REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. E037 OF 2025

–BETWEEN–

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES ..... APPELLANT

–AND–

MICRO-CITY COMPUTERS LIMITED ..... RESPONDENT

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*(Being an appeal from the Judgment of the Court of Appeal at Mombasa (**Gatembu, Nyamweya & Odunga, JJ. A**) delivered on 12th April, 2024 in Civil Appeal No. 49 of 2020 as Consolidated with Civil Appeal No. 59 of 2020)*

Representation:

Mr. Augustus Wafula for the Appellant
(*Cootow & Associates Advocates*)

Mr. Moses Mwakisha for the Respondent
(*Moses Mwakisha & Company Advocates*)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The appeal dated 7th August 2025, is premised on Article 163(4)(b) of the Constitution. It revolves around the sole issue of the applicable scope and evidentiary standard of proof for awarding loss of anticipated profits as special damages for breach of contract. To put it differently, this Court has been called upon to pronounce itself on

the degree of certainty and particularity with which a claim for loss of anticipated profits on account of breach of contract must be proved. More so, in light of the well-established principle that special damages should be strictly proved.

B. BACKGROUND

(i) Factual History

[2] The issue in question arose within the context of a contractual relationship that existed between the appellant and the respondent. Sometime in September 2010, the appellant advertised a tender for the design, supply, installation and commissioning of an electric security surveillance system-closed circuit television (CCTV) and restricted access control system (security system) at its Social Security House Complex in Nairobi. The respondent's tender was successful and it was informed as much by a letter of offer dated 2nd March 2011, which offer it accepted. As a result, the parties executed a contract dated 8th April 2011. The salient terms of the said contract included a project sum of Kshs.244,825,708 and an annual maintenance cost of Kshs.15,000,000 upon expiry of the two-year warranty period from the date of installation of the security system.

[3] Be that as it may, the appellant did not hand over the subject site to the respondent. However, by a strange twist of events, the appellant wrote a letter dated 21st May 2012 to the respondent as follows:

> "***Further to our letter of award dated 2nd March, 2011 in which you were awarded the above tender, we regret to inform you that the Fund is unable to proceed with the project due to budgetary constraints. Any inconvenience is highly regretted.***"

It is this state of affairs that caused the respondent to file a suit in the High Court at Mombasa, **HCCC No. 41 of 2017**.

(ii) Litigation History

(a) At the High Court

[4] The respondent claimed that the appellant's actions amounted to breach of the contract. Specifically, that the appellant had failed to facilitate the handing over of the site to the respondent to carry out the works. What is more, that the appellant went on to purport to re-advertise the tender for the security system. Consequently, vide its further amended plaint dated 30th November 2018, the respondent sought *inter alia*;

> "
> a. *General damages for breach of the contract agreement dated 8th April, 2011*
> b. *Exemplary damages for breach of the contract agreement dated 8th April, 2011*
> c. *Loss of profits resulting from non-performance of the main contract and service contract Kshs.103,447,136*
> d. *Tender preparation costs and consultancies Kshs. 9,930,000.*
> e. *Payments of engineers contracted for the performance of the contract Kshs. 8,794,336*
> f. *Interest on loss of profits Kshs. 75,166,276*
> g. *Interest on contractual amounts paid to engineers contracted for the project Kshs.7, 374,324*
>
> *Total Kshs.214,544,220*
>
> h. *Interest on a, b, c, d, e, f, and g above at prevailing commercial court rates.*
>
> *…"*

[5] In support of its case, the respondent called two witnesses to testify. Of significance, the respondent buttressed its claim for loss of profits of Kshs.103,447,136 by producing a report titled Statement of Financial Claim dated 14th March 2017, which was prepared by Mokua Onwonga & Co., a firm of Certified Public Accountants. According to the evidence tendered on behalf of the respondent, the report, which was premised on documentation provided by the respondent, assessed reasonable/fair financial loss occasioned to the respondent on account of cancellation of the contract. Moreover, it

was maintained that, since the contract had not been performed and no payment had been made thereunder, the respondent could only rely on projections and assumptions that relate to a similar contract in computing the profits that would have accrued to it had the contract been performed. In assessing the loss of profits, the accountants took into account the contractual sum; the period between 2012 to 2018; the fact that the installation of the system was projected to take 16 weeks; and the cost of maintenance and overhead costs up to the year 2018.

[6] On its part, the appellant opposed the suit by its amended statement of defence dated 10th December 2018, and called one witness to testify. The nub of its defence was that although the contract was awarded to the respondent, the same was illegal and contrary to public policy which calls for prudent management of public resources. In that, the contract sum had exceeded the amount that had been budgeted and allocated for the said project in the appellant's annual procurement plan. Besides, that the request to enhance the amount had been declined by the appellant. Further, the appellant asserted that the contract had introduced unfounded annual maintenance cost which was not in the tender documents. To that extent, it was urged that upon investigations the Director of Public Prosecution (DPP) and the Ethics and Anti-Corruption Commission (EACC) found the contract to be illegal on account of the aforementioned grounds and even went a step further to recommend disciplinary action against some of the appellant's officers. Therefore, the appellant maintained it could not proceed with the contract and informed the respondent as much. All in all, the appellant denied that the respondent was entitled to the reliefs is sought.

[7] By a judgment dated 30th April 2020, the High Court *(P. J. Otieno, J.)* found that firstly, there was a valid contract between the parties; secondly, the appellant had breached clause 6.2 of the said contract by failing to issue the respondent with one month notice prior to terminating the contract vide the letter dated 21st May 2012; thirdly, that the investigations by DPP and EACC absolved the respondent from any

illegality or wrongdoing, and as such, the respondent was entitled to a remedy for the breach. As for the remedies, the trial court awarded the respondent Kshs.10,000,000 as general damages for the breach of contract; Kshs.246,128 for the performance bond; Kshs.10,250 for the tender security; and Kshs.5,800,000 inclusive of VAT as the accountant's professional fees for the preparation of the report produced in court. However, the court declined to make any award relating to exemplary damages and payment of engineers on the ground that no evidence had been adduced to support such awards. More importantly, the court dismissed the prayer for loss of profit of Kshs.103,447,136 on the basis that the evidence tendered in that regard was speculative and fell short of the requisite threshold of proof of special damages. In the end, judgment was entered for the respondent in the sum of Kshs.16,056,378 with interest at court rates from the date of the suit until payment in full, and costs of the suit.

(b) At the Court of Appeal

[8] Aggrieved by the trial court's decision, two appeals were filed before the Court of Appeal, that is, **Civil Appeal No. 49 of 2020** and **Civil Appeal No. 59 of 2020** at the instance of the respondent and appellant respectively. The long and short of those appeals is that the respondent took issue with the dismissal of its claim for loss of profits whilst the appellant challenged the entire decision. Consequently, on one hand, the respondent sought an order setting aside the dismissal of his claim for loss of profit and substitution thereof with an award of Kshs.103,447,136 plus interest and costs. On the other hand, the appellant prayed for an order setting aside the High Court judgment in its entirety and substitution thereof with an order dismissing the respondent's suit.

