Tado v Odaa & another (Civil Appeal E079 of 2023)
[2024] KEHC 10633 (KLR) (12 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10633 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E079 OF 2023

RE ABURILI, J

SEPTEMBER 12, 2024

BETWEEN

KENNETH IDDI NASHON TADO ..... APPELLANT

AND

JOSEPH OCHIENG ODAA ..... 1ST RESPONDENT

GORDON OWINO NGUO ..... 2ND RESPONDENT

(An appeal arising out of the Judgment & Decree of the Honourable D. Ogoti in the Chief Magistrate's Court at Kisumu delivered on the 4th May 2023 in Kisumu CMCC No. 167 of 2020)

JUDGMENT

Introduction

1. The appellant was sued by the 1st respondent for amongst others, general damages for personal injury, pain and suffering and loss of amenities, loss of consortium together with interest thereon at 12% p.a.; special damages of Kshs. 85,000 with interest thereon at 12%p.a. from date of filing suit till payment in full; damages for loss of earnings and loss of earning capacity; costs of future medical attention as well as costs of the suit.

2. The 1st respondent's case was that on or about the 8th May 2017 at around 4.30pm along Katito –Kendu Bay road, the 1st respondent who was a lawful fare paying passenger aboard motor vehicle registration number KCE 764U and at Urudi area, the appellant's driver/agent drove, managed and/or controlled motor vehicle registration number KBX 428X Toyota saloon (premio) causing it to veer off and or make a sudden turn onto the path of the Nissan matatu of which the 1st respondent was aboard resulting in the accident and injuries sustained by the respondent.

3. In response, the appellant filed a statement of defence dated 15th June 2020 in which he denied all the particulars in the plaint save for the descriptive parts of the plaint being paragraphs 1 and 2.

4. The appellant subsequently filed an application dated 20.1.2022 seeking to introduce a third party, the 2nd respondent herein, which application was not opposed and was allowed on the 23.2.2022. The 2nd respondent however neither entered appearance nor filed any defence.

5. The trial magistrate apportioned liability in the ratio 70:30 in favour of the 1st respondent against the appellant and further awarded the special damages which were not disputed. The trial court proceeded and awarded general damages of Kshs. 5,000,000; Kshs. 1,800,000 damages for loss of earnings and loss of earning capacity; a total of Kshs. 6,320,000 for costs of future medical attention care and expenses; special damages of Kshs. 85,000 as well as costs of the suit.

6. Aggrieved by the trial court's judgement, the appellant filed his appeal dated 2nd June 2023 in which he raised the following grounds of appeal:

    a. The learned trial magistrate grossly misdirected himself in treating the evidence and submissions on liability before her superficially and consequently coming to a wrong conclusion on the same.

    b. The learned trial magistrate did not in the alternative consider or sufficiently consider the demand for contributory negligence based on evidence adduced and the submissions filed by the appellant.

    c. The learned trial magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.

    d. The learned trial magistrate misdirected himself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the appellant.

    e. The learned trial magistrate erred in not sufficiently taking into account all the evidence presented before her in totality and in particular the evidence presented on behalf of the appellant.

    f. The learned trial magistrate erred in failing to hold that the respondent had failed to prove negligence on the part of the appellant while the onus of proof lay with the respondent.

    g. The learned trial magistrate proceeded on wrong principles (if any) when assessing the damages to be awarded to be awarded to the respondent and failed to apply precedents and tenets of law applicable.

    h. The learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis-à-vis the respondent's claim.

    i. The learned trial magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.

7. The appeal was canvassed by way of written submissions. The respondents have not filed any submissions on record. I will however consider the 1st respondent's submissions before the trial court.

The Appellant's Submissions

8. The appellant submitted that as a condition of stay pending appeal, through his insurance company, he paid Kshs. 3 million to the 1st respondent over the judgement by the trial court.

9. It was submitted by the appellant that the court erred in its judgement by stating that the impact was on the left side of the appellant's vehicle, a fact which was not true as all the witnesses confirmed that the impact was on the right side of the appellant's vehicle while on the left side of the 3rd party's vehicle.

10. The appellant further submitted that his driver was not charged for any traffic offence and thus it was strange for the court to find the appellant 70% liable. It was further submitted that the trial court never considered that there was evidence that had been placed before the court in line with the 3rd party subject vehicle that hit that of the appellant as it was just about to take a right turn; that the 3rd party vehicle was coming from behind the appellant's vehicle and at a high speed, a fact the court failed to consider.

11. The appellant thus submitted that taking all the aforementioned into consideration, it was evident that the trial court erred in apportioning liability and that the same ought to be varied.

12. On general damages, it was submitted that the award of Kshs. 5,000,000 was baseless as there was no support thereof by the 1st respondent and that an award of Kshs. 1,000,000 as proposed by him would be sufficient. Reliance was placed on the case of Siaya Civil Appeal No. 39 of 2019 Pitalis Opiyo Ager v Daniel Otieno Owino & Another where the court noted that "in support of the said fractures and serious injuries the 1st respondent produced various medical reports which the court will note that none of the reports were supported by any Xray report or Xray films."

13. It was submitted that the trial court erred in its award of loss of earnings and future medical attention which items though mentioned in the plaint, no figures were attached to the same but rather the court picked the same from the 1st respondent's submissions. The appellant submitted that prayers under the head of future medical expenses must be specifically pleaded and proved as they are regarded as special damages that can only be awarded once pleaded and proved to the standards of law as was held by the Court of Appeal in the case of *Tracom Limited & Another v Hassan Mohamed Adan* [2009] eKLR a case quoted in *Ongata Works Ltd v Mwangi* (Civil Appeal E046 of 2021) [2024] KEHC 5738 (KLR) (9 May 2024) (Judgement).

14. The appellant submitted that he did not oppose the award of special damages. The appellant thus submitted that the trial court ought to have made its judgement as follows, based on the evidence on record:

    Liability

    1st respondent – 40%

    Appellant – 10%

    2nd respondent – 50%

    General Damages - Kshs. 1,000,000 (To be distributed as above)

    Special Damages – Kshs. 85,000

    Future Medical Expenses - NIL

The 1st Respondent's Submissions before the trial court

15. On liability, the 1st respondent submitted that based on the evidence adduced the same ought to be apportioned in the ratio of 70:30 in relation to the appellant against the 2nd respondent herein who was the 3rd party before the trial court.

16. On quantum, the 1st respondent submitted for a total sum of Kshs. 20,000,000 as the same had been pleaded and proven through the provision of medical records.

17. The 1st respondent submitted that the special damages of Kshs. 85,000 had been pleaded and proven by the production of receipts and that the same ought to be applied.

Analysis and Determination

18. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, bear in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

19. In that regard, 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."

20. Having considered the Appellant's Grounds of Appeal and the parties' Written Submissions, it appears to this court that the issues that had been placed before it for its determination: -

    a. Whether or not the apportionment of liability was fair and reasonable in the circumstances of this case.

    b. Whether or not the award of quantum was unjustified in the circumstances of this case so as to warrant interference by this court.

21. The above issues are resolved below.

Liability

22. On liability, in *Khambi and Another v Mahithi and Another* [1968] EA 70, it was held that:

> " It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

23. That was the position in *Isabella Wanjiru Karangu v Washington Malele* Civil Appeal No. 50 of 1981 [1983] KLR 142 and *Mahendra M Malde v George M Angira* Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate

court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

24. The law is clear that he who alleges must proof. The question therefore is whether the 1st respondent herein discharged the burden of proof that the appellant was liable in negligence for the occurrence of the accident wherein he was allegedly injured.

25. I also note that the appellant introduced a third party, the 2nd respondent herein, whom he blamed for causing the accident.

26. The evidence adduced by the parties was as follows: The 1st respondent testified as PW1. He adopted his statement dated 23rd February 2020. It was his testimony that he was a lawful passenger aboard a matatu and that he had his seat belt on. He testified that whilst in the vehicle, he saw from the corner of his eye the appellant's vehicle which was so negligently managed and/or controlled that it veered onto the matatu in which the 1st respondent was aboard and resulting in the accident that caused the 1st respondent's injuries. It was his testimony that he used to be a mason and watchman but was currently incapacitated. The 1st respondent reiterated his testimony in cross-examination and subsequently closed his case.

27. The appellant testified as DW1 and adopted his statement filed on the 9.5.2022 as his evidence in chief. It was his testimony that he had lend his car, registration number KBY 428X, to one Duncan Muga on the material date who called him and informed him that he had been involved in an accident at Katito where people had been injured. The appellant blamed the driver of the matatu for the accident.

28. DW2, Duncan Muga, testified that he was driving the appellant's vehicle on the material date, that as he was hungry, he saw a shop on his right and indicated that he was turning to the right and that a matatu was approaching at high speed and as he turned, he had an impact on his right bumper. It was his testimony that the approaching matatu could not control its speed and that it rolled several times.

29. In cross-examination, DW2 testified that he noticed the matatu from behind on his side mirror and that it chipped his right bumper. He testified that he was aware that on turning, one should slow down, however, when he was shown the pictures of the impact on the matatu, he noted that it was on the matatu's left front corner. In re-examination, he testified that the impact on the two cars was quite minimal and that the bigger impact/damage occurred because of it rolling severally.

30. I have considered the evidence adduced before the trial court. The parties have given quite varied accounts as to how the accident occurred. How should the court resolve such tension between the account rendered by the Appellant and 1st Respondent on liability?

31. The established judicial method, which rests on the singular dependability of the fact-base, and which vindicates the principles of fairness, objectivity and legitimacy – is to entertain the account from the other side; and thereafter, to weigh, check and balance the two streams of evidence, thereby arriving at a valid and just result.

32. The 1st respondent was firm in his testimony. He testified that he was a lawful passenger in a matatu and had even worn his seat belt, a fact that was not controverted by the appellant. He further testified that he saw the appellant's car veer of its side of the road and end up colliding with the matatu he had boarded.

33. Juxtaposed against this was the evidence presented in support of the appellant's case. Firstly, the appellant did not witness the incident. DW2 who was driving the said vehicle testified that he was turning to the right to enter a shop when a speeding matatu hit him and rolled. He admitted that he had seen the matatu in his side mirror and that it was speeding. He told the court that there was significant

damage on the matatu's right where it had collided with him however when shown photographs of the same in cross-examination, he admitted that the matatu's point of impact was on the left front corner.

34. Taking all the aforementioned into consideration, it is my view that liability cannot be apportioned against the 1st respondent who was a lawful passenger in motor vehicle registration number KCE 764U and had no control over how the accident said motor vehicle was being driven. There was in essence no basis at all for finding the 1st respondent contributorily negligent.

35. On the other hand, the driver of the appellant's vehicle testified that he had seen the matatu approaching him speedily as he had indicated to turn. There is no reason why the appellant's driver failed to stop and allow the matatu to pass having assessed that it was being driven speedily. The appellant's driver simply failed to take due care while on the road.

36. Similarly, there was no reason why the 2nd respondent's agent, the driver of the matatu failed to slow down having seen the car in front of it had indicated that it was turning to the right.

37. In this case, I find that liability can only attach to the appellant and 2nd respondent to the exclusion of the 1st respondent.

38. I thus set aside the trial court's apportionment of liability and proceed to apportion liability equally between the appellant and the 2nd respondent.

Quantum

39. The appellant submitted that the award on quantum of damages was inordinately high considering the injuries sustained by the respondent and past comparable awards and that this court ought to reduce the same to Kshs. 1,000,000. The appellant further submitted that the award for loss of earnings & earning capacity as well as future medical expenses ought to be set aside as the same were not specifically pleaded and proven as required by law.

40. In in *Butt v Khan* [1982-88] KAR 1 it was held -

> " An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge 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".

41. I have considered the submissions tendered together with the authorities cited by the parties.

General Damages

42. General damages are damages at large whose purpose is to compensate the injured to the extent that such injury can be assuaged by a money award. It has repeatedly been stated that money cannot renew a physical frame that has been injured and crushed hence the courts can only award sums which must be viewed as giving reasonable compensation. Awards ought to be reasonable and must be assessed with moderation bearing in mind that the large and inordinate awards may injure the body politic. Furthermore, it is desirable that so far as possible comparable injuries should be compensated by comparable awards putting into consideration the current prevailing economic circumstances including inflation (see *Tayab v Kinanu* [1983] KLR 114 and *West (H) & Son Ltd v Shephard* [1964] AC 326, 345).

