THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 93 OF 2017

CHARLES MUTACHWA.....1ST APPELLANT

NAAMAN SWALEH.....2ND APPELLANT

GEORGE NJUGUNA.....3RD APPELLANT

VERSUS

PHARES NJENGA KIBAKI.....RESPONDENT

J U D G M E N T.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL 93 OF 2019

CHARLES MUTACHWA.....1ST APPELLANT

NAAMAN SWALEH.....2ND APPELLANT

GEORGE NJUGUNA.....3RD APPELLANT

VERSES

PHARES NJENGA KIBAKI.....RESPONDENT

(Being an appeal from the judgment and decree of the Resident Magistrate

Hon. E. Kelly (RM) dated 30th June, 2017 in Nakuru CMCC No. 387 of 2016)

BETWEEN

PHARES NJENGA KIBAK.....PLAINTIFF

-VERSUS-

CHARLES MUTACHWA.....1ST DEFENDANT

NAAMAN SWALEH.....2ND DEFENDANT

GEORGE NJUGUNA.....3RD DEFENDANT

JUDGMENT

1. Vide a Plaint dated 19th February 2016, the Plaintiff/ Respondent sued the Defendants/ Appellants seeking judgment against them jointly and severally for:-

(a) Ksh. 231,000/= being the costs incurred for, during and or incidental to repairing the motor vehicle registration number KAX 875 E TOYOTA MATATU.

(b) Loss of user at Ksh. 3600/= per day or any other sum for such a period that this Honourable Court might deem fit taking into consideration all the circumstances of this case.

(c) Excess Fee.

(d) Costs of this suit

(e) Any other claim that the court might deem fit to grant

(f) Interest on all the above at court rates

2. After a full trial the learned trial magistrate in a judgment dated 30th June 2017 noted that there was a consent on liability and hence the issues for determination were with regard to damages, costs of the suit and interest. The Judgment was in favour of the plaintiff and awarded total of Ksh **350,400** made up of Ksh 75000 for loss of user @ 3600 per day for 21 days, Damages at Ksh 306000 less 10% contribution by the plaintiff (as per the consent) i.e. Ksh 275 400, plus costs and interest from the date of filing the suit.

3. The defendants were aggrieved by the Judgment and filed this appeal on 21st July 2017 on the following grounds

(i) The Learned Magistrate erred in fact and in law in awarding Kshs.275, 400/= for a material damage claim that the Respondent had failed to prove to the required standard.

(ii) The learned Magistrate erred in fact and in law in allowing the Respondent's claim when the same being a material damage claim and especially for special damages was not strictly proved.

(iii) The learned Magistrate erred in fact and in law in disregarding the Appellants' submissions on the Respondent's failure to produce any evidence of the costs of repair.

(iv) The learned Magistrate erred in fact and in law in disregarding the Appellants' submissions on the Respondent's failure to produce any evidence of the loss of user.

(v) The learned Magistrate erred in fact and in law in concluding that the Appellants did not controvert the Respondent's evidence on damage and costs of repair when the respondent never produced any evidence for the Appellants to controvert.

(vi) The learned Magistrate's finding was not supported by evidence on record and no sufficient reasons for the finding were given.

(emphasis added)

4. Parties agreed to dispose of the appeal by way of written submissions. Counsel for each; Kimondo *Gachoka &Co Advocates* for the appellants filed theirs dated 15th February 2021. They urged the court to also look at theirs submission filed before the subordinate court to be found at pages 38 to 41 of the Record of Appeal; *J Ndung'u Njuguna & Co Advocates* for the Respondent filed theirs dated 9th March 2021.

5. This being a first appeal the court is bound by the guidance set out in

Peters Vs Sunday Post Ltd. [19581 EA 424 whereby my function and duty as the 1st appellate court is to subject the evidence to a fresh and exhaustive review and to draw my own inferences and conclusions always keeping in mind that I did not have the advantage of seeing and hearing the witnesses.

6. The case for the plaintiff was that there was an on 4th August 2015 accident involving the Motor Vehicles Registration no KAU 092X and his Motor vehicle KAX 875 E TOYOTA MATATU plying the Nakuru Njoro Mau Narok route. The accident resulted in damages to the windscreen, front bumper grill, right front door, front body, lights reflector and radiator. That the accident was reported at the police station and a police abstract issued. The following day he met the 3rd defendant at the police station, who admitted liability and asked him to take the motor vehicle to a garage of his choice for repair and he 3rd defendant would pay everything. He did as agreed and took it to Top Speed Motor Tech where repairs were carried out. The motor vehicle remained at the garage for one month. He was compelled to pay for the repairs. He filed this suit and produced the supporting documents ; *copies of Motor vehicle log book, police abstract, bundle of job cards and receipts, certificate of test and inspection, OB extract, driving license, motor vehicle inspection report, bundle of daily income worksheet,*

demand notice, notice of intention to institute suit, and search certificate as exhibits.

7. The plaintiff closed his case without calling any other witness,

8. The defence did not call any witness and closed its case.

9. I have perused the record, and considered the submissions by parties.

10. From the foregoing the issues for determination appear to be

a. Whether the plaintiff Respondent produced evidence to prove his claim for material damage to the required standard

b. Whether the plaintiff Respondent produced evidence to prove his claim for loss of user to the required standard

c. Whether the learned trial magistrate disregarded the appellant's submissions on the respondent's failure to produce any evidence of the costs for repair

d. Whether the learned trial magistrate disregarded the appellant's submissions on the respondent's failure to produce any evidence of the loss of user

e. Whether the trial magistrate's findings were supported by the evidence on record and supported by sufficient reasons.

Whether the plaintiff Respondent produced evidence to prove his claim for material damage to the required standard

11. It is NOT in dispute that the accident happened. Neither is the admission of liability disputed as it evidenced by the consent at 90%:10% in favour of the respondent. It is also not in dispute that the m/v belonging to the respondent sustained damage. The dispute is the extent of the said damage and whether the respondent proved the same.

12. The plaintiff on cross examination, testified that that agreement for repair between himself and the 3rd defendant was oral; he paid for the repairs in instalments but could not remember how many installment he made; that the police visited the accident scene and towed his motor vehicle to the police station where it stayed for some time before he took it for repairs; that he collected it from the garage on 3rd September 2015; that the following payments were made: towing charges of Ksh. **20,000/-** as evidenced by a receipt dated 12.8.2015, ksh.**99, 000/=** for spares on 20.8.2015, for spray painting **Ksh 75000** paid for receipt dated 12th February 2016 and EFT receipt dated 12.2.2016 was issued upon completion of the repair amount.

13. Looking at the original record I found the inspection report from the police. It indicates the damage to the m/v to be: **windscreen cracked, front bumper and grill damaged, O/S door and O/S front body damaged, front O/S lights crushed, front reflectors damaged. Pre accident observations – front body dented, N/S door lock defective**.

14. The plaintiff told court that the motor vehicle it was spray painted at Ksh. 75,000/= which was paid in 2015 a cash sale receipt issued followed an EFT receipt. That the repairs for ignition switch, radiator and lower bolt joint which were not supported by the inspection report. He confirmed no photographs of the motor vehicle before and after the repairs, neither was satisfactory note showing the motor vehicle was repaired at the garage to the required standard availed. There was also no motor vehicle assessment report of damage to motor vehicle.

15. On reexamination the plaintiff stated that he owned 5 Matatus and they would be taken to the same garage for repairs. That upon the 3rd defendant's admission of liability, and promise to pay for the repairs it was the plaintiff's case that there was no need to have photographs of the m/v taken or assessment carried to determine the extent of the damage. He testified that Exh 8 which is bundle of income on daily worksheet was always filled by the driver and conductor who were his employees. That they were done before the accident with no reason to exaggerate income and that she has not been shown any alternative income; that Exh 3 which is the police Abstract shows that the motor vehicle was operating as a Matatu, that the inspection report showed that the front body of the Motor Vehicle was damaged; that he could not remember when he paid each sum and that the each document would speak for itself.

16. He testified that he started buying spares on credit on 29.8.2015 and these were recorded on the same receipt every time. That the ETR receipts were issued only after full payment .That receipts for repair and spare parts were enough proof of the extent of damage. On the contrary the defendants had not produced any evidence to controvert his.

17. He could not remember when he took the motor vehicle to garage as it stayed for some time at the garage since the 3rd defendant declined to pay. That it was after the 3rd defendant failed to pay as agreed that the plaintiff was compelled to pay the repair charges amounting to Ksh. 231,000/=.

18. The documents produced by the Respondent indicate payments for;-

1) Panel beating 75,000

2) Rear front pillar assy(sic) 36,000

3) Lower panel assy(sic) 14,000

4) Front door 15,000

5) Parking lamp 4,000

6) Indicator lamp 3,500

7) Wind screen 4,500

8) Upper ball joints 3,000

9) Lower ball joints 3,000

10) Grill 12,000

11) Head lamp 6,000

12) Bumper 12,000

13) Radiator 30,000

14) Ignition switch 6,000

15) *Towing* 7,000

19. Item 1, 2 and 3 were provided by Top Speed Auto Tech vide card/invoice dated 3rd September, 2015 and a receipt dated 5th February, 2016 and ETR dated 12th February, 2016 for Ksh. 125,000.

20. Items 4 to 14 sold by cash sale Riziki Auto Spares dated 20th August , 2015 with an ETR dated 18th December, 2015 for Ksh 99,000.

21. Item 14 paid to Nyakundi Rogan breakdown services receipt dated 12th August, 2015 for Ksh. 7000/= from the scene to the police station.

22. It is argued for the appellants that the respondents had a duty to discharge the burden of proof. Relying on **Anthony Francis Wareharm t/a AF Wareharm & 2 Others vs Kenya Post Office Savings Bank [2004] eKLR and Evans Nyakwana vs Cleophas Bwana Ongaro [2015] eKLR,** to the effect that the burden of proving any particular fact lies with the party who wants the court to rely on it.

The burden is placed by the law at sections 107 (1), 109 and 112 of the Evidence Act Cap 80 Laws of Kenya.

23. It is also argued that to prove a material claim it was paramount for the respondent to produce an assessment report. Reliance was placed on **Omari Gulea Jana vs BM Muange [2010]eKLR, and Linus Fredrick Msaky vs Lazaro Thuram Richoro and Another [2016]eKLR,** where it was argued that this court (Okwengu J) (as she then was) and (Aburuli J), , held that to prove a materiel claim a plaintiff must get an assessor to assess the damages and assign a value to the damage, as without an assessment report it would be impossible for the court to establish the damage to the motor vehicle or the estimated cost of repairs.

24. It was argued that the evidence was insufficient to support the claim. The appellants pointed out that there was no photograph of the motor vehicle before the repairs, the alleged payment for spares through installments was not proved, the receipt for 99,000 was issued on 20th August, 2015 yet the ETR was issued on 18th December, 2015, the spray painting's invoice was for 3rd September, 2015, the cash receipt is dated 5th February, 2016, and the supporting ETR dated 12th February, 2016, that there is an additional cost for ball joints, radiator and ignition switch, items that were never mentioned in the inspection .The appellants' position is that this evidence is in consistent and unreliable and the trial court ought not to have believed it.

25. For the respondent, on this issue it was argued that the court could only decide the case on the evidence placed before it. That the respondent had given a reasonable explanation why he had not produced some of the evidence the appellant was complaining about. That the respondent's failure to procure an assessment report was occasioned by the 3rd appellant who told him to take the motor vehicle to a garage of his own choice for repairs and he would pay and to that extend the respondents were estopped from demanding the assessment report. For this the respondent relied on **Serah Njeri Mwobi vs John Kimani Njoroge [2013] eKLR** were the court of appeal held

> *" The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.*
>
> *[**Seascapes Ltd vs Development Finance company of Kenya Ltd, Nairobi Civil Appeal no. 217 of 2002**]... it therefore follows that where one party by his words or conduct, made to the other party a promise on assurance which was intended to affect the legal relations between them and to be acted on, the other party has taken his word and acted upon it, the party who gave the promise on assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him but he must accept their legal relation subject to the qualification which he himself has introduced".*

26. It is argued for the respondent that the 3rd appellant's promise to pay was the qualification that he introduced and which binds him because he never demanded for an assessment BEFORE the motor vehicle was taken to the garage for the repairs. To this end the counsel for the respondent argued that the 2 cases ***Omar Gulea and Linus Fredrick Masky*** cited above were distinguishable because in the 1st one the issue was whether an assessment report had been done, and why there was no explanation, while in the latter, it was whether the quotation by the garage was sufficient or could serve the same purpose as an assessment report.Counsel also distinguished the other 2 cases, that the appellant relied on.

27. The counsel for the respondent argued further that the appellants by demanding the assessment report wanted to benefit from the 3rd appellant's wrong doing to steal a match from the respondent that failure to assess the matatu was caused by the 3rd appellant's wrong doing. He cited the principles of *nullus commodum capere potest de injuria sua propria* (no man can take advantage of his own wrong) as explained in **BROOMS Legal Maximi,,10th edition page 191** and **John Kipkoech Rotich & 29 others vs Drinks Regulation Committee (exparte John Kipkoech Rotich t/a Silent Pub & 29 others [2019]eKLR**.

28. Counsel argued further that it is an established legal principle that the fact that damages cannot be assessed with certainty does not relieve the wrong doer of the necessity of paying them as every wrong must be remedied, and the court is duty bond to do the best in the circumstances no matter the difficulty, the respondent cited

i. McGregor and damages 19th edition paragraph 10-001 paragraph 10-003 and page 348 to 350

ii. Samuel Kariuki Nyangoti vs Johaan Distelberger [2017]eKLR

iii. Patrick Wambugu Gitahi t/a Wambugu Garage vs Kenya Power Limited Company [2010] eKLR.

The gist of these authorities is that difficulty in quantifying damages ought not to deny the victim an award of damages.

29. The respondent emphasized that the best judge of the facts of the case was the learned trial magistrate, having heard the plaintiff, and arrived at the conclusion that the evidence placed before her was sufficient, and the fact that it is not mandatory to produce an assessment report, the evidence of the plaintiff/respondent was enough, that the burden of proof in civil matters is on a balance of probabilities and the failure by the plaintiff/respondent to produce the said report did not take anything away from his duty, which according to counsel he discharged. On this he cited several authorities.

30. He argued that all the documents were produced by consent of all the parties and hence the appellants would not be heard to change tune by challenging the evidence in the documents – he cited ***KPLC vs John Makori [2016]eKLR, David Chege Ndungu vs Robert Macharia and 2 others [2015] eKLR.*** He urged the court to be wary of substituting its opinion from that of the subordinate court and cited **Susan Muyi vs Keshar Shiani [2013]eKLR.**

31. Having considered all the foregoing, it is clear that the accident is not disputed, it is the extent of the damage and what the plaintiff/respondent ought to have placed before the learned trial magistrate as proof.

The 3rd appellant did admit that he told the plaintiff/respondent to take the motor vehicle to the garage for repairs. This happened while they were at the police station. It appears to me from the record it was after the inspection report dated 5th August , 2015. This report sets out certain specific damages to the car.

32. The question is whether, the mere fact that the 3rd appellant gave the plaintiff/respondent the go ahead to repair the car meant that the plaintiff/respondent without first of all costing the damage, he could go on a spending spree? I do not think so. Taking into consideration the fact that he would have had to account for the cost of the repairs to the person paying the bill it was only reasonable that he would cost the damage. This would have explained the additional repairs to the ignition switch, the radiator and the ball joints not captured by the police inspection report which was the only document he produced in support of the damage caused to the car. Having chosen to rely only on this report then he was bound to stick by what damages it revealed. .

33. On this, the learned trial magistrate clearly pointed out that there was no consent to admit the documents, but proceeded to conclude that the fact that the the defendants had not lead any evidence, the plaintiff evidence remained controverted and unshaken. It was on this basis that the the learned magistrate proceeded to find that the plaintiff had proved his case on a balance of probability.

34. The mere fact that the defendants had not tendered any evidence does not mean that the case for the plaintiff/respondent was unshaken, and to that extent the learned magistrate was mistaken. Even when a default judgment is entered against a defendant the plaintiff has to prove his case through the process of formal proof. It is not surprising for such a case to be dismissed. The plaintiff/respondent had the duty to prove his claim of ksh 231,000 as cost of repairing his motor vehicle, 1st he had to prove the extent of damage to the vehicle, the only evidence available of the damages is that is on the police inspection report. Without any other report it appears that he is the one who took advantage of the situation to include things that were not in the report. For instance repairs to the ignition **switch**. A reading of the report reveals that except for the lights that were crushed and damaged the electrical systems were marked as OK. Hence without the assessors report the plaintiff/respondent ought to have expected to be required to explain repairs of items not in the only report he relied on.

35. The evidence available to the court was that of the damage to the car as per the report, and what it cost to repair that damage. The plaintiff/ respondent presented the following

- *windscreen 4500*

- *front bumper 12,000*

- *grill 12,000*

- *O/S door 15,000*

- *O/S Body -*

- *O/S lights 7,500*

- *front reflectors 6000*

36. The police report shows that *O/S body* was damaged, the motor vehicle also had a pre-accident dent on that part of the motor vehicle. The panel beating expenses needed to be explained in particular the panel beating. It is noteworthy that the receipt in proof of that expense bears items not mentioned in the police inspection report and in addition the receipt and its ETR had unresolved issues which the plaintiff/respondent could not explain.

37. The plaintiff/respondent testified that he paid for the parts in installments. He was invoiced on 3rd September 2015. He paid for this on 5th February, 2016 and was issued with ETR on 12th February, 2016. If he paid cash on 5th February, 2016, why would the ETR come one week later? Similarly for items from Riziki Auto Spares, it says that a cash sale was made on 20th August, 2015, the ETR was issued on 18th December, 2015. This goes to contradict his own statement that an ETR was issued after he paid for all the spares. He said that items collected were recorded in a book, and he was issued with a receipt only when he had completed payment.

38. On the towing charges, the trial court found that he said he did not have the receipts, however he produced one receipt for 7000/= for towing but was awarded the sum of Ksh 20,000.

39. It is trite that every case is to be determined on the evidence presented to court. In this case there was only a consent on liability, there was no consent on production of documents. From the foregoing it is my finding that the only evidence available to prove the damage on the motor vehicle was the police inspection report. For the rest of the alleged damage there no proof.

Whether the plaintiff Respondent produced evidence to prove his claim for loss of user to the required standard

40. The plaintiff/respondent evidence was that his motor vehicle was a matatu plying the Nakuru/Njoro/Mau Narok Route with Narok Travelers Sacco. However he did not produce any evidence to establish the fact that he was a member of that Sacco. Hence no evidence that the motor vehicle was plying the route he alleged.

41. He produced some of documents, headed *PSV Daily worksheet* as proof that for the period 15th July, 2015 to 3rd August, 2015 his matatu making the sum of Ksh. 3600 per day on the alleged route. What is evident is that those daily worksheet do not support the claim that his Matatu was plying the alleged route on the membership to Narok Travellers Sacco. Secondly they are in complete, as the parts were the distance covered ought to be indicated is blank nor is the place for time filled up. Hence there is no telling whether again the moto vehicle travelled anywhere along that route as alleged. The only evidence available from the record is that it was on the Nakuru-Njoro Road.

Hence the plaintiff / respondent did not establish that the motor vehicle plied the route alleged. The worksheets did not present, on their face , credible evidence of the income the m/v made per day.

42. That brings us to the related question; How long was the motor vehicle off the road?. The Accident happened on 4th August, 2015. The plaintiff/respondent would not state when he took it to the garage but that he took it out of the garage on 3rd September, 2015. I found no evidence that the motor vehicle was in the garage between 12th August, 2015 and 3rd September, 2015. Why? 1st he testified under cross examination that the receipt for 7000/= for the towing charges he produced was not for the motor vehicle herein but for another motor vehicle, clarifying that for this one, he paid Kshs 20,000/= but did not have the receipt. However upon perusal of the receipt for Kshs 7000/= indicates that it was issued as proof of payment of towing charges for motor vehicle registration KAX 875E. This contradiction was not explained. Secondly, the plaintiff/respondent could not tell when he took the motor vehicle to the garage, and when he took it from the garage. He said it could have been on the date it was towed, from the police station, but he would not tell when that was. Therefor it is not clear how the learned trial magistrate arrived at 21 days. The motor vehicle could have been in the garage from the date of the accident to 20th August, 2015, or to 3rd September, 2015, or even to 18th December, 2015, or February, 2016. This is because the plaintiff/respondent did not produce any documentary evidence to demonstrate when the m/v left the garage. This is evident in his claim in the plaint.

