



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAJIADO**

**CIVIL APPEAL NO. 31 OF 2015**

**MARGARET MUMBUA MBITHI.....APPELLANT**

**VERSUS**

**A.S.K. SANGHAN.....1<sup>ST</sup> RESPONDENT**

**DAHIR ALI.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal from a judgement dated 20.6.2013 delivered by Hon. Olengo P.A. at Kajiado in PMCC No. 171 of 2003)**

**JUDGEMENT**

**MARGARET MUMBUA MBITHI**, herein referred as the appellant has appealed against the judgement of the learned trial magistrate Hon. Olengo delivered on 20.6.2013 dismissing the suit filed seeking general damages arising out of negligence by the 1<sup>st</sup> respondent agent or servant.

The claim was based on a road traffic accident which occurred on 11.4.2009 along Kitengela – Namanga Road in which the appellant was a passenger in motor vehicle registration KAK 762E owned by the 1<sup>st</sup> respondent and driven by the 2<sup>nd</sup> defendant.

The appellant alleged that the accident was caused due to negligence which accident resulted in physical injuries, loss and damage on the part of the appellant.

Being dissatisfied with the entire judgement and findings of the lower court on liability and quantum this appeal was filed seeking to set aside the orders of the learned trial magistrate.

She was represented in this appeal by Counsel Mr. Makau. In her memorandum of appeal she relied on the following five grounds of appeal:

- (1) The learned magistrate erred in law and fact and misdirected himself by making findings which were not supported by the evidence on record.**
- (2) The learned trial magistrate erred in law and fact and misdirected himself by failing to apportion liability.**
- (3) The learned trial magistrate erred in law and fact and misdirected himself by finding that the plaintiff had not established a claim against the defendant and ordering that the plaintiff was liable to pay costs to the defendants.**

**(4) The learned trial magistrate erred in law and fact and misdirected himself by making an award of damages without seeking out the reasons for the finding.**

**(5) The trial magistrate erred in law and fact and misdirected himself by failing to consider the plaintiff's submissions and not finding the defendants liable despite the weight of evidence.**

Directions were taken in the manner the appeal was to be heard and determined. Both counsels agreed to canvass the appeal by way of written submissions and also rely on the record and evidence of the trial court.

This being the first appellate court it is mandatory by law to evaluate and scrutinize the evidence and come to its own conclusions. In doing so, I bear in mind that I neither heard nor saw the witnesses to observe their demeanor and veracity of their evidence when they testified.

### **The Appellant's Case:**

The appellant's submissions on the grounds of appeal can be christened into two major issues; liability and quantum.

#### **(i) Liability**

The appellant's counsel Mr. Makau submitted that the respondents were wholly to be blamed for the accident. He relied on the facts and evidence that the 1<sup>st</sup> respondent was the owner of motor vehicle registration KAK 762E; which was driven by the 2<sup>nd</sup> respondent. The second reliance was that the appellant boarded the 1<sup>st</sup> respondent's motor vehicle on 11.4.2003 as a lawful passenger. Thirdly the accident occurred due to negligence of the 2<sup>nd</sup> respondent.

That at all material time the 2<sup>nd</sup> respondent drove the 1<sup>st</sup> respondent's motor vehicle lawfully and with authorization from the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent was therefore vicariously liable for acts of negligence committed by the 2<sup>nd</sup> respondent in the course of employment.

Counsel for the appellant reiterated the evidence at the trial court. In his further submissions he impugned the testimony of PW3 a police officer who produced the police abstract and investigations findings and recommendations in support of occurrence of the accident.

According to PW3, the accident was occasioned by the cattle on the road along Kajiado – Namanga road. He narrated the subject motor vehicle colluded with cattle on the road hence the accident ensued.

Counsel for the appellant further submitted that the evidence of PW1 the appellant was very clear on occurrence and causation of the accident. According to the testimony of PW1 she boarded the motor vehicle registration KAK 762E at Bissil travelling towards Kitengela.

In the course of their journey the 2<sup>nd</sup> respondent, being the authorized driver of the 1<sup>st</sup> respondent drove the motor vehicle negligently hitting some cows and resulting in the vehicle overturning. This acts of negligence as per PW1's testimony resulted in her sustaining injuries which she sought compensation.

