REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. E034 OF 2023

AMIGOREAL DEVELOPMENT GROUP LTD..... 1ST APPELLANT

EVERLINE KEMUNTO..... 2ND APPELLANT

-VERSUS-

LEAH AKINYI OKUKU..... RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. R.K Langat, PM dated 25.8.2022 arising from Rongo PMCC No. 238 of 2018.

2. The Appellant lodged a memorandum of appeal against both liability and the award of general damages.

3. The Appeal is against liability and the award of damages. However, the Appellant filed a 9-paragraph mammoth Memorandum of Appeal dated 25.5.2023. It is certainly not edifying for advocates to present 9 argumentative grounds of appeal, and end up arguing only one or two issues. This is

anathema the provisions of Order 42 Rule 1 of the Civil Procedure Rules, which posits as doth: -

> Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

4. A memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. The grounds should not be obscure, imprecise, or argumentative. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is *pari materia* with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] KECA 224 (KLR):

> We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly

not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:

We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric…A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs. The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues…

5. Repetitive grounds of appeal tend to cloud the key issue in dispute for determination by the Court. The same issue was addressed by the Court of Appeal succinctly in the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] KECA 472 (KLR) as follows:

> Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether *Section 62* of the **Kenya Ports Authority Act** ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In **William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013**, this Court stated:
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> > **The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better.**

6. The grounds are thus ancillary, repetitive, prolix, and a waste of judicial time. This court will have to determine

whether the magistrate erred in his findings on liability and in his award of general and special damages.

7. The Plaint dated 30.4.2018 claimed damages arising from an accident that occurred on 15.1.2018. The accident involved the Respondent while a passenger in the 1st Appellant's motor vehicle registration no. KCD 259U along Rongo-Awendo Road at Rakwaro area when the 1st Appellant's said motorvehicle was driven negligently as a result of which it collided with the 2nd Appellant's motorvehicle registration no. KCN 504F which was also negligently driven and as a result of which the Respondent sustained personal injuries.

8. The Plaintiff set forth particulars of negligence for the 2 accident motor vehicles. The Plaintiff pleaded Ksh. 14,210/= as Special Damages and also pleaded General Damages. The injuries were pleaded as follows:
   (i) Bruises on the left knee
   (ii) Bruises on the left leg
   (iii) Chest contusion
   (iv) Bruises on the scalp
   (v) Bruises on the frontal region.
   (vi) Blunt trauma to the neck
9. The Appellants entered appearance and filed their joint Defence dated 16.7.2018 denying the particulars of negligence and injuries pleaded in the Plaint. The Appellants also blamed the Respondent for the accident.

10. The Trial Court heard the parties and proceeded to render Judgement awarding liability at 100% against the Appellants and general damages of Ksh. 300,000=/. The court also awarded special damages of Ksh. 5,105. Aggrieved by the finding of the Trial Court, the Appellant lodged a Memorandum of Appeal hence this Appeal.

Evidence

11. During the hearing, PW1 was No. 57671 PC Dickens Akumba. He testified that on 15.1.2018, his colleague, PC Kimei and PC Osongo visited the scene of the accident. the 2 motor vehicles were moving in the same direction. KCD 259U hit KCN 504F from behind. 5 passengers in KCD 259U were injured. The Respondent was among them. He produced the police abstract. On cross examination, it was his stated case that he was the investigating officer. He did not have the OB in court. He had no sketch plan. The matter was still pending under investigations.

12. PW2 was the Respondent. She testified based on her witness statement and produced her evidence per the list of documents filed in court. According to her, it was on 15.1.2018 around 6 pm. She had boarded the matatu. At Rakwaro, another motor vehicle hit them from behind. She blamed the driver of KCN 504F who abruptly applied bakes. On cross examination, she testified that she was aboard KCD

259U. She saw what happened as she was sited at the back of the driver. She heard a bang. She suffered pains on the chest and head.

13. PW3 was Dr. Morebu Peter Omwenga. He produced his medical report and affirmed the injuries suffered as the injuries pleaded. On cross examination, he testified that he observed the Respondent 4 days after the accident. She sustained soft tissue injuries.

14. The Appellants closed their case without calling a witness.

Submissions

15. The Appellant did not file submissions.
16. The respondent filed submissions dated 19.11.2025. They submitted that PW2 testified that motor vehicle registration number KCD 259 U hit motor vehicle registration number KCN 504 F They relied on the case of Michael Matonye Munyao & another v JNK (suing as the legal administrators of the estate of JOA) [2019] KEHC 9518 (KLR), where held as follows:

> 7. I do not see how the case of **WK v Ghalip** is of any assistance to the appellant here. This being an appeal, and no evidence on contributory negligence, indeed no defence evidence at all, having been adduced, there can be no appeal on contribution. The WK case clearly demands that there must be

evidence of the blameworthiness of both parties before apportionment of liability. In this case there is absolutely no defence evidence at all. In the brief case of **Interchemie EA Ltd v Nakuru Veterinary Centre Ltd [2001] eKLR**, Mbaluto J held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. In this light, I have no choice but to treat this as an appeal purely against the quantum of damages awarded.

17. They submitted that the respondent was only a passenger, who could not be held liable for the accident. Reliance was placed on the case of West Kenya Sugar Co Limited v Lilian Auma Saya [2020] KEHC 7585 (KLR), where **J.** Njagi J held as follows:

> 4. The respondent was only a passenger on the motor cycle. A passenger cannot be held liable when a vehicle he/she is travelling in is involved in accident – See Kungu v Githinji & another (Civil Case 145 of 2010)[2014] KEHC 7499 (KLR). The respondent, therefore, cannot be held liable for occasioning the accident.

18. On quantum, they submitted that the amount of Ksh 300,000/= was not so high as to warrant being set aside.

They relied on the case of Lake Naivasha Growers v Muigai Thuka [2020] KEHC 2064 (KLR), where an award of Ksh. 250,000/= was upheld by R. Mwongo, J, for Severe soft tissue injuries of the left thigh and soft tissue injuries of the left leg.

19. Further reliance was placed on the case of Charles Gichuki v Emily Kawira Mbuba & another [2018] KEHC 1635 (KLR), where J. K. Sergon J, awarded a sum of Ksh 300,000/= for blunt injury (tender) face-right side, blunt injury (tender) shoulders, blunt injury (tender) chest anteriorly, and blunt injury (tender)left thigh.

20. The respondent prayed that the appeal be dismissed.

Analysis

21. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand.

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

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

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

> .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-subordinate and the Court of Appeal is not bound to follow the subordinate Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.

24. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses.

However, documents still speak for themselves. The observation of documents is the same as the lower court, as parties cannot read into those documents matters extrinsic to them.

25. This court's jurisdiction to review the evidence should be exercised with caution. In the cases of **Peters vs Sunday Post Limited [1958] EA 424** , the court therein rendered itself as follows:-

> **It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…**

26. Bearing in mind that the court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet this court must reconsider the evidence, evaluate it itself, and draw its own conclusions.

27. The Appellants urged the court to find that the lower court erred in finding them 100% liable for the accident. On the other hand, the Respondent's general case is that the judgement of the lower court was correct on both quantum and liability and should not be disturbed.

28. The court is asked to establish whether the lower court erred in finding, on a balance of probabilities, that the Appellant failed to prove his case. The legal burden of proof lies upon the party who invokes the aid of the law and asserts an issue based thereon. In **Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, the Court of Appeal held that:

> **As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.**

29. It follows that the initial burden of proof lies on the Plaintiffs, but the same may shift to the Defendant, depending on the circumstances of the case. In **Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR** it was held that:

> **As a general preposition 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.**

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

> **In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party**

is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.

31. The balance of probabilities is also about what is likely to have happened than the other. In **Lord Nicholls** of Birkenhead in **Re H and Others (Minors) [1996] AC 563, 586** held that;

> **The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....**

32. Furthermore, the standard of proof in civil cases must carry a reasonable degree of probability, but not so high as is required in a criminal case for such standard is based on a preponderance of probabilities. In **Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR**, the Judges of Appeal held that:

> **Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372, discussing the burden of proof, had this to say:**
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> **That degree is well settled. It must carry a reasonable degree of probability, but not the high probability required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not, the burden is discharged, but if the probabilities are equal, it is not.**
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> **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.**

33. The Respondent herein was a passenger in the accident motor vehicle. It was her case that the motor vehicle registration number KCD 259U, in which she was a passenger, was hit from behind by a motor vehicle registration no. KCN 504F. She was seated behind the driver and heard a bang. She could also see what transpired. Neither of the two drivers was called to testify on what may have caused the accident.

34. In my reevaluation of the evidence and testimonies in the lower court, the Respondent, as a passenger, was not to blame in any way. The Respondent thus proved that it is the Appellants who was 100% to blame for the accident. Whereas the Respondent, as Plaintiff in the lower court, proved her case to the required standard, it was the duty of the Appellants to prove contributory negligence, which, in my view, they failed to do. They filed a joint defence and did not blame each other for the accident. In the case of **Mac Drugall App V Central Railroad Co. Rbr 63 Cal 431** the court held that:

> *In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the*

plaintiff to show that the injury occurred without such negligence.

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

> There is, as yet, no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.

36. Therefore, the Respondent proved want of care on the part of the driver of the accident motor vehicle. I am in consonance with the reasoning of the Court in the case of **Mombasa Maize Millers & another v Elius Kinyua Gicovi [2021] eKLR** where Nyakundi J referred to **Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan**, and held as follows:

> In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In Nance v British Columbia Electric Rly [1951] AC 601, at page 611, Lord Simon said:

……When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove … that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.

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

In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted, and the statement in the defence therefore remains mere

allegations…Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.

16. Guided by the above case, I find the statements in the defence filed on 10th December 2014 remain mere allegations having not been substantiated orally in court by the Appellant to controvert the Respondents testimony.

38. On quantum, the lower court granted an award of Kshs. 300,000/- in general damages. The Appellant suffered the following injuries:
    (i) Bruises on the left knee
    (ii) Bruises on the left leg
    (iii) Chest contusion
    (iv) Bruises on the scalp
    (v) Bruises on the frontal region.
    (vi) Blunt trauma to the neck

39. I have no reason to doubt the evidence of the medical doctor obtained in the medical report by Dr. Morebu Peter Momanyi dated 19.1.2021 and the treatment notes, as well as the documents produced by PW3. The extent of application of an expert opinion in judicial proceedings, and the general trend is that such evidence is not necessarily conclusive and binding. As was held in **Shah and Another vs. Shah and Others [2003] 1 EA 290**:

> "The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so."

40. Further, the Court of Appeal, on its part in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139 held that:

> ... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.

41. Courts must give proper respect to the opinions of experts; such opinions are not, as it were, binding on the courts, and the courts must accept them as stated in Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

> "while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the

> courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-
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> "The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the *evidence of an expert, I believe it.*"

42. The Appellants did not present any contradictory medical report. The report is consistent with the rest of the evidence. The court was therefore correct in relying on the same.

43. Viewed in line with the finding of the lower court, I equally, in the absence of any contrary medical evidence, find no reason to fault the lower court's finding and therefore uphold the injuries suffered as the injuries pleaded and proved on evidence.

44. Therefore, this court has to establish similar fact scenarios though bearing in mind that no two cases are precisely the same and that it is inevitable that there 29.12.2020. will be disparity in awards made by different courts for similar injuries as established in **Southern Engineering Company Ltd. vs. Musingi Mutia Civil Appeal No 46 of 1983 [1985] eKLR**. However, the Court of Appeal in **Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR** stated that *comparable injuries should attract comparable awards*

45. The principle on the award of damages is settled. In **Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another** [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

    1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

    2) The award should be commensurable with the injuries sustained.

    3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

    4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

5) The awards should not be inordinately low or high.

46. Circumstances in which an Appellate court will interfere with the quantum of damages awarded by a trial court were clearly laid out in the case of **Kenya Bus Services Limited vs. Jane Karambu Gituma** Civil Appeal Case No. 241 of 2000 where the Court of Appeal stated as follows:

> …in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages.

47. The Court of Appeal pronounced itself succinctly on the principles of disturbing awards of damages in **Kemfro Africa Limited t/a Meru Express Services (1976) & another v Lubia & another (No 2) [1985] eKLR** as follows:

> The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

48. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, **Nance v British Columbia Electric Co Ltd, in the decision of Henry Hilanga v Manyoka 1961, 705, 713** at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-'The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance.'

> We find the words of Lord Denning in the West (H) & Son Ltd (1964) A.C. 326 at page 341 on excessive

awards on damages important to replicate herein thus:

> I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a National Health Service. But the health authorities cannot stand huge sums without impending their service to the community. The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation.

49. The words of Lord Denning were reiterated by Nyarangi, JA. in **Kigaragari v Aya** [1985] eKLR thus:

> I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily upon the court. The largest application should be given to that approach. As large amounts are awarded, they are passed on to

members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover (in the case of accident cases) or increased fees.

50. Further, in the case of **Kilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & another Claim No. 2005 HCV 294** being guided by the principles enunciated by both Lord Morris and Lord Devlin in **H. West & Sons Ltd v Shephard {1963} 2 ALL ER** 625 Sykes J stated as follows:

> The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite some time is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant.

51. It is common reasoning that astronomical awards may lead to increased insurance premiums, thus hurting the insurance industry as well as the economy. See the case of

H. West and Son Ltd v. Shepherd [1964] AC.326 (supra) where it was stated that:

> …but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.
>
> In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional…..

52. With the above guide, if the Award is inordinately high, then I will have to set it aside. If, however, it is just high but not inordinately high, I will not do so. For the Appellate Court to interfere with the Award, it is not enough to show that the Award is high or had I handled the case in the Subordinate Court I would have awarded a different figure.

53. I proceed to determine similar fact cases in relation to damages as applicable this Appeal. Therefore, I find the following cases to present similar fact situation to the Appeal herein.

54. In **Samwel Martin Njoroge Kamunyu v Mildred Okweya Barasa [2020] KEHC 4339 (KLR)** the plaintiff sustained: two deep cut wounds on the forehead horizontally; bruises and lacerations on the right cheek; blunt injury to the shoulder and chest; blunt injury to the pelvis; deep cut wounds on the right and left legs. The High Court awarded of Kshs 300,000/= as general damages.

55. In **Oyaro v Mwanyonyi [2025] KEHC 5214 (KLR)** the High Court upheld an award of Ksh. 200,000/= in general damages for a Plaintiff who suffered the following injuries:

    a. Bruises and abrasions on the forehead.
    b. Bruises and abrasions on the right shoulder.
    c. Bruises and abrasions on the right forearm.
    d. Blunt trauma to the back.
    e. Blunt trauma to the left leg.
    f. Sprain and strain of the left ankle joint.

56. In **Blue Horizon Travel Co Ltd v Kenneth Njoroge [2020] eKLR**, the plaintiff sustained: bruises on the scalp; bruises on the neck; bruises on the abdomen; bruises on the lower back; cut wound on the left thumb; cut wound on the left palm; and subluxation of the left shoulder joint. The court awarded Kshs 400,000/= as general damages.

57. In **Mulwa & Another v Nzai (Civil Appeal E072 of 2023) [2024] KEHC 6898 (KLR) (10 June 2024) (Judgment)** the court awarded Kshs. 250,000 reduced from the lower court's

award of Ksh. 400,000 for the Plaintiff who had suffered a Small bruise on the right ankle, Soft tissue injuries on the lower back and right lower limb, blunt object injury to the lower and right limb, and bruises on the right lower limb.

58. All these authorities show that the Award of Kshs. 300,000/= was not inordinately high as to be termed manifestly excessive and erroneous estimate. The Award of Ksh. 300,000/- was, in my view, adequate compensation, taking into account the passage of time and inflation.

59. With special damages, the rule is strict and somewhat mathematical. The court has to discern the pleaded damages and proceed to find the proof. It is not based on estimates. The Court of Appeal in **Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177** where it was stated that:

> The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved, but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from

the particular facts set out in the pleadings. They must be specifically pleaded.

60. Special damages are thus very specific and constitute a liquidated claim which must be pleaded and proved. This court's task thus entails whether the trial court failed to award special damages that were pleaded and proved. In **Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003, Kimaru, J** held that:

> In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred…Special damages and general damages are used in corresponding senses. Thus in personal injury claims, 'special damages' refers to past expenses and lost earnings, whilst 'general damages' will include anticipated loss as well as damages for pain and suffering and loss of amenities…Special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses. Therefore, in the instant case the loss

of income as a direct consequence of this fraud would be both a general damage as well as a special damage.

61. On special damages, the pleadings and evidence show that the Respondent pleaded and proved Ksh. 5,105/=, which the lower court awarded as proved. This leaves the issue of costs, which is governed by Section 27 of the Civil Procedure Act, which provides as follows:

> **(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.**
>
> **(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.**

62. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> "It is our finding that the position in law if that costs are at the discretion of the court seized up of the

matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

63. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Rai & 3 others v Rai & 4 others [2014] KESC 31 (KLR), as follows:

18. It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an

invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

Determination

64. In the upshot, I make the following orders: -

(a) The Appeal on liability is dismissed.

(b) The Appeal against the award of damages is dismissed.

(c) The Respondent shall have the cost of this appeal assessed at Ksh. 55,000/=.

(d) The file is closed.

DELIVERED, DATED and **SIGNED** at **NYERI,** virtually on this **12th** day of **March**, **2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

No Appearance by Parties

Court Assistant- Michael