



REPUBLIC OF KENYA



**Kamwinzi v Rufus (Civil Appeal E91 of 2021)
[2024] KEHC 11228 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11228 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E91 OF 2021
H NAMISI, J
SEPTEMBER 26, 2024**

BETWEEN

SIMON MUYA KAMWINZI APPELLANT

AND

HAMILTON SOKARI RUFUS RESPONDENT

(Being an Appeal from Judgement of Hon. Martha Opanga, Senior Resident Magistrate in Kangundo CMCC NO. 34 of 2017 delivered on 31 May 2022)

JUDGMENT

1. This appeal arises from a suit filed by the Respondent against the Appellant for:
 - i. General damages for pain, suffering and loss of amenities;
 - ii. Special damages of Kshs 693,700/=;
 - iii. Costs of the suit
 - iv. Interest on damages and cost
 - v. Such further or other relief as this Honorable Court may deem fit to grant

2. The particulars of the suit are that on 20 April 2015, the Respondent was travelling as a fare paying passenger in the Appellant's Motor vehicle registration number KBR 246Y, when the Appellant's driver negligently drove the said motor vehicle, thus resulting in an accident. The Respondent sustained the following injuries:
 - i. Fracture of cervical spine 5
 - ii. Loss of right incisor tooth



- iii. Fracture of the right upper 2nd molar tooth;
 - iv. Soft tissue injury to both shoulders
3. The Appellant entered appearance and filed a Statement of Defence denying the allegations by the Respondent.
4. From the lower court file, I am able to discern that the trial court entered its judgement in favor of the Respondent as follows:
 - i. Liability assessed at 100% against the Defendant;
 - ii. General damages awarded at kshs 1,500,000/=
 - iii. Special damages of Kshs 693,700/=
 - iv. Total award of Kshs 2,193,700/=
 - v. Costs of the suit and interest thereon
5. Being aggrieved by the judgement, the Appellants lodged this appeal on the following grounds:
 - i. That the learned trial Magistrate erred in law and fact in finding the Defendant/Appellant 100% liable for the accident;
 - ii. The at the learned trial Magistrate erred in law and fact by failing to exonerate the Appellant from any wrong doing in view of the actions of the Respondent;
 - iii. That the Learned Magistrate erred in fact and in law in finding that the Respondent was entitled to general damages of Kshs 1,500,000/=;
 - iv. That the learned trial Magistrate grossly misdirected herself in treating the evidence presented before her both on liability and quantum and consequently coming to a wrong conclusion on the same;
 - v. That the learned trial magistrate erred in awarding a sum in respect of damages which was inordinately high in the circumstance was excessive in the circumstances occasioning miscarriage of justice;
 - vi. That the learned trial magistrate failed to adequately evaluate the evidence provided both on liability and quantum thereby arrived at a decision unsustainable in law.
6. Parties were directed to canvass the Appeal by way of written submissions. Both parties filed their respective submissions.
7. I have read and understood the contents of the Record of Appeal, grounds of appeal and submissions. I have perused the lower court file as well as the proceedings herein.
8. First, I note that the Record of Appeal dated 20th March 2023 does not contain the judgement, decree or proceedings of the lower court. I also note that the Appellant has not appeared in court on several occasions.



9. That notwithstanding, I will address the issue of 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.

10. 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).

11. 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.

12. 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.”

13. 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 controversies before it. Furthermore, despite the clear provisions on extension of time, and the numerous opportunities accorded to them to do so, the Appellant did not seek any extension of time to file a complete Record of Appeal. The very last document in the Record of Appeal is a letter dated 15th December 2022 to the Registry, requesting typed proceedings, certified copies of the judgement and decree.

14. 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 MACHAKOS THIS 26 DAY OF SEP 2024.

HELENE R. NAMISI

JUDGE

Delivered on virtual platform in the presence of:

Ms Nanjira for the Appellant



Mr. Odhiambo ... for the Respondent

