**Imathiu v Mukiira (Civil Appeal E156 of 2022)**
**[2023] KEHC 27211 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27211 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MERU**

**CIVIL APPEAL E156 OF 2022**

**EM MURIITHI, J**

**DECEMBER 19, 2023**

**BETWEEN**

**ROMANO MWENDA IMATHIU ..... APPELLANT**

**AND**

**JAPHET MAITETHIA MUKIIRA ..... RESPONDENT**

## JUDGMENT

1. The Respondent herein, Japhet Maitethia Mukiira, instituted a suit against the Appellant herein, Romano Mwenda Imathiu, vide the amended plaint dated 19th July, 2021 in Maua CMCC No. 144 of 2019. In that suit, the Respondent claimed from the Appellant a sum of Kshs. 771,300/= as compensation for damaged shop/property, Kshs. 15,550 as special damages, and the costs of the suit plus interests.

2. Briefly, the Respondent's case was that he owned a wooden/timber shop at Antubochiu area along Maua – Kanuni road which was destroyed by the Appellant's motor vehicle registration number KBF 240K Nissan Sunny on or about 17th April, 2019. The Respondent attributed cause of the said accident to the negligence of the Appellant claiming that the aforementioned motor vehicle was on the material day so negligently, carelessly, and/or recklessly managed and/or controlled causing it to veer off the road into the Respondent's shop/property, damaging the shop and the goods therein, killing one person, and leading to a loss of some of the Respondent's items which were in the shop.

3. After a full trial, the learned magistrate allowed the Respondent's claim after finding the Appellant 100% liable for the accident and for the loss occasioned to the Respondent. The learned magistrate subsequently awarded the Respondent the prayers sought in the aforementioned amended plaint.

4. Aggrieved with the said decision, the Appellant filed this appeal in which he has proffered the following grounds of appeal:

i. That the learned trial magistrate erred in law and fact by failing to properly evaluate the evidence tendered and find that the Respondent was not entitled to any compensation since the structure was on a road reserve and the Respondent did not have any proprietary rights on the road reserve.

ii. That the learned trial magistrate erred in law and fact by basing his judgment on a valuation report that was speculative and inconclusive and which fell short of the standard of admissibility of expert evidence.

iii. That the learned trial magistrate erred in law and fact by allowing the Respondent's claim for fittings and foodstuffs whereas the items could not be verified at the time PW3 visited the scene and no other evidence was availed to prove the same and thereby made an award that was not strictly proved contrary to the law on proof of special damages.

iv. That the learned trial magistrate totally misdirected herself into applying unknown or wrong principles of law in arriving at her decision which influenced her into arriving at an erroneous and unreasonably high award.

5. Based on the above grounds, the Appellant prayed for the setting aside of the impugned decision of the trial court and the substitution of the same with a reasonable assessment of damages to be done by this Court. The Appellant further prayed for the costs of this appeal.

6. The Appeal is opposed by the Respondent herein and the same was canvassed by way of written submissions.

**The Appellant's Submissions**

7. It was the Appellant's submission that the onus of proof was on the Respondent to prove on a balance of probability his proprietary rights over the damaged property. That since the Respondent's structure was 3 metres from the road, as per the testimony of PW2, the same was within a road reserve which is under the domain of the county government and thus the Respondent had no basis of seeking compensation over the same.

8. On the issue of the strength of the valuation report produced in evidence by PW3, it was the Appellant's submission that the said report was speculative and inconsistent and did not meet the standard for expert evidence. In this regard, the Appellant faults the Respondent for failing to tender evidence on the expertise of PW3 in order to ascertain his suitability as an expert witness. Further, the Appellant faults the trial court for relying on the aforesaid report claiming that the same was speculative and not independent as the opinion of the expert was allegedly based on the information given to him by the Respondent. For the said reasons, the Appellant contends that the opinion of the expert witness was biased and hence the trial court ought not to have placed reliance on the valuation report presented before it.

9. Finally, the Appellant submitted that the list of damaged fittings and foodstuffs presented in the valuation report of PW3 was not accurate as it was PW3's testimony that the information on the same was given to him by the Respondent. The Appellant thus submitted that the claim on damaged fittings and foodstuffs was not strictly proved as the evidence of PW3 was allegedly not based on his own independent assessment of the same. In the end, the Appellant thus prayed for the appeal to be allowed as prayed.

**The Respondent's Submissions**

10. It was submitted on behalf of the Respondent that the appeal should be dismissed and struck out for non-compliance and incompetency as the Appellant filed an incomplete record of appeal that crucial documents including the judgment, decree, and proceedings before the lower court. Further, that the Appellant filed the appeal without procuring the requisite leave to file the same out of time.

11. On the allegation that the Respondent's property that was damaged was on a road reserve, the Respondent submitted that the evidence produced by him and his witnesses, including copies of the survey map, title deed, and valuation report, was never meaningfully shaken and pointed to the fact that the Appellant's motor vehicle veered off the road, knocked someone down, went beyond a fence and unto the Respondent's developments. That despite the Appellate claiming that the developments were on a road reserve, no evidence was adduced to substantiate this claim. That in any case, the Appellant admitted that his motor vehicle veered off the road and did not stop.

