IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: KIAGE, MUCHELULE & KORIR, JJ.A.)

CIVIL APPEAL NO. 580 OF 2019

BETWEEN

THOMAS OJANGA.....APPELLANT

AND

TOYOTSU AUTO MART KENYA LTD.....RESPONDENT

(An appeal against the judgment and decree of the High Court of Kenya at Nairobi (Kasango, J.) dated 17th October 2019

in

HC Commercial and Tax Division Case No. 341 of 2017)

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JUDGMENT OF THE COURT

1. The appeal before us spotlights the arena of car dealership and purchase in Kenya. Through the plaint dated 31st July 2017, Thomas Ojanga, the appellant, averred that on 29th June 2015, he was desirous of purchasing a Toyota Hilux Double Cabin pickup vehicle. It was then that Mr. Denis Awori of Toyota Kenya introduced him to Mr. Toyooka, the Managing Director of Toyotsu Auto Mart Kenya Ltd, the respondent. The appellant visited the respondent's showroom and identified a black Toyota Hilux Vigo-Double Cabin pickup, which he was told was newly imported. He paid the agreed price of Kshs. 2,905,555 for the vehicle. The appellant deposed that he was never issued with a sale

agreement,

and as at the date of filing suit, he had not received the logbook for the motor vehicle.

2. The appellant, who at the material time was living and working in Switzerland, also averred that things started going wrong when he went to collect the motor vehicle on 21st July 2015. He stated that, upon taking possession of the vehicle and driving it for only 60 kilometres, he had a tyre burst and discovered that there was no removal kit for the spare wheel. That was not all, according to the appellant; he realised that the vehicle had numerous mechanical problems; loose battery terminals, loud exhaust, falling off of the exterior window rubbers, and an unfunctional radio and CD system. This forced him to return the vehicle to the respondent's showroom on 27th July 2015, where the respondent agreed to perform repairs to the vehicle.

3. The appellant further averred that on 17th August 2015, the respondent's salesperson informed him that the vehicle had been repaired, after which he directed that it be delivered at his home in Homa Bay County. According to the appellant, he tracked the vehicle's movement and found that it took 12 hours to cover 400 kms at a speed of 40-60 kilometres per hour. Further, that the vehicle was delivered to a third party and not his mother, as he had instructed. The appellant avowed that the vehicle caused an accident five days later, and his mother succumbed to injuries sustained in the accident shortly thereafter. He proceeded to give a historical background of the difficulties he had in repairing the

vehicle after the insurance company identified counterfeit parts and declined to replace them, and his inability to dispose of the vehicle for lack of proper documentation.

4. The appellant's case was that the entire sale transaction was fraudulent, deceitful, corrupt, negligent, dishonest, and malicious, causing him to suffer damages, loss, psychological and physical torment and torture. He particularised the elements of fraud and sought an order repudiating the contract, an order compelling the respondent to accept the return of the motor vehicle, an award of special damages to the tune of Kshs. 40,438,892, as well as general damages, interest, and the costs of the suit.

5. In response to the suit, the respondent, in a statement of defence dated 21st September 2017, denied the claim. The respondent asserted that the sale was conducted in good faith and that the repairs were made out of goodwill and were part of the after-sales services they accord their customers. The respondent stated that the appellant was aware that the vehicle in question, having been pre-owned, did not come with the manufacturer's guarantee and was, therefore, sold on "*as is, where is*" basis. The respondent also averred that, having sold and delivered the vehicle to the appellant, the risk was transferred and it could not be held liable. Additionally, the respondent deposed that it was not legally obligated to transfer the vehicle to the appellant but offered to do so in good faith, and that the delays occasioned were beyond its control, and

that the appellant ought to have been aware that,

since the vehicle had been pre-owned, it was necessary to transfer the same from the previous owner to him.

6. In support of their positions, the appellant testified as PW1 while the respondent called Hussein Ibrahim (DW1) as its witness.

