REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appeal 203 of 2001

KIMATU MBUVI T/A KIMATU MBUVI & BROS……..……APPELLANT

AND

AUGUSTINE MUNYAO KIOKO…….....…… RESPONDENT

(An appeal from the judgment and decree of the High court of Kenya at Machakos (Osiemo, J.) dated 17th March, 1994

in

H.C.C.C. NO. 225 OF 1992)

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JUDGMENT OF THE COURT

The appeal before us arises from a decision of the superior court, **Osiemo J**, in a road traffic accident case and there is no challenge on liability for the accident. The respondent, who was the plaintiff before the superior court, was traveling as a fare-paying passenger in a matatu vehicle, Reg. no. KUU 516 owned by the appellant and driven by his servant on 11th May 1992 along the Machakos-Kitui road when the vehicle rolled at high speed and the responded sustained bodily injuries.

He listed his injuries in the plaint filed in December 1992 as follows: -

"*(a) Multiple bruises on forehead.*

(b) Deep cut on palm of left hand.

(c) Fracture on left radius and ulna bones.

(d) Severe injuries on left arm.

(e) Severe injuries on the flexion tendons of the thumb, index and middle fingers of the left arm.

(f) Injuries on left fore-arm".

Two medical reports on the injuries were produced at the hearing of the suit and will be discussed in detail shortly. He was admitted in Machakos General hospital for one week and was discharged to continue as an out-patient. As a result of the injuries, he suffered special damages which he quantified at Shs.15,400/= and general damages which he prayed for as follows: -

"*(b) General damages for injuries, future medical expenses and for loss of business."*

Only the respondent testified before the superior court and produced two medical reports (exhibit 2 & 3), other documents in proof of special damages (exhibit 4) and a sales book in respect of his business (exhibit 5). All those exhibits, except exhibit 5, are part of the record in this appeal. The explanation is that exhibit 5, which is a primary document, was lost by the court and could not therefore be included in the record. An attempt was made at the tail-end of the hearing of this appeal by learned counsel for the respondent, Mr. Masika, to urge us to strike out the appeal on account of the missing exhibit but we reject that attempt for two reasons: firstly, the oral application was made too late in the day and certainly in contravention of ***rules 80*** and ***101 (b)*** of this Court's rules. Secondly, there is on record an order of the Deputy Registrar of the superior Court made on 28th March, 2000 at the request of Mr. Masika himself, who held brief for the appellant's counsel, certifying that the said exhibit could not be traced and was not available for inclusion in the record. The certificate was issued pursuant to ***rule 85(3)*** of the rules, and the rule does not limit the nature or number of documents that may be excluded. What more was the appellant expected to do? We find no impropriety in the order made by the Deputy Registrar and we hold that the appeal is validly before us.

The appellant, tendered no evidence before the superior court and indeed expressly conceded 100% liability against him. Submissions were then made on both asides, on the special and general damages awardable on the basis of the evidence on record. In the end the superior court, in a short judgment, made the following findings of fact on the injuries suffered: -

"**1. Multiple bleeding bruises on the forehead.**

2. Deep cut palm of the left hand about 10 cms long, 1 cms deep;

3. Deformed, swollen tender left forearm;

4. Fracture of left radius and ulna bones. He cannot do any work with the left hand."

On the basis of those findings the Judge awarded a sum of Shs.300,000/= as general damages for pain suffering and loss of amenities. In one sentence, he also awarded Shs.100,000/= for future medical expenses, before turning to loss of earning capacity on which he delivered himself thus:

"**I now turn to the issue of loss of earning capacity: Mrs. Mwangangi suggested a figure of Shs.1,200,000.00 adopting multiplier of 5 months. She submitted that if the plaintiff made Shs.8,000.00 per day and he could not work in the butchery for 5 months then he lost Shs.8,000 x 5 x 30 =1,200,000.00 but the doctor's report states that the injuries sustained by the plaintiff could have prevented him from earnings out his business for 2 months. I have to go with the finding of the doctor and adopt 2 months. Hence this figure could be Shs.8,000 x 30 x 2 = Shs.480,000.00.**