The arguments by Mr. Makau for the appellant in contesting the testimony by PW3; was that he did not witness the accident. It was also his contention that PW3 only produced the police file and P3 without participating in investigation. As a result the learned magistrate was influenced by hearsay evidence into making a finding of non-negligence on the part of the 2<sup>nd</sup> respondent. In support of the arguments to support this appeal learned counsel relied on the following decisions:

**(1) Mondo v Jessa [19690 EA**

(2) *Lilian Gakuhi Mworira v Stanley M'nthira [2010] eKLR*

(3) *David Kajogi Mungaa v Francis Muthomi [2012] eKLR*

(4) *Paul Muthu Mwavu v Whitesolene K. Ltd [2015] eKLR.*

While making reference to the legal principles in the cited cases herein counsel submitted that the learned trial magistrate erred both in law and fact and consequently arrived at a wrong decision on liability. He urged this court to set aside an order by the trial magistrate to dismiss the appellant suit for want of prove of negligence and substitute it with liability at 100%.

## **(ii) Quantum**

The appellant's counsel submitted and argued that the learned magistrate in awarding a proposed sum of Ksh.2,000,000/= in damages had no force of the law. On the law counsel challenged the award of Ksh.900,000/= for future medical expenses on grounds that no reasons were cited in both awards by the trial magistrate. On this ground of appeal, there is no error or misdirection in a trial court assessing damages though findings on liability was negative. The trial court is enforced to assess both general and special damages in the event that its findings on liability were to be upset by the appellate court.

## **The Respondent's Case:**

Mr. Solonka counsel for the 1<sup>st</sup> respondent vehemently submitted and contested the line of arguments by the appellant.

The gist of counsel for the 1<sup>st</sup> respondent's argument was that the mere occurrence of an accident will not put the trial court to find negligence on the part of the respondent, nor can a finding on contributory negligence be made without cogent evidence. Counsel further submitted that the evidence by the appellant did not prove negligence against the driver, agent, servant of the respondent.

On behalf of the 1<sup>st</sup> respondent, counsel relied on the testimony of DW1 to the effect that the subject motor vehicle was not a public service vehicle authorized to carry fare paying passengers. The vehicle according to the 1<sup>st</sup> respondent's submissions has a limitation clause that, "***No unauthorized passengers allowed***".

The point the counsel for the 1<sup>st</sup> respondent was making is that the appellant was not authorized to board the vehicle on the material day. The 1<sup>st</sup> respondent defence set out that the motor vehicle operates as a carrier of goods and no way it can accommodate the appellant as fare paying passenger as alluded to in her case. Mr. Solonka in order to rebut the contention by the appellant relied on the holding of the law in the following cases: *David Maina Kinyua v Francis Gathekia [2010] eKLR HCCA No. 131 of 2007*, *Israel Mukundi Kisangi v The Standard Limited HCCA No. 156 of 2010* and *Mureithi v Wambui & Another HCCA NO.105 of 1998*

In his submissions counsel absolved the agent of servant or driver of the 1<sup>st</sup> respondent. That he was driving carelessly and unable to swerve to avoid the accident. Counsel further argued that the appellant was a prohibited passenger and any act done by the 2<sup>nd</sup> respondent was outside his scope of employment.

Counsel urged this court to find that the appellant had not proved liability on a balance of probabilities. In absence of liability the issue of quantum does not arise. Counsel further contended that the judgement by the trial court be affirmed with costs to the respondents.

In her judgement the trial magistrate considered the evidence and made a finding that appellant failed to prove negligence against the 2<sup>nd</sup> respondent. The learned magistrate relied on the evidence of PW3 PC MATHEW NYANGE who blamed the herder who arose his heads of cattle to cross the road. On the

second reason the learned magistrate found that appellant was not a lawful passenger in the 1<sup>st</sup> respondent motor vehicle KAK 762E. Although in the judgement of the trial magistrate negligence was not proved, he was enjoined by law to assess quantum. The trial court is enjoined as a matter of procedure in the event that the findings on liability were to be upset by an appellate court. The learned trial magistrate to assess damages was therefore appropriate.