[9] By a majority judgment *(Nyamweya & Odunga, JJ.A.* with *Gatembu, J.A* dissenting) dated 12th April 2024, the Court of Appeal partly allowed the parties' respective appeals. In particular, the appellate court unanimously upheld the trial court's finding that the appellant had breached the contract by failing to issue the one month notice prior to terminating the contract. The court also unanimously set aside

the award of Kshs.10,000,00 as general damages to the respondent on the ground that general damages are not available for breach of contract.

[10] Moving onto the issue of whether the respondent suffered any loss, the majority judgment held that the general proposition of law as it pertains to pecuniary loss, is that the award should place the innocent party in the position which he/she would have been had the contract been duly performed. In *Nyamweya, J. A's* words, ***"... the normal measure of damages in a wrongfully terminated contract would be the amount the contractor would have earned under the contract***". Nonetheless, the majority pronounced that for the foregoing to apply certain elements must be established.

[11] To begin with, the learned Judges held that the damages/loss in issue should not be remote. In that, based on the ancient rule in ***Hadley Vs Baxendale*** (1854) 9Ex Ch 341, the damages/loss should be reasonably considered as either arising naturally from the breach or having been in the contemplation of the parties, at the time they entered into the contract, as the probable result of the breach thereof. To that extent, the majority considered clause 6 of the contract which reads in part as follows:

> *"6. BREACH AND TERMINATION*
>
> *6.1 A breach shall occur where a party fails to fulfil any of the terms and obligations of this agreement and shall entitle the aggrieved party to any remedies available to it in law. Provided any delay by any party to exercise the rights and remedies due to it under this agreement and/ or the law applicable shall not be deemed and/or construed to be a waiver thereof and/or a limitation to any other rights which it may have in law arising out of a breach of the terms of this agreement and are additional to any other rights.*

6.2 The Employer shall have the right at any time and for any reason to terminate the Contract in whole or in part by giving the Contractor a one (1) month written notice whereupon all the terms of the Contract shall be discontinued in which event the Employer's sole liability shall be to pay the Contract the price for the Goods and Services already supplied as at the termination date but such payment shall not include loss of anticipated profits or any consequential loss."

In doing so, the majority held that, by expressly excluding liability for loss of anticipated profits under clause 6.2 where the contract was lawfully terminated, the parties contemplated that such loss would be recoverable where the termination was unlawful.

[12] Secondly, the majority found that the breach must also have causally contributed to the loss/damage suffered. Towards that end, the learned Judges held that the issue of causation was undisputed since the respondent's claim emanated from the appellant's breach of contract. Moreover, the majority found that the issue of mitigation of loss by the respondent was not applicable in the circumstances. More so, taking into account that the contract was for a specific tender and it was not possible for the respondent to enter into another similar contract.

[13] Having found that the respondent was entitled to claim for loss of profits, the majority went on to determine whether the respondent had indeed established the same. The learned Judges appreciated that the standard of proof of special damages is well settled, that is, special damages should be strictly proved. Likewise, the majority reiterated that the said standard of proof also applies to a claim for loss of anticipated profits. Nonetheless, the majority distinguished claims for anticipated loss from claims for actual loss incurred. They held that a claim for loss of anticipated profits is hypothetical in nature and it would entail proceeding on the basis of estimates and/or approximation to determine such a loss. Especially, in a case, such as this, where there was non-performance of the contract. Therefore, the majority found that there ought to

be flexibility in the manner in which loss of anticipated profit should be established, and the nature of flexibility is dependent on the circumstances of each case. Besides, *Nyamweya, J.A* held that a claimant should not be penalised for the uncertainty surrounding the loss of business and profits as a claim for special damages especially where the uncertainty is caused by the wrong doing of the other party.

[14] Based on the foregoing, the majority observed that the available evidence on loss of anticipated profits was the report of Statement of Financial Claim dated 14th March 2017 as well as the testimony of George Mukoa (PW2), an accountant, who produced the said report at the trial court. The learned Judges whilst appreciating that the said evidence amounted to an expert opinion, which was not binding on a court, found that there was no evidence to dislodge the same. Accordingly, the majority held that the respondent was entitled to Kshs.103,447,136 as loss of anticipated profits for non-performance of the contract.

[15] In the dissenting opinion, *Gatembu, J.A* concurred with the trial court's finding that the respondent failed to prove the claim for loss of anticipated profit and the figures relied on were speculative. In doing so, the learned Judge found that the report relied on had little probative value for a number of reasons. Firstly, that while the projected income therein related specifically to the contract, the operating expenses appeared to relate to the respondent's entire business, without disclosing income derived from its other business activities. In the learned Judge's view, the same distorted the calculation of the anticipated profits. Secondly, that the respondent failed to provide supporting evidence for the projected costs and expenses, including figures for 2011, which ought to have been based on actual records. Thirdly, that the report preceded with a caveat that, *"all observations and recommendations made in the report are based on the assumption that the information provided to us is correct and accurate"* and that Mokua Onwonga & Co. Certified Public Accountants *"were not in a position to test or to verify the information provided"*. Besides, the learned Judge found that the evidence

tendered on the said issue by the respondent's Managing Director before the trial court was inconsistent with the report.

[16] On the basis of the majority judgment, the Court of Appeal partially allowed the respondent's appeal by setting aside the trial court's award on special damages and substituted the same with an award of Kshs.103,447,136 being loss of anticipated profits, and Kshs.9,056,378 being the aggregate costs in respect of tender preparation and consultancies. Accordingly, the respondent was awarded a total sum of Kshs.112, 503, 514 as special damages with interest at court rates from the date of filing of the suit in the trial court. The court also partially allowed the appellant's appeal by setting aside the award of general damages of Kshs.10,000,000. Accordingly, no orders were made in respect of costs of the appeals.

[17] Unrelenting, the appellant approached the Court of Appeal once again under Article 163(4)(b) of the Constitution seeking leave to appeal to this Court on the ground that its intended appeal raises issues of general public importance. The appellate court (*Murgor, Laibuta & Ngenye, JJ.A.)* vide a ruling dated 18th July 2025 granted the leave sought and framed three issues for consideration by the Supreme Court.

(c) At the Supreme Court

[18] Be that as it may, this Court by a ruling dated 30th January 2026 in **Application No. E022 of 2025** reviewed the issues framed by the Court of Appeal pursuant to Article 163(5) of the Constitution. Consequently, this Court found that only issue of general public importance that warrants its pronouncement is:

> ***"What is the applicable scope and evidentiary standard of proof, for awarding anticipated profits as special damages for breach of contract?"***

[19] The appellant's appeal is premised on the aforementioned issue and seeks the following reliefs:

i. *The appeal be allowed.*
ii. *The judgment of the Court of Appeal at Mombasa delivered on 12th April 2024, awarding the respondent a sum of Kshs.112,503,514 with interest at court rates from the date of filing the suit before the trial court be set aside.*
iii. *An order that the respondent bears the costs of this appeal, together with costs before the superior courts.*
iv. *This Honourable Court be pleased to grant any or further relief it deems just to grant.*

C. PARTIES SUBMISSIONS

(i) The Appellant's Submissions

[20] It is the appellant's position that damages for breach of contract are intended to restore the aggrieved party to the financial position it would have occupied had the contract been performed. In its view, damages, loss of profits and loss of anticipated profits describe the same compensatory remedy rather than separate heads of damages. However, the appellant maintains that the recovery is limited to losses which must have been within the reasonable contemplation of the parties when entering into the contract and are not too remote. To buttress that position reference is made to ***Hadley Vs Baxendale*** *(Supra)* and ***British Columbia Saw-Mill Co Ltd Vs Nettleship*** (1868) LR 3 CP 499.

