



REPUBLIC OF KENYA



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**Wachiuri v Kipsang (Suing as the Legal Representative of the Estate of Cheburet Sirma)
(Civil Appeal E004 of 2024) [2025] KEHC 5527 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5527 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CIVIL APPEAL E004 OF 2024
RB NGETICH, J
APRIL 30, 2025**

BETWEEN

VERONICAH WANJIRU WACHIURI APPELLANT

AND

CAROLINE KIPSANG RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF CHEBURET
SIRMA**

*(This appeal was instituted by the Appellant vide a Memorandum of Appeal dated
8th February, 2024 against the judgement of the Senior Principal Magistrate's
Court at Kabarnet delivered by Hon. P. KOSKEY (S.P.M.) on 21st December, 2023)*

JUDGMENT

1. The Respondent who was plaintiff in the trial court filed suit vide Plaintiff dated 4th April, 2023 against the Appellant (then the 1st Defendant) and the 2nd Defendant seeking general and special damages for the death of Cheburet Sirma who died while riding motor cycle registration number KMEL 357 L BOXER which collided with the appellant's vehicle registration number KCU 062 Z on 10th May 2022 along Marigat -Kabarnet road.
2. The Appellant (then 1st Defendant) alongside the then 2nd Defendant entered appearance vide a Memorandum of Appearance dated 18th May, 2023 and further filed their statement of defense dated 22nd May, 2023 in which they prayed that the suit be dismissed with costs and in the alternative that a substantial finding of contributory negligence be made against the Deceased to the extent of his negligence.
3. The matter was fixed for hearing on the 5th May, 2023 wherein the Respondent's one witness was heard marking the close of the Respondent's case. The appellant/Defendant did not avail any witness.



4. The Respondent/Plaintiff filed their written submissions dated 27th October, 2023 while the Appellant filed their written submissions dated 8th November, 2023. Judgment was delivered on the 21st December, 2023.
5. Being aggrieved by the said judgement, the Appellant herein approached this court vide the instant appeal on the following grounds: -
 - i. That the Learned Magistrate erred in law and in fact by misapprehending the evidence and misapplying, misunderstanding and/or overlooking the correct legal principles and judicial precedent and the submissions by the Appellant hence arriving at an award for loss of dependency that was erroneous and inordinately high.
 - ii. That the Learned Magistrate erred in law and in fact in failing to award a global sum for loss of dependency notwithstanding that the Respondent failed to prove the Deceased's net income at the time of his demise.
 - iii. That the Learned Magistrate erred in law and in fact in applying Kshs.64,000/= as multiplicand while assessing loss of dependency when it was apparent that the Respondent did not prove the deceased's net income at the time of demise.
 - iv. That the Learned Trial Magistrate, in assessing damages for loss of dependency, failed to apply the correct principles hence arrived at an erroneous estimate of damages which the deceased suffered.
 - v. That the trial court erred in law and in fact in apportioning liability in the ratio of 90:10 as against the Appellant without the Appellant's consent hence condemning the Appellant unheard.
 - vi. That the Learned Magistrate erred in law and in fact by failing to consider the Appellant's submissions and authorities attached thereto in relation to liability and the applicable multiplicand hence arriving at an erroneous finding and determination.
 - vii. That the Learned judge considered extraneous issues which vitiated her judgement thus arriving at an erroneous finding.

Appellant's Submissions

6. The Appellant submits that in the case of Mursal & Another -vs- Manese [2022] KEHC 282 (KLR), Mativo J, (as he then was) stated thus: -

“A first Appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the Appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the Appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first Appellate court had discharged the duty expected of it. They similarly, rely in the case of Rottger v Karisa & Another (Suing on behalf of the Estate of Said Thoya) (Civil Appeal E062 of 2023) [2023] KEHC 26981 (KLR).