On consideration of the matter on the material placed before him an award of Ksh.2,000,000/= as general damages was awarded and Ksh.900,000/= for further medicals. The appellant grounds of appeal faults the trial court for finding that such liability was not proved and awarding damages without giving reasons in his judgement.

### **Analysis and Resolution:**

I have perused and considered the record of the trial court, submissions by both appellant and respondents' counsel. I am duly bound by law to evaluate and scrutinize the evidence and be able to draw my own conclusions.

On liability, PW1 testified how she boarded motor vehicle KAK 762E along Namanga road on 11.4.2003. In the course of the journey the subject motor vehicle which was driven by the 2<sup>nd</sup> respondent came with contact with cattle crossing the road. The 2<sup>nd</sup> respondent according to the appellant rammed into the cattle occasioning the vehicle lose control. She further testified to have sustained injuries to the upper and lower limbs which she was treated at Kajiado Hospital. The accident was later reported to Kajiado Police Station and investigations commenced. PW3 PC Mathenge the investigating officer produced a police abstract and the details of the occurrence of the accident. He testified that according to the investigations the accident was caused by the presence of cattle on the road.

The respondent on their part adduced evidence of DW1 George Oluoch who denied any occurrence of an accident on the material day alleged by the appellant. He also denied having carried the appellant as a passenger in motor vehicle KAK 762E.

On liability there is no doubt that an accident involving motor vehicle KAK 762E occurred on 11.4.2003 along Kajiado Nairobi road. There is no dispute the accident was reported to Kajiado Police Station who issued a police abstract after completion of investigations. According to the investigations the appellant was injured on the material day of the accident.

The appellant blamed the 2<sup>nd</sup> respondent for driving the subject motor vehicle at high speed resulting in an accident which she sustained physical injuries. The respondent witness on his part and who was employed as a turn boy denied liability and occurrence of an accident in the first place. The driver of the motor vehicle involved in this accident was never called as a witness. The police officer PW3 who produced the investigations findings and a copy of the police abstract was not the same officer who investigated the accident.

I must point out from the onset that the testimony by the respondent's witness was incredible. In so far as denial that no accident occurred. His assertion was disapproved by cogent evidence of the appellant and details of a police abstract confirming an accident involving motor vehicle KAK 762E occurred on 11.4.2003 along Kitengela – Namanga road.

From the record it is not in dispute that the appellant was a passenger in the said motor vehicle in which she sustained injuries when the accident occurred. There is no evidence that the motor vehicle was a public service vehicle for fare paying passengers.

In the instant case the police blamed the presence of cows on the road but endeavored not to charge the owner. If indeed he was charged, no evidence to that effect was adduced at the trial court. It is worthy nothing that when the respondent was served with the first suit papers it was incumbent upon him to join the owner of the cattle.

I bear in mind that the owner of the cows alluded to by the appellant and investigating officer was not a party in PMCC 171 of 2003. The appellant in this case under Section 107 and 108 of the Evidence Act bore the greatest responsibility to prove that the accident which occurred was caused by negligence of the 1<sup>st</sup> respondent agent or driver or servant. The standard of proof in cases of this nature is on a balance of probabilities. In the instant case it can be deduced from the record that the motor vehicle was being driven by the 2<sup>nd</sup> respondent. The accident occurred at about 4.00pm along Namanga – Kajiado Highway. The appellant attributed the cause of the accident in the manner the 2<sup>nd</sup> respondent drove the vehicle at high speed and rammed into cows on the road.

The trial court was not told whether the view of the road had been impaired in any way or existence of conditions of the road to invoke the doctrine of volition on fit injuries (*voluntarily assumption of risk*) as against the respondent. The covering report by the investigation officer admitted in evidence on his behalf by PW3 blamed the presence of cows on the road as cause of the accident. The evidence adduced by PW3 is of no probative value. He did not visit the scene nor draw the sketch map to bring out salient features on the surroundings of the accident scene. The findings from the investigations on said marks and whether the 2<sup>nd</sup> respondent applied emergency brakes before ramming into the cows was relevant meaning the accident occurred due to no fault or by an act of God.

