United Millers Limited v Aetoni (Civil Appeal 20 of 2020) [2022] KEHC 13279 (KLR) (28 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13279 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL 20 OF 2020

JN KAMAU, J

SEPTEMBER 28, 2022

BETWEEN

UNITED MILLERS LIMITED .... APPELLANT

AND

ANN ANYANGO AETONI .... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon P.K. Rugut (PM) delivered at Tamu in Principal Magistrate's Court Case No 82 of 2017 on 23rd April 2020)

JUDGMENT

1. In her decision of April 23, 2020, the Learned Trial Magistrate, Hon PK Rugut (PM), entered Judgment in favour of the Respondent as against the Appellant as follows:-

   a. General damages Kshs 2, 500,000.00

   b. Cost of future medication Kshs 1, 400,000.00

   c. Special damages Kshs 1, 485,000.00

   d. Less 25% Liability Kshs 1, 346,437.00

   e. Kshs 4, 039,311.75

   Plus costs and interest of the suit

2. Being aggrieved by the said decision, on December 22, 2020, the Appellant filed a Memorandum of Appeal dated May 19, 2020. It relied on seven(7) grounds of appeal.

3. Its Written Submissions were dated March 29, 2022 and filed on April 13, 2022 while those of the Respondent were dated April 18, 2022 and filed on April 20, 2022.

4. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123* where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

7. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the Appellant had only challenged the Trial Court's award on quantum as liability had by consent been agreed upon at 75%-25% in favour of the Respondent herein.

8. Although all the Grounds of Appeal were related and intertwined, this court nonetheless dealt with the said issues under the following distinct and separate heads.

I. General Damages

9. Grounds of Appeal Nos (1), (2), (3), (6) were dealt with under this head as they were related.

10. The Appellant averred that the Learned Trial Magistrate only considered one (1) case out of the nine (9) cases she had relied upon and that there was nothing to show why she disregarded them. In this regard, she placed reliance on the cases of *Denshire Muteti Wambua vs Kenya Power & Lighting Co Ltd [2013]eKLR*, *Ram Gopal Gupta vs Nairobi Tea Packers Limited & 2 Others [2017]eKLR* and *Joyce Olweya vs Pauline Akinyi Ojoo & Another [2021]eKLR* where the appellate courts interfered with awards due to failure by the trial courts to consider cited authorities and submissions to guide them in the proper assessment of damages.

11. It submitted that in its nine (9) authorities, courts had given awards of between Kshs 9,000,000/= to Kshs 2,000,000/= between 2018 to 2020 for similar injuries as those that the Respondent had sustained. It argued that it was trite law that similar cases attract similar awards and therefore by ignoring its submissions and the authorities cited therein, the Learned Trial Magistrate made an error of principle which entitled this court to interfere with the award.

12. It was its contention that the case *Sabina Nyakenya Mwanga vs Patrick Kigoro & Another[2017] eKL*R, that was relied upon by the Learned Trial Magistrate, was inappropriate as the plaintiff therein sustained four(4) fractures of the humerus, pelvis, knee and femur which were not similar to the femur and tibia-fibula fractures that were sustained by the Respondent herein and was awarded Kshs 3,000,000/= as general damages. It added that in the aforesaid case, the plaintiff suffered a permanent disability of 42% while in the instant case, no disability was assessed.

13. It submitted that the award for general damages of Kshs 2, 500,000/= by the Learned Trial Magistrate was thus inordinately high as it was reached at by following wrong principles and was influenced by a decision whose injuries were not similar to those of the Respondent and that an award of Kshs 1,500,000/= was suitable in the circumstances as shown by the case of *Patrick Kinyanjui Njama vs*

Evans Juma Mukweyi [2017]eKLR that was cited by the Respondent and evidenced in its nine (9) cited authorities.

14. On her part, the Respondent relied on Section 78(2) of the *Civil Procedure Act* as read with Order 42 Rule 32 of the *Civil Procedure Act*** and expressed her dissatisfaction with the decision of the Trial Court on quantum awarded for pain and suffering and loss of amenities, failure to award loss of earning capacity, quantum awarded for costs of future medication, quantum award for special damages and apportionment of special damages to liability.

