



REPUBLIC OF KENYA



**Kurendi & another v Wanjiku (Civil Appeal E891 of 2022)
[2024] KEHC 10496 (KLR) (Civ) (29 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10496 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E891 OF 2022**

**H NAMISI, J
AUGUST 29, 2024**

BETWEEN

HENRY KURENDI 1ST APPELLANT

MOINDI THOMAS NYAMATO 2ND APPELLANT

AND

JOSEPH NJUGUNA WANJIKU RESPONDENT

*(Being an Appeal from Judgement of Hon. E. Wanjala, Principal Magistrate
in Milimani CMCC NO. 9575 of 2018 delivered on 11 March 2022)*

JUDGMENT

1. This appeal arises from a suit filed by the Respondent against the Appellants, jointly and severally, for:
 - i. General damages;
 - ii. Special Damages of Kshs 44,771/=;
 - iii. Future Medical Expenses of Kshs 250,000/=;
 - iv. Costs of the suit
 - v. Interest on damages and cost
 - vi. Such further or other relief as this Honorable Court may deem fit to grant
2. The particulars of the suit are that on 19 November 2017, the Respondent was lawfully riding a motorcycle registration number KMDN 194B as a pillion passenger, along Lusaka Road in Nairobi. A road traffic accident occurred involving motor vehicle registration number KBA 320A, which



belonged to the 1st Appellant and was driven by the 2nd Appellant. As a result of the said accident, the Respondent sustained injuries involving compound fracture of the right mid tibia, fracture of the distal third right fubula and blood loss.

3. The Appellants entered appearance and filed their Amended Statement of Defence dated 3 May 2019, denying the allegations by the Respondent. Further, the Appellants enjoined a Third Party, Car & General Trading Ltd, as the registered owner of the motor cycle registration number KMDN 194D.
4. Although the Appellants lodged an incomplete Record of Appeal, the lower court file has been availed, thus I am able to peruse the proceedings and judgement of the trial court.

The Respondent's Case

5. At the hearing, the Respondent (PW1) adopted his witness statement dated 30 October 2018. It was his testimony that he was riding the motor cycle from South B towards City Stadium, when the motor cycle was knocked by a vehicle that was driving at high speed. The motor vehicle knocked the motor cycle from the back side.
6. The Respondent sustained serious injuries and was rushed to Kenyatta National Hospital for treatment. He then went to PCEA Kikuyu Hospital for further treatment. A metal plate was later inserted in his right leg at the Radiant Hospital, Kiambu. It was the Respondent's testimony that he was yet to heal from the accident and had to use crutches. The procedure for removal of the metal plate would cost Kshs 250,000/-.
7. The Respondent produced several documents, including treatment notes from the Kenyatta National Hospital, PCEA Kikuyu Hospital and the Radiant Group of Hospitals. He produced a Police Abstract, Police Medical Examination Report (P3 Form) and copy of Records from the National Transport & Safety Authority.
8. PW2 – Dr. Ondieki – testified that he examined the Respondent on 15 May 2018. He confirmed the injuries sustained by the Respondent and opined that post traumatic osteoarthritis is a possibility. The Doctor produced his Medical Report as well as a bundle of receipts.
9. The Respondent filed submissions on the issues of quantum of damages and liability.

The Appellants' Case

10. The Appellants began their case by calling a Police Officer, PC Rashid Hassan of Industrial area Police Station. The Police Officer confirmed that he was not the Investigating Officer. According to the Police Abstract and the Occurrence Book, the accident occurred when the motor cycle failed to keep distance and rammed into the rear of the motor vehicle registration Number KBA 320A.
11. It was the Police Officer's testimony that according to the Occurrence Book, the motor cycle was to blame for the accident. The trial court directed that the extract of the Occurrence Book be filed in court within 7 days.
12. The Appellants did not file any submissions in the trial court.

Third Party's Case

13. The Third Party did not call any witnesses nor tender any evidence before the trial court. They did, however, file submissions on the issue of liability.