The testimony by PW3 left many unanswered questions. ***Did the 2<sup>nd</sup> respondent apply brakes? Did the vehicle stop immediately after the accident? Were there bumps or pot holes on the road? How far could the driver; the 2<sup>nd</sup> respondent see ahead? Is it 50 metres? Is it 100 metres? What is the nature of the sketch plan at a place where the accident occurred? Did the driver slow down when noticing some cows on the road? What made the driver not to swerve to avoid hitting the cows? What was the width of the road?***

The trial court heard the evidence of PW1 on causation and occurrence of the accident. The existence of facts as to any liability against the 2<sup>nd</sup> respondent was not controverted by the respondent or any other witness for that matter. The inference to be drawn from the set of circumstances of the case at the trial court was that the driver was responsible for the accident. He had the opportunity to drive as at reasonable speed. He also owed duty of care to any other road users at the time.

Let us assume for a moment as evidence presented indicates the cows were on the road. The driver had a duty to take positive steps to slow down, or brake to avoid the accident. That piece of evidence that any such duty of care was undertaken by the driver on this material day is missing.

What the police did was to blame the cows for the accident without supporting evidence. The testimony by PW3 was not corroborated with that of the turn boy DW1. The turn boy who admitted being in duty on the material day when the accident occurred denied in toto that any such accident took place. The learned trial magistrate evaluating the evidence of PW3 and the defence which could have made a finding that the evidence on blaming the cows was not conclusive. In my view it is doubtful that the cause of accident is attributed to the presence of the cows on the road.

The burden of proof on the part of the appellant at all times is on a balance of probabilities against the respondent. This is buttressed by Section 107, 108 and 109 of the Evidence Act Cap 80 of the Laws of Kenya. In the case of *Veronica Kanorio Sabari (Legal Representative of Chabar, Mngeraini v Chinese Technical Team for Kenya National Sports & 2 Others HCC No. 376 of 1989* the court held thus on the burden of proof:

**“The onus is on the plaintiff to prove his case on the legal standard necessary. In a civil case the standard is on a balance of probability. It differs from those standards of proof required in a traffic case on a charge of causing death by dangerous driving.”**

See also *Henry Mwobobia v Muthaura Karauri & Another HCC No. 104 of 1991; Aganyanya J* as he then was held:

**“The standard of proof in criminal cases is slightly higher than that of civil cases. In the former cases must prove beyond any reasonable doubt, while the later the burden of proof is on a balance of probabilities.”**

In the circumstances of the appellant’s case, she placed before court that the 2<sup>nd</sup> respondent was in control of the accident motor vehicle which he failed to control by driving on an excessive speed. That fact on control and speed is to be proved on a balance of probabilities.

In view of the other evidence from PW3 and DW1 that assertion by P1 remained unchallenged. The trial court did not come out clearly as having made a finding on negligence from the evidence of PW1.

However the bigger question in this appeal relates to the aspect of vicariously liability of master and servant’s relationship.

The scope of liability was delved into in scholarly text by Salmond on the Law of Torts 17<sup>th</sup> Edition at pg 466 in the following phrase:

**“A master is not responsible for the negligence or other wrongful act of his servant simply because it is committed at the time when the servant is engaged on his master’s business, it must be committed in the course of that business, so as to form part of it, and not be merely coincident in time with it.”**

This principle was further elucidated by Street, the Law of Torts 3<sup>rd</sup> Edition pg 440. See also Joel v Morrison [1834] 6CRP 501 at pg 503 Parke B said:

**“If the servant was going out of his way, against his master’s implied commands when driving on his master’s business, he will make his master liable, but if he was going on a frolic of his own, without being at all on his master’s business, the master will not be liable.”**

In the case of Muwonge v A.G. of Uganda [1967] ea the court held inter alia as follows:

**“The master is exempted only when the servant was on his own business.”**

In the case of Selfe & Another v Associated Motor Boats Co. Ltd [1968] EA 123 the circumstances under which an owner can be held liable for an agent’s negligence. The court held thus:

**“Where, however a person delegates a task or duty to another, not a servant or employs another, not a servant, to do something for his benefit of himself and the other, whether the other person be called agent or independent contractor, the employer will be liable for the negligence of that other in the performance of the task, duty or act as the case may be.”**

The test on vicarious liability on negligence was set out in the case of Joseph Cosmas K. v Gigi & Co. Ltd & Another Civil Appeal 119 of 1986 eKLR.