15. She contended that seven (7) authorities submitted by the Appellant at the Trial Court did not contain injuries that were as severe as those that she had suffered. She added that the only authority that contained injuries close what she sustained was *James Katua Peter vs Simon Mutua Miasya [2008] eKLR* where the court therein awarded Kshs 2,000,000/= for general damages for pain and suffering.

16. It was her argument that since the authority was about fifteen (15) years old, the award could have arisen to the figure of Kshs 4,000,000/= due to the current cost of living and inflation, which she asserted could have been a fair assessment of compensation of the injuries that she sustained and not the Kshs 2,500,000/= that the Learned Trial Magistrate awarded her as had been demonstrated in the case of

    Patrick Kinyanjui Njama vs Evans Juma Mukweyi (Supra), *Christine Mwigina Akonya vs Samuel Kairu [2017] eKLR* and several other cases that she had relied upon.

17. It is well settled in law that an appellate court will not disturb an award of general damages unless the same is so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended the law, a principle that was dealt with in the case of *Margaret T Nyaga vs Victoria Wambua Kioko[2004] eKLR*.

18. It must be understood that money can never really compensate a person who has sustained any injuries. No amount of money can remove the pain that a person goes through no matter how small an injury may or may appear to be. It would in fact be difficult to say with certainty that a particular amount of money would be commensurate with the injuries that a person has sustained. It is merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who has suffered an injury.

19. However, this assessment is not without limits. A court must have presence of mind to ascertain to itself the sum of general damages that courts and especially appellate courts would ordinarily award in respect of a particular injury. A court must therefore be guided by precedents.

20. Indeed, in the case of *Kigaraari vs Aya(1982-88) 1 KAR 768*, it was stated as follows:-

    > ' Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees.'

21. Having said so, an award of damages is not meant to enrich the victim but to compensate such victim for the injuries he or she sustained. As correctly submitted by both parties, similar injuries should attract comparable awards. However, in the quest for consistency, courts must also recognise that no case is exactly the same as the other and therefore each case must be decided with its own peculiar circumstances but keeping in mind that any monies awarded must be sustainable.

22. According to the Plaint dated November 21, 2017 which was subsequently amended on December 11, 2017, the Respondent was said to have sustained fractures of the right tibia and fibula, left

acetabular, left tibia plateau, distal fibula bone, external fixation and debridement of left tibial plateau, debridement of left tibia, degloving of the left leg, deformed right ankle, dislocation of the left hip joint and right ankle joint, tenderness on the neck, chest, head, medial malleoli of the right lower limb and the right leg, injury the right small finger and on the left and right knee with cut wound.

23. According to the P3 Form dated September 7, 2016, the Respondent was said to have sustained tenderness and swelling of the head, neck, backache, chest, bruises on the shoulder, dislocation of the left hip, fracture of the left tibial bone, fracture of the left xxx (the handwriting in this part was not legible) and degloving of the left leg. The degree of the injuries was indicated as 'maim'

24. She was treated at Avenue Hospital where she was admitted on August 10, 2016 and discharged on September 15, 2016. On August 11, 2016, a Radiology Report showed that there was posterior dislocation. However, the X-ray that was taken on August 19, 2016 showed an old fracture left acetabula with fragment displacement but with normal hip joint.

25. Another Radiology Report of August 11, 2016 showed that the Respondent herein had an old fracture distal tibia and fibula with fragment displacement noted. The knee and ankle joint were, however, aligned.

26. She was examined by Dr Okombo who listed her injuries as having been injury to the left hip with fracture, injury on the right knee with cut wound, injury on the left leg with cut wound, injury on the right leg with fracture and injury on the left finger. On examination, he noted that there was a scar from the mid to ankle joint and on the right thigh mid region where grafting was taken. He classified the injuries as 'grevious harm.'

27. At the time of her medical examination, she had not fully recovered and was still complaining of pains on the left hip, left and right knee, both legs and right small finger which were as a result of the soft and bone tissue injuries. In his Medical Report dated 312017 (sic), he opined that the fractured bones would need attention by an orthopaedic surgeon and that she would need to continue with physiotherapy, analgesics and reconstructive surgery which treatment would cost a minimum of Kshs 3,500,000/=.