[21] According to the appellant, loss of anticipated profits are ascertainable pecuniary losses and therefore fall within the category of special damages. Therefore, it is posited that they should be specifically pleaded and strictly proved with reasonable certainty. The appellant maintains that such a claim must be supported by definite evidence of the expected income and the expenses that would have been incurred in earning it. In laying emphasis, the appellant submits that such a claim cannot be founded on speculation,

unsupported projections, conjecture or contingencies. In this regard, ***UBA Plc Vs BTL Industries Ltd*** [2006] NWLR and ***Uganda Telecom Ltd Vs Tanzanite Corporation***, Civil Appeal No. 17 of 2004 [2005] UGSC 9 are cited. As far as the appellant is concerned, the "*reasonable certainty*" test is comparable to the Kenyan requirement of strict proof for special damages.

[22] Applying the aforementioned standard, the appellant contends that the respondent failed to substantiate its projected profits. In support of that argument, the appellant points to inconsistencies between the respondent's Managing Director's estimate of approximately Kshs.26 million and the amount stated in the expert report that the majority decision is predicated on. It also argues that no quotations, records of projected labour costs, tax computations or documents supporting operating expenses were produced. What is more, the appellant asserts that the accountant who produced the report, conceded in his testimony that, *"We did not perform this engagement in the capacity of Registered Auditors. The procedure we performed do not constitute an audit or a review in accordance with International Standards on Auditing or International Standards on Review Engagements (or national standards or practices). Consequently, we do not express any audit assurance".*

[23] Making reference to ***Wang'ondu Vs Ark*** *Ltd [2016] KEHC 3449 (KLR),* the appellant submits that the appellate court was required to evaluate the expert opinion against its underlying reasoning, internal consistency and the other evidence before it. In the appellant's view, the report was founded on unverified assumptions and unsupported projections rendering it unreliable since it did not satisfy the requirements of strict proof and reasonable certainty. The appellant therefore urges this Court to set aside the award for loss of anticipated profits.

(ii) The Respondent's Submissions

[24] Likewise, the respondent reiterated that damages for breach of contract are intended to protect the aggrieved party's expectation of interest by placing it, so far as

money can, in the financial position it would have occupied had the contract been performed. The respondent also acknowledges that recovery is limited to losses arising naturally from the breach or reasonably contemplated by the parties when contracting in line with ***Surrey County Council & Another Vs Bredero Homes Limited*** [1993] 3 All ER 705 and ***Hadley Vs Baxendale*** (*Supra*).

[25] Nonetheless, the respondent contends that anticipated profits cannot always be proved with mathematical precision, since their assessment necessarily entails reasonable projections of the costs of performance and the income that would have been earned under the contract. It maintains that the claim for Kshs.103,447,136 was not speculative, as it represented the difference between the contract sum and the projected cost of performing the principal and maintenance contracts. Relying on ***Parabola Investments Ltd & Another Vs Browallia Cal Ltd***. [2011] QB 477 (***Parabola***) and ***Jackson K. Kiptoo Vs Attorney General*** [2009] KLR 657, the respondent argues that a claimant should not be denied compensation merely because the defaulting party's breach has created uncertainty in quantifying the loss. In its opinion, the degree of certainty and particularity required must therefore depend on the nature and circumstances of each case.

[26] Based on the foregoing**,** the respondent submits that the Court of Appeal neither established a new standard of proof nor departed from the requirement that special damages be strictly proved. Rather, that it properly recognised that proof of anticipated profits may involve reasonable hypotheses and industry-based projections. Moreover, the respondent posits that the loss was foreseeable and sufficiently pleaded. In conclusion, the respondent urges this Court to uphold the award of loss of profit and dismiss the appeal.

D. ANALYSIS

[27] At the outset, it is important to reiterate that, by its ruling dated 30th January 2026, this Court framed the sole issue certified for determination in this appeal as:

What is the applicable scope and evidentiary standard of proof, for awarding anticipated profits as special damages for breach of contract?

[28] The issue as framed defines the boundaries of the present appeal. As this Court held in ***Kenya Airports Authority Vs Otieno Ragot and Company Advocates*** [2024] KESC 44 (KLR), a litigant may not enlarge an appeal certified as one involving a matter of general public importance by introducing issues falling outside the parameters upon which the appeal was certified or admitted for hearing. It is therefore within the confines of that certified issue that we proceed to consider the questions necessary for its resolution.

[29] In determining the certified issue in a clear and structured manner, we find that three sub-questions arise for our consideration, namely:

i. *What is the juridical basis and permissible scope of an award of anticipated profits for breach of contract;*

ii. *What is the applicable evidentiary standard for proving anticipated profits as special damages for breach of contract;*

iii. *Did the evidence relied upon by the Court of Appeal provide a sufficiently reliable factual foundation for the anticipated profit awarded in the present case?*

i. What is the juridical basis and permissible scope of an award of anticipated profits for breach of contract?

[30] The starting point to answering this question is the need to appreciate the compensatory principle that underlies the award of damages for breach of contract. The object of an award for a breach of contract is, so far as an award of money can achieve it, to place the innocent party in the position in which that party would have been had

the contract been performed. This Court stated as much in ***Kwanza Estates Limited Vs Jomo Kenyatta University of Agriculture and Technology*** [2024] KESC 74 (KLR) (***Kwanza Estates Limited***) at paragraph 108, where we held thus:

> "***It is a well-established principle of law that damages for a breach of contract aim, subject to mitigation, to restore the claimant to the position they would have been in had the breach not occurred. This principle, known as restitutio in integrum, underscores the compensatory nature of contractual damages.***"

[31] Flowing from that compensatory principle, damages for breach of contract protect what is commonly described as the performance or 'expectation interest'. They compensate the innocent party for the value of the contractual performance of which it has been deprived, subject to the ordinary limitations of causation, remoteness and mitigation. Anticipatory profits are properly understood within this framework as a manifestation of 'expectation loss'.

[32] In commercial transactions, a party will ordinarily enter into a contract with the expectation that performance will generate receipts exceeding the expenses necessarily incurred in earning them. Where a breach prevents performance, the resulting net profit, rather than the gross contractual receipts, may therefore constitute compensable loss. This was aptly explained by Mason, CJ and Dawson, J in ***Commonwealth Vs Amann Aviation Pty Ltd*** [1991] HCA 54 at 24-25, where the High Court of Australia observed that contractual damages protect the plaintiff's expectation of receiving the defendant's performance and that, in ordinary commercial dealings, a party contracts with a view to securing a profit, being the margin of gain remaining after recoupment of the expenses of performance.