7. In a judgment delivered on 17th October 2019, M. Kasango, J. dismissed the appellant's suit with costs. The appellant is now before us raising 10 long, winding grounds of appeal, marred by narrative and argument which we reproduce verbatim:

    1. The Learned Judge erred in law and fact in failing to appreciate that the Four (4) Substantive Prayers in the Plaint were separate and distinct on Independent and Separate grounds and evidence as between Prayers (a) and (b) from Prayers (c) and (d) and in dismissing the entire Suit purely on the basis of lack of proof of Special Damages through Receipts was grossly erroneous, lopsided, biased, unjust and punitive in the Language of the Judgment.

    2. The Learned Judge erred in law and fact in failing to properly evaluate the evidence tendered by the Appellant and the Undisputed facts relating to the Purchase of the Subject vehicle which was fully paid for on 29/06/15 from Franchised and Certified Dealer in a Showroom without Registration and not disclosing that the Vehicle was subsequently registered in the name of a Third Party after the date of Purchase on 29/06/15 and was never Transferred to the name of the Appellant who never received the Log Book of the Vehicle even at the date of trial hence a

Total Failure of Consideration in the Sale Transaction.

3. ***The Learned Judge erred in law and fact in failing to appreciate that the Particulars of Fraud, Deceit, Malice and Dishonesty were pleaded by the Appellant in Paragraph 20(a)-(g) of the Plaint and proved from the evidence tendered and admissions by the Respondent both in their Pleadings and evidence within the requisite Standard on Balance of Probabilities and was consequently unjustified in dismissing the entire Suit including Prayers (a) and (b) of the Plaint which were distinct and ought to have been considered separately and allowed on their own.***

4. ***The Learned Judge erred in law and fact in failing to appreciate that the Special Damages which were Specifically pleaded in Paragraph 32 of the Plaint and Set 10 out in Prayer (c) included the Purchase Price of the Subject Vehicle of Kshs.2,905,555/= and the Extras fitted on the vehicle and paid for by the Appellant which were admitted by the Respondent in their evidence and emails and therefore ought to have been dealt with separately from the other Costs and Expenses.***

5. ***The Learned Judge erred in the factual analysis of the Case by failing to appreciate that the Appellant in his evidence in Chief reiterated the entire contents of the Plaint, Verifying Affidavit and Documents without having to reproduce the same verbatim as is the practice in the Commercial Courts and the said evidence was firm, consistent and never controverted in Defence or Cross-Examination and even Corroborated in Substantial Content by the***

Defence Witness who confirmed the Truth of all the contents of the email communications between the

Appellant and the Respondent during Cross-Examination and similarly the said Respondent in like manner also just adopted his Statement, Pleadings and Documents filed by the Respondent before being Cross-Examined.

6. ***The Learned Judge erred in law and fact from inception by concluding that the Appellant offered no Evidence when the Proceedings are clear that the Appellant Testified in Court and adopted his Witness Statement on Oath, reiterated the Pleadings and Verifying Affidavit on Oath as Statements of Facts and was Cross-Examined and Re-Examined on all the Documents produced both by the Appellant and the Respondent and the Judge clearly misinterpreted the Ratio Decidendi in the quoted Case of Alfred Kioko Muteti -vs- Timothy Miheso & Another [2015] on the question of Pleadings and Evidence thus arriving at a wrong and erroneous decision and Judgment which was harsh, biased and absurd in the circumstances of the Case as the Evidence produced in form of Documents as Plaintiff's Exhibits 1-48 together with the facts which were never challenged whereas the Respondent in the same manner also adopted his Statement, produced the Documents as Defence Exhibits 1-7 and upon Cross- Examination admitted most of the facts pleaded and outlined in the emails produced by the Appellant and confirmed on oath that the Respondent is a Branded Toyota Motor vehicles dealer of used and Reconditioned Genuine Toyota Vehicles which confirmed the Implied Warranties attached to Dealership and Sale of Vehicles fit for the***

purpose for which they are purchased.

7. ***The Learned Judge erred in law and fact in totally misapprehending the Law on Franchise and Dealership in Specialized items and Implied Warranties on Sale of Goods based on Trade, Custom and Usage to the effect that a renowned Toyota Motor Vehicles Dealer could sell a Branded Toyota Car with the defects noted and go Scott-Free from Liability to an Innocent Trusting Customer who purchased a Branded Toyota Hilux wrapped in Polythene as new whereas the Vehicle was grossly defective as set out in the Pleadings and evidence tendered and to make it worse the inability of the Dealer to deliver to the Appellant Title/Log book of the vehicle for over <u>Three (3)</u> years and even during and after trial in the Superior Court.***

8. ***The Learned Judge erred in law and fact in totally ignoring the Submissions and Authorities on behalf of the Appellant in the Superior Court mainly in relation to the Law relating to Sale of Goods, the Practice, Custom and Usage and the Consequences of selling a Chattel which could not be used for the purpose it was purchased and the ensuing Damages arising therefrom to the Appellant as had been held in the cited Authorities which the Learned Judge failed to consider.***

9. ***The Learned Judge erred in law and fact in failing to appreciate the Commercial Loss suffered by the Appellant which was a direct result of the acts and omissions by the Respondent as pleaded and proved in evidence.***

10. ***The Learned Judge erred in law and fact in***

dismissing the entire Suit and all Prayers by the Appellant in the Plaint including <u>Prayers (a) and (b)</u>

and part of the Special Damages being the Purchase Price of the Vehicle <u>Kshs.2,905,555/=</u> paid in Cash and the Lost opportunities due to inability by the Appellant to secure the Title/Log Book of the Vehicle to date.

8. When this appeal came up for hearing, the appellant appeared in person while learned counsel, Mr. Ogunde, represented the respondent.

9. In arguing his appeal, the appellant restated the historical background of the dispute, claiming that the respondent sold him a vehicle registered to a third party without disclosing the agency status. He argued that this constituted misrepresentation and violated the legal principle *nemo dat quod non habet*, meaning that one cannot transfer a title they do not possess. He submitted that the concealment of ownership and the lack of disclosure constituted fraud and deceit, rendering the transaction invalid. The appellant criticized the learned Judge for concluding that there was no evidence supporting his claim, arguing that the court overlooked the specified special damages for the purchase price paid and losses incurred. He submitted that the High Court misapplied the Sale of Goods Act and the Consumer Protection Act, both of which imply warranties regarding ownership and disclosure. He requested special damages of Kshs.40.5 million, general damages of Kshs.5 million for fraud and suffering, and 12% interest on the special damages from the date of the filing of the suit and from the date of judgment on the general damages, as

well as costs for the appeal and trial court.

10. On his part, learned counsel Mr. Ogunde, counsel stressed that this was a sale on *"as is, where is*" basis. According to counsel, prior to delivery of the motor vehicle, an inspection was done, and the report was furnished to the appellant, and no evidence was produced before the trial court to show that what was disclosed in the inspection report before delivery was misleading, false, or deceitful. Counsel urged that neither party was under any illusion that this was a brand-new vehicle or sale that was on any other basis other than *"as is, where is".* Finally, counsel argued that the appellant was responsible for the accident that allegedly claimed the life of his mother, and the appeal should therefore fail in its entirety.

11. This being a first appeal, our mandate, as was restated in **Abok James Odera T/A A. J. Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR)**, is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons for our decision. In line with that mandate, we have reviewed the record and the submissions by the parties. In our view, the issues arising for determination are: whether the appellant adduced evidence in support of his claim; whether the appellant proved his claim; and whether the appellant is entitled to the reliefs sought in the plaint.

12. The first issue we address is whether the appellant adduced evidence in support of his claim. According to the learned

Judge,

the appellant's witness statement did not tender any evidence but reiterated the contents of the plaint as drawn. The learned Judge held that pleadings do not amount to evidence. On our part, we have perused the record, and we note that on 21st November 2018, the appellant took to the stand as PW1 and produced documents (pg1-48) as exhibits and adopted his written statement filed in court on 17th August 2017. The same is a lengthy statement reiterating the averments made in the plaint. This was followed by cross-examination by counsel for the respondent.

13. The character of the witness statement in civil proceedings is governed by **Order 3 rule 2** and **Order 7 rule 5** of the **Civil Procedure Rules**, requiring that the same be filed and served on the opposing side. However, the mere filing of a witness statement in civil proceedings does not elevate it to the status of evidence, and the same cannot therefore be considered as evidence, just yet. Such a statement only qualifies as evidence once it is adopted by the author under oath and relied on, after which the adverse party is allowed to cross-examine the maker to test the veracity of the averments contained therein. The same applies to exhibits annexed to the statement and to be relied upon by the parties. In the instant case, as we have pointed out, the appellant sought to rely on his witness statement and exhibits. The respondent had an opportunity to cross-examine the appellant, and the counsel on record did so, and none of the documents produced as exhibits were

challenged or impeached. Additionally, despite the appellant reiterating the contents of the plaint in paragraph 2 of his

statement, he did not stop there. The appellant went on to narrate his story, as had been extensively set out in the plaint. He also produced documents to support his case. In the circumstances, the learned Judge erred in finding that the witness statement merely reiterated the plaint and did not amount to evidence. In the circumstances of the case, the learned Judge was bound to consider the evidence adduced by the appellant as opposed to offhand dismissal of the same on the mistaken ground that it had not been adduced.

14. The next question is whether the appellant proved his claim against the respondent. The appellant alleged that the transaction was fraudulent, deceitful, and negligent. He averred that the respondent misrepresented a used, defective vehicle fitted with non-genuine parts as a newly imported vehicle. The suit was founded on claims of fraud, deceit, malice, and dishonesty. As held in **Pamba Ong'weno Amila vs. John Juma Kutolo [2015] KECA 867 (KLR)**, fraud is a conclusion of law, and the facts alleged to be fraudulent must be set out, and evidence led to prove fraudulent intent. It was also held in **Kagina vs. Kagina & 2 Others [2021] KECA 242 (KLR)** that fraud must be proved as a fact by evidence whose standard of proof is beyond a balance of probabilities but not as high as that of beyond reasonable doubt, which is applicable in criminal trials.

15. Particularising fraud, the appellant alleged that the respondent held themselves out as dealers of genuine Toyota vehicles while

selling him a vehicle that was neither tested, inspected, verified, nor certified as genuine. It was his case that the vehicle was fitted with fake and non-genuine parts. He also faulted the respondent for selling a vehicle without a Logbook, Inspection Report, Mechanical Check-sheet, Sale Agreement, or Warranty. Further, that the respondent concealed that the vehicle was defective and not mechanically sound.

16. Additionally, the appellant faulted the respondent for failing to notify him that the vehicle was registered in the name of a third party, and for attempting to transfer ownership to him on 28th August 2015, after the fatal accident. According to the appellant, the respondent pretended to have repaired the vehicle for safe delivery while knowing it had severe mechanical defects and was not roadworthy at the time. It was also the appellant's case that due to the defect, the vehicle directly caused an accident on 22nd August 2015 and the subsequent death of his mother. Finally, the appellant faulted the respondent for conning him of the purchase price of Kshs. 2,905,555 for an unsafe vehicle that lacked proper documentation.

17. The appellant, in his statement, averred that he was introduced to the respondent as a dealer in brand-new Toyota motor vehicles. In re-examination by Ms. Akello, learned counsel for the respondent, he stated that when he saw the vehicle, it was wrapped in polythene, and that he was informed that the vehicle had arrived the previous day and had been reconditioned. The respondent, on

the other hand, asserted that the vehicle, having been imported as a secondhand unit, did not come with the manufacturer's warranty and was sold on *"as is, where is"* basis.

18. **Section 16** of the **Sale of Goods Act, Cap. 31** provides that:

> **"Subject to the provisions of this Act and of any Act in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows -**
>
> **(a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for that purpose:**
>
> **Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;**
>
> **(b) where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality:**
>
> **Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which that examination ought to have revealed;**
>
> **(c) an implied warranty or condition as to quality or fitness for a particular purpose may be**

annexed by the usage of trade;

(d) an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith."

19. Exclusion clauses which purport to derogate from statutory or implied conditions are to be construed strictly, and any ambiguity resolved against the party relying on them. However, in this case, the unrebutted contention by the appellant was that there was no sale agreement whose provisions could oust the implied term that the motor vehicle ought to have been of merchantable quality. Merchantable quality does not connote perfection. It denotes that the goods are reasonably fit for the ordinary purpose for which goods of that description are commonly bought, having regard to their age, price, and description.