The figure may be brought forward as follows: -

a. General damages for pain suffering and loss of amenities. 300,000.00

b. General damages for future medical expenses 100,000.00

c. General damages of loss of business 480,000.00

d. special damages 15,400.00

TOTAL 895.400.00"

There is no challenge for the award of Shs.15,400/= in special damages. The rest of the award was however challenged on six grounds listed in the memorandum of appeal which were argued as three by leading senior counsel for the appellant Mr. Bill Inamdar. The grounds related to the awards numbered

(a), (b) and (c) above.

It is generally accepted by courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As ***Lord Morris*** stated in **H. West & Son Ltd v Shephard [1964] AC 326** at page 353.

"**The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."**

Nevertheless, there are clear principles which have been decanted overtime and will guide us in considering this appeal. We take it from ***LAW JA*** in **Butt v Khan [1981] KLR 349** at page 356.

"**an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low."**

That decision was subsequently followed in **Kitavi vs. Coastal Bottlers Ltd [1985] KLR 470** where ***Kneller JA*** stated at page 477.

"**The Court of Appeal of Kenya, then should, as its fore-runners did, only disturb an award of damages when the trial judge has taken into account a factor he ought not to have taken into account or failed to take into account something he ought to have taken into account or the award is so high or so low that it amounts to an erroneous estimate. *Chanan Singh v Chanan Singh & Handa* [1955], 22 EACA 125, 129 (CAK); *Butt v Khan CA Civil appeal 40 of 1977."***

As for findings of fact made by the superior court, this Court in discharging its duty to re-evaluate the evidence on a first appeal, will be slow to disturb them. This has been underscored in many decisions but we take it from **Mwanasokoni v Kenya Bus Services Ltd [1985] KLR** citing with approval **Peters v Sunday Post Ltd (1958) EA** 424, thus:

"**It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness.**

But the jurisdiction "(to review the evidence) should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion."

We must therefore examine carefully whether the findings of fact on which the assessment of damages in this case were predicated were based on no evidence, or on a misapprehension of the evidence, or the Judge acted on wrong principles in making the findings. What arguments are put forward on the three grounds of appeal laid before us?

The first attack was directed at the finding of fact made by the learned Judge that the respondent had lost his left hand and could not do any work with it. In Mr. Inamdar's submission, the finding was not supported by the evidence on record. The further statement that the finding was "*supported by the medical report of Dr. Kibore and confirmed by the medical report of Dr. Shah"* was also a misreading of those reports and a clear indication that due regard was not made of those doctors' opinions.

The respondent was examined by Dr. Kibore on 2nd November, 1992, six months after the accident

and the doctor's report was produced as exhibit 2. It is a short one and may be reproduced in full for proper appreciation: -

" ***AGOSTINO MUNYAO KIOKO – AGE 61 YEARS***

HISTORY AND TREATMENT:

This elderly man was involved in a Road Traffic Accident on 11.5.92 and was taken to Machakos General Hospital in the following condition: -

1. *Conscious but in great pain.*

2. *Clothes were torn, blood stained.*

3. *Multiple bleeding bruises on forehead.*

4. *Deep cut palm of left hand about 10cm long, 1cm deep bleeding profusely.*

5. *Deformed, swollen tender left fore-arm.*

X-Ray showed.

1. *Fracture left radius and ulna bones.*

The cut was sutured, anti-tetanus toxoid, antibiotics, analgesics were given. The left fore-arm was put in an out-patient for three months.

PRESENT CONDITON:

1. *Deformed, painful weak left arm.*

2. *Weakness left hand.*

3. *Contractures of the 1st, 2nd and 3rd fingers on the left hand.*

PROGNOSIS:

This patient sustained severe injuries to his left arm. The fractured ulna and radius did not unite properly (not unusual at his age) and so the arm is now deformed painful and weak. In addition the flexic tendons of the thumb, index and middle finger left side were injured and the affected fingers are now held in a degree of flexion (contracture) further reducing the use of the left hand. This patient requires operative treatment for both the fracture and the contractures."