[33] The contractual expectation does not, however, render every claim for anticipated profits recoverable. Its permissible scope is constrained by the ordinary principles

governing contractual damages, the first of which is *causation*. Under this limitation, proof of breach, without more, does not establish an entitlement to compensatory damages for lost profits. The claimant must establish that the breach caused the loss claimed and, in the context of anticipated profits, that but for the breach it would probably have earned the asserted profit. This ordinarily requires proof that the claimant was able and willing to perform its own obligations and the performance would have yielded the claimed financial benefit. See the persuasive decision of the High Court in ***Hydro Water Well (K) Limited Vs Sechere & 2 Others (sued in their representative capacity as the officers of Chae Kenya Society & 2 others (Sued in their representative capacity as the officers of Chae Kenya Society)*** [2021] KEHC 22 (KLR) (***Hydro Water Well (K) Limited)*** paragraphs 21 and 30.

[34] Secondly, the recoverable expectation is limited by the *doctrine of remoteness*. Not every loss factually caused by a breach is recoverable in damages. Put differently, liability for breach of contract extends only to losses of a kind for which the party in breach may properly be taken to have assumed responsibility when the contract was made. See ***Kwanza Estates*** **Limited** paragraph 109.

[35] In the context of anticipated profits, the doctrine requires attention to the nature and source of the profits claimed. Profits representing the ordinary net return from performance of the very contract breached will generally be more readily regarded as arising naturally from the breach. Whereas profits dependent upon collateral transactions, particularly customers or other special commercial circumstances, will ordinarily be recoverable only where those circumstances were sufficiently known to the defendant when the contract was made. This is illustrated by the case of ***Victoria Laundry (Windsor) Ltd. Vs Newman Industries Ltd***. [1949] 2 KB 528 (CA), where the Court of Appeal of England and Wales, in a case involving the delayed delivery of a boiler by the respondent, allowed recovery of the ordinary profits that would have

been earned from use of the delayed boiler. However, the court rejected the exceptionally lucrative profits from particular dyeing contracts of which the defendant had no sufficient knowledge. The remoteness inquiry was further refined by the House of Lords in ***Koufos Vs C Czarnikow Ltd. (The Heron II)*** [1969] 1 AC 350, particularly at paragraphs 385–390 and 406, which treated contractual loss as recoverable where, on the information available to the defendant at the time of contracting, loss of that kind was sufficiently likely, or 'not unlikely', to result from the breach.

[36] Accordingly, the fact that a claim is expressed as one for anticipated profits does not, by itself, determine whether the loss is too remote. The relevant inquiry is whether the type of profit claimed fell within the scope of the contractual risk undertaken by the parties. See ***Attorney General of the Virgin Islands Vs Global Water Associates Ltd.*** [2020] UKPC 18.

[37] Thirdly, anticipated profits remain subject to the ordinary requirement of *mitigation*. The claimant is entitled to compensation for loss caused by the breach, but not for loss that could reasonably have been avoided after the breach. In ***Kwanza Estates Limited*****,** this Court held at paragraph 106 that the duty to mitigate arises once the injured party becomes aware of the injury to its interest; that the reasonableness of the steps taken in mitigation depends on the circumstances of each case; and that the burden of establishing failure to mitigate rests on the defendant. In the context of anticipated profits therefore, earnings from substitute transactions, expenditure saved because performance did not proceed, and other post-breach circumstances may reduce the amount recoverable so that the award reflects only the net loss that the breach actually caused.

[38] Fourthly, and critically, the expectation protected by law is the expectation created by *the contract actually made*. An award of damages cannot confer upon the claimant

a commercial benefit which the defendant was never contractually obliged to provide. In this respect, the duration of the contract, rights of termination, alternative modes of performance, price-adjustment provisions, conditions precedent, exclusion clauses and other contractual contingencies therefore form part of the definition of the expectation being valued. The claimant is entitled to the value of lawful performance, not to the value of the most advantageous imaginable course of performance.

[39] The Supreme Court of Canada expressed this principle with particular clarity in ***Hamilton Vs Open Window Bakery Ltd.***, [2004] 1 S.C.R. 303 at paragraphs 19-22, in a case that concerned a contract that had been wrongfully terminated even though the defendant retained a contractual right to bring it to an end lawfully upon notice. The Court held that damages had to be assessed by reference to the minimum performance that the plaintiff was contractually entitled to receive, rather than on the assumption that the relationship would have continued for a longer and more profitable period. In other words, the plaintiff's expectation was defined from the outset by the termination rights contained in the contract itself.

[40] Of particular comparative significance to the present appeal is the decision of the Supreme Court of Zambia in ***Mobil Oil Zambia Limited Vs Ramesh M Patel*** (SCZ Judgment No 2 of 1988) [1988] ZMSC 8 (***Mobil Oil Zambia Limited***). The subject dealership contract could be terminated by either party upon one month's notice. Mobil wrongfully ceased supplying the dealer, and the dealer claimed continuing loss of profits. Although the Court accepted that the cessation constituted wrongful termination, it rejected an award of profits extending over an indefinite period. Since Mobil had a contractual option to terminate upon one month's notice, the damages were assessed on the footing that the option could have been exercised and the recoverable lost profits were accordingly confined to one month.

[41] ***Mobil Oil Zambia Limited*** makes it clear that there is a distinction between *whether there was a breach of contract* and *how the resulting loss should be valued*. A party may breach a contract by failing to follow the agreed termination procedure stipulated in the contract. However, that does not mean damages should be calculated on the assumption that the contract would otherwise have continued for the longest period most favourable to the claimant. The proper approach is to assess the loss by reference to how the contract could lawfully have been performed, including any contractual right to bring it to an end.

[42] The aforementioned principle is directly relevant to clause 6.2 of the subject contract in this appeal. The clause allowed the appellant, '*at any time and for any reason*', to terminate the contract in whole or in part by giving one month's written notice. It also provided that, upon such termination, the appellant's liability would be limited to payment for goods or services already supplied and would not include anticipated profits or consequential loss. The High Court found that the appellant had breached the contract because it did not terminate the agreement in the manner required by clause 6.2.

[43] The effect of clause 6.2 of the contract is therefore germane to the determination of the dispute between the parties. The appellant's failure to follow the agreed termination procedure is relevant to the question whether there was a breach. However, it does not mean that the contractual right of termination becomes irrelevant when the Court later determines the value of the respondent's loss. At the same time, the clause should not automatically be treated as excluding every claim arising from an unlawful termination without first considering its proper meaning and the nature of the loss claimed. What is clear is that the respondent's expectation cannot be valued as though the contract guaranteed performance for a period that the appellant was, under clause 6.2, entitled lawfully to bring it to an end. The termination right was part of the contract

and must therefore form part of the assessment of the benefit the respondent actually lost.

[44] This is particularly important because the Judges of the Court of Appeal took different views on the implications of clause 6.2 of the contract. *Nyamweya & Odunga, JJ.A.* considered that, because the clause expressly excluded anticipated profits in the event of a lawful termination, the parties must have contemplated that such profits could be claimed where the termination was unlawful. On his part, *Gatembu, J.A* took the opposite view and regarded the clause as weighing against the claim for anticipated profits. In our considered view, however, the more fundamental question is not simply whether anticipated profits were recoverable in principle after an unlawful termination, but what contractual benefit the respondent actually lost. Answering that question necessarily requires the Court to take into account the appellant's lawful right to terminate the contract under clause 6.2 of the contract.

