Mathenge v Kenya Hospital Association t/a Nairobi Hospital (Civil Appeal E253 of 2022) [2025] KEHC 5018 (KLR) (Civ) (24 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5018 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E253 OF 2022

JN NJAGI, J

APRIL 24, 2025

BETWEEN

JOHN MWAI MATHENGE ..... APPELLANT

AND

THE KENYA HOSPITAL ASSOCIATION T/A NAIROBI HOSPITAL ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. M.W. Murage, Senior Resident Magistrate, in Milimani CMCC No. 5811of 2013 delivered on 1/4/2022)

JUDGMENT

1. The appellant was on the 20th September 2010 admitted at the respondent`s hospital for medical check-up wherein various samples were taken from him for examination. On the following day, he was informed that one of the samples taken was mixed with samples from another patient and he was requested to provide another sample at the respondent`s cost. The appellant declined to provide the sample. He later took the test at another hospital. He then sued the respondent through a plaint dated 17th September 2013 alleging medical negligence on the part of the respondent. He sought for general damages for pain and suffering; special damages in the sum of Kshs. 166,428/= for a repeat test at the other hospital; loss of income of Kshs. 258,893/=lost for the three days when he was admitted at the respondent`s hospital for samples to be taken; costs and interest of the suit.

2. The respondent denied the claim. After a full trial, the trial court dismissed the case with no order as to costs on the ground that the appellant had failed to establish the loss suffered following the loss of the sample. The appellant was aggrieved by the dismissal of the suit and lodged the instant appeal.

3. The grounds of appeal are that:

1. The learned trial magistrate erred in law and fact by failing to analyze the evidence of the appellant and the appellant's written submissions on the issue of liability.

2. The learned trial Magistrate erred in law and fact by failing to appreciate the case was one of negligence whereupon the admission of liability by the respondent, the court ought to have awarded damages for negligence and the costs directly incurred by the appellant due to the respondent's negligence.

3. The Learned trial Magistrate erred in law and fact and misdirected herself in failing to find that the offer by the respondent to the appellant to do a repeat test as an offer for amends which would serve to mitigate loss but not absolve the respondent from liability.

4. The judgment delivered by the learned trial Magistratewas devoid of any issues for determination, reasons for the said decision in contravention to mandatory requirements of Order 21 rule 4 of the Civil Procedure Rules 2010 and the court never assed damages even after dismissing the suit.

4. The appellant proposed that the appeal be allowed, the judgment of the subordinate Court be set aside and this court to freshly determine the issue of liability and quantum.

Appellant`s case

5. The case for the appellant was that he was admitted at the respondent's hospital between 20th and 21st day of September to undergo various tests. That the first two tests were done successfully and the results released to him. That Dr. Betty Musau through a letter dated 21st October 2010 wrote to the appellant informing her that there were errors in the handling of his colonoscopy samples which had been mixed with those of another patient. The appellant was requested to provide another sample of the same for a repeat test at no cost. The appellant declined on the ground that the test left him both emotionally and physically traumatized and drained. More so that he was not assured of proper handling of the samples.

Respondent`s case

6. In response, the respondent filed its defence on 15th November 2013 denying the allegations of negligence made by the appellant. The respondent contended that on 20th September 2010, two samples were extracted from appellant but only one sample was delivered for testing. Once the mishap was realized, the appellant was informed but declined to take another test.

7. The appeal was conversed by way of written submissions of the respective counsels appearing for the parties.

Appellant's submissions

8. The appellant's counsel submitted that the respondent owed a duty of care to the appellant as a patient at their hospital in which case there existed a patient-hospital relationship between the appellant and the respondent. As such it was the duty of the respondent to ensure that its staff at the laboratory possessed the requisite medical knowledge and skills required of a reasonable medical practitioner. That the laboratory technicians who handled the samples of the appellant were agents and or employees of the respondent and they therefore owed the appellant duty of care when handling his samples. That the respondent was vicariously liable for the acts of its employees or agents. Therefore, that the loss and or mix-up of the appellant`s biopsy samples resulted to professional negligence that can only be attributed to the respondent, its servants and or agents.