20. In the English case of **Bartlett vs. Sidney Marcus Ltd [1965] 1 WLR 1013**, it was observed that disclosure of defects may limit a buyer's expectations, but does not entitle a seller to pass off a vehicle that is incapable of reasonable use. The Court held that:

> **"… It means that, on a sale of a secondhand car, it is merchantable if it is in usable condition, even though not perfect. This is very similar to the position under**
> **s. 14(1). A secondhand car is "reasonably fit for purpose" if it is in a roadworthy condition, fit to be driven along the road in safety, even though not as perfect as a new car.**
>
> **Applying those tests here, the car was far from perfect. It required a good deal of work to be**

done on it; but so do many second hand cars. A buyer should realise that, when he buys a secondhand car, defects may appear sooner or later; and, in the absence of an express warranty, he has no redress. Even when he

buys from a dealer the most he can require is that it should be reasonably fit for the purpose of being driven along the road…"

21. In **Rogers vs. Parish (Scarborough) Ltd [1987] QB 933**, the English Court of Appeal held that in considering whether a car was of merchantable quality, the court had to consider not merely the buyer's purpose of driving the car from one place to another but of his doing so with the appropriate degree of comfort, ease of handling and pride in the vehicle's outward appearance. The Court also held that a manufacturer's warranty did not diminish a purchaser's right or reasonable expectation under the contract but was in addition to the pre-existing rights. Therefore, it is clear that a vehicle may be rendered unmerchantable where defects undermine its reliability and practical usability, even if the vehicle is capable of being driven. In **Van Der Merwe vs. Meades (173/89) [1990] ZASCA 150**, the South African Supreme Court of Appeal held that latent defects which materially impair the utility of the thing sold entitle the buyer to relief, notwithstanding contractual language aimed at limiting liability. From the cited authorities, the underlying principle is that contractual freedom does not extend to validating transactions that offend minimum standards of quality and fairness.

22. In **Bernstein vs. Pamson Motors (Golders Green) Ltd [1987] 2 All ER 220**, Rougier, J. held that:

"First and foremost, it is perhaps self-evident that the court must look not only at the nature of the

defect itself, considered in isolation, but also its likely effect

on the performance of the car. In Bartlett vs. Sidney Marcus Ltd [1965] 2 All ER 753. [1965] 1 WLR 1013
the Court of Appeal decided that the two basic requirements of any car, certainly a secondhand car, was, first, that it should be capable of being driven and, second, that it should be capable of being driven in safety, and that statement I respectfully adopt. A car that will not move is useless; a car that will move as intended but is a death trap to its occupants is worse than useless. In my judgment, it would be only in the most exceptional case (of which I cannot for the moment imagine an example) that a new car which on delivery was incapable of being driven in safety could ever be classed as being of merchantable quality.

…Merchantability, however, is to be tested by reference to the condition of the car at the time of delivery. In practice the argument whether a car was of merchantable quality only arises when, after accepting delivery, the buyer becomes aware of some defect. To that extent, therefore, there will always be an element of latency in any particular defect which is the subject of a claim for rescission such as the present."

23. It is not disputed that the respondent was conducting car dealership business when it presented the motor vehicle to the appellant as a freshly imported and reconditioned unit. When a buyer walks into the showroom of a car dealer, some level of professionalism and guarantee is expected. The least a purchaser expects is that the motor vehicle is serviceable and can be used for transport purposes. A reconditioned car ranks second to a new vehicle. It is supposed to have undergone

professional inspection and repair, thus making it almost like a new vehicle. It ought to be

safe, reliable, and with appealing aesthetics. On the aesthetics aspect, the appellant cannot be heard to complain because he saw with his own eyes that which his heart desired, and he was happy. As regards the other defects, the same could not easily be identified by the appellant at the time of the delivery of the vehicle. Those defects as pleaded in the plaint by the appellant were absence of removal kit for the spare wheel, loose battery terminals, loud exhaust, falling off of the exterior window rubbers, and a defective radio and CD system. Although we agree with the appellant that the phrase *"as is, where is",* which the respondent relied on, is too general and does not clearly and unambiguously exclude the implied condition of merchantable quality, the defects identified by the appellant did not go to the core function of a vehicle. It is also not disputed that upon the discovery of these defects, the respondent accepted responsibility and carried out repairs. The appellant has therefore not proved his averment that the respondent was fraudulent and concealed the defects in the vehicle.

