REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 108 OF 2018

CATHERINE MBITHE NGINA.....APPELLANT

VERSUS

SILKER AGENCIES LIMITED.....RESPONDENT

(Being an appeal from the judgement delivered on 26th July 2018 by Honourable E. W Wambugu R.M in Kithimani in PMCC Number 258 of 2016)

BETWEEN

CATHERINE MBITHE NGINA.....PLAINTIFF

VERSUS

SILKER AGENCIES LIMITED.....DEFENDANT

JUDGEMENT

1. This appeal was provoked by the decision of the Learned Trial Magistrate, **Honourable E. W Wambugu R.M** in Kithimani in PMCC Number 258 of 2016 on 26th July 2018 by which she dismissed the Appellant's suit.

2. The genesis of the suit before the trial court was a road traffic accident that occurred on 2.01.2016 involving motor vehicle registration number KCA 561 T Isuzu Minibus along Machakos-Kithimani road that was being driven by the Respondent's servant or agent. It was the Appellant's case that the Respondent's agent managed, controlled and/ or negligently drove the said motor vehicle that he permitted the same to cross the bumps while on high speed as a result of which the Plaintiff sustained serious bodily injuries which particularized as pain and tenderness on the occipital area, pain and tenderness on the mid back, pain and tenderness on the left elbow joint, pain and tenderness on the right knee and pain and tenderness on the left big toe. She prayed for special damages in the sum of Kshs. 5,500.00, general damages, costs of the suit and interest thereon.

3. On its part, the Respondent filed a defence which was later amended, in which it denied ownership of the said motor vehicle, the occurrence of the accident, the fact of negligence on its part as particularised by the Appellant and instead pleaded that the same was caused by the sole and/or contributory negligence of the Appellant whose particulars it itemised. It also denied the particulars of injuries and damages and pleaded that the suit was fraudulent and based on misrepresentations whose particulars it particularised. It therefore urged the court to dismiss the suit with costs.

4. At the trial, the Appellant called two witnesses being the plaintiff and a police officer while the Respondent called one witness who alleged to have been an employee at Matuu Hospital.

5. PW1, **Corporal Stephen Kuria**, who was a police officer from Matuu Traffic base testified that it was a self-involving accident that was carrying 33 passengers that occurred at the Ndingi Mwana Nzeki area at 10pm on 2nd January, 2016 by motor vehicle registration number KCA 561T that was being driven by **Anthony Irungu Muruguri**. He stated that the driver did not observe a road traffic sign and suddenly ran over a road bump leading to a number of passengers sustaining injuries including the Appellant. It was his evidence that the driver was charged with careless driving on 20th April, 2016 and exhibited the police abstract. In cross examination, he stated that the Appellant did not record a statement while all other witnesses recorded a statement which in his view is mandatory. He also testified to the effect that he could not tell if all the passengers were at the scene when the investigating officer visited the scene. He further stated that the investigating officer

had a duty to visit the hospital where the victims are rushed in order to take their names and the injuries sustained, in this case Matuu Level 4 hospital. He also stated that the investigating officer did not indicate which road sign was on the road. In re- examination, he stated that the Appellant was serial number 7 in the initial report and that the fact that she did not record a statement does not mean she was not a victim.

6. The Appellant who testified as PW2 adopted her witness statement in which she stated that she was a passenger in motor vehicle registration number KCA 561 T which was being driven from Machakos to Matuu town. According to her, the said vehicle was driven in a high speed, dangerously and negligently and crossed the bump at high speed. As a result, she sustained injuries and together with other passenger was rescued and taken to Matuu level 4 hospital for treatment. It was her evidence upon being discharged, she recorded a statement and issued with a P3 form. She also produced a copy of her identity card, treatment note from Matuu Level 4 hospital dated 3rd January, 2016, P3 form dated 15th July, 2016, medical report by **Dr. Muli Simeon Kioko** dated 15th July, 2016, receipt dated 15th July, 2016, a copy of motor vehicle records dated 30th March, 2016, receipt dated 30th March, 2016, demand letter dated 12th July, 2016 and statutory notice dated 6th July, 2016.

7. In cross examination she stated that the accident occurred around 10pm and the road had no lighting. She stated that the driver was driving at a high speed and despite having fastened her safety belt, she hit her chest on the front seat. It was her testimony that she was treated and discharged the same day.

