REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 64 OF 2017

SANG ELIUD KIPTOO.....APPELLANT

VERSUS

CHARLES KARANJA.....1ST RESPONDENT

CHLORIDE EXIDE (K) LTD.....2ND RESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT OF HON. ODUOR

(CM) IN NAKURU CMCC NO. 773 OF 2015 DATED 17TH MAY 2017).

JUDGEMENT

1. The appellant was a lawful passenger abode Motor Vehicle Registration Number KAK 841 P when the same was involved in an accident along Kapenguria- Kamatira Road on 19th July 2017. As a result of the said accident the appellant sustained serious bodily injuries. He then filed suit against the respondents for general damages, costs and interests. The suit was heard to conclusion and in it's judgement the trial Court dismissed the plaintiff's suit with costs for failure to prove negligence and /or breach of terms of contract as against the defendants herein.

2. Dissatisfied by the trial Court's decision, the appellant filed this appeal seeking for the orders; that the appeal be allowed and the judgement of the subordinate court dated 17th May 2017 be set aside and judgement be entered against the respondents as prayed and that Costs of the appeal be borne by the respondent. The appellant cited the following grounds of appeal;

> ***a) THAT the learned magistrate erred in law and fact in dismissing the Appellant's suit on grounds that the Appellant failed to proof his case on balance of probabilities while the evidence tendered by the Appellant was so overwhelming.***
>
> ***b) THAT the learned magistrate erred in law and fact in finding that the Appellant did not adduce any evidence showing that the 1st Respondent (Driver) drove without due care and attention while evidence on record show that the 1st Respondent caused Motor Vehicle Registration No. KAK 841P to swerve hence causing the accident.***
>
> ***c) THAT the learned magistrate erred in law and fact in finding that the Appellant did not adduce evidence of how the 2nd Respondent was negligent while the principle in law is that the 2nd Respondent is vicariously liable for acts and omissions of the 1st Respondent being his employer.***
>
> ***d) THAT the learned magistrate erred in law and fact in assessing general damages at Kshs. 300,000/= while the injuries suffered by the Appellant were more serious involving Injuries on the left arm, injuries at the back, waist line, T/Spine root compression angulations T5/T6 level, abrasion on the left arm and at the back and suffering 30% disability.***
>
> ***e) THAT the learned magistrate's reasoning in the judgment was warped in law and fact.***

3. When the matter came up for hearing the court directed that the same be determined by way of written submissions which the parties complied.

APPELLANT'S WRITTEN SUBMISSIONS.

4. The appellant submitted that the trial court's decision that the appellant had failed to adduce any evidence of how the 1st defendant drove the motor vehicle without due care and attention or how he was negligent was erroneous. This is because the 1st respondent's action of trying to avoid one accident were too drastic and negligent to the extent that the motor vehicle rolled. This is proof of want of due care and attention

on his part. Had he exercised skill then the motor vehicle could not have rolled. The respondent never gave any evidence to controvert the appellant's evidence hence the same ought to be deemed as established.

5. The appellant placed reliance in the cases of **EWO (suing as the next friend of a minor COW) V Chairman Board of Governors Agoro Yombe Secondary School [2018] eKLR** and the case of **Margaret Waithera MAINA V Michael K. Kimaru [2017] eKLR** where the doctrine of *res ipsa loquitor* was discussed and submitted that the appellant pleaded the principle of res ipsa Loquitor and the court ought to use it to find the respondents liable. The respondents failed to offer an explanation as to why the accident happened and whether even after exercise of due care and skill on the part of the 1st respondent, there was no way that the accident could have been avoided.

6. The appellant placed reliance on the case of **Lenson Products Limited v Mary Waithira Ndirangu & Another (suing as joint administrators of the Estate of David Mwaura, deceased)** and submitted that when a motor vehicle is properly maintained, serviced and properly driven it cannot just swerve and roll. The motor vehicle must have not been well maintained and was being driven under a very high speed so that when trying to avoid a collision, the same rolled due to its weight and speed. This shows that the 1st respondent was negligent. The appellant faulted the 1st respondent for not stopping the motor vehicle in order to avoid the accident. The 1st respondent failed to offer any explanation as to why he did not stop the vehicle or what caused the vehicle to roll and which factors if any were out of his control even after exercising due care and skill.

7. The appellant submitted that the trial court erred in not looking at these facts and not applying the principles of res ipsa loquitor. Had it done the same, it would have reached a different conclusion in favour of the appellant. The appellant submitted that he proved on a balance of probabilities that the 2nd respondent was the owner of the motor vehicle and that the 1st respondent was the driver at the time of the accident by producing Pexh 15 Certificate of Motor Vehicle Search and Pexh 2 a police abstract which showed that the accident was self-involving.

8. The appellant submitted on the issue of vicarious liability that the 2nd respondent did not give any evidence to demonstrate how the 1st respondent gained control of it's motor vehicle without being authorized by the 2nd respondent. The appellant was transporting the 2nd respondent from one point to another to allow him to carry his duties as a rural technician. This being the case, there could be no other conclusion other than the 1st respondent was under the instruction of the 2nd respondent hence, the 2nd respondent is vicariously liable. The 2nd respondent owed a duty of care to the appellant to instruct the 1st respondent to take care to avoid causing injury to others.

9. The respondents on their part failed to adduce any evidence challenging the facts as presented by the appellant but instead they only made mere denials in the Amended statement of defence. The facts as presented by the appellant ought to have been deemed as established by the trial court. The appellant discharged his burden of proof and proved his case on a balance of probabilities.

10. The appellant submitted that the trial court did not take into account the principles of awarding damages as espoused in **Sammy Machoka Oira v Josephat Mwangi Kihuro** when it assessed the general damages at Kshs. 300,000. The said figure was too low and it failed to take into account elements of inflationary trends. The appellant submitted that in his amended plaint he listed his injuries to include; injuries on the left arm, injuries at the back, injuries on the waistline, t/spine root compression angulation T5/T6 level, abrasion on the left arm and at the back and 30 % disability. All these injuries were proved through production of Pexh 1,3,8,10,12,13 and 14. The appellant relies in his lower court submissions in which he demonstrated how general damages were awarded in previous cases where there was t/spine root compression angulation t5/t6 level.

11. The appellant also placed reliance in **West Kenya Sugar Company Ltd v Luka Wafula Namasaka [2020] eKLR** where the court awarded Kshs. 2,000,000 to the respondent who had sustained severe head injury with loss of consciousness, thoracic spine injury with compression collapse fracture of T4 vertebral body associated with incontinence of urine and stool and paralysis of both lower limbs and submitted that an award of Kshs. 2,000,000 will be sufficient in this case.

12. The appellant having suffered all those injuries and the doctor having classified the degree of injury as grievous harm and recommended he be awarded a temporary disability of 5 months and a permanent disability of 30%, he urged the court to find in favour of the appellant and compensate him for the injuries caused.

RESPONDENT'S SUBMISSIONS

13. The respondent submitted that it is a fact that the burden of proof in civil cases is on a balance of probability. However, the appellant failed to prove negligence as against the respondents. He failed to adduce evidence with regard to who caused the accident and to what degree. The appellant failed to call any witnesses in court in support of his case, therefore his testimony cannot be weighed against that of an eye witness. The circumstances pertaining the accident cannot be exhaustively ascertained seeing that the same was merely an opinion.

14. In cross-examination the appellant conceded that he noticed a Nissan car coming towards the lane of motor vehicle registration no. KAK 841P, the respondent's driver swerved to avoid head on collision thereby making the motor vehicle KAK 841 P to roll. The 1st respondent's action was to avoid the alleged accident and not to cause it as alleged by the appellant since the oncoming Nissan Car had encroached onto the 1st respondent's rightful lane thereby leaving him with no option but to swerve to avoid the alleged accident. The appellant failed to illustrate or highlight how the alleged accident occurred in his amended plaint dated 22/07/2014, and how the 1st respondent's conduct amounted to negligence in the circumstances surrounding the alleged accident.

15. The respondents relied on the case of **Grace Kanini Muthini v Kenya Bus Service Ltd and Another HCC 4708 OF 1989 as cited in M'mbula Charles Mwalimu v Coast Broadway Company Ltd [2012] eKLR** and submitted that based on the pleadings, documents on record, the appellant indeed failed to prove his allegations of negligence as against the respondent's case on the required balance of probabilities and that the trial court made the correct decision in finding as such.

16. In the case of **Kiema Mutuku v Kenya Cargo Hauling Services ltd [1991] eKLR** it was held that ***"there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on***

negligence".

17. The respondents further relied on the appellate court's case of **Morris Njagi & another v Beatrice Wanjiku Kiura [2019] eKLR** where the court exonerated blame on a driver who swerved to avoid head on collision with an oncoming motor vehicle that had encroached on the appellant's driver's rightful lane, and further observed that such liability ought to have been found on the driver who was to blame for the state of affairs leading to the accident. The appellate court allowed the appeal in favour of the appellant as the respondent failed to proof negligence on the part of the appellant.

18. Based on the above cases, the respondent implores this court to find that the appellant did not proof how the 1st respondent was negligent in trying to avoid causing the alleged accident and uphold the lower court's decision.

19. The respondent submitted that parameters of vicarious liability were set out in the case of **Tabitha Nduhi Kinyua v Francis Mutua Mburi & Another CA 180 of 2009 (2014) eKLR**. Vicarious liability is only applied when the servant, agent and/or employee to a master is found to be negligent in the course of his lawful employment and/or engagements with the master and/or employer. In light of that, the principle cannot be applied herein against the 2nd respondent since the appellant herein did not prove negligence on the part of the 1st respondent and thus must fail. The 1st respondent was not to blame for the alleged accident and thus the 2nd Respondent cannot be held vicariously liable.

20. The respondents submitted that it is not desirable for the court to depart from pleadings hence the assessment of damages in this case must be by reference to the particulars of injuries as enumerated in the amended plaint. The measure of damages is governed by the principle of *restitutio* in *integrum*, that is, an award for bodily injuries is intended to be compensatory in nature such that the plaintiff should receive monetary terms no more and no less than his actual loss. This was the holding in the case of **Fredrick Kimokoti Imbali & 2 others v AKW & Another (suing as the legal administrator of the estate of the late AK (deceased) [2019].**

21**.** The respondents submitted that the appellant's injuries as pleaded resulted in no residual disability. Pw1's testimony confirms that he has fully healed from his injuries. Further, Dr. Malik's medical report dated 15th June 2015 produced by the respondents by consent clearly indicated that the appellant has recovered fully and has suffered no permanent physical disability. The trial magistrate noted the same and the respondents implores this court to find as such.

22. The respondents submitted that the trial court was correct in his assessment of damages awardable to the appellant given the extent of the injuries suffered and factoring in time. The trial court while delivering the judgment addressed all the factual and legal issues that had been raised. He properly considered the evidence on record together with the precedents and arrived at a well-considered decision. The appellant's suit amounted to mere allegations without proof and the same warranted dismissal as it offended Section 107 and 108 of Evidence Act as pertaining to prove of claims. Hence, this court should uphold the trial magistrate's judgement dated 17th May 2017 and dismiss this appeal.

ANALYSIS AND DETERMINATION

23. I have perused the entire record of appeal and considered the submissions by counsel for both parties and there are only three issues for determination in this suit namely;

(a) Whether the appellant proved his case on a balance of probability

(b) Whether the principle of res ipsa loquitor applies.

(c) Whether the award on quantum should be disturbed.

24. This being the first appeal, it is this court's duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123 cited by the appellants where Sir Clement De Lestang (V.P)** stated that:

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

(***a)Whether the appellant proved his case on a balance of probability.***

25. The plaintiff (PW1) said that he was employed by Chloride Exide (K) Limited (2nd Respondent) as a rural technician on contract basis. On 19th July, 2007, he was travelling in a motor vehicle registration number KAK 841 P which belonged to his employer. While on Kapenguria-Lodwar road at a place called Kamatira, the driver of the said vehicle was avoiding to hit an overtaking matatu when he lost control and an accident occurred. He was injured and taken to Kapenguria District Hospital for first aid and other treatment. His left arm was in a sling for 6 months. He also had injuries on his back and on his waist line. Further, he had T/ spine root compression angulation at TS/T6. The next day he was referred to Elgon View Hospital in Eldoret where he was admitted for 21 days. He later underwent physiotherapy at the Provincial General Hospital, Nakuru (PGH). He said that to date he suffers severe back pain and weakness of the left arm.

26. It is clear from the appellant's testimony that the 1st respondent who was the driver of the said motor vehicle was trying to avoid the

accident by dodging an overtaking matatu when their motor vehicle lost control and as a result an accident occurred. According to the evidence adduced, the driver's intention was to avoid the accident, the appellant did not adduce evidence pointing to the driver's negligence. The police abstract report that was produced as evidence by the appellant showed that the case was pending under investigations. The appellant did not take the trouble of calling the investigating officer to come to court and shed light on how the accident occurred, what caused the accident and who was to blame for the accident.

27. Nothing was produced in court to show how the accident happened. No sketch plan, no conclusive police file save inconclusive police abstract that wouldn't help the court at all. It is trite law that he who asserts must prove his case. No evidence was adduced by the appellant. The burden of proof lies with whoever would want the court to find in his favour in support of what he claims.

28. Section 107 of evidence Act succinctly states:

> ***"Whosever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

29. And Section 108 of Evidence Act, further states thus:

> ***"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."***

30. It is clear from the evidence tendered before the trial Magistrate that the single fact which contributed to the cause of the accident is the other Matatu which was trying to overtake. There is nothing pointing to the negligence of the driver of KAK 851 P. Even the appellant confirmed from his testimony that the 1st respondent was trying to avoid hitting an overtaking Matatu when he lost control. The appellant submitted that the motor vehicle must have not been well maintained and was being driven on high speed so that when trying to avoid a collision, the same rolled due to its weight and speed. However, the appellant did not adduce any evidence to that effect. It was upon the appellant to discharge the burden to proof negligence.

31. In **Treadsetters Tyres Ltd –V- John Wekesa Wephukhulu (2010) eKLR** where Ibrahim J allowed an Appeal quoted **Charles Worth & Percy On Negligence, 9Th Edition at P. 387** on the question of proof, and burden thereof where it is stated: -

> ***"In an action for negligence, as in every other action, the burden of proof falls upon the Plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence maybe reasonably inferred and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred."***

31. The Court of Appeal in **East Produce Kenya Limited –v- Christopher Astiado Osiro in Civil Appeal No. 43/01** reiterated that he who alleges negligence bears the burden of proof. The court quoted with approval the case of **Kiema Mutuku –v- Kenya Cargo Hauling's Services Ltd 1991** on the holding that '**there is yet no liability without fault in the legal system in Kenya and the plaintiff must prove some negligence against the defendant where the claim is based on negligence'**.

32. The evidence tendered in my view was not sufficient to proof that the driver of motor vehicle KAK 841 P was to blame for the accident. He is not the one who was overtaking and there was no prove that he was driving at an excessive speed. He tried to avoid the accident but unfortunately the accident occurred. I place reliance in the case of **Morris Njagi & another v Beatrice Wanjiku Kiura [2019] eKLR** where the court held;

> ***"The plaintiff failed to prove negligence. The alleged swerving has been proved to have happened due to the negligence of the driver of KBM 335M who was overtaking when it was not safe to do so as there was an oncoming vehicle. He failed to swerve, to slow down or to avoid the accident. Blame must fall where it lies. The driver of KBM 335 was at fault. Liability falls on the driver who was at fault. Fault is determined from the facts of the case. The respondent did not prove negligence on the driver of KAY 567R."***

33. In this case there is no credible evidence on which negligence can be inferred on the part of the 1st Respondent or the 2nd respondent herein.

(b)Whether the principle of res ipsa loquitor applies in the circumstances

34. The **Black's Law Dictionary (8th Ed.) page 1336** defines *res ipsa loquitur* as**,**

> **"the thing speaks for itself". It goes on to explain that, "The doctrine providing that, in some circumstances, the mere fact of an accident occurrence raises an inference of negligence that establishes a prima facie case". In Nandwa v Kenya Kazi Limited [1988] eKLR, Court of Appeal (Gachuhi JA)** cited, with approval, a paragraph in **Barkway v South Wales Transport Company Limited [1956] 1 ALLER 392, 393 B** on the nature and application of the doctrine of res ipsa loquitur as follows:
>
> ***"The application of the doctrine of res ipsa loquitur, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the Respondents to give an adequate explanation, if the facts were sufficiently known, the question reached would be one***

where facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be confirmed."

35. The appellant submitted that the trial court would have applied the doctrine of Res ipsa Loquitor to find liability on the part of the respondents. The Court of Appeal, in the case of **Margaret Waithera Maina v Michael K. Kimaru [2017] eKLR (WAKI, NAMBUYE & KIAGE, JJ. A)** held as follows on res ipsa loquitur:

"Firstly, it is doubtful whether it is a doctrine, a maxim or a principle of law. Its literal meaning is that "the thing speaks for itself". It is said to be a mechanism whereby the claimant can be relieved of the burden of proving the negligence, and the court can infer negligence in those situations where the factual circumstances of the case would make proving it almost impossible. In the text book Charlesworth & Percy on Negligence, 12th edition, appears this passage:

"Although use of the maxim is periodically discouraged, it is so well entrenched that it may take some time to dislodge entirely. However, it has never been correct to describe it in terms of doctrine:

I think that it is no more than an exotic although convenient, phrase to describe what is in essence no more than a common-sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances.

The question whether to apply the maxim has usually arisen where the claimant is able to prove the happening of an accident but little else. He might well be unable to prove the precise act or omission of the defendant which caused an accident to occur, but if on the evidence it is more likely than not that its effective cause was some act or omission of the defendant, which would constitute a failure to take reasonable care for his safety, then in the absence of some plausible explanation consistent with an absence of negligence, the claim would succeed."

36. The same sentiments were expressed by Hobhouse L.J. in the case of **Ratcliffe v. Plymouth & Tobay HA 1998 PIQR 170:**

".....the expression res ipsa loquitur should be dropped from the litigator's vocabulary and replaced by the phase 'a prima facie case'. Res ipsa loquitur is not a principle of law: it does not relate to or raise any presumption. It is merely a guide to help to identify when a prima facie case has been made out."

37. Secondly, it does not have to be pleaded, as erroneously held by the High Court in this case. This Court so stated in the case of **Nandwa vs. Kenya Kazi Ltd, Civil Appeal No. 91/1987** for the reason that evidence is not to be pleaded. Also see **Bennet V Chemical Construction (GB) Ltd 3 All ER 822** where the Court emphasized that:

"It is not necessary to plead the doctrine; it is enough to prove the facts which make it applicable"

Whether it be referred to as a maxim, doctrine, principle or merely a rule of evidence affecting the onus of proof, it is our conclusion, in view of the learning cited above, that it was unnecessary to apply it in this matter since the negligence of the respondent's driver was proved on a balance of probability."

38. The Court of Appeal, differently constituted in the case of **Fred Ben Okoth V Equator Bo**ttlers **Limited [2015] eKLR** (Musinga, Gatembu & Murgor, JJ. A) held that:

"Proof of causation is crucial to the success of most of the actions in tort, except in instances where the doctrine of "res ipsa loquitur" is applicable."

39. Similarly, in the case of **Sally Kibii & another v Francis Ogaro [2012] eKLR** Ibrahim J (as he then was) pronounced himself as follows: -

"To my understanding, "res ipsa loquitor" would apply where the subject matter is entirely under the control of one party and something happens while under the control of that party, which would not in the ordinary course of things happen without negligence. See BIKWATIRIZO v RAILWAY CORPORATION [1971] E.A 82. To successfully apply this doctrine, there must be prove of facts that are consistent with negligence on the part of the defendant as against any other cause.

This is a case of two cars colliding. What facts have been proved by the Plaintiff to presume negligence on the part of the defendant as against the other vehicle? Can I safely presume that the mere fact that the two cars being KAK 746 J and KAG 331 K collided, negligence was on the part of the defendant's case and not the other? The Plaintiff must prove facts which give rise to what may be called the res ipsa loquitor situation. There cannot simply be an assumption in the Plaintiff's case in this case. If the deceased was in a self-involving accident as against a collision, then perhaps, such a presumption can be made against the owner of the car.

With respect, I disagree with the Appellant's Counsel that the burden of proof of occurrence of an accident shifted to the other side. I hold the view, that the Defendant is only enjoined to rebut the presumption of res ipsa loquitor after the Plaintiff has established a prima facie case by relying on the facts of an accident. It is after this that the court is called upon to evaluate the evidence and find if the inference of negligence should be drawn against the defendant."

40. In the instant case the investigating officer was not called to shade light on how the accident occurred. The police abstract on record

showed that the accident was under investigation. The appellant himself has told this court that the 1st respondent was trying to avoid hitting an overtaking Matatu when the accident occurred, nothing attributes liability to the respondents. Further, there is no prove of facts that are consistent with negligence on the part of the respondents as against any other cause. There cannot be an assumption of liability as the Plaintiff failed to prove facts which give rise to what may be called the res ipsa loquitor situation. In my view the doctrine does not apply in the circumstances.

(c)Whether the award on quantum should be disturbed.

41. The appellant submitted that in his amended plaint he listed his injuries to include; injuries on the left arm, injuries at the back, injuries on the waistline, t/spine root compression angulation T5/T6 level, abrasion on the left arm and at the back and 30 % disability. He was awarded Kshs. 300,000 which he submits that it was inordinately low considering the injuries and the rate of inflation. The appellant relied on the case of **West Kenya Sugar Company Ltd v Luka Wafula Namasaka [2020] eKLR** and implored this court to award Kshs. 2,000,000 for the injuries sustained. I have looked at the cited authority, the injuries sustained by the claimant in that case were so grave as compared to the injuries in the instant case.

42. The respondents submitted that the appellant's injuries as pleaded resulted in no residual disability. Pw1's testimony confirms that he has fully healed from his injuries. Further, Dr. Malik's medical report dated 15th June 2015 produced by the respondents clearly indicated that the appellant has recovered fully and has suffered no permanent physical disability.

43. Therefore, had the appellant proved their case on a balance of probability, this court would not have had any reasons to disturb the award of the trial court. I place reliance in the **Pan Africa Paper Mills Limited v Sylvester Nyarango Obwocha [2019] eKLR** where the respondent sustained soft tissue injury of the lower thoracic region, a compression fracture of the 11th thoracic vertebrae, back injury and the x-ray showed compressed fracture of T12. At the time of examination, he complained of back-ache. The prognosis was that the fracture had healed but with residual deformity and he would have frequent backache due to mechanical de-arrangement of the back. He would also not be able to perform any strenuous work especially carrying heavy loads. The movements of the spine were slightly restricted and he was awarded 10% permanent disability. The court took into account the nature of the injuries sustained and the current economic trends but did not deem it just to interfere with the trial courts award of Kshs. 400,000.

44. In the premises, the sum awarded is commensurate to the injuries sustained.

45. Consequently, I uphold the trial court's findings and find that the appeal lacks merit. The appeal is thus dismissed with no orders as to costs.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 4TH OCTOBER 2021.

H. K. CHEMITEI

JUDGE