(b) "Loss of user at Kshs 3600 per day (or any other sum) for such a period that this honorable court might deem fit taking into consideration all the circumstances for this case"

43. The number of days the m/v was out of the garage cannot be left for it cannot be a matter of conjecture. If indeed the m/v was off the road, the plaintiff ought to have known and there ought to have been evidence from the garage where it was held. If truly the plaintiff/respondent took his motor vehicle to the garage he claimed, then there ought to have been a job card opened on the same date for the repairs. However the only job card available is the invoice dated 3rd September, 2015, while the rest in the list of spares alleged to have been bought on 20th August, 2015, without any evidence that the said garage actually fitted the alleged parts. Surely the garage which issued him with the invoice he produced here in court must have recorded when the motor vehicle came in, and when the repair were complete, and final invoice issued. The mere fact that the plaintiff/respondent proposed 21 days was not sufficient, the proposal of the number of days had to be based on evidence, none was available. Clearly the plaintiff/respondent documentary evidence, and his testimony on loss of user does not

also add up.

44. On issues (c), (d) and (e) , The learned trial magistrate did not apply her mind to the evidence as placed before her, because she would have noted the loopholes. She made correct finding not there was no consent on the production of documents but misled herself by holding that the fact has the defendants/appellants did not lead any evidence, the plaintiff/respondent evidence unshaken. The plaintiff still remained with the duty to prove his claim that he had incurred the costs he pleaded, by discharging his burden under section 107 of the Evidence Act. She did not examine the documents, did not consider the circumstances brought out by the plaintiff/respondent while under cross examination.

45. Guided by the principles set out in **Susan Munyi** above and the treatise ***Judicial Hints on Civil Procedure*** by ***R. Kuloba*** at page 256 cited by the plaintiff/respondent and ***Kemp and Kemp, The Quantum of Damages vol. 1 paragraph 19 -004*** which sates;

> *It's not the function of the appellate court to substitute its opinion for that of the trial judge … the court, before it interferes with an award of damages should be satisfied that the judge has acted on a wrong principle of law, or misapprehended the facts or has for these or other reasons made a wholly erroneous estimate of the damages suffered...*

In ***Peters vs Sunday Post*** (above) citing wiht approval the House of Lords in **Watt vs Thomas [1947] 1 ALL ER 582** Sir O'Conner,

> *An appellant court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon the evidence proved stand, but this jurisdiction should be exercised with caution. It is not enough that the court might itself have come to a different conclusion..."*

46. It is my considered view that had the trial magistrate examined the documents she would have arrived at a different conclusions. I find therefor that:

A. While it not mandatory to provide an assessment report, the plaintiff/respondent presented before the court, a report which set out the damages to the motor vehicle. If anything such an assessment report could have been in favour of the plaintiff/respondent as it would have brought evidence to support the additional repairs. As it is anything outside the report the plaintiff/respondent produced would have to be proved by evidence, no such evidence was availed.

B. There was only a consent on liability. The plaintiff/respondent had to discharge his burden of proof on the claim for the 231,000/= and 3600/= per day.

C. On both the material damage, and loss of user, the police report was the available evidence in support of the damage caused to the car.

D. Without proof that the motor vehicle plied the route alleged it was a long the Nakuru/NJORO Route, I would therefor provide for 15 days for loss of user, at Ksh 1800 per day. The loss of user is substituted - 27,000 On that basis the total claim established would be judgement come to 57,000/= for loss of user.

E. The material damage proved by the report and the receipts is a s follows:

a. - windscreen 4500

b. - front bumper 12,000

c. - grill 12,000

d. - O/S door 15,000

e. - O/S lights 7,500

f. - front reflectors 6000

g. Total 57000

F. Total 57,000+ 27000= 84000, Less 10% 8,400

G. Total damages is Ksh **75,600**

47. The appeal is allowed. The award of the subordinate court be and is hereby set aside and substituted with the award of Ksh 75, 600 plus costs below and interest from the date of filing the suit in the subordinate court at court rates.

48. The appellants will have half the costs of this appeal.

Mumbua T Matheka J

Dated, Signed and Delivered via email this 13th Day of September 2012

Kimondo Gachoka & Company Advocates For appellants

Kairu& McCourt & Company Advocates for Appellants

J Ndung’u Njuguna &Co Advocates for the Respondent