24. The other ground upon which the appellant sought the rescission of the sale contract was the alleged delay in the surrender of the logbook to him by the respondent. A perusal of the pleadings shows that the appellant's averment that he had not received the logbook by the time of filing his claim on 31st July 2017 is incorrect. The appellant did indeed aver at paragraph 29 of the plaint that on 5th February 2016, a salesman called Mr. Hussein Ibrahim sent him a scanned copy of records dated 27th

January

2016 from the Registrar of Motor Vehicles. Indeed, Mr. Hussein Ibrahim, who testified for the respondent as DW1, told the trial court that he had written an email to the appellant to go and collect the logbook, and he was surprised that he had not done so. The respondent stated in its statement of defence, and the explanation cannot be ignored, that the delay in obtaining the logbook was attributable to the slow processes in the office of the Registrar of Motor Vehicles. We thus find no merit in the appellant's claim that the delay in the registration of the motor vehicle confirmed fraud, dishonesty or malice on the part of the respondent.

25. Finally, there is the averment by the appellant that the defects in the vehicle resulted in an accident five days after the second delivery, which led to the death of his mother. We sympathise with the appellant for the loss of his mother in an accident. However, he never adduced any evidence connecting the accident to the alleged defectiveness of the vehicle. The accident not being directly attributable to the alleged defects, the respondent cannot be held liable for the appellant's loss.

26. From the foregoing analysis, it follows that although the learned Judge erred in concluding that the appellant did not adduce evidence in support of his claim, upon consideration of the evidence adduced by the appellant, we find his claim unsupported. Having so found, we are nevertheless of the considered view that the appellant's claim for general damages could not have

succeeded in any event. In saying so, we advert to the principle that general damages are not ordinarily recoverable for breach of contract. This Court has restated that position, in among other decisions, **Dharamshi vs. Karsan [1974] EA 41**; **Provincial Insurance Co. EA Ltd vs. Mordekai Mwanga Nandwa [1995– 1998] 2 EA 289**; and **Kenya Tourist Development Corporation vs. Sundowner Lodge Limited [2018] eKLR**. In the appeal before us, no evidence was placed before the trial court to support the appellant's assertion that he suffered *"mental anguish, torment, torture, inconvenience, and pain"* so that his claim could fall into the exceptions to the general rule regarding award of general damages in claims for breach of contract.

27. Additionally, in the appeal before us, we observe that the appellant did not pursue his claim for general damages with respect to the death of his mother as a result of injuries sustained in an accident involving the motor vehicle in question. We can only reiterate that there was no evidence linking the alleged accident to the defectiveness of the motor vehicle. The claim for compensation could not, therefore, be sustained in such circumstances. We therefore decline the prayer for general damages.

28. As regards the claim for special damages, it is trite that special damages should be specifically pleaded and also proved. In this case, the appellant did not tender any evidence to support his claim for the special damages of Kshs. 36,571,946. As such, had

the appellant succeeded in having the sale contract rescinded, he

could have only been entitled to a refund of the purchase price of Kshs.2,905,555, and maybe the sum of kshs.960,391 that he had allegedly spent on the motor vehicle. Indeed, the appellant appreciated in his Memorandum of Appeal that he did not prove his claim for the special damages of Kshs. 36,571,946, and we find his acknowledgement to be correct.

29. We have said enough to demonstrate that this appeal is without merit, and we dismiss it. As regards the issue of costs, we appreciate that the appellant succeeded in demonstrating that the learned Judge erred in holding that he did not adduce evidence in support of his claim. Even though this victory has not borne any monetary fruits for the appellant, the appropriate order in the circumstances is to direct each party to bear own costs of the appeal, which we hereby do.

Dated and delivered at Nairobi this 6th day of March 2026

P. O. KIAGE

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR