**Bunei v County Government of Uasin Gishu & 2 others (Civil Case E012 of 2024) [2025] KEHC 15004 (KLR) (23 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15004 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CIVIL CASE E012 OF 2024**

**RN NYAKUNDI, J**

**OCTOBER 23, 2025**

**BETWEEN**

**LINDA JEPCHUMBA BUNEI ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF UASIN GISHU ..... 1ST DEFENDANT**

**ISAAC BARMASAI ..... 2ND DEFENDANT**

**ROBERT ORWARO ..... 3RD DEFENDANT**

## JUDGMENT

1. Vide a Plaint dated 1st July, 2024, the Plaintiff sought reliefs as follows:
   a. General Damages
   b. Special damages of Kshs. 2,355,259/=
   c. Loss of income/loss of earning capacity.
   d. Costs of the suit.
   e. Interest at Court rates for (a), (b), (c).
2. The background of the suit as pleaded by the Plaintiff is that on 27th July, 2023, she was lawfully making some purchases at a 'kiosk/shop' at the public matatu stage along Eldoret-Iten road within Eldoret, when County Inspectorate Officers popularly known as "County Askaris" in the course of their employment descended upon the scene, causing panic among members of the public who frantically ran in various directions creating a scuffle. The Plaintiff averred that the 2nd Defendant, with the 3rd Defendant, while within the scope of their employment and/or with permission of and/or authority of and/or instructions of the 1st Defendant, so negligently, carelessly and intentionally using

a baton (Rungu) knocked off a pan of burning hot cooking oil which toppled, spilled and poured directly on the Plaintiff's body.

3. The Plaintiff further averred that in a split second, she suffered several burns whereas the Officers callously sped off in the County Government vehicle leaving her at the mercy of the members of the public. Therefore, as a result of the 1st Defendant's employees' negligence, she suffered unimaginable pain, physical and emotional distress, mental torture and anguish as a result of the severe burns sustained, which have left her with permanent damages, and scars, a stark reminder of the incident. According to her, this breach of duty of care underscores their responsibility for the Plaintiff's enduring suffering and warrants compensation for medical expenses, lost wages, and pain and suffering endured.

4. The particulars of negligence by the Defendants are enlisted as:

    a. Failure to exercise reasonable care in their actions and decisions.

    b. Lack of employing proper skills in handling situations similar to the one involving the Plaintiff, leading to errors or reckless behavior.

    c. Use of excessive force or inappropriate methods in their enforcement actions, causing severe and permanent injuries to the Plaintiff.

    d. Violation of County Government policies and procedures regarding the use of force.

    e. Failure to promptly provide or seek medical assistance for the Plaintiff, after causing injuries.

5. The Plaintiff averred that that the 1st Defendant is vicariously liable for the negligent actions of its employees, the tortfeasors as the negligent acts were committed within the scope of the employees' employment.

6. The particulars of vicarious liability by the 1st Defendant were identified as hereunder:

    a. Breach of duty of care contrary to the relevant laws.

    b. Failure to equip its employees with the necessary skills to perform their tasks.

    c. Failure to train its employees on their jobs, duties, responsibilities and duty of care.

    d. Failure to deal with instances of offences of harassments and assault by carrying out disciplinary actions against the errant employees.

    e. Failure to put out policies designed to minimize risks and harm that may be committed by its employees to the members of the public.

    f. Allowing employees to conduct their tasks without sufficient supervision particularly being unskilled or hiring under qualified individuals.

    g. Failure to determine whether the employees were physically or mentally fit to carry out their duties and effectively perform and discharge the duty.

7. As a result of this, the Plaintiff suffered the following injuries:

    a. Burn wounds on the anterior abdominal walls.

    b. Burn wounds on the back – 3rd degree burn surface area 9%

    c. Burn wounds on both upper limbs – 3rd degree burn surface area 8%

    d. Burn wounds on both thighs & knees – 3rd degree about 9% burn surface area

Total burn surface area is 35% - mainly 3rd degree (very deep)

8. The Plaintiff sought for general damages for pain and suffering, loss of income, future medical expenses and special damages and medical psychological Counselling fees to treat traumatic post effects.

9. The Defendants through the 1st Defendant denied the said accident as having occurred on the said date and the manner in which it occurred. In their defense dated 30th July, 2024, the Defendants denied the averments in the Plaint and averred that:

    a. The 1st Defendant is not responsible for the said injuries incurred by the Plaintiff;

    b. There are no supporting documents to show her allegations against the 1st Defendant as being liable for the said events leading to her injuries;

    c. The 1st Defendant cannot be responsible for all accidents, as in this case, of members of public when some are caused by disobedience of designated areas of such businesses that cause her the injuries.

    d. That the 1st Defendant cannot therefore be responsible, directly or otherwise of the illegal acts of members of public who carry on illegal businesses in crowded places.

    e. In any case, the owner of the said burning or cooking oil with high temperatures is not a party to a suit she played a role in getting the Plaintiff injured.

    f. No party should benefit from an illegality, as the said injuries are because of an act illegal as per the laws and regulations to have such businesses at undesignated areas.

    g. The checks were deposited without the consultations of the Defendant and when no goods (invoices and delivery notes) were delivered.

    h. There is no amount due payable to the Plaintiff on the 1st Defendant and should look to sue the right party responsible for the oil that caused her burns otherwise injuries.

    i. The County employees handling enforcement issues are well trained on handling members of the public and enforcement of County laws.

    j. The Plaintiff is on self-enrichment mission to which he wants to gain where he has not sown.

10. In further response, the Defendants deposed as follows:

    a. There is no breach of duty of care by the 1st Defendant as it is not its primary duty.

    b. The employees are well trained and perform their tasks as per the policy in place.

    c. There is no complaint of harassment by any party or the Plaintiff in regards to the conduct of employees mentioned nor evidence of such being a harassment.

    d. There is no evidence that the 1st Defendant did not put in place safety measures and in fact that was not a designated area for such businesses hence an illegality.

    e. That the said area is highly populated and not designed for businesses done by the Plaintiff or owner of cooking oil, whence the same has not been licensed.

    f. The employees in relation to this matter are qualified contrary to the Plaintiff's assertion and contrary evidence is required of such unfortunate and privileged statement being made by the Plaintiff.

g. No evidence has been tendered by the Plaintiff to show the employees were not physically and mentally fit for the job as the contrary maybe true since no employee was involved as cooking oil could not have splashed one way if indeed such act was committed.

**The Plaintiff's written submissions**

11. Learned Counsel Mr. Tum for the Plaintiff filed written submissions dated 3rd July 2025 in which he identified three issues for determination, namely: whether the 3rd Defendant acted negligently; whether the 1st Defendant should be held vicariously liable for the negligent acts of its Officers; and whether the Plaintiff is entitled to the reliefs sought.