28. In his Medical Report dated March 23, 2017, Dr Tobias Otieno noted that the Respondent was admitted to Avenue Hospital with a fracture of the right tibia, fracture of the left acetabular, external fixation of the left tibia and debridement of the left tibia. When he examined her, he observed that she had left knee osteoarthritis and left hip osteoarthritis. He estimated permanent disability at forty (40%) per cent and opined that she would need total knee and left hip replacements at an approximate cost of Kshs 1,000,000/= for each procedure.

29. At the request of the Appellant herein, she was referred for second medical examination to Dr John Ouma Odondi. According to his Medical Report, he examined the Respondent herein on February 7, 2019. This was almost two (2) years five (5) months from the date of the accident. He observed that the Respondent suffered severe soft tissue and skeletal injuries which had left her with an unsightly scar on the left leg and arthritis of both left knee and hip. He opined that she would suffer pain for long periods which would ultimately lead to hip replacement costing approximately Kshs 700,000/= each.

30. It was evident from the aforesaid reports that apart from the soft tissue injuries that she sustained, the Respondent herein suffered fracture to the acetabulum, fracture to the right tibia and degloving of the left tibia. She also had old fractures to the hip and right tibia and fibula. It was not very clear to this court how much these old injuries impacted on the long term pain that she sustained. However, it was evident that as at August 11, 2016, the knee and ankle joint were aligned and she had normal hip joint.

31. As Dr Odondi who had been instructed to re-examine the Respondent at the instance of the Appellant herein had also opined about hip replacement, this court was persuaded that the long term effects on the Respondent were as a result of her the injuries that she sustained on 9th August 2016.

32. It is not mandatory that a trial court must analyse each and every case that has been submitted by a party. It will suffice if the trial court considers what is most comparable to the injuries a plaintiff has suffered with a view to coming up with an appropriate assessment to compensate such a plaintiff for the injuries he or she would have sustained. It must be noted that cases cannot contain exact injuries and they are merely for comparison purposes.

33. Remaining faithful to the doctrine of stare decisis, this court had due regard to the cases with comparable awards to come to a fair and reasonable assessment of the general damages that ought to be awarded herein.

    1. In the case of *Cold Car Hire Tours Limited vs Elizabeth Wambui Matheri [2015] eKLR* the Respondent suffered a comminuted fracture of the right acetabulum and a dislocation of the right hip joint resulting in total his replacement, and was awarded a sum of Kshs 1,400,000/= as general damages by the lower court which award was upheld by the High Court.

    2. In the case of *Kennedy Ouma Dachi vs Joseph Maina Kamau & Another [2018] eKLR* an award of Kshs 1,000,000/= was made by the lower court for a comminuted fracture acetabulum and was enhanced to Kshs 1,400,000/= on appeal.

    3. In the case of John Mutuga Kamau vs Kanini Haraka Enterprises Limited [2019] eKLR that the Respondent relied upon, the plaintiff therein has sustained a fracture of the acetabular, pelvis and femur. In 2019, the court therein awarded Kshs 2,400,000/= general damages.

    4. In the case of *James Katua Peter vs Simon Mutua Miasya [2008] eKLR*, the court awarded general damages in the sum of Kshs 2,000,000/= where the plaintiff herein had sustained fracture dislocation of the hip, compound fractures of the left tibia and fibula in 2008.

34. The cases of *South Sioux Farm Limited & Another vs Christine N Simiyu Wanzala & Another [2019] eKLR* and *Fred Ogada Azere & Another vs Ezekiel Kiarie Nganga [2019] eKLR* which were decided in 2019, though comparable with the Respondents injuries could not be the basis for the Appellant to argue that inflation could not have driven those awards the awards of Kshs 1,350,000/= and Kshs 1,200,000/= upwards by over Kshs 1,000,000/= for the reason that the Respondent had suffered more severe injuries with permanent incapacity being placed at forty (40%) per cent.

35. Accordingly, taking into account the serious injuries that the Respondent herein sustained vis- a- vis the damages in comparable cases and the inflationary trends this court came to the conclusion that a sum of Kshs 2,500,000/= general damages was not inordinately high in the circumstances. This court did not disturb the general damages that the Learned Trial Magistrate awarded under this head.

36. In the premises foregoing Grounds of Appeal Nos (1), (2), (3), (6) were dealt with under this head were not merited and the same be and are hereby dismissed.

II. Future Medical Expenses

37. Grounds of Appeal No (4) and (7) was dealt with under this head.

38. The Appellant submitted that although the Respondent pleaded that she would claim future medical expenses, that was not particularised in the Plaint. It argued that although the Learned Trial Magistrate

held that future medical expenses were pleaded in Paragraphs 9, 10 and 11 of the Amended Plaint, that was not sufficient pleading for special damages.

39. It was its case that special damages must be pleaded with much particularity as each case demands. It added that the Plaint was amended on December 11, 2017 by which time Dr Okombo had already estimated the future medical expenses at Kshs 3,500,000/=. It added that the fact that Dr Odondi's report showed that the Respondent would require future medication of replacements of joints at Kshs 700,000/= each did not cure the lack of pleading. It urged the court to set aside the award of Kshs 1,400,000/=.

40. It placed reliance on several case amongst them the cases of *Simon Taveta vs Mercy Mutitu Njeri [2014] eKLR*, *Mbaka Nguru & Another vs James S George Rakwar [1998] eKLR* and *Herbert Hahn vs Amrik Singh [1985] eKLR* where the common thread was that future medical expenses must be specifically pleaded and proved. It was emphatic that the Learned Trial Magistrate erred in making an award for future medical expenses while that special damage had not been pleaded and proved.

41. On her part, the Respondent pointed out that she pleaded for future medication at Paragraph 11 of her Amended Plaint dated November 21, 2017 as was required by the law and as had been argued by the Appellant herein. She asserted that the Appellant assumed that the word 'must be specifically pleaded' to mean that the figure to be incurred had to be specifically stated.

42. She relied on the case of *Tracom Limited & Another vs Hassan Mohamed Adan [2009] eKLR* where the Court of Appeal held that a claim for future medication could only be awarded if it was pleaded and thereafter proved during the trial process and that a party was not required to state the exact amount of costs of future medical expenses because the eventual costs could be determined by several factors that could not have been in existence at the time of filing the primary suit.

43. She argued that the fact that Dr Okombo and Dr Odondi, who was her doctor and for the Appellant respectively, were not able to agree on the exact cost of future medical expenses confirmed the Court of Appeal's assertion in the Tracom Limited & Another vs Hassan Mohamed Adan (Supra) that unlike claims for special damages which must be specifically pleaded, the claim for costs of future medication was not capable of being determined with precision and pleaded specifically beforehand like other typical special damages claims.

44. She was emphatic that she specifically prayed for the award for future medical expenses at Paragraph 15(c) of her Plaint. She further explained that both her doctor and the Appellant's doctor agreed that she had suffered a permanent incapacity on her acetabular, tibia and fibular regions and that she would require replacements of both the knee and the hip joints. She added that the only point of departure between the two (2) doctors was the approximate of these replacements, her doctor having stated that it would cost Kshs 3, 500,000/= while the Appellant's doctor having estimated the cost to be at Kshs 700,000/= a piece totalling Kshs 1, 400,000/=.

45. She asserted that the two (2) Medical Reports made it clear that both parties agreed that she was entitled to an award for costs of future medication and that the Trial Court opted to adopt the estimation by the Appellant's doctor and gave an award of Kshs 1,400,000/=. However, she argued that the Learned Trial Magistrate failed to explain why she ignored the estimation by Dr Okombo for an award of Kshs 3, 500,000/= when the said doctor's estimation had been tested and verified on cross-examination while the Appellant's doctor's estimation had not been tested on cross-examination.

46. She pointed out that the report by Dr Odondi did not address the issues of costs of ongoing physiotherapy session and the frequent quarterly visits for review by an orthopaedic surgeon. She added that this was significant because receipts of previous physiotherapy session and orthopaedic

sessions had been admitted into evidence and yet a consideration was not made for these future expenses by Dr Odondi.

47. She placed reliance on the cases of *Kenya Power & Lighting Company Limited vs AMK (Suing as the mother and next friend of JMK-Minor [2021] KECA 52 (KLR)* and *Kamuki & Another vs RKN (Minor suing through her late father and next friend ZKN [2020] eKLR* where the common thread was that it may not be practical for the parties to be able to fully ascertain the exact amount that would be required in future and that it therefore sufficed to give an estimate.

48. She further contended that the authorities quoted by the Appellant related to cases where the claim for future medication was not pleaded anywhere on the body of the plaint and that it relied extensively on the case of Kenya Bus Services Ltd vs Gituma [2004] EA 91 but failed to appreciate that the import and application of the aforesaid case as was discussed and interpreted in the recent case of Tracom Limited & Another vs Hassan Mohamed Adan (Supra).

49. She asserted that the Appellant may have filed its appeal based on misapprehension of the import of the court's decision in the Kenya Bus Services Ltd vs Gituma (Supra) and may not have been aware of the recent Court of Appeal decisions touching on the issue of costs of future medication and how the principle wass applied. She added that in the absence of an appeal to the Supreme court, the decision in the case of Kenya Bus Services Ltd vs Gituma (Supra) was the prevailing guidance on the issue that related to an award under this head. She argued that whereas the Trial Court arrived at the right decision in awarding a sum for costs of future medication, it erred in the quantum awarded.

50. A perusal of the Plaint dated November 21, 2017 did not have the claim for future medical expenses. The said claim was, however, contained in the Amended Plaint that was dated December 11, 2017. This pleading was sufficient to warn the Appellant that the Respondent would be leading evidence on the need for future medical expenses. As was held in the case of Tracom Limited & Another vs Hassan Mohamed Adan (Supra), it was clear that putting an exact amount for future medical expenses could lead to amendment of the plaint depending on the figures that each doctor gave. Once a plaintiff had led this evidence as was contemplated in the case of Kenya Bus Services Ltd vs Gituma (Supra), a trial court was left with the task of assessing the amount to be awarded based on the figures that had been placed before it as evidence.

51. It was clear from all the Medical Reports that were tendered in evidence that the Respondent would require future medical expenses. Dr Odondi opined that a sum of Kshs 1,400,000/= would suffice for both hip replacements. On his part, Dr Okombo stated that her treatment would be a minimum cost of Kshs 3,500,000/= while Dr Tobias Otieno contended that she would require a total knee and left hip replacements at an approximate cost of Kshs 1,000,000/= for each procedure.

52. In the mind of this court, the import of the Court of Appeal's holding was that what the Respondent was required to do was to plead future medical expenses and tender the evidence upon which the court would base its decision. This was a claim for money not yet spent. To demand a specific sum to be proved specifically like special damages would be unreasonable as the estimate amount for treatment was dependent on the recovery a plaintiff had made as at the time of examination for purposes of lodging a claim. A plaintiff then ought not to be denied the award because he or she did not have a specific figure in mind at the time of filing suit.

53. As the Respondent had not only pleaded for future medical expenses, she also adduced evidence of the same. In the absence of any evidence to the contrary, considering that both Dr Odondi and Dr Okombo had not indicated the cost for the total knee replacement having limited themselves to hip replacement, the sum of Kshs 1,400,000/= that was awarded by the Learned Trial Magistrate was fair in the circumstances of the case for both total knee and hip replacements.

54. In the premises foregoing Ground of Appeal Nos No (4) and (7) were not merited and the same be and are hereby dismissed.

III. Loss Of Earning Capacity

55. This court noted the Respondent's submissions on the claim for loss of earning capacity. However, there was nothing to show that she had pleaded the same in her Amended Plaint dated December 11, 2017. Indeed, all parties must be aware of what their opposing party's case to avoid ambush. This court found that it would be irregular if it considered this issue in its decision herein as she did not also cross-appeal to enable this court consider the same.

IV. Special Damages

56. Ground of Appeal No (5) was dealt with under this head.

57. The Appellant submitted that the special damages were not pleaded and proved necessitating the award to be set aside.