**“In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show either that the driver was the owner’s servant or that at the material time, the driver was acting as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner’s request, express or implied on his instructions and was doing so in performance of the task or duty delegated to him by the owner.”**

In the case of Kaburi Okelo & Partners v Stella Karimi Kobia & 2 Others [2012] eKLR. The court of appeal stated as follows on vicariously liability:

**“Where the issue for determination was among others, what level of control over the negligence acts of person B who is directing person A on the doing of those acts, as being held vicariously liable for the negligence, the court of appeal held – vicariously liability arises when the tortuous act is done in the scope or during the course of one’s employment.”**

I have labored on this issue regarding application of various liability principles as between the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The 1<sup>st</sup> respondent was the registered owner of the accident motor vehicle No. KAK 762E. The subject motor vehicle was involved in a road traffic accident on 11/4/2003. The appellant in her testimony stated to have been carried by the 2<sup>nd</sup> respondent as a fare paying passenger.

The testimony of the respondent’s witness as to what the scope of their task rebuts the fact that the vehicle was not for carrying public passengers. The only passengers authorized in terms of capacity would be those associated with employment and purposes designated by the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent had not authorized action by the 2<sup>nd</sup> respondent to give people lift in the course of transporting stones or building materials. The record also reveals that the 1<sup>st</sup> respondent’s motor vehicle had a sign at the door to the effect that no unauthorized passengers are allowed.

The appellant did not provide evidence that she belonged to the category of authorized passengers. She cannot therefore ask the 1<sup>st</sup> respondent to compensate for injuries sustained on the basis that the vehicle belonged to the 1<sup>st</sup> respondent. That is not the principle of vicariously liability. The purpose of charging fare by the 2<sup>nd</sup> respondent was not for the interest of the 1<sup>st</sup> respondent. The appellant cannot also fall under the category of third party in public service vehicle scenario as the vehicle was not licenced as such.

The motor vehicle in question was a commercial vehicle tasked with responsibility of transporting stone and other construction materials. It is further deduced from the evidence of the appellant that on 11/4/2003 when she boarded the vehicle it was carrying building stones. The appellant alleged to have paid a fare Ksh.100/= as fare but no receipt was produced before the trial court to prove that fact.

In my view the negligence acts of the servant or driver done outside the course of his employment cannot bind the master. There is no authority that besides transporting building materials the driver, 2<sup>nd</sup> respondent herein would carry fare paying passengers. As the driver, 1<sup>st</sup> respondent was employed to drive the 1<sup>st</sup> respondent’s motor vehicle without the duty of picking passengers on the way and charging fare. That cannot be attributed to the 1<sup>st</sup> respondent as owner of the vehicle. In carrying the appellant as a fare paying passenger, the driver was doing something outside scope of his employment.

What was the appellant required to proof by way of evidence in order to fix liability against the 1<sup>st</sup> respondent:

- (a) The driver drove the vehicle as an agent of the owner of subject motor vehicle which caused the accident.**
- (b) That at the time the accident occurred; the driver, agent or servant was driving the vehicle at the owner’s express or implied authority.**
- (c) That the owner besides task of transporting stones and building materials, he was also under a duty to transport fare paying passengers.**
- (d) That by the acts committed by the driver or servant or agent during which the accident occurred, the owner of the subject motor vehicle is vicariously liable.**

Applying the above principles in the authorities cited, I am of the view that no evidence was placed before the trial court to answer the elements in the affirmative. I therefore find that the negligence acts of

the servant or agent or driver done outside the course of his employment, but on tasks which cannot be implied as one of the duty to be accomplished cannot pinned the master. There is no evidence that the owner had issued or delegated authority to the driver to carry passengers besides transporting building materials.

I find no error of fact or legal principle that the learned trial magistrate misdirected himself on the question of liability. The ground of appeal on liability therefore fails.

It remains now for me to consider the question of damages as I am enjoined by law to do so. From the judgement, an award of Ksh.2,000,000/= as general damages and Ksh.900,000/= for future medicals was awarded by the trial court. I have carefully considered the record and judgement of the lower court and I am unable to find any reasons supporting the award of damages. It also does not appear to me as what regard to comparable awards with similar injuries to warrant the inference made in exercising discretion on quantum.

The appellant in this appeal suffered blunt head injury, bruise in the left intra-orbital region, bruise in the left – upper limb and bruises on the right lower limb around the right knee joint. She was hospitalized for 5 days while undergoing treatment.

According to Dr. Ndeti the appellant complained of headache, pain in the left upper limb and pain in the knee joint which becomes worse in walking. Dr. Ndeti on examination and findings in his report stated that the nature of injuries suffered by appellant were soft issue with permanent scars. The medical report was produced as evidence by Dr. Gituma on behalf of Dr. Ndeti. The learned trial magistrate did not deal with appellant contention in the trial before her nor did he make a proper and full appraisal of the evidence in making the award on general damages and future medicals.

The approach expected by the trial court in exercising discretion resonates well with the following speech of Lord Morris in the case of West (H) Son Ltd v Shepherd [1964] AC 326 At Pg 345:

**“But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general material of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”**

The Court of Appeal in the case of Tayab v Kinanu [1982 – 88] 1KLR 90 pronounced itself thus citing Lord Denning MR in Lim Phoctoo v Cariden and Ishington area, Health Authority [1979] 1ALL ER 332 at pg 339:

**“In considering damages in personal injury claims, it is often said “the defendant are wrong doers, so make them pay up in full. They do not deserve any consideration.” That is a tedious way of putting the case. The accident, like this one, may have been due to a pardonable error made as my befall any of us. I stress this so as to remove the misapprehension, so often repeated that the plaintiff is entitled to be fully compensated for all the los and detriment such as suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation fair both to the defendants. The defendants are not wrong doers they are simply the people who foot the bill they are as the lawyers say only vicariously liable. In this case it is in the long run the tax payers who have to pay”.**

In the two legal principles in the passages above the awards for compensation ought to be reasonable and not too low or too high.

Coming back to the appeal I am of the holding that the trial magistrate misdirected himself in both fact and law in awarding quantum damages without appraising the evidence. Secondly the claim for future medicals was not supported by any medical report as a result of which the figure of Ksh.900,000/= could be qualified and award by the learned trial magistrate.

The trial magistrate overlooked the overall effect of the injuries suffered by the appellant as diagnosed by Dr. Ndeti. The nearest comparable injury with that of appellant would be found in the following cases; ***Serah Wanjiru Njau v Joseph Ndungu Mwaura Hcc No. 3892 of 1991***; the plaintiff suffered injuries to the pillions cuts on the forehead, forearm, right leg, right ankle joint. She was hospitalized for two weeks. He complained of pain at the waist, in the chest and headache. The court awarded Ksh.200,000/= as general damages. ***John Muhindi Kingori v Charles Maina & Another Nairobi HCC No. 3698 of 1990***. The plaintiff herein suffered head injury, cumbrance concussion, cut wound over the right temporal area of the scalp injury to the right shoulder among other injuries. The court awarded Ksh.150,000/=.

On consideration the appellant injuries could have attracted an award of between Ksh.200,000/= to 250,000/= for pain and suffering. The appellant failed to specifically to plead for future medicals and the learned trial magistrate was correct in dismissing the claim.

On appraisal of the evidence at the trial court, I can say that the learned trial magistrate exercise of discretion was not based on evidence hence an error of fact and principle. This court therefore sets aside the award on general damages.

## **DECISION**

For the reasons stated herein in this appeal, I accordingly dismiss the appeal with costs to the respondent. The judgement of the lower court dated 20/6/2013 duly affirmed.

It is so ordered.

**Dated, delivered in open court at Kajiado on 7<sup>th</sup> day of October, 2016.**

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**R. NYAKUNDI**

**JUDGE**

### **Representation:**

Mr. Khafafa for Solonka for the respondent present

Mr. Makau for Appellant absent

Mr. Mateli Court Assistant