12. Counsel submitted that the Plaintiff's case is anchored on the tort of negligence arising from the reckless acts of the County inspectorate Officers who are employees of the 1st Defendant and were acting in the course of their employment. It was Counsel's contention that the Plaintiff was at the public matatu stage along Eldoret-Iten road when the inspectorate Officers, popularly known as "kanjos," caused a scuffle among members of the public by arriving with a county vehicle intending to impound goods. The women selling fried fish, samosas, roasted maize and other items at the Iten public stage ran for their dear lives to avoid the Officers. One of the Officers, the 3rd Defendant Robert Orwaro, used a baton (rungu) and knocked off a pan of hot cooking oil which toppled and poured on the Plaintiff's body, causing her to suffer severe burns, incur medical expenses, and endure pain and suffering throughout her body.

13. In support of his argument on negligence, learned Counsel relied on the celebrated case of Donoghue v Stevenson [1932] A.C. 562 which established the three essential elements of the tort of negligence: that there was a duty of care owed to the Plaintiff; that the duty was breached; and that as a result of that breach the Plaintiff suffered loss and damage. Counsel submitted that the 2nd and 3rd Defendants, being enforcement Officers, owed a duty of care to members of the public when exercising their powers of impounding goods from individuals selling items on the street. It was argued that the inspectorate Officers caused a stampede knowing very well that anyone could be hurt in the process. Counsel pointed out that during the oral hearing, DW2 and DW3 stated that they have policies and regulations which govern their conduct when carrying out their duties, but it appeared that the inspectorate Officers ignored those policies as no evidence was availed, and they failed to exercise their duties diligently as required.

14. Learned Counsel further submitted that DW1's written statement at paragraph 13 revealed that it is the norm for people selling items on the streets to always run for their dear lives when the inspectorate Officers approach. This statement, Counsel argued, demonstrated how the Officers often risk the lives of others as they know very well that their unprofessional acts cause panic to the traders and hawkers which will eventually cause a stampede in a place where members of the public are ever present. Counsel contended that the inspectorate Officers have all along not followed any professional or reasonable procedure as it is foreseeable by any reasonable person that a commotion will result in one or two people being hurt in the process. It was submitted that the 1st and 3rd Defendants now seek to change the narrative, as seen in their written statements under paragraphs 14 and 16 respectively, by alleging that the owner of the pan with hot cooking oil must have spilled it on the Plaintiff. Counsel argued that even if this were true, their actions led to it because they caused panic to the extent of triggering someone to run holding a burning hot pan with hot cooking oil in a place full of people without expecting anyone to get injured in the process.

15. On the aspect of reasonable anticipation, learned Counsel relied on the case of Mwaka v Karua & another (Civil Case E261 of 2022) [2024] KEMC 29 (KLR) where the Court emphasized the principle

of reasonable anticipation and stated that a person who drives a motor vehicle is bound to anticipate any eventuality like things, people, or animals on his way and thus drive at a speed which may afford avoidance of an accident. Counsel submitted that similarly, the 2nd and 3rd Defendants, in their oral testimonies, acknowledged being inspectorate Officers and stated that they often undergo training before they exercise their duties, from which it can be inferred that they are trained to follow a lawful procedure when impounding goods from street individuals, a procedure designed to avoid causing injury or harm to anyone. The Officers, Counsel argued, knew that when they go to the streets to seize goods from traders they should anticipate that there will be people, things or even animals in the street and therefore they should properly conduct their duties so as not to occasion a melee

16. Counsel pointed to the Plaintiff's written statement which indicated that the 2nd Defendant, accompanied by the 3rd Defendant, struck a pan containing hot cooking oil which toppled and spilled on various parts of her body, causing her to suffer excruciating pain due to severe burns. Even if the 2nd Defendant denies hitting the pan, Counsel argued, his actions together with the 3rd Defendant caused a commotion resulting in the severe injuries suffered by the Plaintiff. On the issue of causation, learned Counsel relied on the case of Elijah Ole Kool v George Ikonya Thuo [2001] eKLR.

17. On the issue of identification, Counsel submitted that DW2 and DW3 in their oral and written testimonies claimed they were not at the scene that day. However, since the impounding of goods is a norm, the traders and some individuals on the street who are used to their goods being seized by the Officers can identify the Officers by their faces and names. Counsel argued that although the Plaintiff did not initially know the 2nd and 3rd Defendants, they were identified to her by individuals who knew them by their names, and therefore they were at the scene since their names could not be guessed.

18. On vicarious liability, Counsel submitted that the elements of negligence have been satisfied by the 2nd and 3rd Defendants, who are employees of the 1st Defendant, therefore making the 1st Defendant vicariously liable. The negligent acts in question were committed by DW2 and DW3 within the course of their employment as they were carrying out duties tasked by the 1st Defendant.

19. Counsel pointed out that the Defendants have an employer-employee relationship as evidenced by their appointment letters and contracts of employment. The doctrine of vicarious liability, Counsel submitted, imposes liability on one party for the wrongful acts of another due to a special relationship between them.

20. In support of this argument, learned Counsel relied on the case of Onesmus Kinyua Muchudu v Mishi Kambi Charo & another [2021] eKLR which cited Joel v Morison [1834] EWHC KB J39 where it was held that the master is only liable where the servant is acting in the course of his employment, and if the servant was going out of his way against his master's implied commands when driving on his master's business, he will make his master liable, but if he was going on a frolic of his own without being at all on his master's business, the master will not be liable.

21. Counsel submitted that the 1st Defendant failed to equip its employees with the necessary professional skills required when exercising their tasks of enforcement in order to minimize potential risks and harms, because if it had done so, the recklessness caused by the inspectorate Officers could have been prevented. It was further submitted that the 1st Defendant failed to carry out investigations on the allegations against its employees despite a demand letter served to them and the news about the Plaintiff's serious injuries being covered by the media. The 1st Defendant neither gave instructions to the head of the inspectorate department to issue a report about the allegations nor exercised its disciplinary powers over its employees for causing grievous bodily harm to the Plaintiff.

22. Learned Counsel pointed out that the representative of the 1st Defendant in its written statement under paragraphs 9, 10 and 11 stated that their employees were not at the scene, yet when asked during cross-examination who among its inspectorate Officers were at the scene, he did not have a definite answer. Counsel submitted that this shows that DW1, being the Deputy Director who assists in the duties of his Director, acted contrary to section 8(1) of the Uasin Gishu County Inspectorate Service Act which sets out the Director's responsibilities including the day-to-day operations of the Inspectorate, the administration, organization and control of other Officers and staff, mapping all areas in need of enforcement, enforcement of all County laws, development and implementation of enforcement and compliance strategies, and facilitation of prosecution and defence in liaison with relevant state organs.

23. Counsel further submitted that the 2nd and 3rd Defendants were identified by their names at the scene. The 2nd Defendant, during cross-examination, stated that he did not know whether there were documents to show that he was not on duty, then later an off-sheet form was produced after he had been heard, implying that the off-sheet is not genuine. The 2nd Defendant stated that he was in another street yet did not bring anyone or partner who was with him to corroborate his statement. Counsel argued that the representative of the 1st Defendant appears to be in collusion with the 2nd and 3rd Defendants as he is trying to cover up for them.

24. On the need for deterrence, learned Counsel relied on the case of Beatrice William Muthoka & another v Agility Logistics Limited [2020] eKLR which cited Joan Doe v Bennee [2004] S.C.J. No 17 where it was stated that vicarious liability is based on the rationale that the person who puts a risky enterprise into the community may fairly be held responsible when those risks emerge and cause loss or injury to members of the public. Effective compensation is a goal, and deterrence is also a consideration, as the hope is that holding the employer or principal liable will encourage such persons to take steps to reduce the risk of harm in the future. Counsel submitted that since it can be seen that the 1st Defendant tolerates the misuse of power by their employees when exercising their duties, it is necessary for it to be deterred by being held vicariously liable and paying for the damages caused by their employees.

25. As to whether the Plaintiff is entitled to the reliefs sought, learned Counsel submitted that the Plaintiff in her plaint prayed for special damages inter alia accumulating to Kenya Shillings Two Million Three Hundred and Fifty-Five Thousand Two Hundred and Fifty-Nine (Kshs. 2,355,259/=). Since it is trite law that special damages are ascertainable and quantifiable as at the date of legal action, Counsel demonstrated how they arrived at the sum pleaded. The Plaintiff was admitted at Moi Teaching and Referral Hospital (MTRH) after the incident for treatment, and the hospital bill summed up to Kenya Shillings Three Hundred and Forty-Five Thousand Two Hundred and Fifty-Nine (Kshs. 345,259/=), which is evidenced by the treatment invoice issued by the hospital. A medical report was made by Joseph Sokobe, and a receipt to prove the costs incurred of Kenya Shillings Ten Thousand (Kshs. 10,000/=) was produced. Counsel submitted that there is a need for further medication and therefore future medical expenses are required as stated in the medical report. The doctor provided an estimate and indicated that since the Plaintiff has sustained severe burns from which she has not recovered, she requires additional treatment such as physiotherapy and management of keloid and hypertrophic scars at an estimated cost of Kenya Shillings Two Million (Kshs. 2,000,000/=).

26. On loss of earning capacity, Counsel submitted that this is sought as a result of the fact that the Plaintiff has sustained permanent disabilities and can neither perform heavy tasks nor stay in hot and cold environments, which lessens her chances in the future of any work in the labor market, all due to negligence on the part of the Defendants. The Plaintiff's situation, Counsel argued, will render it hard for her to find employment that would accommodate her needs, which will make her require maintenance and upkeep, yet she is a lady in her twenties who could be in employment or carrying out a casual business if she had not been injured.

**Defendants' written submissions**

27. Learned Counsel Mr. Keter for the Defendants filed written submissions in which he similarly identified three issues for determination, namely: whether the 2nd and 3rd Defendants acted negligently; whether the 1st Defendant should be held vicariously liable for the negligent acts of its Officers; and whether the Plaintiff is entitled to the reliefs sought.

28. Counsel submitted that the Plaintiff's claim is misconceived, exaggerated, and lacks merit. The Defendants rely on the Uasin Gishu County Inspectorate Act, 2022, recent jurisprudence from the Court of Appeal and Supreme Court, and on various grounds to demonstrate that the Plaintiff's allegations of negligence and vicarious liability are unfounded, as the 2nd Defendant was not on duty at the time and the 3rd Defendant was deployed in a different section of the town and not at the scene of the alleged incident.

29. On the question of negligence, Counsel submitted that the burden of proof was on the appellant to prove his case is in doubt. In support of this submission, Counsel relied on Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya which speaks to the evidential burden of a person who alleges. In support of the principles on burden of proof, learned Counsel relied on the case of Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334 where the Court of Appeal held that as a general proposition under Section 107(1) of the *Evidence Act*, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, and that 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.

30. Counsel then addressed what constitutes negligence, submitting that negligence is that act or omission which is foreseeable by ordinary sense or a reasonable person that it can cause damage and which results into actionable damage, in situations where the careless party owes the victim a duty of care but fails to exercise care and skill in the eyes of a bystander reasonable person. Counsel further submitted that in order to succeed in a negligence claim, the Plaintiff must establish four elements, namely duty, breach of duty, legal damage and causation. In support of this proposition, learned Counsel relied on the case of M (A Minor) v Amullenga & Another [2001] KLR where the Court held that in order to succeed in an action for negligence the Plaintiff must prove that the Defendant owes the Plaintiff a legal duty, that the Defendant was in breach of that duty, and that as a result of the breach of that duty the Plaintiff suffered damage.

31. On the doctrine of duty of care, Counsel relied on the case of Wilson Clyde Coal Co. Ltd v English [1937] 3 All E.R 68 where the doctrine was condensed as follows: is there a relationship of proximity between the parties; was the injury to the claimant foreseeable; and is it fair, just and reasonable to impose a duty. Counsel also cited the case of Caparo Industries PLC v Dickman [1990] UKHL 2 which seemingly followed in the footsteps of the Wilson Clyde case and laid a three-fold test of a duty of care as follows: reasonably foreseeable; there must be a relationship of proximity between the Plaintiff and the Defendant; and it must be fair, just and reasonable to impose liability.

32. Counsel then addressed what constitutes negligence, submitting that negligence is that act or omission which is foreseeable by ordinary sense or a reasonable person that it can cause damage and which results into actionable damage, in situations where the careless party owes the victim a duty of care but fails to exercise care and skill in the eyes of a bystander reasonable person. Counsel further submitted that in order to succeed in a negligence claim, the Plaintiff must establish four elements, namely duty, breach of duty, legal damage and causation. In support of this proposition, learned Counsel relied on the case of M (A Minor) v Amullenga & Another [2001] KLR.

33. Counsel then outlined the defense evidence. The 2nd Defendant gave his evidence that he was not on duty at that particular afternoon through the evening as he had been granted emergency medical leave to attend to his son at Palm Care Hospital. He only heard of the incident through social media and was later served with documents to this case. The 3rd Defendant stated that on that date he was not working at the said scene of the incident and that he had been deployed at Oloo Street. He further stated that he is not a driver with the 1st Defendant and that he is a County askari as per the 2011 appointment letter.

34. The 1st Defendant's witness testified that he is the deputy director of enforcement agency with the 1st Defendant. He stated that the 2nd Defendant was not at work in that afternoon, corroborating the 2nd Defendant's statement. The said witness further stated that the 3rd Defendant was correctly working at a different street on that date and could not have been at the proximity of the scene. The said witness also informed the Court that they have trained the Officers of the enforcement department and produced training certificates. He further produced their employment letters to show the respective job designations, which showed the 3rd Defendant as a County (askari) enforcement officer.

35. Counsel therefore submitted that the 2nd and 3rd Defendants were not in close proximity with the Plaintiff hence they cannot be imposed a duty of care as they are so remote to have caused it. None of their actions wherever they were would have caused harm or injury to the Plaintiff. In this instance, it is therefore left to the Court to dismiss the claim on the ground of negligence.

36. On the question of whether the injury to the Plaintiff was foreseeable, Counsel submitted that the same is to the negative as the answer relates to the agents of the 1st Defendant who are found not negligent by act of not being in close proximity with the Plaintiff.

37. On whether it is fair, just and reasonable to impose duty upon the Defendants, Counsel submitted that the answer is no, as once the Defendant's agents were not in close proximity with the Plaintiff or scene of the incident, then the duty cannot be imposed. Therefore, they are not also in breach of any statutory duty as they were not in the proximity.

38. On the issue of vicarious liability, learned Counsel submitted that vicarious liability imposes liability on employers for the wrongful acts of their employees as such an employer will be held liable for torts committed while an employee is conducting their duties. In support of this submission, learned Counsel relied on the case of Yewens v Noakes [1880] 6 QBD 530 and the case of Joel v Morison [1834] EWHC KB J39.

39. Counsel then addressed what elements have to be proved before one can be made vicariously liable for the torts of another, submitting that first there must exist a relationship between the two persons which made it proper for the law to make the one pay for the fault of the other. Second there was the connection between that relationship and the tortfeasor's wrongdoing, where the tort had to be committed in the course or within the scope of the tortfeasor's employment which has now been broadened. In support of this submission, learned Counsel relied on the case of P.J Dave Flowers Ltd v David Simiyu Wamalwa (2018) eKLR where it was held that the employer is made vicarious liable for the tort of his employees not because the Plaintiff is an invitee, nor because of the authority possessed by the servant, but because it was a case in which the employer having put matters into motion should be liable if the motion that he had originated lead to damages to another, and that it also held that the burden of proving a claim anchored on torts of negligence or breach of statutory duty of care rested on the claimant throughout the trial on balance of probabilities.

40. Counsel submitted that the 1st Defendant cannot be held vicariously liable because the Plaintiff has not proven that the 2nd and 3rd Defendants were on duty on that date, a fact that was otherwise stated by the 1st Defendant's witness that they were not on duty and or in the vicinity. Secondly, she has not

proven that the Defendants were negligent and based on proximity doctrine, they could not be liable for the injury on the Plaintiff.

41. Counsel further submitted that the Plaintiff has not proven systemic failures in training or supervision as alleged in Paragraph 11 of the Plaint. The County Government complied with Sections 8 and 10 of the Inspectorate Act by providing necessary training and equipment of its staff whom have in this case submitted that they are not negligent and that counties or governments are not automatically vicariously liable for Officers' actions unless negligence is proven. The Plaintiff must provide concrete evidence of negligence and breach of statutory duty.

42. Counsel herein submitted that the Plaintiff's suit lacks merit. The Plaintiff has failed to proof that the 2nd and 3rd Defendants were negligent by failing the proximity test. The Plaintiff's failure to proof the negligence means that the 1st Defendant cannot be liable for failure to proof negligence upon its agents. The Plaintiff also failed to proof the failure of the 1st Defendant as being vicarious liable. Counsel submitted that no amount of evidence dislodged the 1st Defendant's case that it had trained its Officers and had issued them with certificates of training hence cannot be said to have failed and are vicariously liable. Its Officers were not negligent and the duty of care not placed upon them.

43. On the specific claim against the 2nd Defendant, Counsel submitted that the Plaintiff's claim is that he was on duty on that day but she has not provided evidence of that. Furthermore, the Plaintiff claims the 2nd Defendant was the one who hit the oil container causing her burns, but the 1st Defendant's witness, PW-3, has shown that he was not on duty on that date. The 2nd Defendant was not under instructions of the 1st Defendant on that date and evidence was tendered in support of that.

44. Regarding the 3rd Defendant, Counsel submitted that the Plaintiff claims he was a driver and her only issue was he did not take her for emergency medical after she has sustained injuries. It is submitted for the Defendants that the 3rd Defendant is neither a driver nor was he at the said scene. The 1st Defendant's witness showed documents that he was at Oloo street on the said date. The only analogy of events is that of the Plaintiff without corroborating evidence.

45. Counsel concluded that the Plaintiff's case must fail for the above reasons and therefore she is not entitled to reliefs sought.

**Analysis and determination**

46. Having considered the pleadings, evidence adduced, and submissions by both Counsel, three main issues arise for determination in this matter. First, whether the 2nd and 3rd Defendants were present at the scene and acted negligently causing injury to the Plaintiff. Second, whether the 1st Defendant is vicariously liable for the acts of the 2nd and 3rd Defendants. Third, if liability is established, what damages is the Plaintiff entitled to recover.

47. Before analyzing the evidence, it is essential to consider the question on the burden of proof on the party who alleges. The law places the burden of proof squarely on the party who invokes the aid of the Court and seeks a remedy. This principle is not merely a procedural technicality; it is a cornerstone of our legal system that protects individuals from being held liable for wrongs they did not commit based on insufficient evidence. Sections 107 to 109 of the *Evidence Act*, Cap 80 Laws of Kenya set out this principle with clarity:

> " 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.

(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.

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.

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."

48. The Court of Appeal authoritatively addressed the application of these provisions in the locus classicus case of Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334. That Court made clear that there are two aspects to the burden of proof - the legal burden and the evidential burden. 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 cast 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."

49. This principle was further elaborated in Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR where the Court emphasized the consequences of failing to discharge the burden of proof. The Court held that:

> " As a general proposition, 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."

50. The standard of proof in civil cases is proof on a balance of probabilities, which is a lower threshold than the standard required in criminal cases. The question is not whether the Court is certain about what happened, but whether the party bearing the burden has persuaded the Court that their version of events is more likely than not to be true. Kimaru J in William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLE 526 explained this standard in practical terms when he 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 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."

51. Lord Nicholls of Birkenhead provided further guidance on how Courts should approach the balance of probabilities standard in Re H and Others (Minors) [1996] AC 563, 586. His Lordship recognized that while the standard remains constant, the nature of the allegation may affect how Courts assess whether that standard has been met. He stated 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 event was more likely than not. When assessing the probabilities the Court will have in mind as a factor, to whatever extent is appropriate 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....."

52. It is important to emphasize what the balance of probabilities does and does not require. Denning J in Miller v Minister of Pensions [1947] 2 All ER 372 articulated the practical application of this standard in memorable terms. The Court of Appeal in Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR cited this classic formulation with approval:

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

53. In the present case, the Plaintiff invokes the aid of this Court seeking substantial damages for injuries allegedly caused by the negligent acts of the Defendants. The burden rests squarely on her shoulders to prove, on a balance of probabilities, the essential elements of her claim. If, having considered all the evidence, I find myself unable to say that her version of events is more probable than not, then she has failed to discharge her burden and her claim must fail. This is not a matter of sympathy or speculation; it is a matter of legal principle that protects all members of society from being held liable for wrongs they did not commit.

54. The foundation of the Plaintiff's case against the 2nd and 3rd Defendants rests entirely on identification. If this foundation crumbles, the entire edifice of her claim against these specific individuals collapses, regardless of how sympathetic her plight may be or how severe her injuries undoubtedly are. I must therefore scrutinize the identification evidence with particular care.

55. The Plaintiff's own evidence, as pleaded and presented, reveals the fact that she candidly admits that she did not know the 2nd and 3rd Defendants prior to the incident of 27th July 2023. She could not, and did not, identify them herself at the scene. Her knowledge of who these Officers were came entirely from what she was told by other persons at the matatu stage who purportedly recognized these Officers and identified them to her by name. This is, in its essence, hearsay evidence of the most problematic kind. The Plaintiff is repeating what unnamed third parties allegedly told her about the identity of the perpetrators.

56. In my considered view, to cast liability at the feet of the first respondent the Plaintiff has the duty to establish a relationship between the second, third, and first Defendant as agents or employees in the service of the County Government. The claim therefore, invites into focus the doctrine of vicarious liability. "In order that the doctrine of vicarious liability may apply, there are two conditions which

must co-exist: (a) The relationship of master and servant must exist between the Defendant and the person committing the wrong complained of; (b) The servant must in committing the wrong have been acting in the course of his employment.

> " Vicarious liability is legal responsibility imposed on an employer, although he is himself free from blame, for a tort committed by his employee in the course of his employment. Fleming observed that this formula represented "a compromise between two conflicting policies: on the one end, the social interest in furnishing an innocent tort victim with recourse against a financially responsible Defendant; on the other, a hesitation to foist any undue burden on business enterprise": The Law of Torts, 9th ed (1998), pp 409-410. (per Lord Steyn, Lister v Hesley v Hall [2002] 1 A.C. 215 at paragraph 14.")
>
> (23) "The expression vicarious liability signifies the liability which A may incur to C for damage caused to C by the negligence or other tort of B. It is not necessary that A shall have participated in any way in the commission of the tort nor that a duty owed in law by A to C shall have been broken. What is required is that A should stand in a particular relationship to B and that B's tort should be referable in a certain manner to that relationship. The commonest instance of this in modern law is that liability of a master for the torts of his servants done in the course of their employment. The relationship required is the specific one of master and servant and the tort must be referable to that relationship in the sense that it must have been committed by the servant in the course of his employment.
>
> The learned authors Salmond & Heuston on the Law if Tort, 19th ed (1982) p.510 delved into this issue of vicarious liability by defining the definition of dimension of an employee as any person employed by another to do work for him on the terms that he, the servant is to be subject to the control and directions of his employer in respect of the manner in which his work is to be done. It must follow that an employee is one who is bound to obey any lawful orders given by the employer as to the manner in which his work shall be done. The employer retains the power of controlling him in his work, and may direct not only what he shall do, but how he shall do it. Whether the job is assigned daily or by task is of no moment." There is a presumption in law that for a servant or an employee to be held culpable for the acts of omission and commission this criteria must be met. " "A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorized by the master, or (2) a wrongful and unauthorized mode of doing some act authorized by the master. (See Ilkiw v Samuels [1963] 1 W.L.R. 991). But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as modes – although improper modes-of doing them. In other words, a master is responsible not merely for what he authorizes his servant to do, but also for the way in which he does it. If a servant does negligently that which he was authorized to do carefully, or if he does fraudulently that which he was authorized to do honestly, or if he does mistakenly that which he was authorized to do correctly, his master will answer for that negligence, fraud or mistake. On the other hand, if the unauthorized and wrongful act of the

> servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside of it. This was also emphasized by a learned authors of Charlesworth 2 Percy on Negligence who stated that " In determining whether or not an employee's wrongful act is done in the course of his employment, it is necessary that a broad view of all the surrounding circumstances should be taken a whole and not restricted to the particular act which causes the damage. There is no simple test which can be applied to cover every set of circumstances, so that it remains essentially a question of facts for decision in each case." (See Charlesworth & Percy on Negligence, 10th ed (2001), p 136 citing finnemore, J in station v N.C.B (1957) 1 W.K.R 893 at 895)

57. What makes this hearsay particularly problematic from an evidential standpoint is that not a single one of these alleged identifying witnesses was called to testify before this Court. Not one person who claims to have witnessed the incident and to have recognized the 2nd or 3rd Defendant at the scene came forward to give evidence under oath and subject themselves to cross-examination. I am therefore presented with uncorroborated hearsay about identification, which is insufficient to support a case of this magnitude.

58. The dangers inherent in acting on such identification evidence are well known to the law and have been emphasized repeatedly. Human memory is fallible. Witnesses can be genuinely mistaken, particularly in chaotic situations where events unfold rapidly. Witnesses can confuse one person with another, especially when dealing with individuals they may have seen on previous occasions in similar circumstances. In moments of panic and confusion, which admittedly occurred in this case, the reliability of identification becomes even more questionable. Moreover, witnesses may sometimes have ulterior motives or biases that affect their testimony, whether consciously or unconsciously.

59. For instance, in this case the circumstances in which these unnamed persons made their identification are not clear. Were they in a position to see clearly? How well did they claim to know the Officers? Had they had previous dealings with these specific Officers, or were they simply familiar with County enforcement Officers generally? How certain were they of their identification? Did they identify these Officers immediately at the scene, or was it only later when discussing the incident? Were there any reasons why they might have been mistaken or might have had a motive to implicate these particular Officers rather than others? All of these questions remain unanswered because the identifying witnesses were never produced.

60. The Law on identification is now well settled as illustrated in the cases of Abdullah Bin Wendo v Republic (1953) EACA 166 Roria v Republic (1967) 583 and finally Maitany V Republic (1986)1 KAR 75, The principle set out in those cases in the law but it can bear repetition: "Subject is to well known exception. It is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favoring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness, can safely be accepted as free from the possibility of an error.

61. I have taken time to weigh and examine the various aspects of Plaintiff's evidence thereafter the rebuttal by the Defendants as already stated in light of the above principles identification evidence by the Plaintiff was not beyond reproach to the extent that I find it to be substantially unreliable to discharge

the burden of proof on a balance of probabilities. This was an incident which happened during broad daylight and it is difficult to believe that in a busy environment as allegedly described by the Plaintiff there was no any other person who saw the commotion so as to corroborate the testimony of PW1 herein the Plaintiff. In the case of R v Tunbul & Others (1976) 3 ALL ER 549, where the Court laid down the factors that ought to be considered when the only evidence turns on identification by a singe witness thus:

> "The judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation". At what distance" in what light was the observation impended in any way. "Had the witness ever seen the accused before" How often. If only occasionally, had he any special reason for remembering the accused, how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description for the accused given to the police by the witness when first seen by them and his actual appearance. Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.
>
> There is no sufficient evidence that the 2nd and 3rd Defendant were known to the Plaintiff prior to this unfortunate incident. The trader who had put together the oil and other devices obviously was not the Plaintiff. She could have been the best person to tell this Court who actually went to her location where the business was being conducted causing the commotion resulting in the severe injuries suffered by the Plaintiff. For reasons not known to this Court she was never called as a witness. That remains a mystery.

62. In this case learned Counsel for the Plaintiff submitted that it is plausible, indeed likely, that traders at the matatu stage would know County enforcement Officers who regularly patrol the area and impound their goods. As a general proposition, this submission has some force. It stands to reason that persons who frequently have their goods seized by enforcement Officers would come to recognize those Officers and learn their names. However, plausibility is not the same as proof, and therein lies the fatal flaw in the Plaintiff's case. The fact that traders might know enforcement Officers in general does not establish that any particular trader correctly identified these specific Officers on this specific occasion. To make the matters worse, none of those traders was called as a witness in support of the Plaintiff's case.

63. The argument, when examined closely is more subjective than objective. If in law, the fact is that all traders know all Officers, then it would be possible for any trader, whether acting in good faith or mistakenly, or even maliciously, to name any officer as having been present at any incident. What was required of the Plaintiff, was to meet the threshold under Section 107 (1), 108 & 109 of the *Evidence Act* without shifting the burden of proof to the Defendants.

64. In this analysis the Defendants raised an alibi defense. That is reflective in the evidence presented by the Defendants concerning the critical question of whether the 2nd and 3rd Defendants were present at the scene. The 2nd Defendant, Isaac Barmasai, testified that he was not on duty on the afternoon and evening of 27th July 2023. He explained that he had been granted emergency medical leave to attend to his son who was ill and receiving treatment at Palm Care Hospital. In support of this testimony, an off-sheet form documenting this leave was produced and admitted into evidence. "Alibi" is a latin word literally means "elsewhere" that the 2nd and 3rd Defendants were elsewhere other than the scene of blameworthiness at the material time during the commission of the tort of negligence giving rise to the breach of the duty of care owed to the Plaintiff. "Alibi: is a defence of founded on the physical

impossibility for the 2nd and the 3rd Defendant being at two different places at the same time not being capable of having the quality of omnipresence. The defence in this case presented by the Defendants places them at a location other than the scene of the wrongdoing at the relevant time when the Plaintiff is alleged to have suffered serious bodily burns.

65. I bear in mind that learned Counsel for the Plaintiff sought to cast doubt upon the authenticity of the off-sheet form by pointing to the timing of its production. It was produced, Counsel emphasizes, only after the 2nd Defendant had testified during cross-examination that he did not know whether documents existed to show he was not on duty. learned Counsel further argued that this timing suggests the document may have been fabricated after the fact to bolster a weak defence. The law is crystal clear that the Standard and burden of proof is vested with the Plaintiff and not the Defendants.

66. I have considered the substance of the 2nd Defendant's explanation; it has a certain inherent plausibility that cannot be ignored. He did not concoct some elaborate or far-fetched alibi. He simply stated that he took emergency leave to attend to his sick son. This is the sort of ordinary family emergency that any parent might face and that employees regularly deal with. It is mundane and believable, which paradoxically renders it credible.

67. The 3rd Defendant, Robert Orwaro, testified that he was not at the Eldoret-Iten road matatu stage on 27th July 2023. He stated that he was deployed at Oloo Street on that date and was carrying out enforcement duties in that different location. Learned Counsel for the Plaintiff criticizes the absence of corroborative evidence for this claim. No colleague who worked with the 3rd Defendant at Oloo Street was called to testify confirming his presence there. No deployment roster, duty log, or other official record was produced showing where various Officers were deployed on that particular day.

68. This criticism has some force, and I acknowledge that the 3rd Defendant's case would have been stronger had independent corroboration been provided. However, I must be careful not to shift the burden of proof. The question is not whether the 3rd Defendant has proven beyond doubt that he was at Oloo Street. The question is whether the Plaintiff has proven that he was at the Eldoret-Iten road matatu stage. These are different questions, and the burden remains throughout on the Plaintiff.

69. Moving to DW1, his statement is significant in establishing a general pattern of how enforcement operations are conducted in Uasin Gishu County and the reactions they typically provoke from traders. It reveals that the 1st Defendant, through its management, is aware that its enforcement operations cause panic and potentially dangerous stampedes. This knowledge is indeed relevant to questions about foreseeability of harm and whether the 1st Defendant has implemented adequate safeguards in its operations. However, I must be careful to distinguish between evidence about general patterns and proof of what happened in this specific incident with these specific Defendants. Accordingly in my view, a successful plea of alibi in a case of this nature is a good defence that establishes the innocence of the Defendants which in effect casts aspersions on the integrity and credibility of the Plaintiff's case and creates a serious doubt in the case as to who indeed was at that scene which occasioned such grave injuries whose scars will never be erased in the lifetime of the Plaintiff.

70. The fact that enforcement operations generally cause panic and that traders generally run when Officers approach does not, in itself, prove that the 2nd and 3rd Defendants specifically were present at this specific operation on 27th July 2023. The admission establishes a concerning systemic pattern, but it does not identify the perpetrators of this particular incident. The logical connection that the Plaintiff's Counsel seeks to draw; that because there was panic at this incident, and because enforcement operations generally cause panic, therefore these specific Officers must have been present, is a non sequitur.

71. Having carefully weighed all the evidence before me and applied the relevant legal principles, I must now make findings on the critical question of identification. This is not a task I approach lightly, because I am acutely aware that the Plaintiff has suffered terrible injuries that have caused her immense pain and will affect her for the rest of her life. However, sympathy cannot be a substitute for proof, and I am bound to apply the law as it stands.

72. I find that the Plaintiff has failed to prove, on a balance of probabilities, that the 2nd Defendant, Isaac Barmasai, was present at the scene on 27th July 2023. The identification evidence upon which her case against him rests is insufficient to meet the required standard of proof. It consists of uncorroborated hearsay from witnesses who were never called to testify. When I weigh the identification evidence against the 2nd Defendant's explanation, I cannot say that it is more probable than not that he was present. The scales do not tip in the Plaintiff's favor.

73. Similarly, I find that the Plaintiff has failed to prove, on a balance of probabilities, that the 3rd Defendant, Robert Orwaro, was present at the scene on 27th July 2023. Again, the identification evidence is insufficient. The 3rd Defendant has provided an explanation that he was deployed at a different location, which, while not independently corroborated, has not been disproved. The Plaintiff has not discharged her Standard and burden of proof on a balance of probabilities to establish that it is more probable than not that the Defendants jointly and severally were present at the scene and causation issues are attributable to them under the doctrine of vicarious liability. The import of this case brings into perspective the doctrine of proximate cause. The Court in Springall v Fredericksburg Hosp and Clinic, 225 S.W. 2d 232, 235 (Tex, App san Antonio 1949) ruled that; "Line must be drawn between immediate and remote causes. The doctrine of proximate cause is employed to determine and fix this line and is the result of an effort by the Court to avoid, as far as possible the metaphysical and philosophical niceties in the age-old discussion of causation, and to lay down a rule of general application which will, as nearly as ay be done by a general rule, apply a practical test, the test of common experience, to human conduct when determining legal rights and legal liability. There is but one view of causation which can be of practical service. To every event there are certain antecedents, never a single antecedent, but always a set of antecedents, which being given the effect is sure to follow, unless some new thing intervenes to frustrate such result. It is not any one of this set of antecedents taken by itself which is the cause. No one by itself would produce the effect. The true cause is the whole set of antecedents taken together". (See Nicholas St. John Green, Proximate and Remote Cause, 4 AM L. REV 201 (1868).

Causation is an essential element in all torts and result crimes for one to be legally responsible for an injury, the wrong doing question, like the one being described by the Plaintiff in this case must have caused the harm. One is generally enjoined from wrongfully causing harm and is potentially liable for the harm he or she has in fact caused. How far did these transactional events extend to the level of causing harm is not crystal clear from the Plaintiff's testimony and the culpability of the Defendants remains remote. There was an attempt to impose liability against the Defendants but the same can be dislodged by the plea of an alibi defence and the doctrine of proximate cause. Ultimately, the doctrine of proximate cause determines whether the Defendants were among the most proximate absorbing causes to the harm. In short, the Plaintiff's evidence has failed to establish on a balance of probabilities like the Defendants are legally the proximate cause of the events from which she suffered serious injuries. For those reasons, liability is lost in so far as it can be analyzed within the scope of relative proximity and proximate cause on the part of the Defendants.

**Assessment of Damages notwithstanding the unanswered question on liability**

74. Although I have found that the Plaintiff has not established liability, it is both appropriate and necessary that I nonetheless assess what damages would have been appropriate had liability been established. As stated in Kamau v Coast Bus (Mombasa) Limited (Civil Appeal 76 of 2022) [2024] KEHC 3232 (KLR), it is good practice for the trial Court or Court of first instance to assess damages even if it finds that liability has not been established. The Court stated as hereunder:

> "On whether the trial Court ought to have assessed damages even after finding that the Respondent was not liable for the Appellant's ordeal, the answer is in the affirmative and I fault the subordinate Court for not doing the same. This Court has always maintained that it is good practice for the trial Court or Court of first instance to assess damages even if it finds that liability has not been established. To dismiss a suit and fail to address the issue of damages is a serious indictment on the part of the trial Court and both the trial Court and this Court must assess damages as they are not Courts of last resort. Their decisions are appealable and the Appellate Court needs to know the view taken by the Court of first instance on the issue of quantum. To the extent that the trial Court failed to assess damages, its judgment was a serious flaw and cannot stand

75. The principles which ought to guide a Court in awarding damages were set out by the Court of Appeal in Southern Engineering Company Ltd. v Musingi Mutia [1985] KLR 730 where it was held that:

> "It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated...The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different Courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in Court of law compensation for physical injury can only be assessed and fixed in monetary

terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

76. In the case of J.S (suing as father and next friend of K.S) V Kenya Power and Lightning Ltd [2015] eKLR which also involved burn injuries due to electric shock, where the minor had suffered superficial burns to the right upper limb (11%), the right leg (6%), and superficial and deep burns on the right foot (4%). The injuries left ugly scars and displacement of the left elbow joint and loss of 20% of body skin. He was awarded Kshs. 1,900,000 in general damages for pain and suffering. The injuries suffered by the present Respondent are accordingly more severe and it is appreciated that no two injuries can be exactly the same hence the Courts only use comparable cases.

77. In James Joseph Rughendo v Kenya Power and Lighting Co. [2011] e KLR, in 2011, the Court awarded Kshs. 3,000,000 as general damages for pain and suffering to the Plaintiff who sustained 70% permanent disability following electrical shock which caused:-

bilateral damage of upper limbs –radial- ulna and median nerve- third degree electrical burns to 40% of both palms and hands- gangrene to right leg leading to amputation below the knee- gangrene to the left dorsal aspect leading to amputation of the left big toe and part of the second toe.

78. These cases provide useful benchmarks for assessing damages in burn injury cases, though as the Court of Appeal cautioned in Southern Engineering case (supra), no two cases are precisely the same and comparisons must be made carefully, ensuring that the facts of one case bear a reasonable measure of similarity to another before awards can be meaningfully compared. The present case must be assessed on its own particular facts while having regard to these precedents.

79. The medical evidence establishes that the Plaintiff suffered extremely severe burn injuries covering 35% of her body surface area, predominantly 3rd degree burns which are classified medically as very deep burns. She sustained burn wounds on the anterior abdominal walls, burn wounds on the back representing 3rd degree burn surface area of 9%, burn wounds on both upper limbs representing 3rd degree burn surface area of 8%, and burn wounds on both thighs and knees representing 3rd degree burn surface area of approximately 9%. The fact that 35% of the Plaintiff's body surface area was affected by such burns is medically classified as a major burn injury requiring intensive treatment and prolonged hospitalization.

80. The medical report prepared by Dr. Joseph Sokobe paints a sobering picture of the Plaintiff's ongoing condition and prognosis. She requires ongoing physiotherapy to maintain mobility and function in the affected areas. She requires management of keloid and hypertrophic scars, which are thick, raised scars that commonly develop after severe burns and can be painful, itchy, restrict movement, and require ongoing medical intervention. The Plaintiff has sustained permanent disabilities that will affect her for the rest of her life. She cannot perform heavy tasks, which significantly limits the types of employment or business activities she can engage in. She will bear permanent scarring and disfigurement on her abdomen, back, arms, and legs, areas that are often visible or semi-visible and cannot be fully concealed by normal clothing. For a young woman in her twenties, these injuries are truly life-altering. The physical scars are permanent and conspicuous. The functional limitations will affect her ability to work and carry out normal daily activities. The psychological trauma of such an incident and its aftermath cannot be underestimated.

81. Turning to special damages, it is trite law that special damages must be specifically pleaded and strictly proved. Unlike general damages which the Court assesses based on the nature of the injury, special damages must be established by evidence of actual pecuniary loss. The Plaintiff claimed special damages totaling Kshs. 2,355,259 broken down into hospital bills, medical report fees, and future medical

expenses. The Plaintiff was admitted at Moi Teaching and Referral Hospital for treatment of her burn injuries and an invoice for Kshs. 345,259 was produced and admitted in evidence detailing the costs of her hospitalization, medical treatment, surgical interventions, medications, and other expenses incurred during her admission. The Defendants have not challenged the authenticity of this invoice or suggested that the charges were unreasonable. This amount has been strictly proved as required by law. A receipt was produced showing payment of Kshs. 10,000 for the medical report prepared by Dr. Joseph Sokobe. This is a reasonable and necessary expense as medical reports are required for purposes of litigation and to document the extent of injuries. The amount charged is not excessive and this expense has been proved. From the receipts as presented the amount that has been strictly proven is Kshs. 355,259/=.

82. On future medical expenses, the Plaintiff claimed Kshs. 2,000,000 for future medical expenses. It is well established that Courts can and should award damages for future medical expenses where the need for such treatment is clearly established by medical evidence, even though the exact amount cannot be determined with precision. In Tracom Limited & Another v Hasssan Mohamed Adan [2009] eKLR, held;

> " The award for future medical expenses is challenged on two fronts. First, that it was not specifically pleaded and strictly proved. Second, that the multiplier of 25 years was inflated. We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a Court of law can award it. In the case of Kenya Bus Services Ltd v Gituma (2004) 1 EA 91, this Court, stated:-
>
> 'And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereon is to be led and the Court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal right should be pleaded.
>
> 'We understand that to mean that once the Plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the Plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require."

83. The medical report by Dr. Sokobe estimates that future treatment including physiotherapy and management of keloid and hypertrophic scars will cost approximately Kshs. 2,000,000. This estimate is based on his professional medical assessment of the Plaintiff's condition and treatment needs. The need for ongoing treatment is not speculative but a medical certainty given the nature and extent of the burns. However, the estimate of Kshs. 2,000,000 is just that, an estimate made at a particular point in time. There is an element of uncertainty inherent in any estimate of future expenses. Exercising judicial discretion and taking a somewhat conservative approach, an award of Kshs. 1,800,000 for future medical expenses would be appropriate and fair, representing a slight reduction from the estimated amount to account for the uncertainties involved while still ensuring that the Plaintiff has adequate resources to obtain the continuing medical care she needs.

84. On general damages for pain and suffering, loss of amenities of life, disfigurement, and psychological trauma, the assessment is inherently subjective because there is no market price for pain or suffering. The present case falls between the precedents cited but closer to the more severe end. The Plaintiff suffered burns to 35% of her body surface area, which is significantly more extensive than the 21% in J.S. but less than the 40% in Rughendo. However, unlike Rughendo, there were no amputations in this case, which is a significant distinction as amputations represent a particularly severe and visible form of permanent disability. On the other hand, the burns in the present case were predominantly 3rd degree burns which are very deep and severe, similar to the severity in both cited cases. The Plaintiff has permanent scarring on multiple visible and semi-visible parts of her body including the abdomen, back, upper limbs, and thighs. She has permanent functional limitations including inability to perform heavy tasks and inability to tolerate extreme temperatures, which significantly impact her quality of life and employment prospects. An additional consideration is that the Plaintiff is a young woman in her twenties. The psychological and social impact of permanent disfigurement can be particularly acute for a young woman who must live with these scars and disabilities for potentially sixty or more years.

85. The cases cited as comparisons were decided in 2011 and 2015 respectively, and it is necessary to adjust those awards for inflation to determine what they would represent in current monetary terms. While precise inflation data is not before me, it is a matter of common knowledge that there has been significant inflation in Kenya over the past ten to fourteen years, with medical costs in particular having increased substantially. A rough adjustment for inflation would place the Kshs. 1,900,000 award from 2015 at somewhere in the range of Kshs. 3,000,000 to Kshs. 3,500,000 in current terms. Given that the Plaintiff's injuries are more severe and extensive than those in J.S., affecting 35% of her body with predominantly 3rd degree burns compared to 21% in that case, and given her young age and the lifelong impact of the disfigurement and disability, an award at the higher end of this inflation-adjusted range would be appropriate. However, recognizing that her injuries, while severe, did not involve amputations as in Rughendo which justifies an award somewhat below what would be appropriate for that level of catastrophic injury, balancing all these considerations and exercising independent judgment judicially, general damages for pain and suffering, loss of amenities, disfigurement, and psychological trauma would be appropriately assessed at Kshs. 3,500,000. This award reflects the severity of the injuries, the permanent nature of the disabilities and disfigurement, the young age of the Plaintiff, and current monetary values.

86. On the question of loss of earnings, The Court of Appeal in Douglas Kalafa Ombeva v David Ngama [2013] eKLR stated:

> " Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the Court will not act in a vacuum or whimsically"

87. Similarly, the Court of Appeal in S J v Francessco Di Nello & another [2015] eKLR held that:

> " Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand loss of earning capacity is compensated by an award in general damages, once proved."

88. Loss of earnings refers to real, actual, assessable loss of income that must be proved by evidence showing what the Plaintiff was earning or would have earned. This is a claim in special damages requiring strict

proof. Loss of earning capacity, on the other hand, is a claim in general damages that compensates for the diminution in the Plaintiff's capacity to earn, recognizing that the injuries have reduced her prospects and opportunities in the labor market regardless of whether she can prove specific earnings. In the present case, the Plaintiff has not adduced any evidence of her actual earnings or income at the time of the incident. There is no evidence before this Court showing that she was employed, what her salary was, or what income she was generating from any business activity. In the absence of such evidence, a claim for loss of earnings as a special damage cannot succeed. The Plaintiff has therefore failed to prove any claim for loss of earnings.

89. However, the claim for loss of earning capacity stands on a different footing. This is a claim in general damages that does not require proof of specific earnings but rather proof that the Plaintiff's ability to participate in the labor market has been diminished by the injuries sustained. The medical evidence before me clearly establishes such diminution. The Plaintiff has permanent disabilities that will affect her ability to work. She cannot perform heavy tasks, which immediately excludes her from a wide range of occupations that would otherwise have been available to her. She cannot tolerate hot or cold environments, which further restricts the types of work environments in which she can function. In a developing economy like Kenya where much employment, particularly for young women without advanced qualifications, is in sectors involving physical labor or work in environments that are not climate controlled, these limitations are significant and real. Many employment and business opportunities that would have been open to her are now foreclosed or significantly constrained.

90. The Plaintiff is a young woman in her twenties. Had she not sustained these injuries, she would have had her entire working life ahead of her, potentially forty or more productive years during which she could have engaged in various forms of employment, pursued business opportunities, or developed vocational skills. Those opportunities still theoretically exist, but they are now severely limited by her permanent physical disabilities and visible disfigurement. Her earning capacity over her lifetime has been permanently and substantially diminished. Even in employment or business activities that she might still be able to undertake despite her limitations, her productivity may be reduced and her prospects may be affected by the unfortunate reality that visible disfigurement can influence how potential employers, business partners, or customers perceive and interact with her. Taking into account the nature and extent of her disabilities, the permanent restrictions on the types of work she can perform, the visible disfigurement she must live with, her young age, and the long duration of her remaining working life during which she will experience this diminished capacity, an award for loss of earning capacity would be appropriately assessed at Kshs. 1,500,000.

91. In summary, had liability been established in this case, the appropriate quantum of damages would have been as follows. Special damages would total Kshs. 2,155,259 comprising hospital bills of Kshs. 345,259, medical report fee of Kshs. 10,000, and future medical expenses of Kshs. 1,800,000. General damages would total Kshs. 5,000,000 comprising pain and suffering, loss of amenities, disfigurement and psychological trauma of Kshs. 3,500,000 and loss of earning capacity of Kshs. 1,500,000. The total award would therefore have been Kshs. 7,155,259. Interest would have been awarded on special damages at the Court rate of 14% per annum from the date of filing suit, being 1st July 2024, until payment in full, as special damages represent actual pecuniary loss that had been incurred or was quantifiable as of the date of filing suit and the Plaintiff has been deprived of this money since that date. Interest on general damages would have been awarded at 14% per annum from the date of this judgment until payment in full, as general damages are assessed by the Court and only become quantified at the date of judgment. Had the Plaintiff succeeded in establishing liability, she would have been entitled to her costs of the suit as costs follow the event.

92. In the end, the suit as against the Defendants is dismissed for lack of sufficient identification evidence.

93. Orders accordingly.

**SIGNED, DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF OCTOBER, 2025.**

**.....**

**R. NYAKUNDI**

**JUDGE**

CIVIL CASE NO. E012 OF 2024 *9*