[45] We would therefore answer the first sub-question as follows: The legal basis for awarding anticipated profits lies in the expectation or performance interest protected by the law of contract. Such profits may be recovered where they represent the net financial benefit that the claimant would have obtained if the contract had been lawfully performed. Their recovery is, however, limited by causation, remoteness, mitigation and, more importantly, the terms of the contract itself. A claimant cannot recover profits that are too remote, profits that it would probably not have earned, gross revenue without deducting the costs of earning it, losses that could reasonably have been avoided, or profits extending beyond the period or benefit that the contract actually guaranteed. Where the contract gives one party a lawful right to terminate, that right must also be taken into account when assessing the value of the lost contractual expectation.

ii. *What is the applicable evidentiary standard for proving anticipated profits as special damages for breach of contract?*

[46] Having established the juridical basis and permissible scope of an award of anticipated profits, we now turn to the question of proof. The requirement that anticipated profits, as special damages, be strictly proved raises three closely related considerations. The first is what is meant by "strict proof" in an ordinary civil claim. The second is how that requirement applies to a loss which must first be shown to have occurred but whose amount depends on what would have happened had the contract been performed. The third concerns the nature and quality of the evidence capable of establishing such a claim, including the proper role and weight of expert evidence.

[47] We begin with the meaning of 'strict proof'. Kenyan law has long maintained that special damages must not only be specifically pleaded but also strictly proved. In the persuasive decision in **Hahn *Vs Singh*** [1985] KLR 716 at 717 and 721, the Court of Appeal stated that the degree of certainty and particularity required in proving special damages depends on the circumstances and the nature of the loss. The rule therefore requires strict proof, but does not prescribe an identical form or degree of evidential detail for every type of special damage.

[48] The aforestated qualification is important when the expression 'strict proof' is considered alongside this Court's jurisprudence on the standard of proof. In ***Kombe Vs Karisa & 3 others*** [2024] KESC 25 (KLR) (***Kombe***), at paragraphs 83–84, this Court drew a clear distinction between the burden and the standard of proof. We explained that the standard of proof refers to the 'level of cogency' which the evidence must attain before a court can find in favour of the party bearing the burden. It is notable that a claim for anticipated profits arising from breach of contract is an ordinary civil claim. In an ordinary contractual claim, the claimant must establish the facts necessary to support the claim on a balance of probabilities. What 'strict proof' regulates is not the level of persuasion at which those facts must ultimately be established, but

the *quality, particularity and cogency of the evidence* required to establish a specifically quantified pecuniary loss.

[49] Given the foregoing conclusion, the remaining question is therefore not whether strict proof applies, but what that requirement means when the loss claimed is inherently prospective. In answering that question, the persuasive decision of the Court of Appeal in ***Nizar Virani t/a Kisumu Beach Resort Vs Phoenix of East Africa Assurance Company Limited*** [2004] KECA 145 (KLR) is instructive. Drawing from Bowen LJ's formulation in ***Ratcliffe Vs Evans*** [1892] 2 QB 524 at 532–533, the Court of Appeal held that the certainty and particularity required in pleading and proving damage must be reasonable having regard to the nature of the loss and the circumstances in which it arose. The law requires as much certainty as the particular loss reasonably admits, but does not demand an impossible degree of precision. This approach accords with ***Hahn Vs Singh*** *(Supra)*, which likewise makes the degree of certainty required dependent upon the circumstances and nature of the loss.

[50] Strict proof therefore does not require every special-damage claim to be established by receipts, invoices or payment vouchers. Those documents will often be the most natural evidence of expenditure that has already been incurred, but they cannot sensibly be required as proof of revenues and expenses which would only have arisen had future contractual performance taken place. Persuasively, in ***Ikumbu Vs Wanjiru*** [2022] KECA 81 (KLR), at paragraph 50, the Court of Appeal, in applying ***Hahn Vs Singh*** *(Supra)*, accepted valuation evidence notwithstanding the absence of receipts and reiterated that the degree of certainty and particularity required depends upon the circumstances and nature of the loss. In our considered view, the point is therefore not that documentary proof is unnecessary, rather it is that *strict proof is contextual rather than formalistic.*

[51] This contextual approach is particularly important for anticipated profits. The claimant cannot produce receipts showing profits which were never earned because the breach prevented performance. It may nevertheless be able to produce existing evidence capable of establishing whether those profits would probably have been earned and of testing the assumptions used to quantify them. Such evidence may include the contract and Bills of Quantities, historical financial statements, previous profit margins, supplier quotations, market prices, tax and banking records, comparable contracts, contemporaneous business records and properly grounded expert evidence. The prospective character of the loss may therefore justify flexibility as to the form of evidence, but it does not justify flexibility as to whether there must be a reliable evidential foundation at all.

[52] The Court of Appeal recognised this distinction in the impugned judgment. More particularly, *Nyamweya, J.A* at paragraph 57 of the said judgment stated that the uncertainty inherent in establishing the hypothetical non-breach position does not give a claimant a 'free ride'. The claimant must deploy the best evidence reasonably available, and the requirement of strict proof remains applicable. What may vary is the manner and method by which the anticipated loss is proved. The distinction between the legal burden and the evidential burden is also relevant. Sections 107 to 109 of the Evidence Act (Cap. 80, Laws of Kenya) place upon the claimant the burden of proving the facts upon which the claimed legal right depends. In **Kombe**, this Court reiterated that the party asserting a right bears the legal burden, although an evidential burden may shift to the opposing party once sufficient evidence has been placed before the Court. Applied here, the claimant must first place before the Court evidence capable of establishing the anticipated-profit claim. The absence of contrary evidence from the defendant may strengthen evidence which has already crossed that threshold, but it cannot supply missing proof or convert an unsupported projection into a proved loss.

[53] This distinction also explains why the requirement of strict proof should not be equated with mathematical certainty. The balance-of-probabilities standard governs whether the factual premises of the claim have been established. Therefore, matters such as the existence and terms of the contract, the claimant's capacity and willingness to perform, historical turnover and expenses, prevailing supplier prices, the contractual period and other objectively ascertainable facts must be proved in the ordinary way. Once those factual foundations are established, however, determining the amount of profit which would have arisen in a future that never materialised necessarily involves an element of estimation. The requirement of strict proof does not transform that counterfactual exercise into proof of an historical fact.

[54] There is therefore an important difference between uncertainty inherent in the loss itself and an evidential deficiency attributable to the claimant. The first arises because the defendant's breach prevented the contractual future from occurring and may make exact calculation impossible. The second arises where evidence which actually exists and could reasonably have tested the projection is not produced. Strict proof does not require the Court to insist on evidence that cannot exist, but neither does the prospective nature of the claim excuse the claimant from producing available records capable of verifying its assumptions. A claimant cannot rely upon the inherent uncertainty of future profits to avoid proving historical and contemporaneous facts within its possession.

[55] The content of the requirement of strict proof becomes clearer when a distinction is drawn between *proving that a loss of profit was suffered* and *determining the amount of that loss*. Although the two inquiries are closely connected and may depend on much of the same evidence, they serve different purposes. The first asks whether the claimant has established that the breach actually caused a compensable loss of profit. The second asks, once such loss has been established, what amount should fairly be

attributed to the profits that would have been earned had the contract been performed. A court should not proceed to the second inquiry unless the first has been established.

