REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. E057 OF 2025

JAMES NGUYO MURIITHI ……..
APPELLANT

-VERSUS-

DAVID GICHIA KARANJA……..
RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. Jackinda Renna Aketch, PM dated 20.05.2025 arising from Kenol MCCC No. E071 OF 2025.

2. The Appellant lodged a memorandum of appeal against liability only. Parties field submissions. He submitted that the respondent did not show how the accident occurred. He submitted that the appellant was not called to testify, did not file submissions. It is unnecessary to set out the fact as they will be subsumed in the analysis.

Analysis

3. 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 subordinate court, unlike the appellate court, had the

advantage of observing the demeanour of the witnesses and hearing their evidence firsthand.

4. This Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong. In the case of **Mbogo and Another vs. Shah** [1968] EA 93 the court stated:

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

5. The duty of the first appellate court was set out in the case of **Selle and another Vs Associated Motor Board Company and Others** [1968] EA 123, where the court in their usual gusto, held as follows; -

> .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-subordinate and the Court of Appeal is not bound to follow the subordinate Court's finding of fact if it appears either that he failed to take account of particular

> circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.

6. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses. this court must bear 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.

7. This court's 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…

8. The Appellants urged the court to find that the lower court erred in finding them 100% liable for the accident. On the other hand, the Respondent's general case is that the judgement of the lower court was correct on liability and

should not be disturbed. 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.

9. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in **William Kabogo Gitau V George Thuo & 2 Others [2010] KEHC 4124 (KLR)** 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.

10. 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…..

11. 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 the high probability

> required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not, the burden is discharged, but if the probabilities are equal, it is not.
>
> This burden on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties…are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.

12. The matter raises only one single question, liability of the appellant. The appellant rather surreptitiously pointed he was not called to testify and did not file submission. He pointed out that this were pointers that he was not heard. The court will not belabour the second ground. It is dismissed in limine.

13. The doctrine of *audi alterum paterm* as properly understood, covers a scenario where a party is condemned unheard. It does not cover a scenario where, a party does not testify. in the former scenario, the Court of Appeal, sitting in Malindi [Makhandia, Ouko & M'Inoti, JJ.A] in the case of **James Kanyiita Nderitu & another v Marios Philotas**

Ghikas & another [2016] KECA 470 (KLR), posited as follows:

> The former Court of Appeal for Eastern Africa, in Ali Bin Khamis v. Salim Bin Khamis Kirobe & Others, [1956] 1 EA 195 expressed the view that where an order is made without service upon a person who is affected by it, procedural cockups will not deter the court, ex debito justitiae, from setting aside such an order. Briggs, JA., with whom Worley P. and Sinclair, VP. concurred, stated thus:
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> "On the appeal before us Mr. Khanna relied on Craig v Kanseen [1943] 1 All ER 108 as showing that where an order is improperly made without serving a person known to be affected by it and having a statutory right to be served before its can be made, the order is a nullity in the sense that it must be set aside ex debito justitiae, and that in cases of nullity procedure is unimportant, since the Court has inherent jurisdiction to set aside its own order. I accept these principles, as laid down by Lord Greene, MR."

14. The later scenario is covered in this matter. The appellant participated and cross examined the respondent. He chose not to testify. He cannot be forced to do so. He must however also take the consequences and ramifications that arise from the choices. the respondent testified that he was heading to Kabati

from kenol, when the appellant's motor vehicle hit the resident's tuk tuk from behind at a high speed. This was evidence giving rise to negligence.

15. This then left the appellant with one singular duty, to proof contributory negligence. The appellant had set out particulars of contributory negligence in paragraph of the defence. Without the appellant testifying, the particulars remain just that. They are of no use. **Michael Matonye Munyao & another v JNK (suing as the legal administrators of the estate of JOA)** [2019] KEHC 9518 (KLR), where held as follows:

> 7. I do not see how the case of WK v Ghalip is of any assistance to the appellant here. This being an appeal, and no evidence on contributory negligence, indeed no defence evidence at all, having been adduced, there can be no appeal on contribution. The WK case clearly demands that there must be evidence of the blameworthiness of both parties before apportionment of liability. In this case there is absolutely no defence evidence at all. In the brief case of Interchemie EA Ltd v Nakuru Veterinary Centre Ltd [2001] eKLR, Mbaluto J held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. In this light, I have no choice but to

treat this as an appeal purely against the quantum of damages awarded.

16. Whereas the Respondent, as Plaintiff in the lower court, proved her case to the required standard, it was the duty of the Appellants to prove contributory negligence, which, in my view, they failed to do. They filed a joint defence and did not blame each other for the accident. 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.

17. There could be no liability without fault on the part of the Respondent as a passenger. In the case of **Kiema Muthuku v Kenya Cargo Handling Services Ltd** (1991) 2 KAR 258, the court of appeal posited as follows:

> 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.

18. Therefore, the Respondent proved want of care on the part of the driver of the accident motor vehicle. I am in consonance with the reasoning of the Court 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:
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> ……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.

19. Further, the Appellants failed to call a driver witness, and the case of the Respondent was uncontroverted. The allegations in the defence were mere averments, not substantiated. In the case of **Janet Kaphiphe Ouma & Another –vs- Maries Stopes International (Kenya),** Kisumu HCCC No. 68 of 2007, Ali Aroni, J citing the decision in **Edward Muriga suing through Stanley Muriga –vs- Nathaniel D. Schulter, Civil Appeal No. 23 of 1997** that:

> In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted, and the statement in the defence therefore remains mere allegations…Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.
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> 16. Guided by the above case, I find the statements in the defence filed on 10th December 2014 remain mere allegations having not been substantiated orally in court by the Appellant to controvert the Respondents testimony.

20. The law still remains that whoever alleges must prove. The respondent alleged negligence and went ahead to tender evidence. The respondent, as a plaintiff had no duty to disprove contributory negligence. It was the duty of the defendant to prove contributory negligence. They failed to do so. The law in this aspect is set out in sections 107-109 of the Evidence Act.

> 107. (1) 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.
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> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
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> 108. 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.
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> 109. The burden of proof as to any particular fact lies on the 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."

21. To make matters worse, the driver of the suit motor vehicle was present when the accident occurred. It is within his

knowledge what transpired. section 112 of the evidence act places the burden on a person with special knowledge as follows:

> In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

22. In **Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others** [2012] eKLR the court stated as follows:

> "Section 112 of the Evidence Act Chapter 80 of the laws of Kenya provides:
> "In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him."
> 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 adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

23. By failing to testify, the court must form an adverse inference that had he testified, the testimony will be against his case. lastly, there were attempts to sore up the case though submissions. Mwera, J (as he then was) in **Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007**:

> "Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."

24. Mwera J, posited as follows when postulating on what is the role of submissions are. He stated that they are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim in the case of **Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993**:

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

where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

25. Submissions are not, strictly speaking, part of the case, the absence of which may do prejudice to a party. There presence or absence does not in any way prejudice a case as held in **Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749**, the Court held that:

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

26. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the

question in the case of **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR**:

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

27. The upshot of the foregoing is that the appeal has no basis and is accordingly dismissed. 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.
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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.

28. 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.

29. 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.

30. The costs follow the event. the event is dismissal of the appeal. The respondent is entitled to costs. A sum of Ksh 55,500/= will suffice.

Determination

31. In the upshot, I make the following orders: -
    (a) The Appeal lacks merit and is accordingly dismissed.
    (b) The Respondent shall have the cost of this appeal assessed at Ksh. 55,500/=.
    (c) 30 days stay of execution.
    (d) The file is closed.

DELIVERED, DATED and **SIGNED** at **NYERI**, virtually on this **11th** day of **May, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Bundi for Mr. Mwangi for the Respondent

Mr. Kamwenji for the Appellant

Court Assistant- Michael / Martin