8. The Respondent called as DW1, **Mr. James Nzuki Kilunda,** the in charge of the health department records at Matuu Level 4 hospital as its only witness. It was his testimony that the patient number and the date of treatment were contradictory even though he could recognise the handwriting on the treatment note. According to him, the treatment note was not taken to him for authentication and from his records, patient number 118 of 2016 on 4th January, 2016 was **Elizabeth Wambui**. In support of his evidence, he relied on a revocation letter for the Appellant. Though he admitted that he recognised the handwriting on the treatment note, he took issue with the outpatient number and the date of treatment which in his view were contradictory since the number belonged to another patient and the Appellant did not appear in their records for 3rd and 4th January, 2016. However, patient number 118 of 2016 who appeared on 4th January, 2016 was **Elizabeth Wambui**.

9. In cross examination he stated that he does not treat patients but he enters inpatient and outpatient records in the hospital system together with three of his colleagues. He admitted that the treatment card had a stamp from the hospital and that the handwriting was that of **Dr. Benjamin Maingi** who was in charge of the clinical department and that in cases of accidents, they pick details from casualty and enter them later. He clarified that the revocation later did not deny that the Appellant was treated at the hospital but only that the patient number belonged to **Elizabeth**. He however, did not have records for 2nd January, 2016 with him.

10. In re-examination, he reiterated that the outpatient number appears in the hospital records for 4th and that the Appellant does not appear in their records of that day.

11. In her judgement, the Learned Trial Magistrate while dismissing the case found that there were contradictions in the evidence in support of the Appellant's Case which she pointed out as failure by the Appellant to clarify if the investigating officer found the victims at the scene; failure by PW1 to produce the occurrence book in order to verify if the Appellant was a victim; the fact that PW1 did not find the Appellant's statement; the fact that the Appellant's treatment note was revoked by DW1; the fact that the Appellant's name does not appear in the hospital record on 3rd January, 2016; and the fact that the outpatient number in the Appellant's treatment note belonged to another patient.

12. Notwithstanding the dismissal of the suit, the Learned Trial Magistrate properly directed herself in law by assessing the award she would have arrived at had she found in favour of the Appellant in the sum of Kshs. 200,000 general damages and special damages at Kshs 5,500.00.

13. In this appeal the appellant relies on the following grounds:

a. The learned trial magistrate erred in fact and in law in dismissing the suit in its entirety.

b. The learned trial magistrate erred in fact and in law in ignoring the evidence and the testimony of Plaintiff and her witnesses on the occurrence of the accident.

c. The learned trial magistrate erred in fact and in law in heavily relying on the evidence of DW1 who did not produce sufficient evidence to rebut the Plaintiff's case.

d. The learned trial magistrate erred in fact and in law by finding that the Plaintiff's suit was fraudulent and full of misrepresentation without any cogent evidence being adduced to that effect.

e. The learned trial magistrate erred in fact and in law by allowing an application to re-open the defence case when it was not proper and/or reasonable to do so.

f. The learned trial magistrate erred in fact and in law in disregarding the test of proof in civil cases to that of a balance of probabilities and substituting it to that of beyond reasonable doubt thus occasioning a miscarriage of justice.

g. The learned trial magistrate erred in fact and in law in that he disregarded the Plaintiff's submissions and judicial authorities both on liability and quantum of damages thus making an award was inordinately low and not commensurate with the injuries sustained by the Plaintiff with the resultant miscarriage of justice to the Plaintiff.

h. The learned trial magistrate erred in fact and in law in failing to appreciate that the Plaintiff had proved all the particulars of negligence as pleaded and the whole case in its entirety on a balance of probabilities.

14. She prayed that the appeal be allowed, the entire judgement be set aside and the court be pleased to assess afresh the issue of liability and quantum. She also prayed for the costs both before the trial court and of this appeal.

15. In this appeal it is submitted on behalf of the Appellant that the decision of the learned magistrate was based on wrong principles and was a misapprehension of the evidence. She submitted that it was not disputed that she was a passenger on board motor vehicle registration number KCA 561T on 2nd January, 2016 and she was victim number 7. She submitted that PW1 came to court with the police file and the evidence in the police file confirmed that the abstract emanated from Matuu police station. Further, that she would not have been issued with a police abstract if the treatment notes, P3 form and identity card did not identify her as a victim in the accident and that if her statement was not in the record, then the police officers should be blamed. On the issue of the occurrence book, the Appellant submitted that the police file was in court and contained all the information with regards to the accident which was corroborated by her testimony. In the Appellant's view, since the accident occurred at 1100hours, was is possible that the Appellant left the hospital on 3rd January, 2016 and since she was not in charge of keeping hospital records, if there is an error, then the hospital should give an explanation. She added that the hospital ought to have produced the register that showed that the patient number belonged to **Elizabeth Wangui** and that since DW1 recognized the handwriting of a **Dr. Maingi** who is the same one who filled the P3 form then it confirms that she was treated at Matuu level 4 hospital.