[56] The fact of loss remains a matter for proof on the ordinary civil standard. It is not enough for a claimant to establish that a contract existed and was breached. The claimant must also establish, on a balance of probabilities, that the breach deprived it of a profit-earning benefit. In the context of anticipated profits, this will ordinarily require proof that the claimant was able and willing to perform the contract and that, had performance proceeded, the transaction would probably have generated some net profit. The High Court adopted this approach in ***Hydro Water Well (K) Limited,*** particularly at paragraphs 22 and 28–36. In doing so, the court distinguished the existence of loss from its measurement and ultimately rejected the claim for profits because the claimant had not first laid a sufficient evidential basis showing that the claimed profits were recoverable and had in fact been lost.

[57] Comparative jurisprudence draws the same distinction. In ***Parabola*** at paragraphs 22–24, Toulson LJ explained that a claimant must first establish an 'actionable head of loss'. In that case, the trial judge had found on a balance of probabilities that, but for the defendant's wrongdoing, the claimant would have traded profitably. Only after that finding did the question arise as to how much profit would have been earned. The Court of Appeal of England and Wales held that the two inquiries should not be confused. While actual or historical facts are proved in the ordinary way, the measurement of a loss that depends on what would or might have happened necessarily calls for a different exercise.

[58] The High Court of Australia expressed the distinction even more directly in ***Sellars Vs Adelaide Petroleum*** [1994] HCA 4. The plurality held at pp 353–355 that causation and the existence of some compensable loss must be established on a balance of probabilities. Brennan, J. similarly explained at pp 367–368 that the balance

of probabilities governs whether a loss was suffered and whether it was caused by the defendant's conduct. Once those matters are established, however, hypotheses and possibilities that cannot themselves be proved as historical facts may be evaluated in determining the value of the loss. That latter exercise is one of what Brennan, J. described as 'informed estimation'.

[59] In our considered view, the reason for the distinction is self-evident. Whether the claimant possessed the contract, had the resources to perform it, intended to perform it, had previously operated profitably, or had incurred particular historical costs concerns facts capable of proof. Those facts cannot be converted into matters of estimation merely because the ultimate claim concerns future profits. By contrast, once a court is satisfied that the claimant would have earned a profit, the precise amount that would have been earned exists only in the hypothetical world in which the breach did not occur. A Court cannot determine that hypothetical future in the same way that it determines whether an invoice was issued or a payment was made.

[60] Accordingly, once the fact of a profit-earning loss has been established, the court should not apply the balance of probabilities mechanically to every element used to measure its amount. As Toulson LJ stated in ***Parabola*** at paragraphs 22–23, where quantification depends upon what would or might have happened, the court does not decide that one particular financial outcome was more likely than not and disregard all others. It must instead make the best assessment it can of the relevant chances, taking account of all significant factors and excluding possibilities and other uncertainties that amount to no more than remote speculation. This does not change the civil standard of proof applicable to the claim. Rather, it recognises that valuation of an established counterfactual loss is different from proof of an historical fact. The significance for anticipated profits is that some underlying assumptions must be proved in the ordinary way, while genuine future contingencies, such as market behaviour or

decisions by independent customers, may properly be reflected through probability in the assessment of quantum.

[61] This approach does not permit a court to speculate. The flexibility available at the stage of quantification operates only after an adequate evidential foundation has been laid. Although the claimant may receive a 'fair wind' in resolving uncertainties created by the breach, that does not amount to a 'free ride'. The claimant must still produce the best evidence reasonably available, and a court cannot engage in pure guesswork. Where relevant evidence exists but has not been produced, the resulting uncertainty cannot simply be attributed to the defendant's breach. See Adam Kramer's analysis in 'Proving Contract Damages' in Graham Virgo and Sarah Worthington (eds), **Commercial Remedies: Resolving Controversies** (Cambridge University Press 2017) p. 232. See also ***Unibros Vs All India Radio*** [2023] 14 SCR 683 at paragraphs 17-19.

[62] We have considered the Majority judgment and dissent penned by the Court of Appeal in this matter. We note that in her lead judgment, *Nyamweya, J.A* adopted essentially the same distinction at paragraphs 52–57 of the impugned judgment. The learned Judge appreciated that the position the claimant would have occupied had there been no breach is necessarily hypothetical and may therefore have to be assessed by approximation. At the same time, she made it clear at paragraph 57 that this does not give the claimant a 'free ride'. The claimant must still present the best evidence reasonably available and satisfy the requirement of strict proof. The issue for this Court is therefore not whether estimation is permissible, but how to distinguish between proving that a loss was actually suffered and estimating the amount of that loss.

[63] In our considered view, the distinction should be drawn in the following way. The claimant must first prove, on a balance of probabilities, the facts showing that the breach actually caused a loss of profit. Depending on the circumstances, this may

include evidence that the claimant was ready and able to perform the contract, the revenue it would have earned, its past trading performance, the costs it would have incurred, the period of performance and any other matters relevant to whether the contract would have been profitable. These matters cannot simply be assumed from the fact that a breach occurred. If the claimant does not establish this factual basis, there is no proved loss of anticipated profit for the court to quantify.

[64] Once that threshold is crossed, however, the court moves from proof to valuation. It must determine what amount of net profit would probably have been earned in a future that the breach prevented from occurring. At that stage, exact proof is neither possible nor required. The court may make a reasoned estimate by evaluating the relevant probabilities and possibilities, including expected revenues, costs of performance, market conditions, contractual contingencies, mitigation and other factors that would have affected the financial outcome. The result must be grounded in evidence, but the court need not pretend that the counterfactual can be reconstructed with mathematical certainty.

[65] It follows that the claimant must first establish, on a balance of probabilities, that the breach caused the loss of a profit-earning contractual benefit and must prove the factual premises supporting that conclusion. Once that foundation has been established, the court may assess the amount of the loss by reasonable and informed estimation, taking into account the relevant probabilities and contingencies. The power to estimate quantum cannot, however, be used to make good a failure to prove that the loss itself was suffered. This distinction also informs the nature of the evidence required to establish a claim for anticipated profits.

[66] There is no single form of evidence that must be produced in every claim for anticipated profits. What is sufficient will depend on the nature of the contract, the business involved and the circumstances in which the loss arose. The claimant must,

however, place before the court the best evidence reasonably available which is capable of establishing both that the contract would probably have yielded a profit and a reliable basis upon which the amount of that profit may be assessed.

[67] In our considered view, the court should place particular weight on *objective and contemporaneous evidence* that can test the assumptions underlying the anticipated-profit claim. Depending on the circumstances, this may include the contract itself and any Bills of Quantities, historical financial statements and audited accounts, the claimant's previous profit margins, supplier quotations and prevailing market prices, tax and banking records, comparable contracts, records of similar work previously performed, industry data, and evidence concerning the claimant's capacity to undertake the contract. Where the claim extends over a period of time, the evidence should also address the contractual duration, termination rights, expected changes in costs and revenue, and other contingencies capable of affecting profitability. The aim is not to require every item on this list, but to ensure that the projected profit is anchored in evidence rather than assertion.