58. On her part, the Respondent placed reliance on the case of *Capital Fish Kenya Limited vs The Kenya Power and Lighting Company Limited [2016]eKLR* where the Court of Appeal reiterated that it was a legal requirement that apart from pleading special damages, they must also be strictly proved with as much particularity as circumstances permit. She added that that meant that a party was required to produce actual receipts in order to meet the test of specifically proving special damages that had been pleaded in his or her pleadings.

59. She argued that she pleaded for special damages in her Plaint dated November 11, 2017 and the details of the special damages were specifically particularised in Paragraph 12 of the Amended Plaint as amounting to a total of Kshs 1,598,649/=. In this regard, she relied on the case of *Finmax Community Based Group & 3 Others vs Kericho Technical Institute [2021]eKLR* where the court held that once a party had pleaded the quantum of loss in his Plaint, then that loss amounted to a claim of special damages and that the next step would be for such a party to prove such loss by way of production of receipts.

60. She contended that she produced receipts totalling to Kshs 1,619,444/= in support of her claim for award for special damages. She added that although she only pleaded for Kshs 1,598,649/=, the Learned Trial Magistrate awarded her Kshs 1,485,000/= only and failed to give a reason why she did not awarded the sum of Kshs 134,444/=.

61. She further argued that it was trite law that special damages should not be subjected to contribution as was affirmed in the case of *Pitalis Opiyo Ager vs Daniel Otieno Owino & Another [2020] eKLR*. She also placed reliance on several cases among them, *Swalleh C Kariuki & Another vs Viloet Owiso Okuyu [2021] eKLR*, *Hashim Mohammed Said & Another vs Lawrence Kibor Tuwei [2018] eKLR* and *AO Bayusuf & Sons Limited vs Samuel Njoroge Kamau [2008] eKLR* where the common thread was that special damages ought not be subjected to apportionment of liability.

62. She pointed out that the Learned Trial Magistrate erred when she subjected the awarded special damages to twenty five (25%) per cent contribution liability. She submitted that on appeal, this court had the power on appeal to vary or correct a decision under Order 42 Rule 32 of the Civil Procedure Rules as was held by Onguto J in the case of *Eric Kyalo Mutua vs Wiper Democratic Movement, Kenya & Another [2017] eKLR*.

63. A reading of the Judgment showed that the Learned Trial Magistrate indicated that the Respondent had under assessed her special damages while the computation done by the Appellant omitted Kshs 900/=. The Respondent had claimed a sum of Kshs 1,598,649/= in Paragraph 12 of the Amended Plaint dated December 11, 2017. It was not therefore clear why he or she proceeded to award a lower amount without indicating her reasons. Only special damages that were specifically pleaded and proven could be awarded. As this court sits like an original court, it calculated the receipts that had been tendered by the Respondent and found that the same amounted to Kshs 1,359,951.78.

64. This court ascribed to the school thought that special damages must be subjected to contribution for the reason that the party who would have suffered a loss had would have contributed to the causation of the accident in which he or she sustained the injury. The same principle would apply even where a party had not necessarily contributed to the causation of the incident but has conceded some form of contribution during negotiations with a view to amicably resolving the issue of liability. Once liability was apportioned at 75%- 25%, the Learned Trial Magistrate acted correctly when she subjected all the sums due to the Respondent to contribution.

65. This court thus came to the firm conclusion that neither the Appellant nor the Respondent persuaded this court that the Learned Trial Magistrate ought not to have awarded the Respondent special damages or that she ought not to have subjected the same to contribution. Going further, this court calculated the figures in the receipts and found that the same amounted to over Kshs 1,900,000/=. However, the Respondent had only claimed Kshs 1,598,649/= in her plaint. She could not therefore be awarded more than she pleaded. As she did not cross appeal, this court was not persuaded that it should interfere with the finding of the Learned Trial Magistrate.

66. In the premises foregoing, this court found and held that Ground of Appeal No (5) was not merited and the same be and is hereby dismissed

Disposition

67. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal lodged on December 22, 2020 was not merited and the same be and is hereby dismissed. The Appellant will bear the Respondent's cost of this Appeal.

68. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF SEPTEMBER 2022

J. KAMAU

JUDGE