Six months later on 14th April, 1993, Dr. Shah also examined him and filed his report produced in evidence as exhibit 3. After relating the history and the present complaints that he "*cannot do any work with left hand*", Dr. Shah made his findings and prognosis which may also be reproduced in full: -

"*PRESENT EXAMINATION FINDINGS: - Head has no abnormality. He has a 1" long scar over right elbow and a 5 inch long scar over left hand palm.*

Pronation, internal rotation, movement of left forearm is reduced by 25 degrees. Wrist movements are full. There is a small degree of stiffness of joints of fingers of this hand so that on making fist the finger tips fail to reach palm. So the fist making is incomplete. There is a slight deformity of left forearm. Fractures have united.

There are no contractures of fingers.

OPINION: - As result of that accident, this man sustained fractures of left forearm bones (the radius and ulna) and a few cuts. So he had to be hospitalized for one week.

LEFT FOREARM FRACTURES:- These could be expected to have caused pain for a few weeks, followed by discomfort for 2 months. He would not have been able to use that limb for 6 weeks.

He is now left with some restriction in pronation (internal rotation) movement of left forearm and is unable to make full fist. These are permanent disabilities. The disabilities are moderate in that he has lot of movement of forearm and he can make almost full (though not quite full) fist. So, though he has some definite handicap in the use of left hand, he still has very useful left hand. And he is right handed. As a rough approximation, the strength and function of left hand can be said to have been reduced by 20 percent.

There is no evidence to show that any tendons were injured. And he has no contractures of any fingers.

He does not need any operation for his fractures, except that an attempt at close manipulation of fingers might be worth trying to see if the finger tips can bend fully to make full fist. Such procedure could cost all total of about 10,000/= shillings.

Since he has no contractures of any of his fingers, he does not need any operation for that.

His disability in left hand is moderate. He can do most things with left hand though with some handicap. It is a very useful hand indeed.

His injuries could have prevented him from working for 2 months after the accidental.

The deformity of left forearms is slight and there should be no pain after first two months from time of the accident (and he has not complained of any pain)"

The reports therefore, according to Mr. Inamdar, confirm that the left hand was only "weak" during the first six months while, almost one year later, it was assessed at 20% permanent disability but was otherwise declared a useful hand. In his view, the misdirection in that finding led to an erroneous assessment of general damages for pain suffering and loss of amenities at a figure which was inordinately high in the circumstances and which this Court ought to interfere with. Referring to three previous decisions of the High Court on comparable awards, he submitted that the award on that head would be between Shs. 125,000 – 130,000 and no more.

On the other hand, Mr. Masika found no fault with the finding since the respondent testified that he had lost use of the hand and he was seen in court by the trial Judge. The opinions of the doctors, he submitted, were only for guidance and were not binding on the Judge. Nevertheless, the Judge combined the respective opinions of the two doctors that there was reduced use of the hand and a percentage of permanent disability together with the oral testimony of the respondent to arrive at the finding he made and he cannot be faulted. Mr. Masika further submitted that there was bound to be a difference in the opinions of the doctors because they were instructed to examine the respondent on both sides of the case and the opinions would favour the instructing client.

We find this latter submission by Mr. Masika rather disconcerting since the suggestion appears to be that doctors would consciously sacrifice their professional integrity and honour at the alter of monetary benefit! Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions. We have stated before, and it bears repeating, that such opinions are not binding on the court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified. But a court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so. In **Ndolo v Ndolo [1995] LLR 390 (CAK),** this Court stated: -

"**The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful**

consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decisions. A court cannot simply say: "Because this is the evidence of an expert, I believe it".

Coming back to the opinions of the doctors in this matter, which we have carefully examined, we think in view of the different periods in which the respondent was examined, it cannot be strictly submitted that their opinions are divergent. In both reports the major injury was on the left hand which was malunited or deformed and three fingers of that hand which had no contractures and thus restricted further the use of that hand. The other comments by the two doctors are worth considering too, but on the whole, taking their evidence together with the respondent's evidence, we are unable to say that the learned Judge was wrong in principle in making a finding that the respondent lost the use of his left hand, although we would not go as far as stating that it was totally useless and could not do any work at all.

It was suggested by Mr. Inamdar that the injuries were in the same league as the injuries in the following decided cases: -

1) **Narkiso Nyandara v John Nganga Mwaura HCCC 5152/88 (ur)** where **Mbogholi J** awarded Shs.100,000/= in general damages for a cut wound on the left supra-orbital region, deformed subleen left wrist and deep cut on the wrist, fracture of the left ulna and radius lower third;

2) **Christian Ombete vs. Kenya Bus Services Ltd HCCC 529/90 (ur)** where **Mwera J** in 1992 awarded Shs.100,000/= for a fracture of the right radius and ulna which were well healed, with 5% disability, bruises over the right elbow and soft tissue injuries;

3) **Margaret Ochieng v David Njihia & Anor HCCC 57/93 (ur)** where **Kuloba J** in 1995 awarded Shs.250,000/- in general damages for fracture of both radius and ulna of the lower third, poor grasp in left hand, paralysis of left hand, resulting in 20% disability, pains and left ankle swelling.

With respect, we do not think the injuries suffered by the respondent here were comparable to the first two cases cited above. Mr. Masika suggested that we apply the decision of this court in I**di Ayub Shabani vs. City Council of Nairobi & Anor CA 52/84 (ur)** where an award of Shs.350,000/= was made for personal injuries to a young school boy,the most serious of which was to the left arm and elbow which was permanently disabled. Three operations had already been done on the hand. Permanent disability had been assessed at 75%. The award included an element of loss of earning capacity. Again with respect, we think the award in that case is not comparable to the case at hand.

In his judgment, the learned Judge relied on the award of general damages made in **Joseph Wahome v Patrick Cheni Ngugi & Others HCCC 2971/85 (ur)** where Shs.250,000/= was awarded for a fracture of the head of the left radius, cuts on the left brow of nose and on outer aspect of the upper lip and loss of upper incisor tooth. He considered the injuries in the two cases comparable and in view of the fact that the award in that was some eight years old, he awarded Shs.300,000/= in this case.

We have considered the submissions of counsel and the authorities cited before us but we cannot, with respect, find any violent departure in principle in the assessment of general damages for pain suffering and loss of amenities in this matter. Indeed we find even closer comparison with it to the case cited by Mr. Inamdar as number (3) above. The award in this case is higher by some Shs.50,000/= but we do not consider it inordinately so high as to deserve our interference. The respondent's injuries, in our view, were fairly serious although we hesitate, as we said earlier, to classsify them with the "*useless claw"* referred to by **Muli J** (as he then was) in **Opuka v Akamba Public Road Services Ltd HCCC 1684/76**, or "*the chumsy and useless appendage"* which the plaintiffs' hand became in **Isabella Karangu v Washington Malele CA 50/81**, or the "*man in no better position than a man with no left hand and forearm"* in **Mativo Mutuva v Mbwika & Kaypee Enterprises HCCC 442/80** all of which attracted damages of Shs.170,000/=, 200,000/= and 250,000/= respectively more than twenty years ago.

In the result we reject that ground of appeal and affirm the assessment of damages made by the superior

court for pain suffering and loss of amenities.

The second ground of appeal relates to the award of Shs.100,000/= for future medical expenses in one sentence which made no reference to the pleadings or any evidence relating thereto. There was a recommendation in the medical report of Dr. Kibore that future treatment may be required both for the fracture and the contractures but there was no opinion expressed on the cost of such operation. Dr. Shah for his part found it was necessary to have a future operation for manipulation of the deformed fingers but he estimated the cost for such operation at Shs.10,000/=. There was no other evidence, including the respondent's own, which related to the cost of future medical treatment. In the premises, we agree with Mr. Inamdar that there was no evidence to justify the award made by the learned Judge. Mr. Masika conceded that there was no evidential basis for the award and that the respondent has not attempted any medical operation 14 years after the accident.

