REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO.E052 OF 2025

CLIMAX COACHES LIMITED……**1ST APPELLANT**

JAMES KIPKIRUI CHEPKWONY……**2ND APPELLANT**

VERSUS

RICHARD OKUMU OGAGA……**1ST RESPONDENT**

STANBIC BANK LIMITED……**2ND RESPONDENT**

(Being an appeal from the Judgment/decree of Hon. B.Limo (PM) dated and delivered on 11th October 2024 at Siaya CMCC No. E014 of 2022)

BETWEEN

RICHARD OKUMU OGAGA.....PLAINTIFF

VERSUS

STANBIC BANK LIMITED.....1ST DEFENDANT

CLIMAX COACHES LIMITED.....2ND DEFENDANT

JAMES KIPKIRUI CHEPKWONY.....3RD DEFENDANT

JUDGMENT

1. The appeal by the 1st and 2nd Appellants arise from the judgment of **Hon. B. Limo (PM)** delivered on 11th October 2024. The claim before the trial Court arose from an accident that occurred on 19th December 2021. It was claimed that the 1st Respondent (Plaintiff) was hit by the Appellants motor vehicle registration number KCE 106X Scania Bus while he was riding a motorcycle registration number KMFA 027 H, and who sustained injuries from the accident.

2. In his judgment, the learned trial Magistrate found the Appellants jointly and severally 100% liable in damages to the 1st Respondent. On quantum of damages, the learned

trial Magistrate awarded the 1st Respondent general damages of Kshs. 350,000.00; future medical expenses of Kshs. 200,000.00; special damages of Kshs. 3,550; and costs of the suit and interest.

3. Dissatisfied, the Appellants lodged an appeal to this Court by filing a Memorandum of Appeal dated 18th October 2024 wherein they raised six grounds of appeal as follows:

   i) That the learned trial magistrate erred in fact and in law in finding the Appellants wholly liable for the accident.

   ii) That the learned trial magistrate erred in law and in fact in awarding general damages of Kshs 350, 000/ which award was excessive and not commensurate to the nature of injuries sustained by the 1st Respondent.

   iii) That the learned trial magistrate erred in law and in fact in awarding future medical costs of Kshs 200, 000/ which was neither pleaded nor proved as required by law.

   iv) That the learned trial magistrate erred in law and in fact in failing to pay regard to authorities in the Defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar cases as the case he was deciding.

v) That the learned trial magistrate's exercise of discretion in assessment of quantum was injudicious.

vi) That the learned trial magistrate erred in fact and in law in failing to consider the Appellants' submissions on quantum by completely disregarding the submissions and authorities of the Appellants and as a result arrived in an unjustified decision on quantum.

The Appellants therefore prayed that the judgement and decree be set aside and this court do re-assess the evidence on record on liability and quantum and come up with its own decision and that the Appellants be awarded the costs of the appeal.

4. Richard Okumu (PW1) was the Plaintiff (1st Respondent herein) testified that he is a casual labourer and proceeded to adopt his witness statement dated 15/2/2022 as his evidence in chief. He stated that on the 19/12/2021 he was riding his motorcycle registration number KMFA 027H make Boxer along Siaya- Luanda road near Karapul when the driver of motor vehicle registration number KCE 106X Scania bus recklessly drove the said motor vehicle that it lost control and knocked down the motorcycle from behind and that he was thrown to the edge of the road and that he lost consciousness and found himself at Siaya District hospital and learnt that he had sustained several injuries such as a fracture of the right arm, dislocation of left shoulder and

fracture, multiple cut wounds on knee joint and lower limb. He also relied on his list of documents dated 15/2/2022 and went ahead to produce his Identity card (Exhibit 1), Police abstract (Exhibit 2), P3 form (Exhibit 3), Copy of motor vehicle search records (Exhibit 4), Demand letter (Exhibit 5), Medical report and receipts (PMFI-6 (a) and (b), Treatment notes (PMFI-7) and Copy of intention to sue (Exhibit 8).

On cross-examination, he stated inter alia; that he was then riding a boda boda and that he had a riders licence; that he had not attended a driving school; that he had gumboots and a helmet; that the vehicle hit him on the right side; that he had bought the motorcycle and had the logbook; that he had one pillion passenger; that he received treatment at Siaya County referral hospital; that he still experience pains and that he is still on treatment; that he had been a gym instructor but could not do it anymore; that he had no documents to show that he still attends to treatment.

5. No. 84197 Pc Christian Onyango (PW2) stated that he was attached at Siaya police station traffic base. That the accident took place on 19/12/2021 along Siaya-Luanda road near Karapul area involving motor vehicle registration number KCE 106X make Scania bus and motorcycle registration number KMFA 207H make Boxer. That Plaintiff had a pillion passenger who died as a result of the accident. There was also another unknown motorcycle which was

involved as well and that the bus and the motorcycles were moving in the same direction. That the driver of the motor vehicle tried to overtake the two motor cycles at a road bump and hit them and later ran over them and that one of the riders and a pillion passengers were fatally injured and died on impact. That after investigations, it was established that the driver of the bus was to blame for the accident as he failed to keep distance and thus caused the accident. He produced the police abstract as Exhibit 2.

On cross-examination, he stated that the driver of the bus was charged with an offence of causing death by dangerous driving.

6. Howard Muga (PW3) a medical officer attached at Siaya County Referral Hospital testified that the Plaintiff was treated at the said hospital and that he later examined him on 29/12/2021 and noted a left temporal laceration and wounds on the left side of the head and left shoulder joint, edema and partial inability to flex. That an x-ray revealed lateral 3rd complete fracture of the clavicle and that the right arm had laceration. That the age of the injuries was 7-10 days. He produced the P3 form as exhibit 3 and treatment notes as exhibit 7.

On cross-examination, he stated inter alia; that the patient did not have a fracture as per his notes; that the patient sustained soft and bone tissue injuries; that he saw a left shoulder lateral 3rd complete fracture of the clavicle; that the issue of the fracture is not indicated in in the medical report; that the

patient ought to have recovered and did not require any treatment.

7. Dr George Mwita (PW4) the chief clinical officer at Ahero County Hospital. That he examined the Plaintiff on 8/6/2023 and noted several injuries on the head, both lower and upper limbs, multiple lacerations on the head, fracture of the left clavicle bones. He concluded that the patient had not healed yet and that the fractured clavicle needed surgery at a cost of Kshs 200,000/. He also stated that the patient had a disability of 5%. That the patient was still on pain killers. He produced the medical report and receipt as exhibits 9(a) and (b).

   On cross-examination, he stated inter alia; that he did not treat the Plaintiff; that the medical report was prepared one year after the accident; that the x-ray showed a fracture of the clavicle; that the x-ray report does not indicate the fracture of clavicle; that he had not provided a breakdown on the cost of the surgery and also not provided any quotation from the medical facility.

8. Dr Jeniffer Kahuthu (DW1) produced a medical report dated 8/6/2023 that had been prepared by her collegue Dr Steve Ochieng with whom she had worked for two years and was familiar with his handwriting and signatures. That the Plaintiff was examined after two years and who had a healed scar on the right hand, left shoulder and that the left wrist had normal movement. That the dislocation was confirmed based on

examination and x-ray. That the injury sustained was left shoulder dislocation and soft tissue. She produced the medical report as D-Exhibit 1 while the x-ray reports as D-exhibit 2 (a) and (b). and that she did not examine the documents.

On cross-examination, she stated that she did not examine the Plaintiff.

9. The appeal was canvassed by way of written submissions.

10. Vide submissions dated 28/10/2025, the Appellants raised the issue of whether the trial court erred on the issue of liability, quantum of damages and future medical expenses.

11. It was submitted that no proper evidence was advanced by the Respondent to pinpoint the Appellants' driver as the sole contributor of the accident. It was further contended that the alleged traffic case had not been concluded so as to impute negligence on the part of the Appellants' driver and that as far as the Appellants are concerned, they are blameless for the accident as the 1st Respondent did not discharge his burden of proof under section 107 of the Evidence Act.

12. As regards the issue of quantum of damages, it was submitted that the 1st Respondent only sustained dislocation of the shoulder and soft tissue injuries and that the alleged fracture and loss of consciousness were fabricated. Several cases on quantum were relied upon namely; **Hassan Farid & Another Vs Satanya Mepukori & 6 Others [2018] Eklr**

where a plaintiff who sustained fracture and dislocation of right hand finger and soft tissue injuries was awarded Kshs 200,000/ as general damages; **Entertainers Trucks Co. Ltd Vs George Karanja Maina [2020] eKLR** where a plaintiff who sustained mild head injury, deep cut wound, dislocation of right shoulder, post traumatic osteo-arthritis of shoulder joint- the High Court reduced an award of Kshs 750,000/ to Kshs 200,000/.

As regards the claim for future medical expenses, it was submitted that the 1st Respondent's doctor (PW4) had proposed a sum of Kshs 200,000/ for constructive surgery but did not give a breakdown of the surgery cost or quotation from a medical facility. It was further submitted that the future medical expenses being a special claim must be specifically be pleaded and proved. Reliance was placed in the case of **Kenya Bus Services Ltd Vs Gituma [2004] 1EA 91.** The Appellants therefore urged the court to reject the said award.

13. The Respondent's submissions are dated 29/10/2025. It was submitted that the apportionment of liability at 100% against the Appellants by the trial court was proper as it was the Appellants vehicle which had hit the 1st Respondent's motorcycle and other motorcycle riders and further that the Appellants failed to offer evidence in rebuttal.

14. As regards the award of general damages, the 1st Respondent submitted that the amounts awarded should be retained as the 1st Respondent truly sustained the injuries complained of. Several cases were relied upon such as the following :

i) Jaldesa Dida T/A Dikus Transporters & Another Vs Joseph Mbithi Isika- Machakos HCCA No. 96 of 2021 where the High Court awarded the Respondent general damages of Kshs 350,000/ for fracture of clavicle, head injury, lacerations to scalp, left knee and shoulder.

ii) Goghi Rapoje Construction Co. Ltd Vs Francis Ojuoko Okewe [2015] eKLR where a plaintiff who suffered a fracture of radius/ulna and dislocated elbow joint was awarded Kshs 350,000/.

iii) Francis Vs Gabriel Ongole Ogolla & Another Migori HCCA No. 23 of 2015 where the court awarded Kshs 350,000/ in general damages for a plaintiff who suffered dislocation of left shoulder and other injuries.

Learned counsel for the 1st Respondent submitted that the 1st Respondent's injuries were similar to those in the above authorities and thus the award should not be interfered with.

15. As regards future medical expenses, it was submitted that the court have discretion to award such expenses even if they are not pleaded

14. I have given due consideration to the record of appeal and the rival submissions. The issue for determination is whether the trial magistrate applied the correct principles in arriving at the apportionment of liability and assessment of quantum of damages for injuries sustained and whether the assessment of future medical expenses was proved by the 1st Respondent.

15. As regards the issue of liability, the Appellants contend that the trial court erred when it apportioned 100% liability against them yet the 1st Respondent and other boda boda operators were responsible for the accident. On the other hand, the 1st Respondent maintains that it was the Appellants' driver who caused the accident by ramming their bus onto him from behind and thereby injuring him and killing his pillion passenger.

16. The legal burden of proof was on the 1st Respondent to prove his claim on a balance of probabilities. It was therefore incumbent upon the 1st Respondent to prove his assertions pleaded in his Plaint dated 15/2/2022. Section 107(1) of the *Evidence Act*, Cap 80 provides that:

> **Whoever desires any court to give judgment as to any legal right or liability dependent on**

the existence of facts which he asserts must prove that those facts exist.

17. However, the burden may shift to the Defendant (Appellant) to disprove the alleged claim. This is the *evidential burden of proof,* which is well captured under Sections 109 and 112 of the Evidence Act. See **Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**. The two concepts are well illustrated by the Court of Appeal in the case of **Mbuthia Macharia v Annah Mutua & Another [2017] eKLR**, that:

> **"The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes an evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced."** See **Supreme Court in Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR,**

18. The *standard of proof* is well captured in the case of **Palace Investment Ltd v. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, where the Court held that:

> **Denning J. in Miller v Minister of Pensions (1947) 2 ALL ER 372, discussing the burden of proof, had this to say:**
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> **"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say, we think it is more probable than not, the burden is discharged, but if the probabilities are equal, it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a 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."**

19. **Kimaru J.** (as he then was) in **William Kabogo Gitau vs George Thuo & 2 others (2010) 1 KLR 526** 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 opposite party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegation that he made has occurred."**

20. The record of appeal especially on the evidence of the investigating officer No. 84197 Pc Christian Onyango attached at Siaya Police station Traffic base is that the Appellants' bus registration KCE 106X Scania bus as well as the motor cycles were moving in the same directions towards Luanda town and that on reaching Karapul area the bus driver who was behind the motor cycle tried to overtake both motor cycles at a road bump and in the process hit both motor cycles near Mwisho Mwisho

market and that the 1st Respondent who was the rider was pushed forward and fell on the ground while the pillion passenger was ran over by the bus and died on the spot. It was the opinion of the said witness that the driver of the bus was to blame for the accident as he failed to keep distance and that the driver of the bus was charged with an offence of causing death by dangerous driving and that the case was still pending under investigation. The evidence of the 1st Respondent was corroborated by that of PW2. Since the 1st Respondent was hit from behind, it is ipso facto proof that the bus driver must have been driving at high speed and failed to keep distance and to have a proper look out for other road users. Had the bus driver been driving carefully and at reasonable speed, the accident would have been avoided. Indeed, the bus driver was blamed for the accident by the traffic police. It is instructive that upon the 1st Respondent presenting his evidence regarding the aspect of liability, it was incumbent upon the Appellants to call witnesses to rebut such evidence. The Appellants did not do so but only called a doctor whose evidence mainly dwelt on the injuries sustained. The failure by the Appellants to call the driver or any other person who witnessed the accident implies that the version of events as presented

by the 1st Respondent and the police officer must be believed. As the 1st Respondent and other boda boda operators were ahead of the Appellants' driver, they should not be held to have contributed to the accident since they were hit from behind by the Appellants' driver who failed to maintain a safe distance in accordance with the Highway Code of Traffic. Hence, the finding by the learned trial magistrate on liability was quite sound and must be upheld.

21. As regards the issue of quantum of damages, it is trite that in addressing the trial court's duty in assessment of damages, regard must be had to the principles on assessment of damages. The Court of Appeal in the case of **Kimatu Mbuvi t/a Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko (2006) KECA 130** held:

"It is generally accepted by courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated in H. West & Son Ltd v Shephard [1964] AC 326 at page 353:

‘The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of 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 of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably 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. ”

The Court of Appeal in **Butt vs. Khan [1981] KLR 349**, held that an appellate court will only interfere with the award of damages where it is shown that the trial court took into consideration an irrelevant fact or that the sum awarded is inordinately low or high that it must be an erroneous estimate of the damages or that a wrong principle of law was applied in awarding the damages.

22. The Appellant challenges the award of general damages as excessive. It is trite that assessment of damages is an exercise of judicial discretion and the Court in assessing

award of damages, should take into account, so far as possible, comparable injuries and the passage of time from when the award was made, that is the rate of inflation. The Court of Appeal observed in **Simon Taveta vs. Mercy Mutitu Njeru (2014) KECA 755 (KLR)** that:

“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.” See Arrow Car Limited vs. Elijah Shamalla Bimomo & 2 others (2004) KECA 136 (KLR)

Also, the Court of Appeal in **Kaikai v Chacha & 2 others (Civil Appeal E028 of 2020) [2025] KECA 1278 (KLR) (11 July 2025)** (Judgment) Neutral citation: [2025] KECA 1278 (KLR) had this to say:

> **‘’It is trite that each case must be determined on its circumstances as injuries suffered cannot be 100% identical. The award of general damages is not a mathematical exercise in which a court takes a calculator to add or subtract from previous awards. Each case depends on its own facts, and the award of damages is just an estimate that should be as close as possible for similar injuries. This means that unless an award is inordinately low or high, an appellate court should be slow to interfere with an award of**

damages by the trial court. This is because, unlike an appellate court that only relies on what is written on paper, the trial Judge has the advantage of seeing the victim of the accident assess the impact of the injuries, even as they consider the medical reports."

23. The Appellant contends that the award of Kshs. 350,000.00 is excessive since the Respondent only suffered dislocation of the shoulder and soft tissue injuries which have fully recovered and further that the allegations of a fracture and loss of consciousness were fabricated and that the 1st Respondent failed to prove his case on balance of probabilities. Reliance was placed in two cases namely Hassan Farid & Another Vs Satanya Mepukori & 6 Others [2018] Eklr and Entertainers Trucks Co. Ltd Vs George Karanja Maina [2020] eKLR where the plaintiffs sustained fracture and dislocation of right hand as well as dislocation of shoulder were awarded Kshs 200,000/ as general damages.

24. On the other hand, the 1st Respondent maintains that the award of Kshs350,000/= was reasonable and should be upheld by this court since the 1st Respondent sustained injuries similar to those of the Plaintiff's in the cited authorities. In the case of Jaldesa Dida T/A Dikus Transporters & Another Vs Joseph Mbithi Isika- Machakos

HCCA No. 96 of 2021 the High Court awarded the Respondent general damages of Kshs 350,000/ for fracture of clavicle, head injury, lacerations to scalp, left knee and shoulder and also in Goghi Rapoje Construction Co. Ltd Vs Francis Ojuoko Okewe [2015] eKLR the plaintiff who suffered a fracture of radius/ulna and dislocated elbow joint was awarded Kshs 350,000/. Looking at the injuries sustained by the 1st Respondent as well as the effects of inflation on the economy, I am of the considered view that the award of Kshs350,000/= as general damages for pain and suffering by the trial court was reasonable in the circumstances. The trial court duly considered the requisite principles in assessment of damages and that it did not take into account irrelevant factors. The said award must be upheld.

25. The Appellants have also contended that the future medical expenses were not specifically pleaded and proved. Reliance was placed in the case of **Kenya Bus Co. Ltd Vs Gituma [2004] 1 EA 91.** It was further contended that the 1st Respondent was under obligation to specifically plead the alleged claim before the court could make a determination thereon. The Appellant therefore urged the court to dismiss the claim. On the other hand, the Respondent is of the view that the court has discretion to grant the award even if they are not pleaded. The position of the law is that future medical expenses are in the nature of special damages and therefore they must comply with the strict rules namely that they must

specifically be pleaded and proved. The 1st Respondent vide his plaint dated 15/2/2022 pleaded that the future medical expenses were to be ascertained by the court. I find this style of pleading to be confusing in that the 1st Respondent has left the responsibility of pleading his claim to the court yet the duty lay upon him to disclose the said future medical expenses. It is instructive that the 1st Respondent prior to filing suit has been examined by his doctors who were expected to have indicated any future medical expenses. I have perused the said medical report dated 24/1/2022 by Dr. Onyimbi and does not contain any amount of money towards future medical expenses. The witnesses who testified for the 1st Respondent indicate that the sum of Kshs200,000/= was sufficient to cater for future medical expenses but however failed to present empirical documentary evidence to support the same. The fact that the 1st Respondent's witness was at pains to provide the medical facility from where the computation was arrived at or his failure to avail the exact tabulation of the amount is clear proof that the 1st Respondent failed to prove the claim for future medical expenses. In the case of **Kenya Bus Services Ltd vs. Gituma (2004) 1 EA 91,** the 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."

After a careful analysis of the evidence regarding this limb of damages, it is my finding that the claim for future medical expenses was not specifically pleaded and was also not proved by the 1st Respondent on a balance of probabilities. Hence, the finding by the learned trial magistrate thereon was in error and must be interfered with.

26. I find the learned trial Magistrate applied the principles in assessment of damages correctly and that the award of Kshs. 300,000.0 was not manifestly excessive. The Respondent sustained comparable injuries to the Plaintiff in the decision relied upon by the learned trial Magistrate and the decision cited by the Respondent in this appeal. The Appellant's cited court decisions offer low awards. Awards for such injuries sustained by the Respondent fall within that range noting the inflation rate and the nature of injuries must be taken into consideration. I find that the decision in support of the Respondent's case are recent and were quite persuasive.

27. In view of the foregoing observations, it is my finding that the Appellant's appeal partially succeeds to the extent that

the award of future medical expenses of Kshs200,000/= is set aside while the other awards in the judgment dated 11/10/2024 shall remain undisturbed. As the appeal has partially succeeded, the Appellant is awarded half costs of this appeal while the Respondent shall have full costs in the lower court.

Dated and delivered at Siaya this 27th day of February 2026

D. K. KEMEI

JUDGE

In the presence of:

M/s Ongonga……for Appellants

M/s Achieng…… for 1st Respondent

N/A……for 2nd Respondent

Maureen……Court Assistant