REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. E028 OF 2024

MARTHA KERUBO ONDIGO (Suing as the legal representative of the estate of the late BENARD ORETO AUKO) ..... APPELLANT

-VERSUS-

TERRY AMINA.....

.....RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. S.N Mutava, Resident Magistrate, given on 15.5.2024, arising from Rongo PMCC No. E125 of 2023. The appellant was the plaintiff in the lower court.

2. The lower court heard the parties and proceeded to render the impugned judgement as follows:
    a. Liability at 50:50
    b. Special damages Ksh. 100,000/=.
    c. Pain and suffering -Ksh. 50,000/=
    d. Loss of dependency -Ksh. 851,236/=
    e. Loss of expectation of life- Ksh. 100,000/=

    Total Ksh. 1,101,236/=

    less 50% - Ksh.550,618/=.

Ksh. - 550,618/=.

3. The Appellant was aggrieved by the judgment and filed a Memorandum of Appeal dated 24.5.2024, raising the following grounds of appeal:

    (a) The learned magistrate erred in law and fact in finding liability at 50:50 between the parties despite overwhelming evidence on behalf of the Appellant.

    (b) The learned magistrate erred in law and fact in awarding Ksh. 851,256 on loss of dependency which was inordinately low.

    (c) The learned magistrate erred in law and fact in finding that the deceased was 59 years against the Appellant's pleadings and evidence.

    (d) The learned magistrate erred in law and fact in applying wrong principles of law by relying on documents which were not before court.

    (e) The learned magistrate erred in law and fact in misinterpreting and misapplying the evidence before the court, leading to a wrong conclusion.

    (f) The learned magistrate erred in law and fact in disregarding the submissions, pleadings and evidence of the Appellant.

Pleadings

4. The appellant filed a Plaint dated 19.9.2023 claiming damages for an accident that occurred on 9.2.2023 when the deceased was riding a motorcycle along Migori-Rongo Road at

Kanyawanga area, and the Respondent, or her driver, or agent, negligently and dangerously drove Motor vehicle Registration No. KBQ 628L caused it to violently collide with the motorcycle, as a result of which the deceased suffered fatal injuries.

5. 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.

6. The Respondent entered an appearance and filed a Defence dated 31.10.2023 denying the particulars of negligence and injuries pleaded in the Plaint.

Evidence

7. During the hearing, PW1 was Martha Kerubo Ondigo. She was the widow of the deceased. She relied on her witness statement and produced the documents filed in court. The chief's letter indicated that the late left behind three children aged 9, 7, and 8 years. There were also death certificates no. 1527238 was produced. The death certificate was also produced. She testified that the deceased was a mechanic. The accident is said to have occurred along the Migori–Rongo road. The same involved motor vehicle registration number KBQ 628 L, Toyota Harrier. The deceased was riding from

work. She also produced a post-mortem dated 11.02.2023 showing the deceased was 40 years old.

8. According to her, the deceased earned between Ksh. 30,000/= to Ksh. 50,000/= from his work as a mechanic. They had 3 children, all of whom were minors.

9. PW2 was Isaac Omondi. He was a mechanic at Kanyawanga junction. He blamed the driver of the motor vehicle. He was next to the road at the scene of the accident. He saw what happened. There was a sign for a speed limit of 20Km/hr. The Respondent was likely driving at 80 Km/hr. The deceased was cycling on the left side of the road. The accident occurred on the left lane. The driver lost control. He did not brake or swerve. The motorcycle was not from the petrol station and did not hit the car.

10. PW3 was No. 57671 PC Dickens Agumba. He was the investigating officer. The motorcycle was not at the scene. The deceased and the driver were both moving towards the Rongo direction. The motorcycle emerged from a petrol station on the right-hand side of the road. The car hit the motorcycle. The driver was released on cash bail. He produced the police abstract. On cross-examination, it was his case that the petrol station was 40 meters away from the scene. The driver informed him that there was a reasonable distance between them. He received information from members of the public.

The investigations were incomplete due to the motorcycle's absence. He could not ascertain who to blame.

11. DW1 was William Stanely Odhiambo. He produced the license, the certificate of examination of the motor vehicle, and the police abstract. He was driving the accident motor vehicle to Rongo, and the accident occurred on the left side. The motorcycle joined the road from Shalom Petrol Station.

12. He stated that there was no signage on speed limits. On cross-examination, it was his case that the motorcycle was slightly ahead of him. He had an opportunity to try and brake, swerve or stop. There were other vehicles in front of him. There are also pedestrians walking. He was during 50 Km/hr. The right side of the bumper hit the motorcycle. Good Samaritans took him to the hospital, but he later died.

Submissions.