We allow the appeal on that ground, set aside the award of Shs.100,000/= and substitute therefor an award of Shs.10,000/=.

The final ground of appeal is on the award of Shs.480,000 ostensibly for loss of business, although the issue set out for consideration by the learned Judge was loss of earning capacity. We have set out the issue above and the manner in which it was resolved. It was Mr. Inamdar's submission that the award was wholly misconceived as it was not pleaded at all as a special damage. Furthermore there was no evidence on the basis of the calculations relied on by the court.

The basis of the award was the pleading in paragraph 6 of the plaint which was as follows: -

"**The plaintiff further avers that prior to the said injuries he was running inter alia, a profitable butchery business in Machakos Town but following the injuries his business suffered and continues to suffer a great draw back since he could not operate it as he used to do prior to the accident."**

It was on that pleading that prayer (b) for general damages for loss of business was made. But the award was made for damages suffered for two months soon after the accident, that is to say, between 11th May, 1992 and 10th July, 1992 when, according to Dr. Shah, the respondent was unable to attend to his business. The suit was not filed until 10th December, 1992. So, clearly, the loss of business or loss of earnings had already been incurred before the suit was filed and was in the nature of special damages. These as the law stipulates ought to have been not only specifically pleaded but also strictly proved. In Mr. Inamdar's view therefore, there was no basis for the award of the claim for loss of earnings and the award ought to be set aside altogether. Even if it was assumed that the pleading for loss of business and prayer for general damages thereunder was relating to loss of earning capacity which may be pleaded as such, Mr. Inamdar still submitted that there was no evidence relating to the multiplicand or the amount earned by the respondent. The only evidence on record was a brief one by the respondent as follows: -

"**I was engaged in butchery business. Prior to the accident, I earned Shs.80,000.00 per month net profit. After the accident I did not continue with the said business. I stopped the people I had employed, I closed the business. I used to do purchasing of the animals, I stopped the business…….. this is the sales book, exhibit 5"**

There was nothing exhibited in form of audited accounts to prove the monthly net profit which would end up as a substantial net annual income of Shs. 960,000/=. The only document produced was a sales book which, as stated earlier, was lost by the court and is not before us. Calculations by the learned Judge were however based on a daily income of Shs.8,000/= which would amount to Shs.240,000 per month. It would mean therefore that the award was not made on the basis of the evidence on record. Shs. 80,000/= per month would translate to about Shs.2,700/= per day and therefore the damages awardable, would have been drastically less. Mr. Inamdar once again called for setting aside of that award as it was untenable in law and in fact.

For his part Mr. Masika submitted that there was unchallenged evidence by the respondent that he was running a butchery business which was closed as a direct result of the accident. He conceded however

that there was no factual basis for the finding that the daily net loss was Shs.8,000/= since the evidence by the respondent was that he earned a net profit of Shs.80,000/= per month. The pleading for special damages for loss of earnings was also not made and therefore no award could be made. Mr. Masika however submitted that on the basis of the evidence and the pleading relating to loss of business, this Court in exercise of its duty to re-evaluate the evidence, has enough material to make a finding on loss of earning capacity and make a reasonable award thereunder.

We think, for our part, that the pleading made on behalf of the respondent for claim of damages for loss of earnings or loss of business was careless and unprofessional. The issue of loss of earning capacity was even raised during the submissions of counsel in the superior court. Loss of earning is, as correctly submitted by Mr. Inamdar, a special damage claim and must be pleaded specifically and strictly proved. We were referred to **Mwangi & Anor. Vs. Mwangi [1996] LLR 2859 (CAK)** where that principle was underscored, thus: -