9. It was submitted that the offer for a second test for free would only serve to mitigate the damages for the negligence on the part of the respondent for negligently mixing up his samples with those of another patient which did not in any way absorb the respondents from their medical negligence of mishandling the appellant`s biopsy samples.

10. It was submitted that the appellant as a patient at the respondent`s facility had a legitimate expectation that the respondent had relevant facilities, staff, knowledge, expertise and experience to undertake the medical tests. Therefore, that the trial court erred in failing to hold that the respondent owed a duty of care to the appellant and that that duty was breached. The appellant made reliance on the case of M (a minor) v Amulega & another (2001) KLR 400 as cited with approval in the case of Cyrus Kanyi v Consolata Hospital & another (2017) eKLR where the court stated the requirements of the tort of medical negligence to be as follows:

> " Authorities who own a hospital are in law under the self-same duty as the humblest doctor. Whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment. The hospital authorities cannot of course do it by themselves. They must do it by the staff whom they employ and if their staff is negligent in giving the treatment, they are just as liable for that negligence as in anyone else who employs others to do his duties for him..... It is established that those conducting a hospital are under a direct duty of care to those admitted as patients to the hospital. They are liable for the negligent acts of a member of the hospital staff, which constitutes a breach of that duty of care owed by hospital authorities are in fact liable for breach of duty by its members of staff.... It is trite law that a medical practitioner owes a duty of care to his patients to take all due care, caution and diligence in the treatment."

11. Further reliance was placed in the case of Blyth vs. Barmingham Co. (1856) 11 which was cited with approval in the case of Herman Nyangala Tsuma v Kenya Hospital Association T/A the Nairobi Hospital & 2 others (2012) eKLR where medical negligence was defined as follows:

> Negligence was defined as the omission to do something which a reasonable man, guided upon those considerations which regulate the conduct of human affairs would do, or doing something which a provident and reasonable man would not do. In strict legal analysis, negligence means more than needless or careless conduct, whether in omission or commission, it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing...A duty of care arises once a doctor or other health care professional agrees to diagnose or treat a patient. That professional assumes a duty of care towards that patient".

12. It was submitted that the respondent was guilty of mixing the appellant`s samples with those of another patient and therefore duty of care was breached.

13. On whether the appellant suffered any damage or loss as a result of breach of duty of care, the appellant submitted that he was forced to undertake another test at Aga Khan Hospital thereby taking time out of work and pay again for services that the respondent was supposed to render in the first place. That he had to endure pain and suffering while undergoing the repeat procedure as the process of extracting the biopsy samples was energy draining, painful, uncomfortable, gruelling and time consuming. The appellant would not have undergone these if the respondent had acted professionally. That the offer for free test did not take away the suffering and mental anguish caused o the appellant.

14. The appellant submitted that he produced documents in proof of loss of income of Ksh.258,893/= which the respondent was liable to compensate him for the damage and loss sustained.

15. On quantum of general damages, the appellant submitted that a sum of Ksh.1,500,000/= would be adequate compensation considering the immense trauma and suffering that he underwent. The appellant relied on the case of *IPS v AgaKhan Health Service, Kenya t/a The Aga Khan Hospital & 2 others (Civil Case No. 807 of 2003*) (2006) KEHC 2134 (KLR) (Civ) (16 April 2006) (Interim Judgment) where the court assessed damages for pain and suffering at Ksh.800,000/= in a medical negligence case in the year 2006.

16. On special damages, the appellant submitted that he produced receipts and a summary of the bill for the second test at Aga Khan Hospital in the sum of Ksh.168,428/=. He urged the court to award the said sum.

17. The appellant asked the court to award him the costs of the appeal with interest at court rates.

Respondent`s submissions

18. Counsel for the respondent submitted that the respondent was only responsible for the pathology testing which was dependent on the samples arriving at the laboratory. That the appellant's colonoscopy was never received at the respondent's laboratory. That this was communicated to the appellant who refused to take another test. Relevance was placed in the case of Bolitho vs. City and Hacknery Health Authority (1998) AC 232 where it was held that:

> In addition to proving negligence, a claimant must prove that the negligence caused the loss of which he complains. In other words, in a medical negligence action, the claimant must prove that had there been no negligence, the injury, loss and damage of which he complains of would have been avoided or at least have been much less.

19. The respondent submitted that it was the duty of the appellant to mitigate the loss after the occurrence of the incident. Reliance was placed in the case of African Highland Produce Limited vs John Kisorio (2001) eKLR where it was held that:

> It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the defendant.

20. It was submitted that the appellant underwent a repeat test at Aga Khan hospital three years later in 2013 after the one at the respondent`s hospital aborted. That the appellant has not given any reason why he did not go for another test immediately if he was uncomfortable with the procedure being repeated at the respondent`s hospital. It was submitted that the appellant had a duty to act immediately if the loss was genuine. That the appellant cannot rely on a test done after 3 years to support a claim against the respondent.

21. The respondent submitted that the repeat test at Aga Khan Hospital does not indicate any adverse finding on the appellant`s health condition such as that he was suffering from any condition that increased in severity that could have been detected earlier. The report indicated that the appellant was in normal health.

22. It was submitted that any negligence on the part of the respondent must be shown to be the proximate cause of the damage to the appellant. That the report dated 3rd September 2013 did not establish a connection between the diagnosis and the colonoscopy procedure. That in the absence of evidence from a medical expert linking the loss of the sample to the condition afflicting the appellant, the loss of the sample did not cause any damage to the appellant. The respondent in this respect relied on the case of Oropesa (1943) 1 AII, 211 where it was held that:

23. On whether the appellant was entitled to damages, the respondent submitted that the appellant did not provide evidence to show that he suffered any loss due to the missing samples and therefore no damages are payable. The respondent cited the case of Rothwell v Chemical & Insulating Co. Ltd (2007) UKHC where the court observed that:

> Certain well-known formulae are invoked, such as that the chain of causation was broken and there was a novus actus interveniens. These phrases, sanctified as they are by standing authority, only mean that there was not such a direct relationship between the act of negligence and the injury that the one can be treated as flowing directly from the other.

24. On reimbursement of for costs incurred at Aga Khan hospital, the respondent submitted that the same would have been avoided if the appellant had agreed to a repeat test at the respondent`s facility. That notwithstanding, the costs were not paid by the appellant himself but by his insurance company and as such the appellant cannot seek for their refund.

25. In regard to the claim of Ksh.258,293/= for loss of income he would have earned had he not been admitted in hospital, it was submitted that the appellant stated in cross-examination that he was not admitted at the respondent`s hospital. He further said that his office was running during those days. Therefore, that the claim was unfounded. More so that the documents he produced in proof thereof did not tend to prove the claim. Additionally, that he did not call the author of the reports to produce them as evidence and speak to the source of the documents.

26. The respondent urged the court to dismiss the appeal with costs.

Analysis and determination

27. This is a first appeal and this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that, see Gitobu Imanyara & 2 others v Attorney General [2016] eKLR; Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR and Selle & another v Associated Motor Boat Co. Ltd & others [1968] EA 123.

28. In addition, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that:

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

29. I have considered the grounds of appeal, the record of the trial court and the submissions of the respective counsels for the parties. The issues for determination are:

    1. Whether the respondent owed the appellant duty of care.

2. Whether the duty of care was breached and if so, whether the appellant suffered loss and damage.

3. Whether the appellant was entitled to compensation in damages

4. Who should bear the costs.

Whether the respondent owed the appellant duty of care

30. The appellant particularized the breach of duty of care and negligence as follows:

1. Handling the plaintiff`s biopsy samples recklessly.

2. Failure to exercise reasonable and due care in handling the biopsy samples.

3. Mixing the samples with those of another patient undergoing similar tests in the defendant`s facility.

4. Failing to release results of the tests for colonoscopy.

31. It would be proper for me to start by defining what negligence is. The court in the case of Bahari Parents Academy v LBZ (Minor suing through his father and next friend) BNZ [2020] eKLR cited the following definition of 'negligence' from Salmond and Heuston on the Law of Torts 9th Edition

> " Negligence is a conduct, not state of mind – conduct which involves an unreasonable great risk of causing damage; negligence is the omission to do something much a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something, which a prudent and reasonable man would not do."

32. The appeal herein involves a claim on medical negligence. The test in cases of medical negligence is not that of any other ordinary person but that of a person in the same profession, such as a doctor or a person practising in that field. The test of duty of care in medical negligence was set out in the case of Bolam vs Friern Hospital Management Committee (1952) 2ALL E.R as follows:

> The test whether there has been negligence or not is not the test of the man on the clapham omnibus, because he has not this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skills.

33. The same was observed in the case of John Gachanja Mundia v Francis Muriira & Another, Civil Appeal No. 26 of 2015 [2017] eKLR where the court held as follows:

> " A case of medical negligence is not an ordinary case of negligence. The test to be applied is not that of an ordinary reasonable man known in law, but that of an ordinary skilled doctor or consultant in that field. A patient who approaches a doctor expects medical treatment with all the knowledge and skill that the doctor possesses to bring relief or solve the medical problem. A doctor therefore owes certain duties of care whose breach gives rise to tortious liability."

34. Similar finding was made in the case of Magil v. Royal Group Hospital & Another [2010] N.I QB 1 the High Court of Northern Ireland where it was held:-

> " The general principles of law applicable in clinical negligence cases are rarely in dispute in modern cases.... To all the defendants in this case, there is to be applied the standard of

the ordinary skills of a consultant, doctor or nurse as the case may be. They must act in accordance with the practice accepted at the relevant time as preferred by a responsible body of medical and nursing opinion, see also Sidaway v. Bethlem Royal Hospital Governors [1985] 1 ALL ER 643 at 649.

35. The appellant in this matter was admitted at the respondent`s medical facility for some medical tests to be undertaken. It was the evidence of the appellant who was the only witness in his case that he was informed by his doctor that the hospital had informed her that his colonoscopy samples had been mixed up with those of another patient. The witness who testified on behalf of the respondent, Peter Kariuki who was the respondent`s Laboratory Services Manager testified that he is not the one who handled the appellant`s samples. He however confirmed that colonoscopy was done by the doctor at their hospital but that their records indicated that their laboratory received one biopsy instead of 2. He said that there was no indication of the biopsys having been mixed up with another but there was an order to repeat the procedure.

36. From the above evidence there is no dispute that the appellant underwent a colonoscopy procedure at the respondent`s hospital but the appellant never got the results. The same were either mixed up with that of another patient or they got lost. Either way it was the duty of the respondent to put into place a mechanism of ensuring that biopsys are properly handled until the results are released to the patient. The respondent owed the appellant a duty of care of ensuring that the biopsy taken from him for examination was properly handled until results are released to him. That the biopsy of the appellant got mixed up with that of another patient or it got lost showed negligence on the part of the respondent`s employees and or agents who handled the biopsy.

37. A hospital is vicariously liable for the negligent act of its employees and agents. In the case of Ricarda Njoki Wahome (suing as an administrator of the estate of the late Wahome Mutahi (deceased) Vs. Attorney General & 2 others (2015) eKLR the court held thus;

> " A duty of care arises once a doctor or other health care professional agrees to diagnose or treat a patient. That professional assumes a duty of care towards that patient. On the other hand, a hospital is vicariously liable for the negligence of the member of staff including the nurse and the doctors. A medical man who is employed part-time at a hospital is a member of a staff, for whose negligence the hospital is liable.....
>
> See Charlesworth & Percing on negligence"

38. The existence of the duty of care of a hospital towards a patient it admits is asserted in the following words quoted from Charlesworth and Percy on Negligence:

> ....the law is that hospitals are liable vicariously for the negligence of the members of its staff, including nurses and doctors. A medical man who is employed part time at a hospital is a member of the staff for whose negligence the hospital is responsible similarly in the English Court of Appeal case of Cassidy Vs. Ministry of Health (1954) 2 KB 343) the court remarked thus;
>
> > ....it is established that those conducting a hospital are under a direct duty of care to those admitted as patients to the hospital. They are liable for the negligent acts of a member of the hospital staff, which constitutes a breach of that duty of care owed by him to the plaintiff thus there has been acceptance from the courts that hospital authorities are in fact liable for breach of duty by its members of staff....."

39. This position in law is also captured in the case of M (a minor) Vs Amulega & another (2001) at page 426 where Muluka J, quoted in the case of Gold Vs Essex County Council (1942) 2KB 293 where Lord Greene stated as follows:

> "Where a patient seeking free advice and treatment knocks at the door of the defendant hospital, what is he entitled to expect? He will find an organization which comprises consulting physicians and surgeons, a staff of nurses, equipment.... Radiographers etc."

He went further to say;

> "..... it they (hospital authorities) exercise that power (of treating patients) the obligation which they undertake is an obligation to treat and they are liable if the person employed by them to perform the obligation on their behalf act without due care....."

40. It is apparent that the biopsy of the appellant was mishandled by the employees and or agents of the respondent leading to it getting lost. That can only mean that the employees or agents acted without due care. The appellant had thereby proved that the respondent owed him a duty of care and that the same was breached by the negligent acts of the respondent`s employees and or agents.

Whether the appellant suffered loss and damage

41. The appellant was expected to show that he suffered damage, injury or harm which was attributable to the breach of duty of care by the respondent. He pleaded that he was traumatised and depressed by the actions of the respondent as the process of extracting the samples was energy draining painful, uncomfortable gruelling and time consuming.

42. The appellant submitted that he suffered loss in that he was forced to undertake another test at Aga Khan Hospital thereby taking time out of work and pay again for services that the respondent was supposed to render in the first place. That he had to endure pain and suffering while undergoing the repeat procedure as the process of extracting the biopsy samples was energy draining, painful, uncomfortable, gruelling and time consuming in that it necessitated him not to take food for first 24 hours, take lots of water to clean up his system and visit the toilet for long as he needed to empty his bowels and clean up his stomach and intestines. The appellant would not have undergone these if the respondent had acted professionally. That the offer for free test did not take away the suffering and mental anguish caused o the appellant.

43. The respondent on the other hand argued that the appellant did not provide evidence that he suffered loss due to the missing samples. That the repeat test was taken after a period of 3 years which was inordinately long to be the basis of the appellant`s claim.

44. The rationale for award of general damages for pain and suffering is explained in Halsbury`s Laws of England 4th Ed. Vol. 12(1) page 348-883 as follows:

> "Pain and suffering damages are awarded for physical and mental distress caused to the plaintiff, both pre-trial and in the future as a result of the injury. These include the pain caused by the injury itself, and the treatment intended to alleviate it the awareness of and the embarrassment at the disability or disfigurement or suffering caused by anxiety that the plaintiff's condition may deteriorate. It follows that, therefore, that the award for pain and suffering is intended to compensate the plaintiff for the anguish he has endured as a result of the accident whether physical or mental."

45. The trial court in its judgment stated that the appellant did not establish what loss he suffered as a result of the loss of the sample.