13. The Appellant filed submissions dated 22.9.2025 and submitted that 100% negligence was proved against the Respondent. It was submitted that there could be no liability without fault and reliance placed on **Caparo Industries PLC v Dickman** (1990) 1 ALL ELR 568.
14. On quantum, it was submitted that the deceased was 40 years at the time of his demise and not 59 years as erroneously determined the lower court. The 20-year multiplier, according to the Appellant, would be appropriate. It

was also submitted that the statutory earnings of an ungraded artisan are Ksh. 18,936 ought to have applied as a minimum wage bill.

15. The Respondent filed submissions dated 11.11.2025. it was submitted that the finding of liability at 50:50 was proper and supported by the evidence before the court. The Respondent urged this court not to interfere with this finding of fact without a basis. Reliance was placed on **Bundi Makube an infant suing by his next friend Thomas Bundi Vs Joseph Onkoba Nyamuro** [1983] KEHC 47 (KLR).

16. It was also submitted that the multiplier and minimum-wage approach was proper and did not lead to an inordinately low award for dependency. In this regard, the Respondent relied, inter alia, on the case of **Roger Dainty v Mwinyi Omar Haji & another [2004] KECA 147 (KLR)**, the Court of Appeal [R. S. C. Omolo, E. M. Githinji and J. W. Onyango Otieno] stated as follows:

> The court rejected the rule and re-asserted that dependency is a question of fact. Hancox CJ said in part at page 291:
>
> > The extent to which the family is being supported must depend on the circumstances of each case. To ascertain it the judge will analyse the available evidence as to how much deceased earned and how much he spent on his wife and

family. There can be no rule or principle of law in such a situation.

To ascertain the reasonable multiplier in each case the court would have to consider such relevant factors as the income of the deceased, the kind of work deceased was doing, the prospects of promotion and his expectation of working life.

17. They submitted that the determination of a multiplier was a matter of fact, which was at the discretion of the lower court.

Analysis

18. 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.
19. 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…

20. 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…

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.

22. The Appellant urged the court ought to have found the Respondent 100% liable. The court is asked to establish whether the lower court erred in finding, on a balance of

probabilities that the deceased and the Respondent were equally to blame for the accident. The legal burden of proof lies upon the party who invokes the aid of the law and asserts an issue based thereto, and in this case, the Appellant. In **Ndiritu (Suing as Administrator for the Estate of George Ndiritu Kariamburi - Deceased) v Ropkoi & another [2004] KECA 65 (KLR)**, **t**he Court of Appeal [O'kubasu, Githinji & Waki, JJ.A] 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.

23. 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 **Nyakwana v Ongaro [2015] KEHC 8440 (KLR)**, DAS Majanja, j, held as follows:

> 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.

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] KEHC 4124 (KLR)

> 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 is 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.

25. 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…..

26. 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 Investments Limited v Geoffrey Kariuki Mwenda & another** [2015] KECA 616 (KLR), the court of appeal [K**aranja, Okwengu & G. B. M. Kariuki, JJ.A]** posited as follows:

> The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. 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 the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof 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' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

27. It was common position of the parties that the deceased was riding a motorcycle at the time of the accident. The Appellant's case on liability was that the Respondent failed to brake or swerve and was driving at a high speed in the circumstances. This court has reevaluated the evidence and for the reasons to be stated hereafter, the lower court was erroneous in its apportionment of liability as the Respondent was clearly 100% to blame for the accident.

28. It was uncontroverted testimony of PW2, the eyewitness, that the accident occurred on the left lane and the driver of the motor vehicle did not swerve, brake, or stop. DW1, the driver, confirmed that there was a reasonable distance between the motorcycle and the motor vehicle, but he did not swerve, brake, or stop. He hit the motorcycle, and the front bumper, windshield, and motorcycle were damaged.

29. The fact that the deceased was thrown up and landed on the windshield confirmed that the collision was violent and corroborated PW2's evidence that the motor vehicle was driven at an excessive speed in the circumstances.

30. The evidence of the police officer, PW3, did not present a case from which contributory negligence could be inferred. He admitted that he was not at the scene of the crime and the information he recorded was based on the story he received from the members of the public and the driver of the accident motor vehicle. Inasmuch as his evidence was crucial to establishing that the accident was reported, he was not a credible witness as to who caused it.

31. 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 confirm that the accident occurred, was reported, and, where available, to present as accurately as possible a report on the circumstances that led to the accident. It does not matter whether the report supports one case or the other. The report might as well find no one to blame.

32. It was the duty of the Respondent to prove contributory negligence on the part of the deceased. The Respondent did not present a case to support a factor for which the accident could not have occurred. There any third-party proceedings initiated to blame the motor vehicles that were said to be ahead of DW1. These are the factors DW1 alluded to as having prevented him from swerving, braking, or stopping. 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.

33. The accident can therefore not be said to have occurred by magic. Or unidentified flying object. In a courtroom 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. Having found that there is no merit in the question of contributory negligence, the court erred in finding the deceased 50% liable. All the evidence pointed to one fact only. The court therefore sets aside the finding on liability and finds the Respondent 100% liable.

35. On the damages, the Appellant appealed only against the award on loss of dependency. The deceased herein was pleaded and proved to have been 40 years old and married to the Appellant together with whom they had 3 children, all minors.

36. The lower court erroneously found that the deceased was 59 years. There was no basis for this finding; the court imputed that the deceased's national identity showed that he was born in 1964. The said national identity card was not part of the evidence of the Appellant and the Respondent, nor did the Respondent challenge the age pleaded in the Plaint or on the notification certificate.

37. The court thus digressed into a fishing spree to fetch and import evidence suo moto. This was improper and unacceptable. The post mortem, burial notification of death, and I therefore uphold the age of 40 years pleaded and established, as narrated on the burial permit produced in evidence. The respondent's submissions are also based on the deceased's age being 40 years. The age of the deceased was thus not in dispute.

38. It was not controverted that the deceased was a mechanic. From the single business permit produced in evidence, the deceased engaged in motorbike repair services and was well described as a mechanic. There was, however, no proof of income. The minimum-wage approach, as opposed to the global sum approach, was therefore the most appropriate formula for calculating the loss of dependency. The work of a mechanic must have earned him income. I have perused the Regulations of the Minimum Wage Order 2022, which the lower court correctly applied. I do not find basis upon which

the court adopted Ksh. 15,201 as applicable income for the deceased who was undisputably engaged in motorbike repair services to earn income. The income applied by court was for a general labourer in the cities and was not applicable to the deceased.

39. The Appellant submitted that the Deceased was ungraded mechanic and would be entitled to Ksh. 18,936/= as monthly income. In the absence of a certificate based on which the deceased could be graded, I find it prudent that the categorization as an ungraded artisan was the most accurate grading for the deceased, who was engaged in motorbike repair services to earn income. Under this category and noting that the deceased was working within Rongo municipality of Migori County, Ksh. 18,936.85 was applicable for ungraded artisan that applied to him.

40. The court cannot lightly interfere with damages for loss of dependency unless satisfied that the court acted on a wrong principle of law, or misapprehended the fact, or for these or other reasons made a wholly erroneous estimate of the damage suffered. 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 a 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.

41. The Deceased died at 40 years old and would be expected to work until the retirement age of 60 years. He had 20 years of useful working life. Furthermore, he had three children and a young wife, all of whom depended on him. The children could have depended on their father between the ages of 12 and 16. The widow had an even longer period to depend on her sweetheart.

42. However, due to the vicissitudes of life and payment in a lump sum, the multiplier should be considerably brought down. Therefore, a 15-year multiplier 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.

43. The deceased was undisputedly engaged in income-generating activities. He was married with 3 children, all minors who relied on him. I find that the award of dependency, based on a 2/3 ratio, is proper and takes into account that the deceased was married and had 3 children. As was held by Odunga J (as he then was) in **J W N v Kassam Hauliers Limited [2020] eKLR stated as follows:**

> 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.

44. The commensurate and adequate compensation under loss of dependency, which I find and award, works out as follows:

Ksh. 18,936.85 X12 X 15 X 2/3 = Ksh. 2,272,422/=.

45. There was no appeal against the award on pain and suffering, loss of expectation of life, and special damages, and the same remain undisturbed.

46. This leaves the issue of costs, which 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.

47. 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 if 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.

48. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Rai & 3 others v Rai & 4 others** [2014] KESC 31 (KLR), 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.

49. Costs are discretionary, and they follow the event. The event here is the allowance of the appeal. The Appellant will have the costs of the appeal and the costs in the court below.

Determination

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

a. The appeal is allowed on both liability and quantum.
b. The finding on liability is hereby set aside. In lieu, therefore, I substitute judgment on liability for the appellant against the Respondent at 100% liability.
c. The award on loss of dependency of Ksh. 851,256/= is set aside. In lieu thereof, I enter judgment on loss of dependency for a sum of Ksh. 2,272,422/=.
d. This works out as follows:
    a. Liability against the Respondent 100%.
    b. Loss of dependency - Ksh. 2,272,422/=.
    c. Special damages Ksh. 100,000/=.
    d. Pain and suffering -Ksh. 50,000/=
    e. Loss of expectation of life- Ksh. 100,000/=.

    Total Ksh. 2,522,422/=.

    f. Costs of the lower court to the Appellant
e. The appellant shall have costs of Ksh 105,000/=.
f. 30 days stay of execution.
g. Right of Appeal 14 days.

DELIVERED, DATED and **SIGNED** at **NYERI** Virtually on this **12th** day of **March, 2026.** Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Aron for the Appellant

Muma for the Respondent

Court Assistant – Michael / Martin