"**In her plaint the respondent had claimed damages for loss of earnings and loss of earning capacity. Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of "loss of earning capacity" can be classified as general damages but these have also to be proved on a balance of probability. The plaintiffs cannot just "throw figures" at the judge and ask him to assess such damages. See the case of Kenya Bus Services Limited vs. Mayende (1991) 2 KAR 232 at page 285."**

In the absence of a specific pleading therefore, it is our judgment that there could be no award made for loss of earnings. There is nevertheless a pleading that the respondent lost his business since he closed it down after the accident. His earning capacity was in effect lost and we understand why the learned Judge equated the issue of loss of earning capacity with the loss of business and awarded a figure for the latter. Even then, as stated in the ***Mwangi Case*** (supra) evidence ought to be placed before the court to assess such loss as general damages.

We appreciate the expectation of Mr. Inamdar that accounts books, Income Tax returns or audited accounts would have put the claim beyond doubt if it was specifically pleaded as special damages or even as general damages. But there is *dicta* in decided cases that a victim does not lose his remedy in damages merely because its quantification is difficult. **Apaloo J** (as he then was) considered such difficulties in the case of a village-man in his mid fifties dealing in cattle trade, who was injured in a road traffic accident. He stated: -

"**I am bound to say that the evidence he led of his earnings, is of very poor account. Although he appeared to be a man of enterprise and was somehow exposed to banks and did business with a state commission, that is, the Kenya Meat commission, he kept no books of account or any business books. So his income and expenditure were all stored up in his memory. He has apparently not heard of income tax and never paid any in his 24 year cattle trade. It should require no ingenuity to see that figures he gave as his earnings supplied from his memory bank, may well be exaggerated. I think the figures the plaintiff gave as his business earnings and expenditure, must be considered with great care. Nevertheless, I am satisfied that he was in the cattle trade and earned his likelihood from that business. A wrongdoer must take his victim as he finds him. The defendants ought not to be heard to say the plaintiff should be denied his earnings because he did not develop more sophisticated business methods."**

That case was **Wambua v. Patel & Anor [1980] KLR 336**.

This Court also stated recently, in June 2005: -

"**We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can**

prove these things."

- See **Jacob Ayiga Maruja & Anor. Vs. Simeon Obayo Civil Appeal No. 167/02**.

The matter related to a 53 year-old carpenter, who had a family and school-going children and was said to be earning about Shs.5000/- per month. He was killed in a road traffic accident and the court was grappling with assessment of damages with scanty evidence on his earnings. The evidence from his brother was: -

"***I do not have any document to show that my brother was a carpenter. I do not have any document to support that my brother earned Shs.5000/= per month. I do not know whether my brother filed Income tax returns."***

His widow could only state that the deceased was educating their children but she had no document to show for it or his income.

We propose to adopt the reasoning in those decisions in the matter before us. Admittedly the evidence tendered on the respondent's earnings was poor and the best he could do was produce a sales book (exhibit 5) which the superior court had the benefit of examining but we do not. The sworn evidence that he was carrying on the business of butchery which he had to close down as a result of the accident was unchallenged. On the basis of the evidence by the respondent that he earned Shs.80,000/- per month and using a multiplier of 2, we would award general damages for loss of earning capacity at Shs.160,000/=. Subject to that extent, the ground of appeal succeeds and the award of Shs.480,000/= is hereby set aside and substituted with a figure of Shs.160,000/=.

The final awards may be summarised as follows: -

(a)	General damages for pain suffering and loss of amenities	300,000.00
(b)	General damages for future medical treatment	10,000.00
(c)	General damages for loss of earning capacity	160,000.00
(d)	Special damages	15,400.00
	TOTAL	485,400.00

In the end the appellant has succeeded substantially in the appeal but the respondent too has retained much of what was awarded by the superior court. We think in the circumstances that the fairest order on costs would be that each party will bear its own costs of this appeal. It is so ordered.

Dated and delivered at Nairobi this 28th day of July, 2006.

R.S.C. OMOLO

…….

JUDGE OF APPEAL

P.N. WAKI

……..

JUDGE OF APPEAL

W.S. DEVERELL

……..

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR