REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 63 OF 2020

MBITHUKA TITUS.....APPELLANT

-VERSUS-

JACKLINE MUTINDI.....RESPONDENT

*(Being an Appeal from the Ruling and orders of **Hon. Nelly Kenei**, Resident Magistrate dated 12th March 2020 in Machakos CMCC No. 312 of 2019)*

BETWEEN

JACKLINE MUTINDI.....PLAINTIFF

AND

MBITHUKA TITUS.....DEFENDANT

JUDGEMENT

1. By a plaint dated 3rd June, 2019, the Respondent herein as the Plaintiff in the lower court sued the appellant as the Defendant therein seeking damages arising from a road traffic accident that occurred on 26th April, 2019 involving the appellant's motor vehicle registration no. KAS 324F and motor vehicle registration no. KCS 770P in which the Respondent was travelling. Together with the plaint, the Respondent filed a verifying affidavit, a list of witnesses, a list of documents, witness statement and copies of her documents.

2. In response the Appellant on 23rd July, 2019 filed his defence dated 22nd July, 2019 in which he denied the allegations made in the plaint but averred in the alternative that the accident in question was caused by the negligence of the driver of motor vehicle registration no. KCS 770P. There is on record the Appellant's List of Documents dated 14th November, 2019 and filed on 4th December, 2019 to which is annexed copies of a medical report and it is indicated therein that his documents include "any other document to be adduced before the hearing hereof by leave of the court."

3. To that defence was filed on 24th July, 2019 a reply to the defence dated the same day together with what the Respondent termed as agreed issues as well as the pre-trial questionnaire.

4. When the matter came up before the trial court on 14th August, 2019 for pre-trial conference, the Respondent informed the Court that she had complied with the pre-trial directions while on behalf of the Appellant it was sought 30 days to do so and the matter was fixed for mention on 18th September, 2019. On 18th September, 2019 Learned Counsel for the Appellant informed the Court that the Respondent was yet to undergo second medical examination and as a result applied that the matter be taken out. The same was then rescheduled for pre-trial directions on 30th October, 2019. On the said date, Learned Counsel the Respondent reiterated that she had complied and informed the Court that the Respondent had been re-examined on 17th September, 2019. On behalf of the Appellant the Court was informed that the Appellant was yet to file witness summons as his counsel had difficulty reaching him to do so and sought a mention in 30 days. Though the Respondent's counsel opposed further extension, the Court indulged the Appellant and directed the Appellant to comply within 14 days and the hearing was fixed for 4th December, 2019.

5. Come the hearing date, Learned Counsel for the Appellant instructed another Counsel to hold his brief and applied for adjournment informing the court that the Appellant had not complied with the directions and that the Appellant wished to engage the Respondent. That application was opposed by Learned Counsel for the Respondent which objection was upheld and the matter proceeded to hearing. It would seem that after the said ruling Counsel who was holding brief for the Appellant's Counsel on record opted to withdraw from further proceedings since at the hearing the Appellant was no longer represented.

6. After hearing the Respondent, the matter was fixed for mention on 18th December, 2019 to confirm the filing of the written submissions and for reservation of a judgement date.

7. However, on 11th December, 2019, an application dated 9th December, 2019 was filed on behalf of the Appellant seeking to have the proceedings of 4th December, 2019 set aside and the recall of the Respondent to give evidence. It was further sought that the Appellant be allowed to fully comply with Order 11 of the ***Civil Procedure Rules*** and to call his witness. The grounds upon which the application was based were that the Appellant and his counsel had been treated unfairly as the Court denied them adequate time to comply and denied them the opportunity to negotiate the matter out of court pursuant to Article 159 of the Constitution. According to the supporting affidavit, prior to the hearing date, the Appellant's Counsel got in touch with the Respondent's Counsel and it was agreed that the matter would be taken out in order to give negotiations a chance.

8. The application was however opposed by the Respondent. Apart from setting out the history of the matter it was averred that the Respondent's proposal was never responded to formally before the matter proceeded on 4th December, 2019. The deponent denied receiving a telephone call from the Appellant's Counsel and averred that there was no plausible reason for failure by the Appellant to attend court on the hearing date.

9. In dismissing the application, the Learned Trail Magistrate held that between the first pre-trial to the hearing date, the Appellant had three months and twenty days to comply with Order 11 but failed to do so. According to her the Appellant did not give any reason why he failed to comply and that had he complied and sought an adjournment, that would have been different. She therefore found that the Appellant had not approached the Court with clean hands in seeking to set aside the proceedings.

10. In this appeal, the Appellant challenges the said decision on the following grounds:

> **1) <u>THAT</u> the Learned Magistrate erred in law and in fact in finding that the Appellant herein wilfully disregarded court orders and/or directions.**
>
> **2) <u>THAT</u> the Learned Trial Magistrate erred in law and in fact in failing to take into account the Appellant's Submissions therein.**
>
> **3) <u>THAT</u> the Learned Trial Magistrate erred in law and in fact by disregarding the provisions, letter and principles of Articles 50 and 159(1)(a)(b) and (d) of the Constitution of Kenya, 2010.**

11. In support of the said grounds, it was submitted that it was not only erroneous but also unfair of the honourable trial magistrate to issue a blanket condemnation to the Appellant. It was submitted that while in her ruling the Learned Trial Magistrate paints a picture of the Appellant as a litigant who went against court orders and/or directions all through the subsistence in the trial case before the hearing date of 4th December 2019, the Appellant at all material times relevant made their best intention to comply with Order 11. The trial magistrate totally ignored the fact that during the first two mentions, the Appellant's none compliance with Order 11 was due to the fact that the Respondent had not attended the second medical examination. The Appellant's submit that the trial magistrate failed to appreciate this particular fact and therefore erred in the said Ruling.

12. It was further submitted that the Learned Trial Magistrate erred in finding that the Appellant did not at any point state the reason for non-compliance with Order 11 when the Appellant clearly informed the court that they were indeed experiencing challenges in getting the Witness to execute the statement which suggests that the Witness Statement was prepared but could not be filed without being executed.

13. It was therefore submitted that in arriving at her conclusion the Learned Trial Magistrate did not take into consideration is that the Appellants did their very best in the circumstances to comply with Order 11 and partially did so by filing a List of Documents dated 14th November 2019 producing the medical report of the Plaintiff.

14. While the Appellant agreed with the trial magistrate that strict compliance of court orders and directions is the fundamental of all the court's authority as is a position where the court gets the opportunity to assert its authority and avert anarchy and/or disrespect to the court, it submitted that there are however situations where extenuating circumstances warrant such as the one above where the court ought to be lenient and understanding. In this regard reliance was placed on the decision in ***<u>Yatin Vinubhai Kotak vs. Tucha Adventures & Another (2000) eKLR</u>*.**

15. It was further submitted that the Appellant's Submissions were never considered by the trial court. While the trial magistrate in her Ruling made several references to the Respondent's Replying Affidavit, she did not make any reference to the Appellant's Submissions. It was submitted that the said Submissions produced authorities of similar instances from the High Court to the Court of Appeal which were binding to the trial court it being a lower court which the Appellant feels would have correctly aided the trial magistrate in reaching a just Ruling. According to the Appellant, had the trial magistrate considered the same it would have come to a totally or slightly just conclusion.

16. According to the Appellant, condemning a party unheard is a very punitive decision which courts use sparingly and in extreme of circumstances which are not warranted in the instant case and made reference to the decision of the Supreme Court of Uganda in the case of **<u>The Management Committee of Makondo Primary School and Another vs. Uganda National Examination Board, HC Civil Misc</u>**

Application No.18 of 2010, which was followed with approval by **Justice Lenaola** in **Mandeep Chauhan vs. Kenyatta National Hospital & 2 others [2013] eKLR**.

17. It was submitted that the case at the lower court is one arising from a road traffic accident which is alleged to have occurred on 26th April 2019, the Respondent herein blames the Plaintiff entirely for the accident even though she was a passenger in another vehicle and the Appellant vehicle. This brings the question of liability in full glare. It cannot be regarded as an open and shut case which the trial magistrate could easily decide on. It is therefore utterly unfair and unjust for the trial magistrate to deny the Appellant the opportunity to be heard and give their version of events.

18. It was submitted that Article 50 of the Constitution of Kenya enshrines the fundamental right to a fair hearing which must be granted to a party. The said right has several aspects as espoused in J**udicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR.**

19. According to the Appellant, he was denied the right to properly present his case and defend himself by calling witnesses and producing documents to further his case. While it was appreciated that the court should not entertain a party wishing to derail or discourse the path of justice, it was contended that in some way the court is to strike a balancing act which will not occasion any injustice on any party.

20. To the Appellant, the learned trial magistrate ought to have at least in the court's discretion granted an opportunity to the Appellant to be heard or to better yet even cross-examine the Respondent's witnesses. The Application filed at the lower court as evidenced at page 5 of the record of Appeal was not only touching on compliance of order 11 but also made several prayers which the trial court gave an umbrella dismissal. If the trial court felt that the Appellant had several opportunities to comply with order 11 and failed to do so, the court should have dismissed the prayer for compliance and granted them the opportunity to cross examine the Respondent witnesses. By denying all the prayers and stating in the Ruling that the Application was solely on compliance with order 11, the trial magistrate erred.

21. Your lordship, on the other hand, the trial magistrate erred by stating that the reason for the adjournment was solely so that the Appellant could comply. The Appellant on 7th November 2019 had received a proposal from the Respondent's counsel which they communicated to their client who was considering the same and the insurance company being a body corporate any counter offer had to go through several approvals before being communicated as acceptable. This was one of the reasons for the adjournment.

22. Even prior to the date of hearing, it was submitted that the then legal assistant now counsel communicated to the Respondent's counsel and as shown therein informing them of their intention to settle the matter and that the hearing should be adjourned. The Respondent's counsel agreed to this and the Appellant had even waited for the court to assess the costs for the day and for them to be paid by the Appellant.

23. Therefore, on the said hearing date, the said legal counsel attended court and approached counsel in court to hold brief and adjourn the matter as parties had already agreed to the same. To the bemusement, the Respondent's counsel in a rant stated that he was ready to proceed and declined of ever being in negotiations with the Appellant's advocate or even receiving any phone call from the said legal assistant.

24. Despite it being a first hearing the court declined to adjourn and let the Appellant pay Court Adjournment Fees (CAF) and Respondent's costs for the day as is standard practice.

25. It was submitted that the counsel holding brief did not have any instructions to proceed with the hearing and had only been approached in court to hold brief since parties had agreed to adjourn the matter. He therefore could not proceed with the hearing as he was not in conduct of the matter and neither did he have instructions to appeal.

26. The Appellant submitted that the courts are bound under Article 159(2)(c) that in the exercise of their judicial authority they ought to promote alternative dispute resolution mechanisms. By failing to give room for such and proceeding with a hearing even when a party begs to be indulged so as to complete negotiation or make a counter-offer is in wide disregard to the said constitutional duty.

27. It was submitted that this was the first and only time the trial court suit came for hearing. The Appellant had not at any point made any request for adjournment neither were they habitual in that request. The Respondent stood to suffer little or no prejudice if the same would have been granted. Even if the Respondent supposedly suffered prejudice, it would not be so grave that it cannot be recompensed with an award of throw away costs something the Appellant remains amenable to paying so as to be granted the opportunity to be heard. Since the Appellant has not made mistakes which are so grave that they go beyond tantamount their denial from a fair hearing, it was submitted that the Appellant ought to be granted an opportunity to call witnesses and give evidence. If the court is not amenable to this, it should at least grant the Appellant the opportunity to cross examine and/or challenge the Respondent's case and/or evidence.

