



REPUBLIC OF KENYA



**Watako v Yusuf (Civil Appeal E118 of 2021)  
[2023] KEHC 382 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 382 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E118 OF 2021  
JWW MONG'ARE, J  
JANUARY 31, 2023**

**BETWEEN**

**CHARLES WATAKO ..... APPELLANT**

**AND**

**KATHIRA AHMED YUSUF ..... RESPONDENT**

*(An appeal against part of the judgment of Hon. Christine Menya (SRM),  
delivered on 27th August 2021 in Eldoret CMCC No. E123 of 2011)*

**JUDGMENT**

1. The appeal before this court is against a decision of the Magistrates Court Case No. Eldoret CMCC No. E123 of 2011 for an award of general damages against the appellant for the sum of Kshs.1,118,000. The appellant also faults the trial court for failure to take into consideration apportionment of liability and subject the order for special damages and future medical expenses.
2. The cause of action in the said matter arose from a road traffic accident that occurred on November 24, 2020. The respondent brought a suit for damages and compensation by the appellant from the injuries sustained therein.
3. The matter proceeded to full hearing and the trial court delivered its judgment on August 27, 2021 for the plaintiff as follows;
  - (i) Liability apportioned at 50:50
  - (ii) General damages Kshs. 1,500,000/=
  - Less 50% Kshs. 750,000/=
  - Add
  - (iii) Special damages Kshs. 218,000/=



- (iv) Future medical expenses Kshs. 150,000/=
  - Total Kshs. 1.118.000/=
  - (v) Plus costs of the suit and interest.
4. The appellant, being dissatisfied with the award for damages, instituted the present appeal vide a memorandum of appeal dated September 27, 2021 on the following grounds;
- 1. The learned trial magistrate erred in law and in fact by awarding Kshs.1,500,000/- general damages which award is excessive and inordinately high considering the nature of injuries sustained by the respondent.
  - 2. The learned trial magistrate erred in law and in fact by failing to rely on the discharge report as the primary evidence of the injuries suffered by the respondents.
  - 3. The learned trial magistrate erred in law and in fact by entering judgment for the respondent without taking into account comparable judgments of the superior court for similar injuries and failed to take into account the submission made by the Appellant.
  - 4. The learned trial magistrate erred in law and in fact by failing to subject the special damages and future medical expenses to the apportioned liability.
- The parties prosecuted the appeal vide written submissions.

#### **Appellant's Case**

- 5. The appellant submitted that the award of general damages of Kshs. 1,500,000/= was inordinately high. He relied on the case of *Kemfro Africa Limited t/a Meru Express Services (1976) & another -vs- Lubia & another (No. 2)* [1985] eKLR on the principles an appellate court should follow in disturbing quantum of damages. He contended that the trial court failed to take into account relevant factors being the injury sustained by the plaintiff as per the treatment notes where she was attended to after the accident. Counsel urged that the most relevant document to be used to assess the injury sustained is the Discharge Report from Cedar Hospital which was admitted in evidence as "plaintiff exhibit 3". The sequence of events as seen from the discharge report to the plaint and the police abstract confirm that the plaintiff's first contact with a medical facility after the accident was at Cedar Hospital.
- 6. It was the submission of the appellant that the injuries listed in the medical report of Dr. Joseph C. Sokobe dated November 30, 2020 under "injuries sustained" are exaggerated and unsupported with the primary medical evidence He contended that the primary medical evidence was the Discharge Report from Cedar Hospital and that the trial court only captured the Plaintiffs injuries as per Dr. Sokobe's medical report and ignored the initial medical records.
- 7. The appellant submitted that the award of general damages should be set aside and be substituted with an award of Kshs. 300,000/ = arguing that the same was excessive. The appellant further stated he was dissatisfied by the failure of the Honourable trial court to apportion liability to the special damages and future medical expenses, despite having held that liability was to be apportioned at 50;50. He urged the court to allow the appeal and review the award as follows;
  - (i) Special damages Kshs. 218,000/=
  - (ii) Future medical expenses Kshs. 150,000/=
  - (iii) General damages Kshs. 300,000/=