[68] The Supreme Court of Ghana adopted a similar approach in ***Environmental Development Group Ltd Vs Provident Insurance Company Ltd & others*** (Civil Appeal No J4/31/2019) [2020] GHASC 12 (18 March 2020). The contractor claimed that it would have earned a profit of 15 per cent on the uncompleted portion of the works. The Court observed that this could have been tested by evidence showing the profit actually earned on the portion of the same contract that had already been performed. A further claim for a 5 per cent return on subcontracted works could similarly have been supported by a prototype subcontract or other evidence showing an entitlement to such a return. The absence of that evidence was material to the rejection of the claim. This persuasive decision demonstrates that, where historical or comparable evidence is available, the claimant should ordinarily produce it rather than rely solely on a projection.

[69] Expert evidence may play an important role in bringing such material together and assisting the Court to understand its financial significance. Section 48 of the Evidence Act permits opinion evidence from persons specially skilled in an area of science or art. In a claim for anticipated profits, an accountant, economist, quantity surveyor or other suitably qualified expert may therefore assist a court by analysing financial records, estimating future revenues and expenses, applying accepted valuation methods, and explaining the effect of relevant commercial assumptions. The expert's proper role, however, is to assist a court in evaluating the evidence, not to replace the evidence or decide the case.

[70] This limitation is reflected in this Court's jurisprudence. In ***Odinga & 16 others Vs Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)*** [2022] KESC 56 (KLR) (***Odinga 2022***), at paragraph 150, the Court emphasised that expert evidence is not binding on the Court and must be considered alongside the other evidence on record. Similarly, in ***MMG Vs Tribunal Appointed to Investigate the Conduct of Hon Justice MMG*** [2023] KESC 73 (KLR) (***MMG***), at paragraph 55, the Court reaffirmed that expert evidence does not relieve a court of its duty to evaluate the evidence and reach its own conclusion. It follows that expert accounting evidence on anticipated profits may assist the court, but the court must still assess its reliability, reasoning and consistency with the rest of the evidence.

[71] We view this as an important consequence for the use of expert evidence in claims for anticipated profits. We think that an expert may calculate the financial consequence of assumed facts, but the expert's opinion cannot, by itself, prove those facts. For example, an accountant may calculate the profit that would result if equipment cost a particular amount, labour costs were at a particular level, or a maintenance contract continued for five years. However, if those inputs are material to the calculation, there must be evidence supporting them or the expert must clearly identify them as

assumptions so that the court can determine whether they are justified. An expert's arithmetic may be correct while the resulting figure remains unreliable because the assumptions on which the arithmetic rests have not been proved.

[72] We are persuaded that the same principle applies where an expert relies on information supplied by the party who instructed the expert. The fact that the information appears in an expert report does not convert it into independently proved fact. The court should ask what material supports the input, whether it is consistent with the contract and the claimant's historical records, whether the expert tested it, and whether reasonable alternative assumptions would materially alter the result. The strength of the opinion therefore depends not merely on the expert's qualifications, but on the reliability of the data, assumptions and method from which the conclusion is derived.

[73] Nor does an expert opinion become conclusive merely because the opposing party has not produced another contrary expert opinion. This follows directly from this Court's holding in ***Odinga 2022*** that expert opinion is not binding and must be assessed against the evidence as a whole. The absence of competing expert evidence may strengthen the weight of an opinion which is already properly founded, particularly where it has survived cross-examination. It does not, however, shift the claimant's legal burden or require the court to accept an opinion whose factual assumptions, methodology or reasoning are deficient. The issue is therefore not whether the defendant has produced an expert to contradict the claimant's expert, but whether the claimant's evidence, considered as a whole, satisfies the applicable evidential threshold.

[74] The foregoing is particularly relevant in the present appeal as *Nyamweya, J.A* in the lead judgment of the Court of Appeal, placed weight on the fact that PW2's accounting evidence had been tested in cross-examination and that the appellant did not produce a competing expert opinion. *Odunga, J.A* similarly considered that the

appellant had an opportunity to present a contrary opinion but did not do so. The absence of another expert opinion in rebuttal was a matter the trial court could properly consider when assessing the weight of the evidence before it. It could not, however, remove the need to examine whether the accountant's assumptions and inputs were themselves supported by the evidence. Indeed, the appellant's submissions before this Court identify the lack of documents supporting some of the operating expenses and challenge the rationality and internal consistency of the expert's conclusions.

[75] We would therefore answer the second sub-question by holding that anticipated profits, as special damages, must be strictly proved, but strict proof does not impose a standard of persuasion higher than the balance of probabilities. It requires the claimant to produce the best evidence reasonably available and to establish with sufficient particularity and cogency the factual foundation from which the anticipated profit can rationally be inferred. The claimant must first prove, on a balance of probabilities, that the breach caused the loss of a profit-earning contractual benefit. Once that loss is established, its amount may be assessed by reasonable and informed estimation, taking into account the relevant probabilities and contingencies. No single form of evidence is invariably required, but the evidence must provide a reliable basis for the projection. Expert evidence may assist the court in analysing the relevant material and estimating the loss, but it cannot substitute proof of the facts and assumptions on which the calculation depends. Nor does an expert opinion become conclusive merely because no competing expert evidence has been produced.

iii. Did the evidence relied upon by the Court of Appeal provide a sufficiently reliable factual foundation for the anticipated profit awarded in the present case?

[76] This issue calls for application of the principles set out above to the evidence in this appeal. The question is whether the evidence placed before the trial court provided

a sufficiently reliable factual basis for the specific award of Kshs.103,447,136 as loss of anticipated profits made by the majority of the Court of Appeal.

[77] The Financial Statement Report projected profits from the main contract and the maintenance component and PW2 explained the calculations and was cross examined on the projections. *Nyamweya, J.A* noted in the lead judgment at paragraphs 61–63 that the contract, Bills of Quantities and other documents supplied by the respondent had been used to prepare projections for the period 2011 to 2018. The learned Judge was therefore correct to hold that the claim could not be rejected merely because the projected expenses had no receipts. A future expense which was never incurred because the contract was not performed will ordinarily have no receipt.

[78] The difficulty, however, is that the admissibility of a projection and the reliability of the assumptions underlying it are different questions. As we have already observed, expert evidence does not prove itself. This Court stated in ***Odinga 2022***, that expert opinion is not binding on the Court and must be considered together with the other relevant facts and the evidence as a whole. Similarly, in ***MMG***, this Court reiterated that expert evidence does not relieve a court of its duty to form its own judgment. The question was therefore not simply whether PW2 was an expert or whether the appellant produced another expert, but whether the data and assumptions on which the expert opinion rested were sufficiently supported by the evidence.

[79] In this respect, several difficulties arise from the record. Firstly, there was a significant difference between the evidence of PW1, the respondent's Managing Director, and the figure ultimately adopted by the report. During cross-examination, PW1 stated that approximately Kshs.150 million would have been spent on equipment, Kshs.26 million on labour and Kshs.40 million on VAT, leaving a projected profit of approximately Kshs.26 million. The appellant specifically pointed out that this figure differed materially from the Kshs.103,447,136 claimed in the report. The same concern

was raised by *Gatembu, J.A* in his dissent. There was no clear reconciliation in the evidence explaining how the respondent's own Managing Director arrived at an anticipated profit of approximately Kshs.26 million while its expert arrived at a figure almost four times greater. That inconsistency went directly to the reliability of the factual foundation of the award.

[80] Secondly, the report itself contained important qualifications. PW2 acknowledged that the operating expenses used in calculating the anticipated profits were projections and were not supported by documents showing payment. By itself that would not be fatal because projected future expenses would not ordinarily have payment documents. More significant, however, was the report's express statement that the engagement was not undertaken as an audit or review in accordance with the applicable auditing standards and that the accountants did not express any audit assurance. The Report also stated that its observations were based on an assumption that the information supplied to the accountants was correct and accurate and that the accountants were not in a position to test or verify that information. While those qualifications did not make the report inadmissible, they made it particularly important for the court to examine whether the principal inputs supplied by the respondent had been independently established.

[81] Thirdly, there was a question whether the expenses used in the calculation related specifically to the contract in issue. *Gatembu, J.A* correctly observed that the projected operating expenses appeared to relate to the respondent's operations as a whole rather than only to the contract with the appellant. Without evidence of income and expenditure from the respondent's other business activities, it was difficult to determine what proportion of those expenses was properly attributable to this particular contract. The learned Judge further correctly observed that some of the figures, particularly those relating to 2011, concerned a period that had already passed and should therefore have been capable of support by actual business records. The difficulty was therefore the fact

that existing historical records which could have tested the reasonableness of the projections were not placed before the court.

[82] The above position is consistent with the majority's own statement at paragraph 57 of the impugned judgment. *Nyamweya, J. A* correctly observed in the lead judgment that flexibility in proving a hypothetical non-breach position does not give the claimant a 'free ride', and that the claimant must deploy the best evidence reasonably available. The learned Judge expressly recognised that strict proof continues to apply and that the flexibility relates only to the manner and methods of proof. In our considered view, evidence such as the respondent's historical accounts, actual operating expenses, previous profit margins, supplier quotations or other contemporaneous financial records would have been relevant not because future profits must be proved by receipts, but because such material could have tested the assumptions on which the projection was based.

[83] Fourthly, the maintenance component rested on an assumption that required a separate evidential foundation. PW2 stated in cross-examination that he calculated loss on the maintenance contract for five years because he considered that to be a reasonable length of the maintenance contract. Yet the contractual material provided for an annual maintenance cost of Kshs.15 million was after expiry of a two-year warranty. The evidence identified does not establish that the respondent was contractually guaranteed five years of maintenance work. While an expert may calculate the financial consequence of a five-year maintenance period, the expert cannot, merely by regarding that period as reasonable, turn it into a contractual entitlement. The duration used in calculating the profit had first to be supported by the contract or other evidence.

[84] The difficulty becomes more significant when clause 6.2 of the contract is taken into account. As already discussed, the clause permitted the appellant, *"at any time and for any reason",* to terminate the contract on one month's written notice, and provided

that upon such termination its liability would not include anticipated profits or consequential loss. Even if the respondent was entitled to claim anticipated profits because the appellant did not terminate the contract in accordance with that clause, the value of the expectation being compensated could not be assessed as though continued performance for the entire projected period was guaranteed. The five-year maintenance projection therefore required consideration not only of the evidence supporting that duration, but also of the contractual power by which the appellant could lawfully have brought the relationship to an end.

[85] We therefore agree with the majority of the Court of Appeal on one important point. The trial court was not entitled to reject anticipated profits simply because projected expenses lacked receipts. The majority was also correct that a court assessing profits from an unperformed contract must allow reasonable flexibility in the mode of proof. However, we respectfully differ from the majority on the application of that principle to the evidence. The problem with the respondent's case was not merely the absence of receipts for hypothetical expenditure. It was the absence of a sufficiently reliable evidential basis for several material assumptions that produced the final figure of Kshs.103,447,136.

[86] We would therefore answer the third sub-question in the negative. The material before the Court did not provide a sufficiently reliable factual foundation for the specific award of Kshs.103,447,136. The unreconciled difference between PW1's estimate and PW2's calculation, the inability of the accountants to verify important information supplied to them, the use of operating expenses that were not clearly shown to relate to this contract, the failure to produce available historical financial material, the unsupported five-year maintenance assumption and the effect of clause 6.2 of the contract, collectively prevented the claimed amount from meeting the required proof. The absence of a competing expert report from the appellant could not cure those

deficiencies. As a result, we think we have said enough to demonstrate the award of Kshs.103,447,136 for anticipated profits cannot be justified and must be set aside.

[87] Having reached that conclusion, we must nevertheless consider whether the failure to prove the sum of Kshs.103,447,136 necessarily defeats the claim for anticipated profits altogether. It does not follow as a matter of principle that a claim for anticipated profits is an all-or-nothing claim. Where a claimant has proved that a loss of profit was in fact suffered, but the evidence does not support the full amount claimed, a court may award a lesser amount if the evidence provides a rational basis for doing so. This follows from the distinction we have already drawn between proof of the fact of loss and assessment of its amount. Once the fact of loss has been established, difficulty in determining its precise amount does not prevent a court from making a reasonable assessment. That assessment must, however, remain grounded in the evidence. The court cannot select a figure merely because it considers that some loss must have occurred.

[88] In the present case, the record does not provide a sufficiently reliable basis upon which this Court could substitute a lower award for the sum granted by the Court of Appeal. In particular, PW1's estimate of approximately Kshs.26 million cannot simply be adopted as an alternative measure of anticipated profit. That figure was itself based on projected costs of equipment, labour and tax which were not sufficiently supported by the underlying evidence, and it was materially inconsistent with the calculation contained in PW2's report. Nor does the record disclose another reliable figure or range from which the Court could reasonably assess the net profit that would have been earned. This difficulty is compounded by the fact that performance had not commenced, the site had not been handed over, substantial costs of performance had therefore not been incurred, the duration of the maintenance component was not established, and clause 6.2 permitted the appellant lawfully to terminate the contract on one month's notice. In those circumstances, any reduced award of anticipated profits would itself

rest on speculation rather than an informed assessment of proved facts. The appropriate course is therefore to set aside the award of Kshs.103,447,136 without substituting another amount for anticipated profits.

E. COSTS

[89] Bearing in mind that this matter was certified as one of general public importance and the principles on the award of costs enunciated in ***Rai & 3 others Vs Rai & 4 others*** [2014] KESC 31 (KLR) we are constrained to order that parties should bear their own costs.

F. ORDERS

[90] In the premise, we issue the following orders:

i. ***The appeal dated 7th August, 2025 and filed on 12th August, 2025 is hereby allowed.***

ii. ***The Judgment of the Court of Appeal delivered on 12th April 2024 in Civil Appeal Nos. 49 and 59 of 2020 (Consolidated) is hereby set aside only to the extent of the award of Kshs.103,447,136 for loss of anticipated profits. For the avoidance of doubt, all the other orders of the Court of Appeal shall remain undisturbed.***

iii. ***Each party will bear their own costs of the appeal before this Court.***

iv. ***We hereby direct that the sum of Kshs. 6,000/- deposited as security for costs upon lodging of this appeal be refunded to the depositor.***

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **30th** day of **October**, 2026.

.....

M. K. KOOME

CHIEF JUSTICE & PRESIDENT

OF THE SUPREME COURT

.....	.....
S. C. WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
I. LENAOLA	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA