REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 199 OF 2016

STEPHEN NJOROGE THUO.....APPELLANT

VERSUS

HELLEN MUIHU MAINA.....RESPONDENT

JUDGMENT

1. By a Plaint dated 28/06/2001, the Respondent herein sued the Appellant claiming compensation for injuries she says she sustained when a vehicle allegedly owned by the Appellant in which she was a lawful passenger was negligently driven and was involved in a Road Traffic Accident in which she sustained personal injuries. The Appellant filed a Defence denying any liability for the accident. In particular, the Appellant denied that the Respondent sustained any injuries during the accident.

2. The suit was filed at Muranga Senior Principal Magistrate's Court before it was transferred to Thika Chief Magistrate's Court. The Learned Martha Mutuku heard and concluded the trial and entered judgment on 04/08/2014.

3. The Learned Trial Magistrate found that the Respondent had proved her case on a balance of probabilities and awarded her compensation of Kshs. 550,000/= as general damages and Kshs. 1,600/= as special damages.

4. The Appellant is aggrieved by that decision and has appealed to this Court. Through his advocate, he filed a Memorandum of Appeal which listed nine grounds of appeal. They are as under:

i. The Learned Magistrate erred in Law and in fact by entering judgment for the plaintiff against the Defendant on 100% liability when the evidence adduced by the Plaintiff in Court did not support such a finding.

ii. The Learned Magistrate erred in Law and in fact by failing to take into account that the driver who allegedly drove the accident motor vehicle Reg No. KAG 172X was not made a party to the suit and accordingly no liability would attach to the Defendant vicariously without making the driver a co-Defendant.

iii. The Learned Magistrate erred in Law and in fact by failing to thoroughly, properly and correctly evaluate the evidence given by the Plaintiff and its witnesses and which evidence was not credible but very much contradictory.

iv. The Learned Magistrate erred in Law and in fact by failing to appreciate that the Plaintiff's name visa viz the Plaintiff's name as indicated in Plaintiff's exhibit Number 6 were contradictory as the name in receipt No. 25 dated 16th January 2000 the plaintiff name read Hellen Moigo, Receipt No. 355 dated 17th May, 2000 the Plaintiff's name read as Hellen Muhiu Maina, Receipt No. 2530 dated 21st January , 2000 the Plaintiff's name read as Hellen Muigu Njoroge and in receipt No. 19 dated 4th September, 2000 the Plaintiff's name read as Hellen Muhiu Mwangi.

v. The Learned Magistrate erred in Law and in fact by not taking into account the Defendant's evidence and that of Defendant's witness which was very weighty.

vi. The Learned Magistrate erred in Law and in fact by not appreciating that the totality of all the evidence adduced in Court was not in favour of the Plaintiff's case but in favour of the Defendant and the learned Magistrate ought to have dismissed the Plaintiff's case with costs to the Defendant.

vii. The Learned Magistrate erred in Law and in fact by considering the Defendant's evidence as unsworn evidence while the Defendant and its witness gave sworn evidence in Court.

viii. The Learned Magistrate erred in Law and in fact by failing to take into account the Defendant's written submission on liability.

ix. The Learned Magistrate erred in Law and in fact by not complying with Order 21 Rule 1 of the Civil Procedure Rules relating to delivery of the judgment outside sixty tow(62) days from the conclusion of the trial

5. In his advocate's written submissions, the Appellant clustered the grounds into three: Ground 9; Grounds 1, 5, 6, 7 and 8; and Grounds 2, 3 and 4.

6. The Respondent has opposed the Appeal and urges the Court to dismiss it. In essence, the Respondent argues that no basis has been established to warrant this Court to interfere with the judgment of the Trial Court. The Respondent's advocates also filed written submissions opposing the appeal.

7. I have read and considered the respective arguments in those submissions.

8. As a first appellate court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123***in the following terms:

> *I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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 this 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 (**Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**).*

9. This same position had been taken by the Court of Appeal for East Africa in ***Peters –vs- Sunday Post Limited [1958] EA 424*** where Sir Kenneth O'Connor stated as follows:-

> *It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt – vs- Thomas (1), [1947] A.C. 484.*
>
> *"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, 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 is really 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 the trial and especially if that conclusion has been 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 circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."*

10. The appropriate standard of review established in these cases can be stated in three complementary principles:

a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

11. These three principles are well settled and are derived from various binding and persuasive authorities including ***Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000***: Tunoi, Bosire and Owuor JJA); ***Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another*** (Civil Appeal No. 345 of 2000: O'Kubasu, Githinji and Waki JJA); ***Virani T/A Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd*** (Kisumu High Court CC No. 88 of 2002).