Total Kshs. 668,000/=

Less 50% Kshs. 334,000/=

(iv) Net award Kshs. 334,000/=

### Respondent's Case

8. The respondent opposed the appeal and submitted that a certified copy of the decree has not been included in the record of appeal therefore it should be dismissed with costs. He relied on the Supreme Court case of *Bwana Mohammed Bwana vs Silvano Buko Bonaya & 2 others* (2015) eKLR where the apex court addressed the issue of an incompetent appeal. He stated that the issues of failure to attach a decree is a jurisdictional point.
9. On quantum, the Respondent submitted that Dr. Joseph Sokobe opined that the Respondent sustained both soft tissue injuries and fractures and that he was yet to recover from the said injuries. It was her submission that she still requires further medical treatment at an estimated cost of Kshs. 150,000/-. She informed the court that as a result of the injuries sustained she was likely to develop early osteoarthritis in her right ankle and her permanent disability was assessed at 10%.
10. As far as ground 4 is concerned the respondent submitted that special damages and future medical expenses are not subject to apportionment of liability. In support of this position, he cited the cases of *Hashim Mohammed Said vs Lawrence Kibor Tuwei* (2018) eKLR, *Swalleh C. Kariuki & another vs Violet Owiso Okuyu* (2021) eKLR and *Mara tea factory vs Lillian Bosibori Nyandika* (2021) eKLR where courts have held that medical expenses and future treatment costs should be subjected to apportionment as they are actual costs incurred and not general damages. He urged the court to dismiss the appeal with costs.

### Analysis and Determination

11. This being an appeal on quantum, the court need not delve into the issues of liability. The main issue for determination is whether the court erred in its award of damages. However, the respondent has brought it to the attention of the court that the appeal may be defective for failing to include a certified copy of the decree in the record of appeal and therefore it shall also be addressed. Therefore, the issues for determination are as follows;
  1. Whether the appeal is incompetent for lack of a certified copy of the decree
  2. Whether the trial court erred in its award of quantum

### Whether the Appeal is incompetent for Lack of a Certified copy of the Decree

12. Section 65(1)(b) of the *Civil Procedure Act* provides:

- “(1) 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—
  - (b) from any original decree or part of a decree of a subordinate court, on a question of law or fact;



13. Order 42 rule 2 of the *Civil Procedure Rules* provides as follows:-

“Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the Appellant shall file such certified copy as soon as possible and in any event within such a time as the court may order, and the court need not consider whether to reject the Appeal summarily under section 79B of Act until a copy is filed.”

The Supreme Court of Kenya, in the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* [2015] eKLR held as follows at paragraph 41:

“Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or *the Constitution*, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”

14. Order 42, rule 13(4)(f) requires the judgment and decree appealed from to be part of the record. In the present appeal, a perusal of the record of appeal shows that the appellant attached a copy of the judgment together with the certified copy of the lower court’s proceedings but there is no certified copy of the decree attached as is mandatorily required. The appellants did not respond to this issue either orally or in their written submissions and it remained uncontroverted. As per the binding decision of the Supreme Court, failure to include a decree is fatal as the same goes to the root of the appeal and jurisdictional aspect of the court. Observing the doctrine of stare decisis, I am in agreement with the finding of the Supreme Court and find that the appeal is incompetent for the absence of the decree on record.

15. In the premises the appeal is dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 31<sup>ST</sup> DAY OF JANUARY, 2023.**

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**J.W.W. MONGARE**

**JUDGE**

**Judgment delivered virtually in the presence of;**

1. Mr. Masinde for the Appellant
2. Mr. Okara for the Respondent
3. Mr. Kimathi Court Assistant

**J.W.W. MONGARE**

**JUDGE**