28. It was for these reasons that the Appellant prayed that this court allows this Appeal with costs.

29. On behalf of the Respondent it was submitted that though the Defendant's medical report was filed on 4th November, 2019, the same day the matter was coming up for hearing, the same has never been served on the Respondent. It was therefore submitted that the Appellant had no witness to call. It was therefore submitted that the Court rightfully rejected the application for adjournment on the ground of negotiations due to non-compliance with Order 11 of the ***Civil Procedure Rules*** despite several chances to do so.

30. According to the Respondent, from the record, the Appellant was out to abuse the court process and was disentitled from the exercise of the court's discretion hence the trial court rightfully dismissed the application seeking to set aside the proceedings.

Determination

31. I have considered thee submissions mad in this appeal.

32. Order 7 rule 5 of the ***Civil Procedure Rules***, 2010 provides as ***hereunder:***

> ***(1) The defence and counterclaim filed under rule 1 and 2 shall be accompanied by-***
>
> ***(a) An affidavit under Order 4 rule 1(2) where there is a counterclaim;***
>
> ***(b) A list of witnesses to be called at the trial;***
>
> ***(c) Written statements signed by the witnesses except expert witnesses; and***
>
> ***(d) copies of documents to be relied on at the trial.***
>
> ***(2) Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.***

33. It is therefore clear that the general rule is that a defence ought to be filed with a list of witnesses, the witnesses' statements and copies of the documents intended to be relied upon at the trial, unless leave of the Court is obtained pursuant to Order 7 rule 5(2).

34. The rationale behind these provisions is to discourage trial by ambush and to ensure that the provisions of sections 1A and 1B of the ***Civil Procedure Act*** are meaningfully implemented. In the case of **Harit Sheth T/A Harit Sheth Advocate vs. Shamascharania Civil Application No. Nai. 68 of 2008** the Court of Appeal held *inter alia* that the principle aims of the provisions of sections 1A and 1B of the ***Civil Procedure Act*** and sections 3A and 3B of the ***Appellate Jurisdiction Act*** include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing. Advocates and their clients are obliged under section 1A(3) of the ***Civil Procedure Act*** to assist the court to further the overriding objective of the Act and, to that effect, to participate in the process of the Court and to comply with the directions and orders of the Court.

35. From the record, it is clear that the Appellant did not file his witness statements and the documents with his defence and thereafter despite having been indulged by the Court to do so he never complied with the directions of the Court. From the record, it was not until the hearing day on 4th December, 2019 that the Appellant filed his List of Documents dated 14th November, 2019 to which is annexed copies of a medical report and it is indicated therein that his documents include "any other document to be adduced before the hearing hereof by leave of the court."

36. Currently the failure to comply with the directions of the court is dealt with under Order 11 rule 3(1)(a) under which the Court is empowered to consider compliance with Order 3 rule 2 and Order 7 rule 5 and may under rule 3(2)(f) make any procedural order and under rule 3(2)(o)(i) and (iii) strike out the action or defence or strike out any document or part of it. The trial Court however decided to proceed with the hearing without necessarily striking out the defence. The problem however was that the Counsel who was holding brief for Counsel on record for the Defendant seemed to have left the court room since his instructions were limited.

37. While the Appellant contends that there is a usual practice that a first application for adjournment ought to be granted, I am not aware of such practice and if there is such a practice it is not grounded in law. Any application for adjournment whether the first or the tenth must be grounded in law. The circumstances under which an application for adjournment would be granted was considered by the Supreme Court of Uganda in **Famous Cycle Agencies Ltd & 4 Others vs. Masukhalal Ramji Karia SCCA No. 16 of 1994 [1995] IV KALR 100** where the Court expressed itself as follows:

> **"The High Court's discretion to adjourn a suit is provided for in Order 15, rule 1(1) of the Civil Procedure Rules, which states that the Court, may, if sufficient cause is shown, at any stage of the suit grant time to the parties, or to any of them, and may from time to time adjourn the hearing of the suit…Under this rule the granting of an adjournment to the party to a suit is thus left to the dissection of the court and the discretion is not subject to any definite rules, but should be exercised in a judicial and reasonable manner, and upon proper material. It should be exercised after considering the party's conduct in the case, the opportunity he had of getting ready and the truth, and sufficiency of the reason alleged by him for not being ready. But the discretion will be exercised in favour of the party applying for adjournment only if sufficient cause is shown. Sufficient cause refers to the acts or omissions of the applicant for adjournment. What is sufficient cause depends upon the circumstances of each case and generally speaking, where the necessity for the adjournment is not due to anything for which the party applying for it is responsible, or where there has been little or no negligence on his part an adjournment would not normally be refused. But where the party has been wanting in due diligence or is guilty of negligence an adjournment may be refused…..Under the corresponding rule of the Indian "*Code of Civil Procedure*" by Manohar and Ditaley, 10th Ed, page 543, circumstances which have been held to constitute sufficient cause for adjournment include where a party is not ready for hearing by reason of his having been taken by surprise; where he could not reasonably know of the date of the hearing in sufficient time to get ready for the same; where his witnesses fail to appear for the hearing owing to non-service of summons on them when such no service is not due to the fault on the party; where a party is not ready owing to his lawyer having withdrawn his appearance in the case under circumstances which do not give the party sufficient time to engage another lawyer and enable him to get ready; and where the refusal of an adjournment to a party will enable the opposite party to successfully evade a previous interim order against him…The reasons given for adjournment did not justify one. First it is clear that the 2nd respondent's lack of interest in the suit was a matter of surprise to the applicant's when the suit came up for hearing on the material day. But from the correspondence it is shown that the 2nd respondent's position regarding the suit was known long before the hearing date and therefore instructions should have been sought before the hearing date. Secondly since the objective of the suit was to determine who the appellant's landlord was and not to determine any proprietary interest by the appellant in the suit property, and as the 2nd and the 3rd respondents disclaimed any interest over the suit property and it was clearly evident to the appellants that only the 1st respondent had claimed such interest in the suit**

property, is not true that an adjournment of the suit property to enable the appellants' counsel obtain instructions from them was sufficient cause."

38. It is therefore clear that in granting an adjournment, the court must be satisfied that a sufficient cause has been shown. In this case the reasons advanced for seeking the adjournment on the hearing date were that the Appellant/Defendant was not ready as h had not complied with Order 11 and that he wished to engage the Plaintiff. The Court was never informed of the discussion, if any, that had allegedly taken placed between the representatives of the respective parties. Even assuming that there was such a conversation, it ought not to have been assumed that the Court would necessarily be bound by the same. It would seem that the Appellant's Counsel adopted the deprecated position in the above case where the Court noted that:

> **"Thirdly, all the appellants were themselves absent from the court when the suit was called for hearing and no explanation was offered for their absence. Their absence without an explanation leaves the impression that their learned counsel went to court with the expectation of being granted an adjournment as a matter of course and if that was so, it was too presumptuous on the part of those concerned for which the appellants only have themselves to blame"** See **Nitin Jayant Madhvani vs. East African Holdings Ltd & Others Civil Appeal No. 14 of 1993 (SCU)(UR)."**

39. As was held in **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009**:

> **"A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible."**

40. Therefore, parties ought not to simply apply for adjournment on the ground that it is the first application or that an impression was created by the opposite side that such an application would not be opposed. While such an indication may be considered in granting an adjournment, it ought not be taken for granted that the application will be granted on that ground.