43. The 1st respondent pleaded that he sustained the following injuries:

> Paraplegia with a total loss of movement or sensory ability of the waist and lower limbs

Fracture of the left neck of the femur

Fracture of the 6th,7th, 8th and 9th ribs and bilateral pleural effusion

A compression fracture involving the 11th and 12th thoracic vertebral bodies

T11 and T12 compression

Herniation of T11- T12 intervertebral disc with cord compression

Multiple soft tissue injuries on the lower limbs and chest wall

44. The 1st respondent thus submitted that as a result of the injuries, he would require a wheelchair for mobility. A paraplegic patient's bed and mattresses and weekly physiotherapy sessions, total loss of erectile function resulting in total inability to perform sexual intercourse and reproductive ability; total loss of bladder and bowel movement control resulting in faecal and urinary incontinence thus requiring constant us of catheter, urinary bags and adult diapers and pressure sores from prolonged immobility.

45. The said injuries were contained in the P3 form produced by the 1st respondent as well as the discharge summaries and medical report produced by the 1st respondent as exhibits in support of his case and as such the appellant, having not opposed the production of the said documents cannot allege that the same were not proven due to lack of production of x-rays. Furthermore, the trial court that heard and saw the plaintiff /1st respondent in court must have observed the severity of the injuries especially those involving paraplegy as such injuries are too obvious to be hidden from the view of the court.

46. In the case of *Brian Muchiri Waihenya v Jubilee Hauliers Ltd & 2 others* [2017] eKLR the Plaintiff suffered severe spinal injury at the neck and a cut wound on his head, had a complete loss of sensation from the chest up to the lower limbs, he was a paraplegic, who would be bed-ridden for life. If he had to get from one place to another, he would have to use a wheel-chair. The court awarded Kshs 8,000,000 damages for Pain & Suffering and Loss of Amenities.

47. I find that the injuries listed in the authority above are more comparable to those sustained by the 1st respondent herein.

48. The trial court awarded the 1st respondent Kshs. 5,000,000 for general damages. I find no reason to interfere with the same and thus, I uphold it.

Loss of earnings and loss of earning capacity

49. The 1st respondent testified before the trial court that as a result of the injuries sustained, he was incapacitated and could not work whereas before the accident, he used to work as a watchman and mason and would earn an average of Kshs. 18,000 per month.

50. The appellant submitted that the 1st respondent did not prove his claim under this heading which required to be specifically pleaded and proven and that h only provided the figures for this in his submissions.

51. The trial court awarded the 1st respondent Kshs. 1,800,000 under this heading noting that the 1st respondent never tendered any evidence in support of his claim. The trial court calculated the 1st respondent's award on the basis of him earning Kshs. 5,000 per month for 30 years.

52. The Court of Appeal in *S J v Francesco Di Nello & another* [2015] eKLR while making a distinction between loss of future earnings and loss of earning capacity stated that: -

> " Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real or actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved. This was the position enunciated in *Fairley v John Thomson Ltd* [1973] 2 Llyod's Law Reports 40 at pg. 14 wherein Lord Denning M.R. said as follows:
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> > " It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages."

The court proceeded to state that: -

> " The correct position as in the Fairley case (supra) was restated by this court in the case of *Cecilia Mwangi & Another v Ruth W. Mwangi* CA No. 251 of 1996 as hereunder:
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> > " Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. "In the authority of *Butler v Butler* [1984] KLR 225, the issue of awarding damages for loss of earning capacity was carefully considered and Chesoni Ag. JA (as he then was) said:
> >
> > > " Whilst loss of earning capacity or earning power should be included as an item of general damages, it is not improper to award it under its own heading ... Once it is in principle accepted that the victim of personal injuries who has lost his earning capacity is entitled to compensation in the form of damages it is of little materiality whether the award is under the composite head of general damages or as an item on its own, as a loss of earning capacity. At any rate, what is in a name if damages are payable."

53. Thus, the claim in respect of lost income is a special damage claim requiring strict proof. Equally, the 1st respondent was obligated to prove the alleged diminished future earning capacity which claim was denied by the appellant. No evidence was led by the 1st respondent in respect of these alleged losses and expenses. Confirmation of the 1st respondent's incapacitation through the medical report was not enough. He had to prove that he was a mason or watchman and that he was earning the amount claimed or awarded.

54. The Court of Appeal in the case of *Karani v Nchedu* (1995-1998)1 EA 87 stated:

> " The claim for loss of earning is a special damage. It must be pleaded and proved. That is the law. The plaintiff gave some evidence in which she said she used to operate a kiosk of some sort at Kasarani, near Nairobi, from which she made Kshs. 50,000/= per month. She produced no documentary evidence to support this claim but even if she had, it would have

been of no practical value because the claim was not pleaded. There was really no legal basis for the award and it is accordingly set aside."

55. The above decision was in a case where there was an attempt to prove loss of earnings. Here, there was no attempt at all. It was merely pleaded and left to the court to determine the same. Further, it is not clear on what basis the trial court picked the amount of Kshs. 5,000 per month for 30 years as it's basis for calculating the same. This award was not proper in its entirety and I disallow it.

Costs of Future Medical Attention, Care and Expenses

56. The issue herein is whether the claim for future medical expenses should have been specifically pleaded and strictly proved. The issue of future medical expenses considered in the case of *Tracom Limited & another v Hassan Mohamed Adan* [2009] eKLR where the Court of Appeal pronounced stated as follows: -

> " The award for future medical expenses is challenged on two fronts. First, that it was not specifically pleaded and strictly proved. Second, that the multiplier of 25 years was inflated. We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of *Kenya Bus Services Ltd v. Gituma* (2004) 1 EA 91, this Court, stated: -
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> > ' And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal right should be pleaded.'
>
> We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require."

57. However, the Court of Appeal in *Kenya Power & Lighting Company Limited v AMK (Suing as the mother and next friend of JMK - Minor* (Civil Appeal 58 of 2020) [2021] KECA 52 (KLR) (8 October 2021) (Judgment) in reference to the decision in *Tracom Limited & another v Hassan Mohamed Adan* (*supra*) stated as follows:

> " 28. As has been held above, in as much as future medical expenses are in the realm of special damages, it may not be practical for the parties to be able to fully ascertain the exact amount that will be required in the future, it therefore suffices to give an estimate as the respondents did during their testimony.
>
> 32. On the challenge to the award on future medical expenses which the appellant says had not been specifically pleaded and proved, this does not turn on much as the respondent had in their plaint stated that the minor requires additional

> and medical care. In our view, the functional prosthesis (artificial limbs) and their maintenance costs are covered under that prayer and as held in Tracom Limited & another v Hasssan Mohamed Adan (supra) it was not mandatory for the respondent to delve into detail of the future expenses at that stage thus that ground of appeal fails."

58. Similarly, in the case of, *Forwarding Company Limited & another v Kisilu; Gladwell (Third party)* (Civil Appeal 344 of 2018) [2022] KECA 96 (KLR) (4 February 2022) (Judgment) the Court of Appeal in overturning the decision of this Court declining to award future medical expenses on the ground that the plaintiff had pleaded generally on the same but had failed to attach a specific figure thus lacked specificity, stated as follows: -

> " 62. In the instant case, we do not agree with the finding of the learned judge that failure to plead future medical expenses would fatally affect this specific claim. To demand a specific sum to be proved specifically like special damages would be unreasonable. This is a claim for money not yet spent, for money estimated to be spent depending on how the claimant's body is responding to treatment, among other things. It is not always clear at the time of filing a case what these future costs may be. The prognosis could change for better or for worse depending on various circumstances."

59. Based on the aforementioned decisions which are binding on this court, the argument that the future medical expenses were not specifically pleaded and proved is neither here nor there, it is not a correct argument under the law as was settled in the above cited cases.

60. In the instant case, the plaintiff stated in the plaint that, he was claiming for costs of future medical expenses and therefore put the defendants on knowledge thereof. The plaintiff, 1st respondent herein, went on to list what he would need including a wheelchair, paraplegic patient's bed and mattresses, nurse aid, catheter, urinary bags and adult diapers as well as weekly physiotherapy sessions.

61. Secondly the medical report of Dr Otieno R. Simba supported these claims by the 1st respondent. That report was admitted in evidence and not challenged. It is therefore an undisputed fact that the 1st respondent would require. I find no reason to interfere with the trial court's award on the same.

62. As special damages were not disputed, having been pleaded and proved, I find no reason to interfere with the same.

63. The upshot of the above is that the instant appeal is only partially successful in so far as it apportions liability equally between the appellant and 2nd respondent and further sets aside the award for loss of earnings and loss of earning capacity. The rest of the awards made by the trial court are sustained.

64. I order that each party bear their own costs of the appeal which is only partially successful.

65. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 12TH DAY OF SEPTEMBER, 2024

R.E. ABURILI

JUDGE