12. With the above principles in mind, I will now proceed to deal with the appeal.

13. The Respondent's case was founded on the alleged negligence of the Appellant. As such, she was by law required to establish on a balance of probabilities that:

a. The Respondents owed her a duty of care;

b. The Respondents breached that duty, and;

c. She suffered injury as a result of that breach.

14. The Respondent's case, as it emerged at the trial was that she boarded Motor Vehicle Reg. No. KAG 172X on 15/01/2000 on her way to Nairobi. She says she boarded the Motor Vehicle at a place called Gatheri along the Kiriaini-Murang'a Road. According to her pleadings testimony, when the Motor Vehicle got to Ruiru, it was involved in a self-involving road traffic accident. As a result, the Respondent got injuries. The Respondent testified that she suffered a fracture on the left leg and got bruises on both legs. The Respondent testified that she was taken to hospital by a Good Samaritan where she was admitted for four days at Ruiru Hospital. Later on, she was seen at Murang'a Hospital. She produced receipts showing payments to the Ruiru Hospital and a hand-written hospital card from Murang'a Hospital.

15. The Respondent alleged that the injuries were caused by the negligence of the driver of the Motor Vehicle who was an employee or agent of the Appellant. As such, she argued that the Appellant was vicariously liable.

16. The Respondent called a Policeman, PC Macdonald Ngorome who produced the Police Abstract. He, however, admitted that he was not the Investigation Officer in the case and neither was he at the station at the time the accident was reported. His task was ministerial: to produce the Police Abstract as it was recorded. He had no individual knowledge of what was recorded therein.

17. The Respondent also called Patrick Mwangi, a Clinical Officer. Mr. Mwangi testified that he examined the Respondent on 02/02/02 and prepared a medical report which was produced in Court as Exhibit 5. According to Mr. Mwangi, the Respondent had sustained multiple fractures on her right lower limb and a compound fracture on the knee. She also has a simple fracture on the upper third tibia. Additionally, Mr. Mwangi testified that the Respondent had suffered soft tissue injuries on her chest and left lower limb below the knee. Mr. Mwangi's opinion was that the injuries were "serious" and that the Respondent may suffer degeneration of the bone in the future.

18. Mr. Mwangi said that he relied on the P3 form which was supplied to him by the Respondent as well as a discharge summary from Ruiru Hospital. He also relied on the card from Murang'a hospital.

19. The doctor who wrote the discharge summary was never called as a witness and the Plaintiff closed her case before the discharge summary was produced as evidence.

20. On the Appellant's side, two witnesses were called. Julius Kiragu Muthui who was the driver of the Motor Vehicle when it was involved in an accident, testified as DW1. His testimony was that on 15/01/2000, he drove the Motor Vehicle from Othaya on the way to Nairobi using the Mukurwe-ini-Karatina-Sagana-Kenol-Thika Road. When Muthui got to Kihunguro in Ruiru, another PSV Motor Vehicle which was picking up passengers at the stage suddenly joined the road. To avoid hitting the other motor vehicle from behind, Muthui testified that he swerved from the extreme left lane where he was driving to the extreme right. In the process, however, he lost control of the Motor Vehicle and it hit a tree next to the road.

21. It was Muthui's testimony that only passengers at the front out of the 18 passengers in the vehicle got injured. He was positive that the Respondent was not a passenger in the vehicle and was never injured in the accident. He testified that all passengers were usually given receipts and the Respondent had not produced hers.

22. Regarding the accident, Muthui testified that he was driving at a moderate speed of 75-78 Kilometres per hour when the accident occurred. He was adamant that he was not careless or negligent in driving the Motor Vehicle and offered as demonstration of that the fact that there were Policemen at the stage who witnessed the accident but they did not elect to charge Mr. Muthui with any traffic offence.

23. The Appellant testified as DW2. He testified that he was driving another PSV vehicle he owns on the same day. He had left Othaya for Nairobi in the other vehicle less than half an hour apart. He testified that he caught up with the Motor Vehicle driven by Mr. Muthui at Karatina where he was balancing tyres pressure. The two vehicles then followed each other all the way to Sagana Bridge where the Appellant stopped his vehicle for some passengers to go to the bathroom. Mr. Muthui and his passengers proceeded towards Nairobi. Shortly thereafter, the Appellant found them at the accident scene in Ruiru.

24. It was the Appellant's testimony that all passengers in his vehicles are given receipts and it was curious that the Respondent did not have one. Further, he was categorical that both his vehicles (the one he was driving and the one Mr. Muthui was driving) used the Mukurwe-ini-Karatina-Sagana-Kenol-Thika Road and not the Kiria-ini-Muranga-Thika Road. Hence, the Appellant is certain that the Respondent could not have been a passenger in the Motor Vehicle since she claims to have boarded the Motor Vehicle in Gatheri on the Kiria-ini-Muranga-Thika Road.

25. In brief, this was the evidence presented to the Court.

26. In a judgment delivered on 04/08/2014, the Learned Trial Magistrate summarized the Plaintiff's case and then penned thus:

I have considered submissions of the both parties.

In her submissions before (sic) the plaintiff has this court to award him (sic) general damages of Kshs. 550,000 as a mode of compensation for injuries suffered. She has relied on 3 decisions….I have considered the said submissions and also the injuries that the Plaintiff suffered and sustained as a result. In my considered view the authorities quoted are relevant to this case in sutar (sic) as the Plaintiff suffered the injuries as result (sic) of the accident which were of a more serious nature. In the circumstances of this

case, doing the best that I can I award the Plaintiff the sum of Kshs. 550,000/= as general damages for pain and suffering.

On special damages, I hope that the Plaintiff shall be paid sum of Kshs. 1,600/= as pleaded in her plaint as fees of Police Abstract and the medical report. The upshot of the above is that judgment is entered against the defendant as hereunder:

a) Liability: The Defendant is found to be 100% liable.

b) On quantum:

a. General damages – Kshs. 550,000/=

b. Special damages – Kshs 1,600/=

c. *The Plaintiff shall have costs and interests of the suit.*

27. The Appellant complains bitterly that the Learned Trial Magistrate set out to write a judgment in favour of the Respondent regardless of the evidence. He points this out from the fact that the Learned Trial Magistrate does not anywhere in her judgment analyse or weigh the evidence of the Appellant. From a perusal of the judgment, the Appellant is right. The judgment only presents the Plaintiff's evidence and then indicates that the Learned Magistrate "considered" submissions of both sides before only citing the submissions of the Plaintiff and relying on them to assess quantum.

28. The only time the Learned Trial Magistrate refers to the evidence presented by the Appellant is a very curious paragraph towards the beginning of the judgment where the Learned Trial Magistrate writes thus:

The Plaintiff suffered both special and general damages of which special damages amounts to shs. 1,600 as of police abstract and medical report at Kshs. 100/= (sic) and Kshs. 1,500/= respectively. <u>The Plaintiff called 3 witnesses and the Defendant gave unsworn evidence</u> denying that he was negligent and responsible for the injuries that the Plaintiff sustained.

29. From this description, it is doubtful that the Learned Trial Magistrate truly assessed the totality of the evidence that was before her. Other than the unfortunate reference to "unsworn evidence" which is unknown in civil cases, the Appellant presented two witnesses – not just one – but this appears to have escaped the Learned Magistrate's attention. Tellingly, there was no attempt to summarize the Appellant's case at all. The Learned Trial Magistrate spends the entire judgment summarizing the Plaintiff's case. There is no doubt that this led the Learned Trial Magistrate into error.

30. One erroneous avenue this seems to have led the Learned Trial Magistrate is that she did not do any analysis at all to come to a reasoned conclusion whether the Respondent was a passenger in the Motor Vehicle or not and why she determined that the Appellant was negligent. These are two issues that were forcefully brought to her attention by the Appellant his cross-examination of the Plaintiff's witnesses; in the Defence's own testimonies as well as in the written submissions filed on behalf of the Appellant. These two issues remain at the crux of this appeal

31. On my part, I have evaluated the entire record as I am required to do. As pointed out by the Appellant, there are quite a number of discrepancies that it behooves the Court to take note and then come to a conclusion whether, in their face, one can still come to a conclusion that the Respondent's case was proved on a balance of probabilities. I have noted the following discrepancies, inconsistencies or contradictions in the Plaintiff's case:

a. First, there is discrepancies in names. In various documents produced, the Respondent is referred to by different names. The Respondent is named in the Plaint as *Hellen Muihu Maina*. That is also the name in her Police Abstract as well as the Medical Report produced in Court. The same name appears in the receipt dated 17/05/2000 by Ruiru Hospital being in payment for a P3 form. However, the name entered into the OB is *Hellen Muhiu Njoroge.* Additionally, the name in the receipt for the Medical Report is *Hellen Muhiu Mwangi*. Further, the name in the receipt no. 2504 dated 16/01/2000 issued by Ruiru Hospital refers to Hellen Muigo while the receipt no. 2530 issued by the same hospital refers to *Hellen Muigu Njoroge*. No explanation at all was given for these different permutations of the names of the Respondent. On appeal the Respondent's advocate refers to the issue as one of a "technicality."

b. Second, there are inconsistencies on the injuries allegedly suffered by the Respondent. The Plaint lists her injuries in paragraph 4 thus:

i. Fracture of the tibia – left lower third;

ii. Fracture of the tibia – left mid third;

iii. Cut wounds to the left leg

On the other hand, the Medical Report by Mr. Mwangi produced in Court describes the injuries thus:

i. Multiple fractures on the right lower limb:

1. Compound fracture on the middle 1/3 tibia;

2. Simple fracture on the upper 1/3 tibia

ii. Soft tissue injuries of the anterior or chest;

iii. Soft tissue injuries of the left lower limb below the knee.

Then there is the evidence of the Respondent in Court who described her injuries as: fractured left leg; bruised legs and chest injuries.

These discrepancies are not minor. Mr. Mwangi says he referred to the card from Murang'a Hospital (which was marked for identification though not produced as evidence). That card chronicled injuries to the right leg as well. The doctor who examined her also spoke of fractures to the right leg. Yet the Respondent herself was categorical that the fracture was on her left leg.

Additionally, while the Respondent talked of a fracture; the Plaint and the Medical Report talked of multiple fractures.

Lastly, there is some inconsistency as to where the soft tissue injuries are.

32. These discrepancies and inconsistencies in the evidence of the Respondent are accentuated by other troubling aspects of the case:

a. First, the Respondent did not produce any receipt to show that she was a fare-paying passenger in the Motor Vehicle. This in itself, in the Kenyan context, would not be dispositive but seen in the context of the other factors in this case, it assumes some importance.

b. Second, it appears very curious that the first time the Respondent says she reported to the Police about her being involved in the accident was on 18/01/2000. This is curious because in another part of her testimony she says she was admitted to Ruiru Hospital for four days after she was taken there by a Good Samaritan. If the accident occurred on 15/01/2000, it would mean that she was under admission until at least 19/01/2000. This curiosity is doubled by the fact that it appears that the Respondent was issued with a P3 Form on 21/01/2000 but it was not filled until 18/05/2000. It is unclear why or how the Respondent reported to the Police on 18/01/2000 but the date on the P3 Form reads 21/01/2000. It is also noteworthy that the P3 Form implies that the Respondent was taken to the Police Station by "Good Samaritans" on 15/01/2000 at 9:00am after the accident. All these curiousities are compounded by another inconsistency: the receipt issued by Ruiru Hospital for filling in the P3 Form is dated 17/05/2000.

c. Third, there is also another curious inconsistency in the case: the Respondent is said to have been examined by Mr. Patrick Mwangi on 02/02/2002. Yet, the receipt for the examination produced in Court is dated 04/09/2000 – about two years before the examination. It seems odd that the Respondent would pay for a medical examination two years before it is conducted.

d. Fourth, the receipts allegedly issued by Ruiru Hospital are curious in three ways:

i. One, the receipt issued latest in time – the one dated 17/05/2000 – bears the serial number 355 while the one issued earliest – the one dated 16/01/2000 – bears the serial number 2504. In other words, the serial numbers seem to have decreased between January, 2000 and May, 2000.

ii. Two, the receipt issued in May, 2000 appears physically different than the other two issued in January, 2000.

iii. Three, all the three receipts have the curious notation "Out Patients Department." This is curious because the Respondent testified that she was admitted at Ruiru Hospital for four days. There are questions why a hospital admission bill paid is receipted as an outpatient bill.

e. It is also noteworthy and odd that the Policeman who was called to give evidence knew nothing about the accident: he was not at the Police Station when the report was made; he was not the one who entered the OB; and he was not the one who filled the Police Abstract and he was not the Investigating Officer in the case. Consequently, his testimony is of very low probative value.

33. In the face of all these inconsistencies, contradictions and discrepancies, in my view, a careful analysis was needed before arriving at the conclusion that the Respondent was a passenger in the Motor Vehicle. My own review has persuaded me that she did not establish to the required standard that she was, indeed, a passenger in the Motor Vehicle. Apart from the inconsistencies, contradictions and discrepancies pointed out above, there is also the very detailed and solid evidence by DW1 and DW2 which in my view is credible on the route that the Motor Vehicle used that morning. I find the evidence of DW1 and DW2 on this aspect of the case as eminently credible given their consistency and details. The accounts remained unshaken after cross-examination.

34. It is therefore my finding and holding that the Learned Trial Magistrate erred in finding that the Appellant was negligent since there is no sufficient credible evidence to demonstrate that the Respondent was in the Motor Vehicle that caused the accident. I have already held that if the Learned Trial Magistrate had carefully considered the evidence and submissions by the Appellant she might not have fallen into that error.

35. This finding obviates detailed analysis of other aspects of this appeal. Suffice it to say that I find Ground 9 in the Memorandum of Appeal unavailing and unpersuasive. It urges overturning the judgment of the Learned Magistrate merely on the ground that the judgment was delivered more than sixty days after the submissions were issued and in violation of Order 21 Rule 1 of the Civil Procedure Rules. Suffice it to say that the effect of non-compliance of that order is not the impugnment or invalidation of the judgment delivered after the due date.

36. Similarly, had the Respondent survived a showing that she was a passenger in the Motor Vehicle, I would have found the Appellant liable for the accident on the strength of the doctrine of *Res ipsa loquitur*. The evidence tabled would have been enough to establish that the Motor Vehicle was driven negligently.

37. There is also an interesting argument that the Appellant made in Ground 2 in its Memorandum of Appeal. It is to the effect that the Learned Magistrate erred in Law and in fact by failing to take into account that the driver who allegedly drove the accident motor vehicle Reg No. KAG 172X was not made a party to the suit and accordingly no liability would attach to the Defendant vicariously without making the driver a co-Defendant. The argument is interesting but ultimately futile. A Master can be found liable vicariously for the negligence of his Servant even where the Servant himself is not sued. The doctrine of *respondeat superior* under which such a suit is brought does not require the servant who caused the tort to be a party to the suit. The doctrine allows a third party (the employer, Principal or Master) to be held liable for the negligence of an employee, agent or servant even if the third party was not there when the injury occurred and did not cause the injury as long as the Plaintiff can demonstrate that the injury occurred while the employee, agent or servant was acting within the scope of his employment or was authorized or the actions were so connected with an authorized act that it can be considered a mode even though an improper mode of performing the act. A Plaintiff can, therefore, sue the employer, principal or master directly under the doctrine as long as they can prove all the elements.

38. Finally, given my finding and holding I find it unnecessary to analyse what compensation I would have awarded the Respondent had she been successful. This is because there are questions whether the injuries complained of were, in the first place, caused by the road traffic accident in question and what the extent of those injuries are. The Trial Court accepted the injuries as described in the Plaint and was of the opinion that Kshs. 550,000 would have been adequate compensation as general damages for pain, suffering and loss of amenities. I am aware that the law requires me not to interfere with the lower court's estimate of general damages unless it is "so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the (court) proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low." (*See* ***Butt –vs- Khan, Nairobi Civil Appeal NO. 40 of 1977***). If these were established to have been the injuries caused by the negligence of the Appellant in this case, I would not have found the award of Kshs. 550,000 was so inordinately low or high as to warrant my interference.

39. In summary, I find and hold that given the evidence presented in the case, there was insufficient proof on a balance of probabilities to establish the Respondent's case. In particular, there was insufficient proof to demonstrate that the Respondent was a passenger in Motor Vehicle Registration Number KAG 172X on 15/01/2000 when the Motor Vehicle was involved in a Road Traffic Accident at Kahunguro, Ruiru along Thika Road. Finally, there was insufficient evidence that the Respondent suffered the injuries alleged in the Plaint as a result of the road traffic accident. It was an error for the Learned Trial Magistrate to have found the Appellant negligent.

40. **Consequently, for the reasons stated above, this appeal is allowed. The judgment and decree of the Lower Court in Thika CMCC No. 765 of 2006 delivered on 04/08/2014 is set aside in its entirety. In its place, there shall be an order dismissing the Respondent's case.**

41. **The Appellant is also awarded the costs of this appeal.**

42. Orders accordingly.

Dated and delivered at Kiambu this 27th day of July, 2017

……

JOEL NGUGI

JUDGE