46. I do not agree with the trial court that the appellant did not suffer any loss as a result of the loss of his biopsy samples by the respondent. The appellant was expected to undergo another procedure to extract the samples which fact was confirmed by the respondent when they asked him to undergo another procedure at their own cost. The appellant explained that the process of extracting the biopsy samples was energy draining, painful, uncomfortable, gruelling and time consuming. This was not challenged by the respondent. It is therefore my finding that the appellant suffered psychological and mental torture after the respondent lost his biopsy samples as he was expected to undergo another painful procedure. He also had to be away from work. The fact that he did not undergo the procedure immediately does not erase the psychological torture suffered. It can only mean that the psychological torture was not of high magnitude because if it was so, he would have gone for a repeat test immediately. The failure to go for a repeat test immediately can only affect the amount of damages awardable to him but cannot defeat the claim for general damages. However little psychological torture the appellant underwent, he was entitled to damages. Taking into account the circumstances of this case and considering that the appellant did not go for another test immediately the one done at the respondent`s facility aborted and further considering that the respondent made an offer for amends that was rejected by the appellant, I am of the view that an award of Ksh.200,000/= would be sufficient compensation in general damages for the psychological torture suffered by the appellant after the respondent lost his biopsy samples.

Special damages

47. The appellant claimed special damages of Ksh.168,428/= being medical expenses incurred at Aga Khan Hospital for the repeat medical examination.

48. The respondent argued that the repeat test was taken after a period of 3 years. That three years is inordinately long to be the basis of the appellant`s claim. That the appellant told the trial court that part of the bill was paid by AAR while he paid the balance. That he did not indicate how much he paid himself while he is not entitled to what was paid by his insurance company.

49. It is trite law that special damages must be strictly proved. The Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716 held the following on the subject:

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

50. This court has made a finding that the respondent lost the appellant`s colonoscopy results. The same had been paid for. In my view, the appellant was not obligated to take a second test from the respondent after they lost his initial results. It was therefore fair and just for the respondent to refund the cost of the test for which they did not provide the results or meet the costs of a repeat test at a hospital of the respondent`s choice. The appellant however did not seek refund of the test for which he did not get the results but sought for the costs of a test done 3 years later at Agha Khan Hospital. I would expect the appellant to have gone for a repeat test immediately the one at the respondent`s hospital aborted. In my view, a test conducted after a lapse of three years cannot fit the description of a "repeat" procedure. There are many things that could have happened in the health condition of the appellant in those three years. Consequently, the appellant did not show the nexus between the biopsy test conducted

by the respondent in 2010 and that conducted at Aga Khan Hospital in 2013. The 2013 test was not proximate to the 2010 test so as for it to be regarded as a "repeat test". Besides that, the appellant admitted that part of the costs of the 2013 test were met by his insurance company. He is not entitled to what was paid by the insurance company. He did not state how much he paid himself. It is therefore my finding that the claim of Ksh.168,428/= was not proved.

Loss of income

51. The appellant claimed Ksh.258,893/= being loss of income for 3 days that he was out of work as he underwent medical examination at the respondent`s medical facility. He said that he is a quantity surveyor by profession, an advocate of the High Court of Kenya and an arbitrator. In support of the claim, he produced his audited accounts for the years 2008 and 2009 that estimated his daily income at Ksh.80,297.92, thereby totalling to Ksh.258,893.76 for 3 days which is the sum claimed.

52. The appellant in his evidence in court stated in cross-examination that he was actually in hospital for 2 days and not for 3 days. He said that he had workers in his office and that the office was running when he was in hospital. He however said that there were those matters at the office that required his personal attention.

53. Upon my own examination of the evidence, I am not persuaded that the appellant had proved the claim of Ksh.258,893/=. His office was still running when he was in hospital as he had employees at the firm. He did not give a list of persons who required his personal service at the firm who were not attended to due to his absence. It is such loss that could have been claimed and not loss for the entire 3 days (or 2 days) yet the office was still running. The appellant`s computation of a loss of Ksh.80,297.92 per day did not take into account that his office was still running even in his absence. I find no merit in the claim of Ksh.258,893/=. The trial court rightly dismissed the claim.

Disposition

54. The upshot is that the appeal succeeds only on the claim for general damages for pain and suffering for which this court awards the appellant a sum of Ksh.200,000/=. The rest of the appeal is dismissed. As the appeal has partially succeeded, I order each party bear its own costs the appeal.

    Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF APRIL 2025

J. N. NJAGI

JUDGE

In the presence of:

.....for Appellant

.....for Respondent

Court Assistant -