was not present at the scene. The police officer who testified similarly admitted that he was not the investigating officer and did not conduct any investigations into the accident. No investigation file, sketch plan, or scene reconstruction was produced.

11. The Appellants argue that the evidence tendered on the manner of occurrence of the accident was therefore hearsay and of no probative value. They rely on ***Kennedy Nyangoya v Bash Hauliers*** **(Milimani HCCA No. 8 of 2015),** where the Court held that a police abstract, in the absence of supporting evidence from the investigating officer or production of investigation materials, is not conclusive proof of liability.

12. They further submit that the failure by a defendant to call evidence does not lessen the plaintiff's burden of proof. In support of this proposition, the Appellants rely on ***Evans Mogire Omwansa v Bernard Otieno Oundo & another*** **(Nakuru HCCA No. 209 of 2012),** where the Court held that a plaintiff must still prove his case notwithstanding the fact that the defence has not testified.

13. Similarly, reliance is placed on ***Daniel Kimani Njoroge v James Kihera*** **(Eldoret HCCA No. 92 of 2009)**, where the Court upheld the dismissal of a claim on the basis that none of the witnesses could explain how the accident occurred and none of the particulars of negligence had been proved.

14. The Appellants also cite ***Benter Atieno Obonyo v Anne Ng'ang'a & another*** **(Nakuru HCCA No. 148 of 2019),** where the Court emphasised that in the absence of evidence from the investigating officer, together with a sketch map or investigation report, a Court cannot properly determine who was to blame for an accident.

15. It is further submitted that pleadings, without evidentiary support, remain mere statements. On this point, reliance is placed on ***Trust Bank Ltd v Paramount Universal Bank Ltd,*** where it was held that where a party fails to call evidence in support of its pleadings, such pleadings remain unproven.

16. Beyond the evidentiary matters, the Appellants submit that the learned trial Magistrate fundamentally erred by failing to give reasons for the finding on liability. They point out that the judgment merely reproduced the Respondent's submission that the Appellants were 100% liable, without any analysis of the evidence or explanation as to how that conclusion was reached.

17. In support of this ground, the Appellants rely **on *John Mwangi Wandeto v James N. Nderi t/a Nderi &***

Kiingati Advocates **(Nyeri HCCA No. 5 of 2015),** where the Court underscored that it is a fundamental requirement of the common law that a judicial officer must identify the issues for determination and give reasons for the decision.

18. On quantum, the Appellants submit, without prejudice to the foregoing, that the awards made were excessive and not justified by the evidence. They reiterate their submissions made before the trial Court and maintain that, had liability been properly addressed, the issue of quantum would not have arisen at all.

19. Accordingly, the Appellants urge the Court to allow the appeal, set aside the judgment of the trial court in its entirety, dismiss the Respondent's suit with costs, and award the costs of the appeal to the Appellants.

20. The Respondent on her part opposes the appeal and submits that the learned trial Magistrate correctly found the Appellants wholly liable for the accident and properly exercised his discretion in assessing damages. It is contended that the Appellants have failed to demonstrate

any error of law or principle warranting interference by this Court.

21. The Respondent submits that the burden of proof on a balance of probabilities was duly discharged. The occurrence of the accident, the involvement of motor vehicle registration number KCP 463C/ZF 5086, and the death of the deceased as a result thereof were not in dispute. Evidence was tendered through the police officer who produced the police abstract and confirmed that the accident involved the Appellants' motor vehicle and the motorcycle on which the deceased was riding as a pillion passenger.

22. The Respondent further submits that the 2nd Appellant was charged with and convicted of a traffic offence arising from the same accident. It is contended that, while a criminal conviction is not conclusive proof of civil liability, it constitutes prima facie evidence of negligence and was properly taken into account by the trial Court. Reliance is placed on **Robinson v Oluoch [1971] EA 376.**

23. The Respondent also submits that the doctrine of *res ipsa loquitur* was properly invoked. The motor vehicle was

under the control of the Appellants' driver, and the accident was of a kind that does not ordinarily occur in the absence of negligence. In the absence of any explanation from the Appellants, an inference of negligence was justified.

24. Reliance is placed on ***Scott v London & St Katherine Docks Co.*** **(1865) 3 H & C 596,** as adopted locally, and on the Court of Appeal decision **in *Richard Kanyango & 2 others v David Mukii Mereka*** **[eKLR],** where the court held that where the defendant offers no explanation, the application of res ipsa loquitur is proper and a finding of negligence inevitable.

25. It is further submitted that although the Appellants pleaded negligence on the part of the motorcycle rider and sought leave to institute third-party proceedings, they failed to do so and called no evidence at all. The Respondent contends that allegations of negligence, without evidentiary support, could not form a basis for apportionment of liability. In these circumstances, the trial court was entitled to find the Appellants wholly liable.

26. The Respondent also submits that the judgment, when read as a whole, demonstrates that the learned trial Magistrate considered the evidence placed before him and the applicable law.

27. On quantum, the Respondent submits that the awards made were reasonable and within the accepted range. The sums awarded for pain and suffering and loss of expectation of life were conventional and modest, and the Appellants have not demonstrated that the learned trial Magistrate acted on wrong principles.

28. With respect to loss of dependency, the Respondent submits that the deceased's age, occupation, and earnings were proved through documentary evidence. The learned trial Magistrate adopted a conservative multiplier and a dependency ratio appropriate to a married man with young children. It is contended that the multiplier of ten years was cautious, and that the award cannot be described as inordinately high.

Issues:

29. I adopt the twin issues framed by the Appellant for determination, to wit:

a) **Whether the Respondent proved her case in the lower court to a balance of probability**

b) **Whether the quantum was excessive**

Determination:

30. I have re-evaluated the entire record, the pleadings, the evidence tendered before the trial court, and the rival submissions on appeal. This being a first appeal, this Court is under a duty to re-evaluate and re-analyze the evidence tendered before the trial court and to draw its own conclusions, while bearing in mind that it neither saw nor heard the witnesses testify and should therefore accord due allowance to that fact.

31. It was held in **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123** that:

"An appeal to this court from a trial by the High 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."

32. The Respondent pleaded negligence on the part of the Appellants. The Appellants filed a statement of defence dated 11th December, 2020, consisting mainly of general denials. Further, they pleaded, in the alternative, that the accident, if it occurred, was caused by the negligence of the rider of motorcycle registration number KMCT 891D. The Appellants also sought leave to institute third-party proceedings, which were never pursued.

33. The record further reveals that as early as March, 2021, the Appellants expressed an intention to explore a settlement. A hearing date was subsequently taken, and when the matter eventually came up for hearing on 14th March, 2022, counsel for the defence informed the trial court that the Appellants had no witnesses to call.

34. It is trite law that a party is bound to adduce evidence in support of the averments made in their pleadings. The principle is well captured in the case of **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others** it was held that in regard,

"It is trite that where a party fails to call

evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged."

35. Be that as it may, I do agree with the Appellant only in this respect that the duty still rests upon the Plaintiff to prove his case to the requisite standard of a balance of probabilities. The mere fact that the case is undefended does not automatically entitle a party to judgment. The Plaintiff must still discharge the evidentiary burden imposed by law.

36. **Section 107(1)** of the **Evidence Act** provides in this regard 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."

37. Of burden of proof, **Section 108** provides that:

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

38. **Section 109** similarly provides that**:**

"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

39. The Respondent called three witnesses. Of relevance to liability was **PW3,** Police Constable No. 84938 Paul Ongulu, who produced the police abstract relating to the accident. He confirmed that the accident occurred on 9th February, 2019 along the Mombasa–Nairobi Highway, involved motor vehicle registration number KCP 463C/ZF 5086 and motorcycle registration number KMCT 891D, and that the deceased was a pillion passenger on the said motorcycle.

40. He further testified, on the basis of the police records, that the driver of the motor vehicle was charged in **Makindu Traffic Case No. 262 of 2019** and, upon trial, was convicted and sentenced to pay a fine of

Kshs.50,000/= or serve six months' imprisonment in default.

41. The Appellants have faulted this evidence on the basis that **PW3** was not the investigating officer and that no sketch map was produced. However, that argument cannot be considered in isolation from the Appellants' own failure to tender any evidence whatsoever.

42. The law on the effect of failure to call evidence that is within a party's knowledge or control is now settled. In **Nesco Services Limited v CM Construction (EA) Limited [2021] eKLR,** Odunga J (as he then was) stated as follows:

> ***"Where a party has custody or is in control of evidence that that party fails or refuses to tender or produce, the court is entitled to make an adverse inference that if such evidence was produced, it would be adverse to such a party."***

43. The same position was reiterated in **Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others [2012] eKLR**, where the Court held that:

> ***"Where a party has custody or is in control of evidence which that party fails or refuses to***

tender or produce, the court is entitled to make an adverse inference that if such evidence was produced, it would be adverse to such a party."

44. Similarly, in **Kimotho v KCB (2003) 1 EA 108**, the Court held that adverse inference should be drawn against a party who fails to call evidence in his possession. Further in **Leo Investment Limited v Mau West Limited & another [2019] eKLR**, Kariuki J stated:

"Where a defence is filed but no witness is called to give evidence in support of the defence, it means that the defence renders the plaintiff's case unchallenged."

45. From the facts before me, it is evident that the Appellants, despite having pleaded contributory negligence and having indicated an intention to pursue third-party proceedings, failed to call the one witness who was best placed to explain how the accident occurred, the driver of the motor vehicle. They also failed to present an alternative account of the events.

46. Their statement consisted solely of denials. Even if it were considered, its probative value would have been

exceedingly weak. It was incumbent upon the Appellant to lead evidence to controvert the evidence of the Respondent. Indeed, it would have been preferable to call its driver to explain an alternative theory of how the accident might have occurred.

47. As I have intimated in preceding paragraphs of this Judgment, that the driver was not called could only imply that the testimony he would have given, and especially having been convicted of a traffic offence arising from the said accident, would have been fatal to the Appellant. The Court in **John Wainaina Kagwe v Hussein Dairy Limited [2013] eKLR** had this to say in similar circumstances:

> ***"...the respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify, meaning, that the allegations in its defence with regard to the blameworthiness of the accident on the appellant either wholly or substantially remained just that, mere allegations. The respondent thus never tendered any evidence to prop up its defence. Whatever the respondent***

gathered in cross-examination of the appellant and his witnesses could not be said to have built up its defence."

48. Further, **Anyangu v Chepkirin (Civil Appeal E052 of 2022) [2023] KEHC 17954 (KLR) (16 May 2023) (Judgment)** the Court held that:

"Based on the above cited authorities and the evidence on record in this matter, it is my finding that in the absence of any evidence from the defendant especially the driver in this case, it is my finding that the plaintiff proved his case on the balance of probabilities, hence the defendant is hereby held 100% liable for this accident."

49. Going by the foregoing exposition of the law and its application to the facts of this case, it is plain that the Respondent proved her case on a balance of probabilities. The contention by the Appellants that no such proof was tendered is, with respect, untenable.

50. In my view, the evidential threshold was met, and indeed surpassed, and the complaint on liability discloses no

arguable basis upon which appellate intervention could properly be invited. This was not, in the circumstances, a matter that warranted the invocation of the appellate jurisdiction of this Court.

51. The appeal on liability was therefore entirely misconceived and lacked any sustainable legal foundation.

52. On quantum, the deceased was aged 45 years at the time of death, was in the employment of the Kenya Police Service, and earned a gross monthly salary of Kshs.73,400/=, translating to a net income of Kshs.57,324/= after statutory deductions. He was a married man and the sole breadwinner for his wife, the Respondent herein, and two minor children.

53. The Court of Appeal pronounced itself succinctly on the principles of disturbing awards of damages in **Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR** as follows:

> ***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by***

a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

54. The trial Court in this matter took into account the vicissitudes of life and correctly appreciated that, while the deceased had fifteen years to statutory retirement, it would be prudent not to assume uninterrupted service. In adopting a multiplier of ten years, five years less than the remaining period to retirement, the trial Court exercised restraint and caution. In my view, that approach was wholly reasonable, and no basis has been laid to warrant interference with the award.

55. Finally, on costs, 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."

56. The Appellant having failed to mount a successful appeal, the award of costs is to the Respondent.

Disposition:

57. The Appeal fails in its entirety with costs to the Respondent.

DATED, DELIVERED and SIGNED at NAIROBI through the Microsoft Teams Online Platform on this 17TH day of DECEMBER, 2025.

……

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Ms. Anyangu, Advocate for the Appellant

Mr. Anyonje, Advocate for the Respondent