16. The Appellant took issue with the Magistrate's court for allowing the application of the Respondent to re-open their case to her prejudice.

17. It was her submissions that since it is not clear what time the investigating officer arrived at the scene, it cannot be concluded that she was not a victim of the said accident. Lastly, she submitted that the allegations of fraud and misrepresentation were not proven apart from the production of the revocation letter .The Appellant relied on the following cases to support her submissions; **Eunice Wayua Munyao –vs- Mutilu Beatrice & 3 others (2017) eKLR, Stapley vs. Gypsum Mines Limited 2 (1953) AC 663 at page 681, Joseph Mutua Nthia vs Fredrick Moses M. Katuva (2019) eKLR, Patrick Kinoti Miguna vs. Peter Mburunga G. Muthamia (2014) eKLR** and **Dr. Adolf Muyoti & Another vs. Thomas Micha Sawe, High Court Civil Appeal No 101 of 2005.**

18. On behalf of the Respondent, it was submitted that the ingredients of legal duty of care, breach of the duty and causation in a suit for negligence to succeed were not proven, that the documentation presented in court was fraudulent and thus the claim was fraudulent. It was contended that the Appellant relied on OP 188/16 which did not appear in the register for 4th January, 2018 and that she had not provided any evidence to counter the particulars of misrepresentation raised by it. Further that the treatment notes produced did not appear in the register for 3rd of January 2018. It further submitted that the Appellant was hell bent on insisting that she suffered injuries from the accident but had not proven the same on a balance of probability. On quantum, the Appellant submitted that Kshs. 90.000 would be sufficient in the circumstances. The Respondent relied on the following cases to support its submissions; **Farida Kimotho vs. Ernest Maina (2002) eKLR, George Mugo and another vs. AKM (Minor suing through next friend and mother of A MK (2018) eKLR** and **Ndungu Dennis vs. Ann Wangari Ndirangu & Another (2018) eKLR.**

Determinations

19. I have considered the submissions made on behalf of the parties herein.

20. From the, it is clear that three issues fall for determination. Firstly, whether it was in order for the trial court to reopen the defence case; secondly, whether the Appellant was involved in the accident in question; thirdly, whether the Appellant sought treatment in the manner she alleged; fourthly, whether the documents she relied upon amounted to fraudulent misrepresentation; and whether there was an error in the assessment of damages.

21. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

22. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties. It was therefore held by the then East African Court of Appeal in **Ramjibhai vs. Rattan Singh S/O Nagina Singh [1953] 1 EACA 71** that:

> **"This Court will not disturb a finding of a trial Judge merely because of an irregularity in the format of the judgement if it thinks that the evidence on the record supports the decision."**

23. However, in **Peters vs. Sunday Post Limited [1958] EA 424,** it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity**

and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

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

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

25. On the first issue, the power to re-open a trial as was the case herein is clearly a discretionary power which is to be based on the facts and justice of the case. In this appeal, the Appellant has not satisfied the court that in exercising her discretion to reopen the case, the Learned Trial Magistrate committed an error. Without such evidence, there is no basis upon which this court can justifiably interfere with the Learned Trial Magistrate's undoubted exercise of discretion.

26. The second issue is whether the Appellant was involved in the accident. The only evidence on record on that issue came from the Appellant. The Appellant relied on the police abstract report produced without any objection by the Respondent which clearly showed that it was reported to the police that the Appellant was involved in the said accident. I must point out however, that the contents of the police abstract as extracted from the records held by the police is merely evidence that a report of an accident was made. It is *prima facie* evidence of the occurrence of the accident and the particulars of those involved. It can however be rebutted. It was therefore held in **Peter Kanithi Kimunya vs. Aden Guyo Haro [2014] eKLR**:

"A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was 'reported' at a particular police station."

