REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO.E015 OF 2025

ERICK ODHIAMBO OGINJO.....**APPELLANT**

VERSUS

MANOAH MUSA LIPESA.....**RESPONDENT**

(Being an appeal from the Judgment and Decree of the Hon. E. Tsimonjero (SRM) delivered on 11th September 2024 in Ukwala CMCC No. E073 of 2022)

BETWEEN

ERICK ODHIAMBO ONGINJO.....
.....PLAINTIFF

VERSUS

MANOAH MUSA LIPESA……
……DEFENDANT

JUDGMENT

1. The Appeal arises from the whole judgment delivered by **Hon. Stella Wanjiru Mathenge** at Bondo on 5th September 2024 in Bondo Civil Suit No. E067 of 2022.

2. Vide a Plaint dated 15th July 2022, the Respondent prayed for general and special damages including costs of future medical care, costs of the suit and interest on damages at court rates. By a Plaint dated 15th June 2022, the Respondent prayed for judgment against the Appellant for: general and special damages; costs of the suit; and interest on damages at court rates. On 30th April 2022, the Respondent was a passenger in a motor vehicle registration No. KDE 689R Toyota Hiace Matatu that was involved in an accident along Kisumu-Busia Road at Got-Nanga area. As a result of the accident, the Respondent sustained head injury with loss of consciousness, blunt injury to the forehead, neck, left shoulder, and both knees, massive pleural effusion bilaterally, fracture right ribs(anterior) 4th ,5th, 6th, and 7th due to blunt trauma to the chest, fracture right scapula, fracture ribs 2nd, 4th ,5th and 6th

posterior right, fracture ribs 6th , 9th , and 10th anterior left, fracture ribs left 5th, 6th, 7th, 9th, 10th, 11th, and 12th posterior left. According to the Respondent, he sustained very severe soft and skeletal (fractures) injuries from which he had not fully recovered, and therefore he would require future treatment for physiotherapy at a costs of Kshs. 100,000/. He particularized special damages for medical expenses at Kshs. 69,899, medical report at Kshs. 6,000, and police abstract at Kshs. 200. The Respondent blamed the driver for negligent, careless and/or reckless driving.

3. In cross-examination, PW2, who is the Respondent herein, stated that he had to get a caregiver for physiotherapy, and he still attends physiotherapy. He stated that he pays using the NHIF but still pays the caregiver out of pocket. He stated that NHIF paid Kshs. 36,800, but the total costs came to Kshs. 92,209. He stated that he paid the difference out of pocket.

4. PW3 **Dr. Joseph Sokobe** stated that he saw the Respondent two months after the accident. He stated that he did not treat the Respondent but relied on the medical report from Vihiga County Referral Hospital, CT Scan report, Discharge Summary, and a filled-in P3 Form. He stated that loss of consciousness was not captured, but the fracture of the scapula was in the CT Scan with a finding of massive hemorrhage related to the injury to the scapula. He stated that he recommended physiotherapy at an estimated cost of Kshs. 100,000/ stating

that it would range between Kshs. 50,000 to 70,000 at a public hospital, though he did not have a quotation. He stated that the therapy could be catered by NHIF.

5. PW4 **Ibrahim Vonyori**, Clinical Officer at Vihiga County Hospital, stated that the Respondent was admitted at the hospital with history of road accident. He stated that the Respondent was in hospital for 18 days as he was discharged on 19th May 2022. He stated that the Respondent was diagnosed with massive pleural effusion to multiple rib fractures.

6. PW5 **Victor Odhiambo Achayo**, Senior Clinical Officer Trauma and Orthopedic at Vihiga stated that the Respondent had chest and back pains. He stated that the multiple fractures made the Respondent's breathing difficult. They classified the injury as grievous harm. On being cross-examined, he stated that fractures heal with time. He stated that the payment was made in cash and not NHIF. He stated that the Respondent sustained severe injuries.

7. In his defence, the Appellant filed a defence dated 15th November 2022 wherein he denied that the suit motor vehicle belonged to him and the negligence allegations by the Respondent. It was pleaded that the accident was caused solely and/or substantially contributed by the Respondent's own negligence. The Appellant prayed that the suit be dismissed with costs.

8. DW1 **Dr. Ochieng** stated that he re-examined the Respondent on 25th May 2023. He found the Respondent was in a fair general condition with a normal walking gait. He had a healed surgical scar on the right side of the chest. He objected to the injury by the Respondent's doctor of the fracture of the scapula, which had not been mentioned in the initial treatment notes and ex-ray as well as the head injury. He stated that the Respondent sustained fractures of multiple right and left ribs, left hemothorax with left lung collapse. He produced the medical report dated 29th September 2023. He stated that from the initial treatment notes from Siaya and Vihiga, there was no mention of loss of consciousness, as the Respondent only suffered fracture of the ribs. He stated that a fracture of a scapula takes about8-12 months to heal. That he examined the patient after one year. That the x-ray did not show fracture of scapula

9. In her judgment, the learned trial Magistrate found the Appellant 100% liable for the accident. On quantum, the learned trial Magistrate held that despite there being a point of divergence regarding the fracture of the right scapula, it did not defeat the fact that the Respondent sustained multiple skeletal fractures of the ribs coupled with multiple severe soft tissue injuries. The learned trial Magistrate held that due to the possibility of human error in recording the injuries, the Respondent suffered multiple fractures of the ribs, scapula, as well as multiple severe soft tissue injuries as pleaded. Guided

by the case of **Swift Rides Logistics Limited vs Ogambo[2022]** where the Plaintiff sustained multiple rib fractures and severe soft tissue injuries, an award of Kshs. 3,000,000.00 was reduced to Kshs. 800,000.00, the learned trial Magistrate awarded the Respondent Kshs. 1,300,000.00, taking into consideration the passage of time and current inflation. On future medical expenses, the learned trial Magistrate observed that since Dr. Ochieng did not assess any estimated future medical expenses, Dr. Sokobe's recommendation of Kshs. 100,000 was well-founded. Kshs. 43,630/ was awarded for special damages plus costs and interest on the total award at court rates from the date of judgment.

10. Dissatisfied, the Appellant has lodged an appeal to this Court contending that:

    1. **That the learned trial magistrate erred in law and in fact in awarding general damages of Kshs.1, 300,000.00 which award was excessive and not commensurate to the nature of injuries sustained by the Respondent (Plaintiff).**

    2. **That the learned trial magistrate erred in law and fact in awarding Future Medical Costs of Kshs. 100,000.00, an award which was never proved.**

3. **That the learned trial magistrate erred in law and fact in failing to pay regard to the Appellant's(Defendant's) submissions and 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,**

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

11. The Appellants pray that the decree be set aside, and this Court do re-assess the evidence on record on quantum and the costs of this appeal be awarded to the Appellant.

12. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. See ***Selle vs. Associated Motor Boat Co. [1968] EA 123)***; ***Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR.***

13. In **Ephantus Mwangi and Another vs Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278,** the Court of Appeal held that:

> **"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."**

14. I have considered the record of appeal, the grounds in support thereof, the respective rival submissions, and the law. It is not in dispute that the Appellant has not raised any objection regarding the issue of liability and hence this appeal is limited to the issue of the quantum of damages.

15. Before delving into the merits of the grounds of appeal, I note that the Respondent contends in his submissions that the Appellant's submissions have been filed by a stranger and should be disregarded. According to the Respondent, the submissions are filed by M/s KRK Advocates LLP while the appeal was filed by M/s Kairu McCourt & Company Advocates. The Respondent contends that no Notice of Change of Advocates has been filed and served.

16. Order 9 Rule 5 of the Civil Procedure Rules provides:

> A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.

17. A Notice of Change of advocates ought to have been filed in this appeal by M/s KRK Advocates LLP and served to M/s Kairu McCourt & Company Advocates. The Respondent urges this Court to disregard the submissions. Article 159(2)(d) of the Constitution enjoins this Court to administer justice without undue regard to technicalities. A perusal of the Memorandum of Appeal clearly shows that the firm of Kairu & Mcourt & Company Advocates and the firm of KRK LLP Advocates are one and the same entity and thus I see no big deal about the issue raised by the Respondent. I find there is no prejudice that will be suffered by the Respondent if the submissions remain on record as filed by M/s KRK Advocates LLP. In the interest of justice, I will consider M/s Kairu McCourt & Company Advocates is still on

record for the Appellant. I will not expunge the submissions as sought by the Respondent.

18. The second ground of opposition is that the appeal was clearly filed out of time and no leave was sought to extend the time for filing an appeal out of time. The impugned judgment was delivered on 11th September 2024. I cannot see a copy of the Notice of Appeal but a Memorandum of Appeal dated 19th February 2025 and filed on 21st February 2025 is on record. It is trite that an appeal filed out of time and without leave of court, renders such a document a nullity and of no legal consequence. See Supreme Court in **SC Appl No 38 of 2014; TSC vs Simon Kamau and 19 Others** adopted its decision in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others**. Section 79G of the Civil Procedure Act states: -

> **Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant**

satisfies the court that he had good and sufficient cause for not filing the appeal in time

The Notice of Appeal ought to have been filed by 11th October 2024, within 30 days from the date of the judgment on 11/9/2024. It is noted that the Respondent has been participating in the directions of the Deputy Registrar and this court and that the Respondent has never raised any issue to the effect that the appeal herein had been filed out of time without the leave of the court. The Appellant herein has filed several applications in other matters in the past seeking for orders of stay of execution of decree as well as leave to lodge appeals. I have no doubt that had the Appellant failed to seek leave to lodge the appeal herein out of time, the Respondent's counsel being a vigilant one would have raised the objection. Ordinarily, the miscellaneous applications once determined, the registry places the files in the relevant dockets and would be retrieved once required by the parties. It is instructive that the objection is being raised at the tail end of the proceedings herein. The Respondent could not agree to go through all the motions and take directions and finally file submissions and then raise the objection. Iam satisfied that there was leave granted to the Appellant and hence the objection is unmerited. The appeal should be determined on merit.

19. Regarding the merits on quantum of damages, in addressing the trial court's duty in 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.**
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> **'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.' "

20. The Appellant challenges the award of damages as excessive in particular, general damages of Kshs.1, 300,000.00 and Future Medical costs of Kshs. 100,000.00. 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)***

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.”**

21. The Appellant vide submissions dated 27/102025 submitted that the award of Kshs 1, 300,000/ as general damages was

excessive yet the injuries sustained by the Respondent were not that major, and further that the same had healed fully. The Appellant proposed the sum of Kshs 400, 000/ as reasonable compensation. Reliance was placed in the following cases:

i) K.B Sanghani Vs Lydia Wanjiku Njuguna & 2 Others [2016] Eklr where the plaintiff who had suffered fractures of 6th , 7th , 8th and 9th ribs with chest problems was awarded Kshs 450, 000/.

ii) Gabriel Kariuki Kiguttu & Another Vs Monica Wangui Wangechi [2015] eKLR an award of Kshs 800,000/ was reduced to Kshs 400,000/ where the plaintiff had suffered severe fractures.

iii) Bolpak Trading Co Ltd Vs Gilbert Onyango Odie [2022] eKLR where the plaintiff suffered 7th and 8th rib fracture.

The Appellant also contended that the claim for future medical expenses should be rejected since the Respondent had fully healed as confirmed by the Appellant's doctor during the Respondent's second medical examination. It was further contended that the claim for future medical expenses being a special damage should have been pleaded and thus the same should be rejected. Reliance was placed in the case of Kenya Bus Services Vs Gituma [2004] 1EA 91.

22. The Respondent submits that the Appellant has not demonstrated that either the trial Court committed an error of principle in that the award is too high in view of the injuries sustained. It was submitted that the Respondent sustained several injuries which include several fractures of ribs and scapula and other injuries as well as noted by Dr Sokobe. It was submitted that the Appellant's doctor Ochieng who examined the Respondent later on conceded that he omitted to capture the details in the P3 form issued by Vihiga County Hospital which indicated fracture of the scapula and hence the evidence of the said doctor was out to downplay the extent and serious ness of the injuries suffered by the Respondent. It was further submitted that the award should be upheld since the injuries were serious. Reliance was placed in the cases of Kisumu High Court Civil Appeal No. E006 of 2021 Sift Rides Logistics Ltd Vs Clarice Akinyi Ogambo where the plaintiff who sustained soft tissue injuries and fractures of 8 ribs was awarded Kshs 800, 000/. Nairobi HCCA No. 188 of 2009 Hellen Atieno Oduor Vs S.S Mehta & Sons Ltd & Another where the plaintiff who sustained soft tissue injuries, fracture of 6 ribs, fracture of the scapula and fracture of the tibia and fibula was awarded Kshs 1, 500, 000/ in 2015. Learned counsel urged the court to uphold the award as granted by the trial court.

As regards the award of future medical expenses, it was submitted that both the Respondent's doctor and that of the

Appellant confirmed that the Respondent were agreed that physiotherapy was still needed. It was submitted that the sum of Kshs 100, 000/ be sustained to cater for the Respondent's physiotherapy sessions.

23. I have given due consideration to the rival submissions by learned counsels regarding the two awards. As regards the award of Kshs 1, 300, 000/, it can be gleaned from the proceedings that indeed the Respondent sustained several injuries which include fracture of several ribs and scapula. Whereas Dr Sokobe gave the comprehensive injuries in his report, the Appellant's doctor Ochieng in his report seemed to downplay the injuries noted by his colleague. It came out quite clearly from the evidence of Dr Ochieng that when he examined the Respondent one year later, he noted the presence of fluid in the flexural space which could be relieved by chest physiotherapy and went ahead to confirm that even at that time, the Respondent was still undergoing physiotherapy sessions weekly. Looking at the rival medical reports, it is not in doubt that the Respondent suffered serious injuries such as fracture of several ribs and scapula. I find the cases relied upon by the Appellant herein do not capture the true injuries of the Respondent. Iam persuaded by the case relied upon by the Respondent's counsel and which is that of **Nairobi HCCA No. 188 of 2009; Hellen Atieno Oduor vs S.S Mehta & Sons Limited & Another** where the Plaintiff who sustained soft tissue injuries, fracture of 6 ribs, fracture

of the scapula and fracture of the tibia and fibula was awarded Kshs. 1,500,000/ in 2015. I find this case to be in all fours with the circumstances of the Respondent. I find the trial court's assessment was proper in the circumstances and that the trial court did not take into consideration irrelevant factors in arriving at the award and that the same is not excessive as it has factored the effects of inflation on the economy. Hence, the trial court's assessment must be upheld. Consequently, i find the Appellant's ground of appeal on this head of damage lacks merit and is rejected.

24. Regarding the claim of future medical costs, the Appellant submits that the Respondent's injuries had healed and thus there is no need for such an award. It was also contended that the said claim for future medical expenses was not specifically pleaded and ought to be rejected.

25. The Respondent submits that it was his evidence that he had employed a care giver for physiotherapy whom he pays out of pocket. It was PW3's testimony that the Respondent required physiotherapy while PW4 and DW1 confirmed that the Respondent was still attending physiotherapy sessions. According to the Respondent, such costs are based on estimates by experts like a doctor. Reliance has been placed on Bungoma HCCA No. 25 of 2016; C.K vs Kenya Power and Lighting Company Limited. The Respondent submits that the Appellant's doctor (DW1) did not dispute the estimate of Kshs.

100,000.00 assessed by PW3 as he did not present his own estimates.

26. The Court of Appeal in **Gilgil Hills Academy Limited v Koech & another (Suing as the legal representatives of the Estate of LCK - Deceased) (Civil Appeal E002 of 2021) [2025] KECA 2159 (KLR)** stated that:

> **"As for special damages, the High Court accepted a modest claim for funeral-related expenses, correctly noting that in cases of bereavement, strict proof by receipts is not always feasible and that reasonable funeral expenses should ordinarily be allowed. That approach is consistent with decisions such as Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR and subsequent authorities. We see no basis to upset that finding either."**

27. 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. See ***Kemfro Africa Ltd v A. M. Lubia & Another (1988)1 KAR 727*.**

28. It is noted that the Respondent pleaded for future medical expenses in the sum of Kshs 100, 000/ vide paragraph 6 of his plaint dated 15/7/2022. This seems to answer the Appellant's claim that the claim was not specifically pleaded. The principle in this regard was laid down in the case of **Kenya Bus Services Ltd Vs Gituma [2004] 1EA 91** where it was held as follows:

> **'' An 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 general damages, the need for future medical care is itself special damages 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 generally from the infringement of a person's legal right should be pleaded.''**

It is clear that the Respondent did comply with the foregoing guideline. The Respondent's injuries were found to have yet to heal when he was examined by the Appellant's medical doctor one year later and who confirmed that physiotherapy sessions were still needed. At that time, the Respondent was still undergoing weekly physiotherapy sessions. This

therefore leaves no doubt that the claim for future medical expenses was merited. In any event, the Appellant's doctor did not provide his proposed amount for the physiotherapy sessions with a view to rivalling or challenging the amount proposed by the Respondent's doctor. I find the sum of Kshs 100, 000/ awarded under this head is not excessive in the circumstances. The trial Magistrate did not take into account irrelevant factors while coming up with the amount. The same must be upheld. I find that the learned trial Magistrate properly evaluated the evidence, applied correct legal principles, and exercised his discretion judiciously. The Appellant's ground of appeal under this head of damage must therefore fail.

29. In view of the foregoing observations, it is my finding that the Appellant's appeal has no merit. The same is dismissed it with costs.

Dated, and delivered at Siaya this 27th day February 2026.

D. K. KEMEI

JUDGE

In the presence of:

M/s Ongonga……..for Appellant

Omondi…….. for Respondent

Maureen …….. Court Assistant