



REPUBLIC OF KENYA



**Mbugua v Porojo (Civil Appeal E003 of 2021)  
[2023] KEHC 434 (KLR) (24 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 434 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
CIVIL APPEAL E003 OF 2021  
RN NYAKUNDI, J  
JANUARY 24, 2023**

**BETWEEN**

**KINUTHIA MBUGUA ..... APPELLANT**

**AND**

**JACKLINE SHINDANI POROJO ..... RESPONDENT**

*(Being an Appeal against the decision of Hon B. Wachira  
(RM), Delivered on 25th Day of March, 2021 in CMCC NO. 13 OF 2019)*

**JUDGMENT**

1. The appeal before this court is against the decision of the trial court delivered on March 25, 2021. The respondent instituted a suit against the appellants vide a plaint dated February 7, 2018 seeking orders for general and special damages, costs and interest. The cause of action arose from an accident that occurred on October 25, 2018 where the plaintiff claimed that she was hit by a vehicle controlled by the 1<sup>st</sup> defendant causing her to sustain injuries.
2. The matter proceeded for full trial and upon consideration of the evidence presented before the court, the testimonies of the witnesses and submissions of both parties, the trial court entered judgment against the defendant as follows;
  - a. Liability in the ration of 100% in favour of the plaintiff.
  - b. General damages Kshs 150,000/-
  - c. Special damages of Kshs 6,550/- and
  - d. Costs of the suit
3. The Appellant being dissatisfied with the judgment of the trial court, instituted the present appeal vide a memorandum of appeal dated April 23, 2021 on the following grounds;



The parties prosecuted their appeal by way of written submissions.

### **Appellant's Case**

4. The Appellant filed submissions on November 21, 2022. He submitted that the circumstances leading to the occurrence of the injuries suffered by the respondent were reasonably foreseeable to warrant the trial court declare the appellant liable for the injuries sustained. He submitted that there was no witness who testified as to whether the plaintiff was hit from behind. Further, that there was no independent eyewitness who testified to shed light on the alleged accident.
5. The appellant contended that the factual grounds alluded to by the plaintiff are silent on how the accident occurred, the only testimony relied to by the trial court was on the nature of injuries as testified by the clinical officer as well as the investigating officer who were not at the scene of crime. The absence of an independent eye witness to shed light on the alleged accident casts aspersions on the proximity test applied in determining liability.

He urged the court to quash the decision of the trial court.

### **Respondent's Case**

6. Learned counsel for the respondent filed submissions on November 9, 2022. He submitted that the appeal is fatally defective and/or incompetent and cannot stand on its merit for the reasons that it was filed nine (9) months after delivery of judgment. That the said period is inordinately too late to salvage the appeal. The appellant did not give any reasons as to why the memorandum of appeal was filed out of time without leave of the court. The respondent cited section 75G of the *Civil Procedure Act* and submitted that the appeal was fatally defective. There was no appeal to enlarge time and it was not served upon the respondent. He further raised the issue that the record of appeal did not contain a copy of the decree and therefore it is incompetent and ought to be dismissed. He relied on order 42 rule 2 of the *Civil Procedure Rules* to buttress this point.
7. Learned counsel submitted that the appeal has no merit as the trial magistrate made a judgment based on sound evidence. PW1 produced an abstract and confirmed that indeed there was an accident involving the plaintiff/respondent herein and the appellants motor vehicle KBX491H that was owned and driven by the appellant along show ground road within Kapsabet Town. PW2 tendered evidence that she was a pedestrian along show ground road when the defendant's motor vehicle KBX491H hit her from behind. She produced the abstract P/Exhibit 1, and plaintiff exhibits 2- treatment notes, 3- X-ray request notes, 4-P3, 5(a) medical report and 5(b) receipt for medical report through the clinical officer Hanson Gitonga confirming the injuries pleaded.
8. Learned counsel submitted that costs follow the event and further, that as the appeal is incompetent the same should be dismissed with costs to the respondent.

### **Analysis & Determination**

9. It is settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. (See *Stanley Maore -vs- Geoffrey Mwenda* "the duty of the appellate court is to re-evaluate the evidence, assess it and make its own conclusions...")
10. Upon considering the memorandum of appeal, submissions and the record of appeal, the following issues arise for determination
  - a. Whether the appeal is fatally defective



- b. Whether the trial court erred in its finding on liability
- c. Whether the trial court erred in its finding on damages

**Whether the appeal is fatally defective**

- 11. The Respondent raised two grounds upon which she contends that the appeal is defective; The appeal was filed out of time without leave of the court The appeal is defective for want of a certified copy of the decree in the record of appeal

**Whether the appeal was filed out of time**

- 12. The judgment appealed against was delivered on March 25, 2021. The memorandum of appeal was filed on December 7, 2021. This is a period of 9 months.

Section 79G of the Civil Procedure Act states;

"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

- 13. The appellant has not addressed this issue. The delay in filing the appeal has not been explained and it is evident that the appeal was filed out of time and against the provisions of section 79G of the Civil Procedure Act.
- 14. I find that the appeal was filed out of time without leave of the court.

Whether the appeal is defective for want of a certified copy of the decree in the record of appeal

- 15. The respondent raised this issue and contended that the appeal is incompetent. I have perused the record of appeal and I confirmed that there is no certified copy of the decree. this is a substantive issue that goes to the root of the appeal. The apex court rendered its verdict on this particular issue in the case of Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR where it 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."

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;

16. 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 but there is no certified copy of the decree attached as is mandatorily required. In the premises, the appeal is defective and this court cannot entertain it any further.

The appeal is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED ON THIS 24<sup>TH</sup> DAY OF JANUARY 2023 AT KAPSABET**

.....

**R. NYAKUNDI**

**JUDGE**