27. Similarly, the fact that an accident is not reported does not necessarily mean that no such accident occurred. Proof of negligence, being on a balance of probabilities, does not solely depend on the evidence of the investigating officer or report of the accident to the police though such report may corroborate the other available evidence. Negligence, however, can be proved notwithstanding the fact that the accident in question was never reported to the police since there is no nexus between a report of an accident to the police with proof of negligence. While such report and the steps taken thereafter may be proof of the occurrence of the accident in question, where there is independent evidence proving that an accident took place and that it was caused by the negligence of the defendant, the failure to call the investigating officer is not necessarily fatal in accident claims.

28. In this case there was evidence of PW2, an eye witness to the accident who narrated how the accident took place. No other evidence was adduced to disprove her sworn evidence that she was in the said vehicle. The mere fact that her statement did not appear in the police records cannot be evidence that she was in fact not in the said vehicle. Since it was the Respondent who was alleging that she was not in the vehicle, notwithstanding the documentary evidence adduced, the burden shifted onto the Respondent to prove this fact by way of passenger manifest or any other evidence. Sections 109 and 112 of the ***Evidence Act***, Cap 80 Laws of Kenya, provide as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

29. These provisions were discussed the Court of Appeal in **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, in which it was held that:

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

30. The standard of proof in cases such as this was restated by the Court of Appeal in the case of **Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR** while citing **Miller –vs- Minister of Pensions [1947] 2 All ER 372** where held that:

> **"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not. This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties…are equally (un) convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained."**

31. In this case the evidential burden having shifted to the Respondent to prove that notwithstanding both oral and documentary evidence, the Appellant was not involved in the said accident, in the absence of any evidence to the contrary, there was no basis in finding otherwise. I therefore find that based on the evidence on record, it was an error on the part of the Learned Trial Magistrate to have found that the Appellant was not involved in the accident. This ground must succeed.

32. The next issues are whether the Appellant sought treatment in the manner she alleged and whether the documents she relied upon amounted to fraudulent misrepresentation. In arriving at the decision that the treatment documents relied upon were as a result of fraud and/or misrepresentation, the trial court relied on the evidence of DW1. However, DW1 admitted that the entries of the treatment notes were made by **Dr. Benjamin Maingi** who was in charge of the clinical department. Apart from that there were other members of staff who were tasked with record keeping apart from DW1. In **Urmilla W/O Mahendra Shah vs. Barclays Bank International Ltd and Another [1979] KLR 76; [1976-80] 1 KLR 1168**, it was held by the Court of Appeal that:

> **"Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. A higher standard of proof is required to establish such findings, proportionate to the gravity of the offence concerned."**

33. In this case, it is clear that DW1's evidence was simply that from the records in his possession, the number in question belonged to one **Elizabeth** and not the Appellant herein. The doctor who examined the Appellant was not called to rebut the evidence of the Appellant that she was treated at the facility. The Appellant clearly had no control over the record keeping by the facility. In light of clear evidence that the person who made entries on the treatment documents was a medical officer therein the discrepancy in the numbering, in my view, cannot be evidence of fraud or misrepresentation. In the premises, I am not satisfied that, based on the evidence adduced, there was a basis upon which fraud or misrepresentation could be sustained. That ground of appeal similarly, succeeds.

34. As regards quantum of damages, the Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> **"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."**

35. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

> **"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect… A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country."**

36. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in **Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730** where it was held that:

> **"It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated… The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment…It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or**

other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award…it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

37. In this case the Learned Trial Magistrate's opinion was that the Respondent would have been entitled to an award of Kshs 200,000.00 in general damages and Kshs 5,500.00 special damages. In my view, the amount proposed by the trial court, even if more or less than what this court could had awarded had it been the trial court, does not necessarily justify interference unless it is shown that the trial court applied the wrong principles, (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate. I am no so satisfied.

38. In the premises this appeal succeeds, the judgement of the trial court dismissing the Appellant's case is hereby set aside and is substituted therefor judgement for the Appellant against the Respondent in the sum of Kshs 200,000.00 general damages and Kshs 5,500.00 special damages. The said sums shall accrue interest at court rates from the dates of judgement of the trial court and date of filing respectively. The costs, both of this appeal and before the trial court are awarded to the Appellant.

39. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 15TH DAY OF APRIL, 2021.

G.V. ODUNGA

JUDGE

Delivered in the presence of:

Miss Kabuteh for Mr Kariuki for the Respondent

CA Geoffrey