7. That in light of the above cited authority, and further considering that the present appeal is a first appeal, they invite this Honourable Court to re-consider the evidence, re-assess, re-evaluate and re-analyze the extracts on the record and draw its own conclusions and determinations on the following condensed issues: -
- i. Whether the Respondent proved her case on a balance of probabilities.
 - ii. Whether the trial court failed to consider the correct legal principles and/or considered extraneous issues.
 - iii. Whether the trial court erred in law and in fact in its assessing of damages for loss of dependency.
 - iv. Whether the trial court erred in law and in fact in apportioning liability in the ratio of 90:10 as against the appellant.
 - v. Who should bear the costs of this appeal?
8. On whether the respondent proved her case on a balance of probabilities, they submit that they shall condense grounds 1, 2 and 3 of the Appeal under this head and submit in the negative. They rely in Sections 107 and 108 of the *Evidence Act* and in the case of Wangongu –v- Kithinji & 2 Others (Civil Appeal 293 of 2023) 12024] KEHC 6272 (KLR), while citing with approval the Court of Appeal case of Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, where the Court 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 Appellant submits that the Respondent failed to prove her case to the requisite standard of proof, for the following reasons: That It was the Respondent's (then Plaintiff) evidence at the trial court that the deceased earned a monthly salary of Kshs.63,861/= and to support this, the Respondent produced a pay slip for the month of September 2021 marked as P. Exhibit 6. That while the deceased is said to have died on the 10th May, 2022, there was no evidence that the deceased was earning the said sum of Kshs.63,861/= or any earning at all at least for any of the seven (7) months immediately prior to his death; there was no cogent evidence that the deceased was employed or earned anything for any of the months between September, 2021 and May, 2022 at the time of his demise.
10. On whether the trial court failed to consider the correct legal principles and/or considered extraneous issues, the appellant submit that the trial court failed to consider the fact that whereas the Respondent herein (then Plaintiff) confirmed that there were three minors left by the deceased, it was the Respondent alone issued with a grant of letters of administration and as such was the sole administrator, in support of this argument and Section 4 of the *Fatal Accidents Act* and Section 58 of the *Law of Succession Act* and the case of In Re Estate Of Joseph Rongoei Kerich (Deceased) [2009]eKLR where the court held that because minors were involved there must be two administrators/ administratrix as provided under section 58 of the *Law of Succession Act*.
11. It is the Appellant's submission that the Respondent herein, on cross examination admitted that she was the only administrator and instituted the present matter in the trial court as such. That despite there being three (3) minors in the estate of the deceased, there was however one administrator alone,



- as opposed to the legal requirement of a minimum of two (2) administrators in such a case. That the trial court however failed to consider the correct legal principle that there ought to be at least two administrators where minors are involved.
12. That the learned trial magistrate, in her judgement, paragraph 25 thereof, while applying the Kshs.64,000/= as multiplicand stated thus: "On the multiplicand, I have considered the letter from Teachers Service Commission dated 18/10/21... The pay slip for the month of September 2021 was produced as P. Exhibit 6. It shows that the deceased had a gross salary of Kshs.85,243/=..... Net pay September 2021 – Kshs.63,681/20.
 13. That the learned trial Magistrate further went ahead and applied the sum of Kshs.64,000/= as the multiplicand while assessing loss of dependency notwithstanding that there was no proof of the deceased's net income prior to his demise and in the circumstances of the present case, and there being no accurate and/or precise evidence as to the multiplicand, their submission is that the trial court erred in law and in fact in applying the Kshs.64,000/= as the multiplicand.
 14. That in view of the above cited authorities, they submit that the trial court ought to have awarded a global sum for loss of dependency as the Respondent clearly failed to prove the deceased's net income immediately prior to his demise. That the trial court however applied the multiplier approach even when the circumstances and facts did not support the same.
 15. That as a result of the trial court's misapprehension of the evidence, misapplication, misunderstanding and/or overlooking of the correct legal principles and judicial precedents resulted in an award for loss of dependency that was erroneous and inordinately high and ought to be substituted with award by this court.
 16. In respect to global award, the trial court cited the case of Lee Construction Company Limited –v- Obare Sued as Personal Administrator of The Estate of Stella Nyaboke Nyameino Deceased) (Civil Appeal No. E005 of 2023) [20231 KEHC 25912 (KLR), where the Court held as follows:-

“Guided by the above cited precedents, it is my view that a global sum of Kshs.1,500,000/ = would be suitable compensation under this heading. They similarly rely, in the case of Stephen Murathi V Brenda Makena (suing As The Legal Representative of The Estate of Andrew Muthuri (Deceased) [20211 eKLR where the court awarded a global sum of Kshs 2,500,000 for loss of dependence, considering the deceased age, good health and marital status.”
 17. Further in the case of Benard Kirui Kiptoo & Another V Esther Nyambura Mwangi (suing As The Legal Representative of The Estate of Paul Kiratu-deceased) & Another [20201 eKLR the Court awarded a global sum of Kshs.1,000,000/=.
 18. That in view of the foregoing and further considering that the Respondent failed to prove employment or earning, they humbly pray that a global sum Kshs.2,000,000/= for loss of dependency be awarded.
 19. On liability, they submit that apportioning liability in the ratio of 90:10 as against the Appellant was unjust, illogical and tantamount to injustice on grounds that the Appellant was not given a chance to air her views in arriving at the said consent and the said consent was procured against her desires and without her involvement and/or information, and the Appellant only came to know of the consent upon the judgement being entered against her and cited Supreme Court of Uganda in The Management Committee Of Makondo Primary School And Another –vs- Uganda National Examination Board, Hc Civil Misc. Application No.18 of 2010, which Justice Lenaola approved in the case of Mandeep Chauhan V Kenyatta National Hospital & 2 Others [2013] eKLR by holding



that no one should be condemned unheard and further the case of Judicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR, where the court emphasized the right to fair hearing under Article 50(1) of the Constitution.

20. The appellant submits that it is trite law that an Advocate can enter into a Consent on behalf of his client provided he acts bona-fide, that the Consent should not be contrary to express negative directions and further that it should not be made through misrepresentation or in ignorance of material facts and this position was affirmed in the Court of Appeal case of InterCountries Importers and Exporters Limited –vs- Teleposta Pension Scheme Registered Trustees & 5 Others [2019] eKLR.
21. The appellant further submit that the records of the trial court's proceedings at pages 74, 74 and 76 on the Record of Appeal show that on the 5th October, 2023, that the Honourable Court adopted a consent entered into between Counsel for the Respondent and former Counsel for the Appellant but it was however not done in consultation and/or involvement of the Appellant herein but trial Court however proceeded and adopted the said consent despite not hearing from the Appellant.
22. That besides adopting the said consent, it is equally on record that whereas the Respondent's then witness (PW1) was heard on the 7th August 2023, the Appellant's case was never heard but the then Counsel appearing for the Defendant closed the Defendant's case without ever giving the Defendants a chance to be personally heard. That the Honourable Court proceeded and issued orders for filing of submissions without hearing the appellants herein, and thereafter apportioned liability in the ratio of 90:10 as against the appellant thus condemning the appellant unheard.
23. They submit that the said consent was entered into by the appellant's former counsel contrary to the appellant's express directions and desire and he was not given an opportunity in person to express themselves as far as the said consent is concerned and submit that a litigant should not be precluded from pursuing justice due to their counsel's errors and/or mistakes.
24. The Appellant further submit that police abstract dated 26th July 2022, clearly indicated that the investigation had not been completed and either party in the accident could have been prosecuted but the Learned Trial Court condemned and found the Appellant blameworthy. He prayed that the trial court finding on liability be set aside, and the suit Kabarnet SPMC Civil Suit No. E024 of 2023 be remitted back to the Senior Principal Magistrate Court at Kabarnet and/or any other court for hearing on merit on the issue of liability.
25. On the issue of the costs of this appeal, the Appellant submits that it is trite law that the award of costs is discretionary and ordinarily follows the event under Section 27(1) of the Civil Procedure Act and urged this court to grant the Respondent costs of this suit.

Respondent's Submissions

26. The Respondent on their part submits that it is imperative to note that before the case commenced on 5th October 2023, a consent order was recorded in terms of liability. That the plaintiff conceded 10% liability and the defendant shouldered 90% liability. The issue of liability was therefore settled as per the Consent Order of the court.
27. The Respondent identified the following issues for determination: -
 - i. Whether the trial court considered incorrect legal principles and/or considered extraneous issues.
 - ii. Whether the trial court in apportioning liability at ratio of 90:10.



- iii. Who should bear the costs?
28. On the first issue, the Respondent submits that the trial court acted within the set circumstances the case presented itself to her and proved the respondent case on the balance of probability by adhering to correct legal principles and did not consider extraneous issues and relied on Sections 109 and 110 of *Evidence Act*.
29. The Respondent submit that in the case of Interchemie EA Limited vs- Nakuru Veterinary Centre Limited, the court held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted and similar position was held in Trust Bank Limited v Paramount Universal Bank Limited & 2 Others.
30. The Respondent submits that the trial court adjudicated issues before her with the facts placed upon her and it is not disputed that the appellant did adduce evidence that the deceased earned a monthly salary of Ksh.63,861/= and a pay slip was produced to prove the same and it is worth noting that her counsel did not object the tendering of the said evidence neither was contrary evidence filed to challenge the same.
31. The Respondent further submit that the deceased was a teacher with a Teacher Service Number with known colleagues and known working station. A fact that can be proved by the directorate TSC and letter acknowledging his death and argued that the defendants had their time, and chance to proof whatever contrary allegations they had before the trial court but instead elected to sleep on this maiden opportunity, only for them to come and allege contrary information in appeal seeking untenable prayers.
32. That the appellants counsel postulates absence of pay slips for a period not less 7 months prior to his demise, the appellant specifies months between September, 2021 and May, 2022 when the deceased died and further beseechs the court to infer the contrary but the learned counsel fails to appreciate the fact that the trial defence counsel did not question the same and neither did the trial court aske for evidentiary proof or lack of the same.
33. The Respondent relied on the case of Ondigo Gilbert –vs- Joab Jonah Olunyama (2018) where the court held that where there is substantive challenge to the award and the multiplicand, income to be used in the multiplicand would be what the deceased was earning at the time of his demise. The court ruled that where oral testimony and death certificate shows occupation, it is prima facie proof of occupation.
34. That no case law has been adduced by the trial defence counsel to challenge admissibility or the probative value of the pay slip adduced before the court and there is no letter of termination of employment or a letter of dismissal to show that deceased was not on work or not earning the money in the pay slip at the time of his demise. That it is trite law that whoever alleges a fact should prove the contrary.
35. The Respondent submit that it is clear that the respondent did prove his case at the trial court. The trial court did pronounce itself in law and in fact by establishing itself on a balance of probabilities that the income of the deceased was Ksh.64,000/= while assessing the loss of dependency and humbly pray this court do reaffirm the trial court's finding.
36. Further that the respondent's counsel in his submission gave a rationale on how he arrived at the cumulative figure of Kshs 64,000 where relying on the case of HELLEN GESARE AYOTI VS PN MASHRU LTD NAKURU CA NO 2 OF 2014(UR) and submit that the trial court considered correct legal principles and did not consider extraneous issues.



37. In respect to liability, the Respondent submits that it was conceded as counsels executed a consent on liability on 5th October, 2023 for plaintiff to shoulder 10% liability and the defendant 90% liability hence the issue of liability is settled and this court ought not visit a settled issue; that this court will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties; that for court to interfere, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court and relied on the case of WASIKE –vs- WAMBOKO[1982-1988]1KAR and in Sett on Judgments and Orders (7th Edn), Vol.1 pg. 124 as follows:-

“Prima Facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them... cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court...: or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.”

38. Further, that the court of appeal in Brooke Bond Liebig Ltd V Mallya [19751 EA 266 at 269 stated as follows: -

“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”

39. The Respondent submit that the appellant did not place any evidence to show illegality in the consent giving rise to the judgment on consent, and neither have they adduced evidence of collusion and connivance before court or even a scintilla of evidence to support them and they remained mere allegations on the appellant’s decision to challenge the consent, and the same is not credible and ought not to be entertained.

40. On Respondent’s capacity to institute the instant suit, the Respondent submits that she was issued with limited grant of letters of administration ad litem on 27th February, 2023 limited to instituting the instant suit as provided for under Section 7 of the *Fatal Accidents Act* and the award was to be held by her in trust for the minors survived by the deceased. Further, the issue of two administrators where minors are involved was not raised at the trial court neither has its relevance been demonstrated by the respondent in this trial. As to the question of letters of administration or otherwise procurement of limited grant ad litem, the same has not been subject to any trial both at the trial court and the appeal.

Analysis and Determination

41. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence adduced before the trial court and make its own conclusion. The court 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.

42. The duty of the trial court was stated in the case of Selle and another –vs- Associated Motor Board Company and Others [1968] EA 123 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-trial and the Court of Appeal is not bound to follow the trial 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.”



43. Further, in the case of Mbogo and Another vs. Shah [1968] EA 93 the Court stated as follows: -

“...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 it 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.”

44. Further in the case of Peters vs Sunday Post Limited [1958] EA 424, 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...”

45. In view of the above, I have perused and considered the record of Appeal, the memorandum of Appeal and the rival submissions by the parties and wish to consider as follows: -

- a. Whether this court should interfere with award by the trial court
- b. Whether this court ought to interfere with the consent judgement on liability.

(a) Whether this court should interfere with award by the trial court

46. On whether this court should interfere with award by trial court, the court of appeal pronounced itself succinctly on principles to be observed in the case of Kemfro Africa Ltd vs Meru Express Service –vs- A.m Lubia & Another 1957 KLR 27 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 the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account irrelevant facts 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 damages.

47. From the foregoing, for this court to interfere with the award, it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure. The duty of appellate court is threefold regarding quantum of damages: -

- a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.
- b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.
- c. The award is simply not justified from evidence.

48. The Appellant herein argue that the trial court erred in law by applying a multiplicand of Kshs.64,000/= in assessing loss of dependency yet the pay slip produced was not a recent pay slip; that there was no prove that the deceased was employed at the time of his death and neither was proof of earning produced in court.in respect to this issue, PW1 testified in court that she was the wife of the deceased and the deceased left behind three minors. She said that the deceased was a high school teacher at



Kibingor Secondary school. To prove this, she produced a letter of employment which showed that the deceased was employed by the Teachers service commission in the year 2012. She also produced letter dated 18th October, 2021 showing that the deceased was a teacher at Kibingor secondary school and a pay slip before court. She said that the deceased was earning a monthly income of Kshs.63,861/= which she proved by producing a pay slip. The court in assessment of damages applied a multiplicand of Kshs.64,000/= stating that it is the amount the plaintiff pleaded in her plaint.

49. In the case of Jacob Ayiga Maraja and Francis Karani V Simeon Obongo (suing as the Administrator of the Estate of Thomas Ndenga Obonyo C.A. No. 167 of 2002 (Kisumu), the Court of Appeal stated thus: -

“In our view, there was more than sufficient material on record from which the learned judge was entitled to and did draw conclusion that the deceased was a carpenter and that his monthly earnings were about Kshs.4000/= per month. We do not subscribe to the view that the only way to prove the profession of a person must be by way of the production of certificates and that the only way of proving earnings is equally the production of documents. The kind of that stand would do a lot of injustice to very many Kenyans who are even illiterate, keeps no record and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that any documentary evidence can prove these things.

In this case, the evidence of the Respondent and the widow coupled with the production of several reports was sufficient materials to amount to strict proof for damages claimed. Ground one of the grounds of appeal must accordingly fail on ground two, we know of no law or any other requirements that a self-employed compensator must retire at age 55.”

50. From the evidence adduced in the trial court by the Respondent and relying on the above authority, the trial court correctly applied the multiplicand of Kshs. 64,000/= basing on the documents placed before it. The documents produced by the Respondent were more than sufficient to prove that the deceased was a teacher earning a monthly salary. In view of the above, I have no reason to interfere with the decision of the trial court in applying a multiplicand of Kshs.64,000/=.
51. On argument that the deceased left three minors whereas only the respondent was granted letter of administration. Upon perusal of grounds of appeal, I note that this issue was not raised and the respondent further argue that it was not an issue in the trial court. I will not therefore deal with this issue.
52. In respect to entry of consent on liability in the ratio of 90:10 without consulting or knowledge of the appellant, I have perused the record of appeal and note that when the matter came up for hearing on the 5th October, 2023, counsel for the Appellant informed the court that he had written to his colleague for settlement and he then requested for the file to be placed aside as they talk. Later at 11:15 a.m. Mr. Kemboi counsel for the Plaintiff informed the court that they had a consent to record and they dictated the terms of the consent and the court adopted the consent as an order of the court.
53. The appellant argue that the insurer appointed an advocate who did not represent him properly and recorded consent without involving him. The Appellant’s insurance company was obligated by law to indemnify the appellant; the appellant did not say the insurer repudiated the insurance contract nor withdrew legal representation. There were no submissions that the advocate appointed by the appellant’s insurer failed to act in accordance with the insurer’s instructions or acted contrary to public policy. The appellant engaged an Advocate to file appeal after notice of judgment.



54. The duty of an insurer to satisfy any decree arising from a judgement against their insurer is founded on Section 10(1) and (2) of The Insurance (Motor Vehicle Third Party) Risks Act, Cap 405 Laws of Kenya. The insurer is therefore an interested party from the time a suit is instituted against its insured and hence the need for the insured to inform the insurer which has an interest in the proceedings and outcome of the case. Once the insured has informed the insurer of the proceedings against him, the insurer then appoints a legal representative to secure its interests. At this point, the insured is a witness in the case and the insurer may or may not call him to give evidence. The insurer may opt to enter into a consent judgement and compromise the suit.

55. Section 10 (1) of the Insurance (Motor Vehicle Third Party) Risks Act provides: -

“If, after a policy of insurance had been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments. Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in section 5(b) prescribed in respect thereof in the Schedule.”

56. The appellant herein wants the court to find that the trial court erred in law by recording the consent judgement entered into by his insurer’s advocate, on instructions of his insurer. The insurer did not challenge the judgement. In the case of SMN v ZMS and 2 OTHERS HCCA No.205 of 2015, the court of appeal held as follows: -

“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be varied unless it is proved that it was attained by fraud, collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material or misrepresentation or ignorance of such facts in general for a reason which would enable the court to set aside the agreement.”

57. The consent judgement entered between the appellants’ advocate and the respondent’s advocate is deemed to have had the ostensible authority of the appellants through his insurers. It has the effect of a contract and therefore ousts the court’s jurisdiction to exercise its discretion. In the case of Anura Perera –vs- Nation Media Group Limited And 2 Others [2015] eKLR, Hon. Justice R. Aburili held that: -

“In this case, it is trite from the order of 2nd October 2014 that the parties agreed to the terms of the consent which the learned Judge Waweru J, recorded as an order of the court. In my view, an order of the court which is recorded out of or arising from a consent of the parties is a binding contract between the parties to the dispute and as such, is like any other order of the court leaving no room for the discretion of the court to set aside that order save where the complaining party shows to the satisfaction of the court that the consent was entered into by mistake, fraud or misrepresentation. Thus a consent between the parties to the suit presents an impermissible fetters of the discretion of the court to tamper with that consent without the consent of both parties or as would a court set aside a contract between parties



thereto, and enlargement of time for compliance with a consent is equally fettered where such time is fixed by consent between the parties.”

58. From the foregoing, it is my finding that the trial court did not err in recording the consent judgement on liability. The consent judgement was regular and the appellant should follow the insurer to satisfy the decree. From the foregoing, I see no merit in the appeal on both liability and assessment of damages.

Final Orders: -

59.

- 1) Appeal is hereby dismissed in its entirety.
2. Costs of both the trial court and appeal to the Respondent.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 30TH DAY OF APRIL, 2025.

.....

RACHEL NGETICH

JUDGE

In the presence of:

Mr. Oyondi holding brief for Mrs. Mukira for Appellant.

Mr. Kemboi for Respondent.

Court Assistant – Elvis.