14. The trial court entered judgement in favour of the Respondent as against the Appellants jointly and severally, as follows:
- Liability - Defendants 100%
 - General Damages for Pain & Suffering - Kshs 1,300,000/=
 - Future Medical Expenses - Kshs 250,000/=
 - Special Damages - Kshs 20,340/=
 - Total - Kshs 1,570,340/=
- Interest to apply from the date of the judgment.
- The Plaintiff is awarded costs of the suit. The claim by the Defendants against the Third Party is dismissed with no orders as to costs.
15. Being aggrieved by the judgement, the Appellants lodged this appeal on the following grounds:
- I. That the learned magistrate erred in law and in fact when he failed to consider the Applicant's evidence and submissions on points of law and facts on finding the appellant fully liable for the accident which is the subject matter of this suit;
 - II. That the learned magistrate erred in law and in fact when he failed to consider the applicants' submissions on points of law and facts on damages payable as quantum to the Plaintiff;
 - III. That the learned magistrate's decision was unjust, against the weight of the evidence and was based on misguided points of facts and wrong principles of law and has occasioned a miscarriage of justice;
 - IV. That the learned magistrate erred in law and in fact in unduly disregarding the submissions and judicial authorities cited by the Appellants and by instead relying on the authorities cited by the Respondent which were excessive in the circumstances.
 - i. the claims for general damages and future medical expenses.
16. Parties were directed to canvass the Appeal by way of written submissions. By the time of preparing this judgement, the Appellants had not filed their submissions.
17. In their submissions, the Respondent began by submitting on the issue of the defective Record of Appeal. Backed by the provisions of Section 65 (1) of the *Civil Procedure Act*, the Respondent relied on several authorities including *Bwana Mohamed Bwana -vs- Silvanus Buku Bonaya & 2 Others (2015) eKLR* and *Kilonzo David t/a Silver Bullet Bus Company -vs- Kyalo Kiliku & Another (2018) eKLR*.
18. I have read and understood the contents of the pleadings, the proceedings, judgement, grounds of appeal and submissions by the Respondent. I have perused the lower court file as well as the proceedings herein.
19. First, I note that the Record of Appeal dated 16 May 2024 does not contain the judgement, decree or proceedings of the lower court. I also note that the Appellants have not attended court since lodging this Appeal. At each court attendance, the Appellants were granted more time to file a complete Record of Appeal, the last opportunity being granted on 25 April 2024. The Appellants' absence is in itself telling of the seriousness which they take this appeal.



20. That notwithstanding, I will deal with the incomplete Record of Appeal. Section 65(1) of the Civil Procedure Act forms the basis of appeals from the subordinate courts to the High Court. It provides as follows: -

Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court-

- (a) (Deleted by 10 of 1969, Sch.);
- (b) from any original decree or part of a decree of a subordinate court, other than a magistrate's court of the third class, on a question of law or fact;
- (c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.

21. Order 42 Rule 13(4) of the Civil Procedure Rules provides as follows: -

Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record and that such of them as are not in the possession of either party have been served on that party that is to say:

- (a) the memorandum of appeal;
- (b) the pleadings
- (c) the notes of the trial magistrate made at the hearing;
- (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
- (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
- (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal;

Provided that-

- (i) a translation into English shall be provided of any document not in that language;
- (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

22. Courts have severally dealt with the issue of incompleteness of the Record of Appeal. In *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* (2014) eKLR the Supreme Court stated as follows:

(16) For a competent appeal to lie before this Court it must comply with the provisions of Rule 33(1) of the Supreme Court Rules, 2012 which provides that:

An appeal to the Court shall be instituted by lodging in the registry within thirty days of the date of filing of the notice of appeal –



- (a) a petition of appeal;
- (b) a record of appeal; and
- (c) the prescribed fee.

(17)

(36) The use of the word ‘shall’ in Rule 33(1) suggests the mandatory nature of the rule, requiring strict adherence to the completeness of the rule. Thus, a strict reading of rule 33(1) leads to the conclusion that an appeal comprises the Petition

(37)

(38) The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the appeal before it.

(39) If an intending appellant were to present the Court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the Court to determine ‘the appeal’ on the basis of these two, such an appeal would be incomplete and hence incompetent. Indeed, this is the gist of Rule 33(1) of the Supreme Court Rules.

22. In Kakamega Election Petition Appeal No. 3 of 2018 Elvis Anyimbo Sichenga v Orange Democratic Movement & 4 Others (2016) eKLR the Court dealt with the same issue in an election petition appeal from the subordinate court. In that appeal the Record of Appeal did not include the decree of the judgment appealed against. The Learned Judge held as follows: -

“What then am I saying about the failure by the appellant to attach a certified copy of the decree appealed from? I am saying that that omission is not a mere technicality for if it were so, the drafters of the rules would not have made its attachment a mandatory requirement. I am therefore satisfied that the applicant has satisfied this court that the said omission is fatal to the petition and I so find.”

23. The provisions of Order 42 Rule 13 (4) are clear. Whereas a Judge may dispense with the production of documents or part of documents, certain documents must be contained in the Record of Appeal for the same to be considered complete. These are: the Memorandum of Appeal, the pleadings and the Judgement, order or decree appealed from. This is not something that an Appellant can simply wish away. A complete Record of Appeal must be placed before the court to enable the court understand and appreciate the factual or legal controversy before it. Furthermore, despite the clear provisions on extension of time, and the numerous opportunities accorded to them to do so, the Appellants did not seek any extension of time to file a complete Record of Appeal.

24. I, therefore, find that the Record of Appeal is incomplete, hence the Appeal is incompetent. The appeal is, therefore, struck out with costs to the Respondent assessed at Kshs 40,000/=.

DATED AND DELIVERED AT NAIROBI THIS 29 DAY OF AUGUST 2024.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered virtually in the presence of:

N/A for the Appellants



Mr. Ombuna for the Respondent