41. It is true that the right to hearing is a fundamental right that cannot be denied. I therefore agree with the decision of the Supreme Court of Uganda in the case of **The Management Committee of Makondo Primary School and Another vs. Uganda National Examination Board, HC Civil Misc Application No.18 of 2010**, as cited with approval by **Lenaola, J (as he then was)** in **Mandeep Chauhan vs. Kenyatta National Hospital & 2 Others [2013] eKLR** to the effect that:

> **"It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase** *'audi alteram partem'* **literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing."**

42. However, as noted by the Court of Appeal in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998**:

> **"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself….Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."**

43. The case before the trial court was not one in which the Appellant was denied an opportunity of being heard but one in which such an opportunity was not taken up. He cannot therefore be heard to claim that he was denied an opportunity of being heard in the matter. This is simply a case where a party who was given an opportunity to be heard decided not to utilise the same. Such a party only has himself to blame if the Court, in the exercise of its discretion, decides to proceed his absence notwithstanding.

44. It is clear that a decision whether or not to set aside proceedings is an exercise of discretion. In **Mbogo & Another -vs- Shah (1968) EA 93 at 96,** the Court of Appeal stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

45. In this case the Learned Trial Magistrate cannot be said to have misdirected herself or acted on matters which she should not have acted upon. Did she fail to take into consideration matters which she should have taken into account? According to the Learned Trial Magistrate, had the Appellant complied with Order 11 of the ***Civil Procedure Rules***, and sought an adjournment, the position would have been different. If I understand the Learned Trial Magistrate correctly, had the Appellant complied, most probably the discretion would have been exercised favourably to him. A perusal of the record reveals that at least one document had been filed on the hearing date. Accordingly, it cannot be said that there was complete non-compliance. While the past directions had not been complied with there seems to have been a belated

attempt to do so. It would seem that the notice of the Learned Trial Magistrate was not drawn to that particular document. I cannot say what the Learned Trial Magistrate would have decided had the Court's attention been brought to the existence of this document. This Court must however lean towards hearing parties where it is not sure of what the position might have been.

46. That however does not excuse the failure to file witness statements without which the Appellant would be disentitled to call witnesses.

47. In the present era, trial by ambush is no longer acceptable in civil litigation and any party who does so, will be doing so at the risk of being locked out of relying on its documents at the very least or having its defence struck out. In the case of **Topen Industries Ltd. vs. Afrolite Industries Ltd. Civil Application No. Nai. 334 of 2000** the Court of Appeal held that where a time limit is given by the Court for complying with the order for discovery and inspection and the same is not complied with until well beyond the date fixed by the Court, the filing of the said documents without extension or obtaining the consent of the opposite party is unjust. Again in **Menze and Others vs. Matata [2003] 1 EA 151** it was held that although a litigant who has failed to comply with a Court order for discovery should not be precluded from pursuing his claim or setting up his defence, where the failure to comply is due to wilful disregard of the order of the Court and is a great impediment in the Cause and the cause of justice in the matter, the litigant may be precluded from setting up his defence.

48. I associate myself with the opinion expressed in ***Yatin Vinubhai Kotak vs. Tucha Adventures & Another (2000) eKLR*** *by* ***Mbogholi J****. that:*

> ***"the court should not be astute to find excuses for such failure since obedience to peremptory orders of the court is the foundation of its authority, but, if the non-complying party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, the failure ought not to be treated as contumacious and ought not to disentitle him to rights which he would otherwise have enjoyed."***

49. Having considered the matter, while in the absence of witness statements, no use would be served by setting aside the proceedings in their entirety, since no serious prejudice would be occasioned by partial setting aside of the proceedings, I allow the appeal and direct that the Respondent be recalled but only for cross-examination. Only to that extent does the appeal succeed.

50. The costs of this appeal are however awarded to the Respondent.

51. It is so ordered.

Judgement read, signed and delivered at Machakos this 6th day of October, 2020.

G.V. ODUNGA

JUDGE

In the presence of:

Miss Ngunekya for Mr Owano for he Appellant

Mr Makau for Mr Sila for the Respondent

CA Geoffrey