12. On the issue of the valuation report adduced by the Respondent's witness (PW3) and relied upon by the trial court, it was the Respondent's submission that the assertion that the said report was inconclusive and speculative was false and misleading. That the claim that the PW3's opinion was not independent for the reason that the expert valuer gathered information from the Respondent is not sufficient to dislodge the valuation report as PW3 did not just rely on information from the Respondent. That in any event, the Appellant did not provide a contra-report to disapprove or challenge the valuation report by PW3.

13. Finally, on the issue of the award made by the trial court, the Respondent submitted that the valuation report shows that the valuer visited the scene and took photos of the destruction. That there was no evidence that the costs tabulated in the valuation report came from the Respondent or that they were wrongly estimated. The Respondent thus prayed for the appeal to be dismissed for want of merit with costs to the Respondent.

**Issues for Determination**

14. I have carefully considered the record of appeal, the grounds of appeal, and the rival submissions by the parties herein. The main issues that arise for determination are:

    i. Whether this appeal is incompetent; and if not,

    ii. Whether the Respondent was entitled to compensation for loss caused on his structure/ property; and if so,

    iii. Whether the award made by the trial court was justified.

**Analysis and Determination**

**Whether the appeal is incomplete**

15. Before delving into merits of this appeal, I shall first deal with the preliminary issue raised by the Respondent who avers that the Appellant filed an incomplete record of appeal that lacks crucial documents including the judgment, decree, and proceedings before the lower court. The Respondent further faults the Appellant for lodging the present appeal out of time and without leave of this court.

16. On the issue that the present appeal was filed out of time and without leave of this Court, it is notable from the Appellant's Memorandum of Appeal dated 11th November, 2022 was filed on 15th November, 2022 pursuant to leave granted on 8th November, 2022 in Meru High Court Miscellaneous Civil

Application No. 54 of 2022. The same was confirmed by this Court before the appeal was admitted for hearing. It thus goes without saying that this claim by the Respondent cannot stand as a ground for dismissing the appeal.

17. On the issue that the record of appeal filed is incomplete, the law on this is very clear. Section 65(1) of the *Civil Procedure Act* provides as follows:

> "(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—
>
> a. Deleted by Act No. 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."

18. In addition, Order 42 of Civil Procedure Rules 2010 (the "Rules") clearly prescribes the contents of a record of appeal. Order 42 Rule 2 of the Rules specifically 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."

19. In addition, Order 42, Rule 13(4)(f) of the Rules provides that:

> "(4) 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—
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> (a) the memorandum of appeal;
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> (b) the pleadings;
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> (c) the notes of the trial magistrate made at the hearing;
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> (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
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> (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
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> (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:"

20. It is follows from the provisions of Order 42, Rule 13(4)(f) of the Rules that the record of appeal should contain the judgment, order or decree appealed from and the order (if any) giving leave to appeal. In view of the above provision, it was thus required that the judgment and decree/order appealed from to be part of the record of the present appeal.

21. 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."

22. In the case of in Chege v Suleiman [1988] eKLR, the Court of Appeal firmly stated that the issue of failure to attach a copy of the decree in the record of appeal is a jurisdictional point, and held thus as follows:

> " But we concur positively in the submission of Mr Lakha that this is not a procedural but a jurisdictional point. Those holdings were founded on a proper interpretation of section 66 of the *Civil Procedure Act* which confers a right of appeal from the High Court to this Court from "decrees and orders of the High Court". And those holdings were predicated on the fact that since the appeal could only lie against a decree or order, no competent appeal could be brought unless those decrees or orders were formally extracted as the basis of the appeal."

23. In the persuasive case of Kilonzo David t/a Silver Bullet Bus Company v Kyalo Kiliku & another [2018] eKLR, the Court held as follows:

> " 12. Despite the provisions of Article 159 (2) (d) of *the Constitution* of Kenya, 2010 that mandates courts to administer justice without undue regard to procedural technicalities, this court took the firm view that omission to include the decree or order to be appealed from in the Record of Appeal was not a procedural technicality for the reason that the word "shall" in Order 42 Rule 2 of the *Civil Procedure Act* contemplates that the furnishing of the decree or order is mandatory and cannot be wished away.
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> ...
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> ...
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> 15. It was very clear that the Appellant's omission to seek leave to file a Supplementary Record of Appeal to attach a copy of the decree he was appealing from rendered his Appeal incompetent. Having said so, whereas in the cases of Ndegwa Kamau T/A Sideview Garage vs Isika Kalumbo [2016] (Supra), Kulwant Singh Roopra vs James Nzili Maswii [2014] (Supra) and Joseph Kamau Ndungu vs Peter Njuguna Kamau [2014] (Supra) Ngaah J struck out the appeals therein because the decrees that were being appealed from had not been annexed in the respective records of Appeal, this court took a different position that it would be too draconian to strike out the Appeal herein.
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> 16. This court's thinking was informed by the fact that it inadvertently admitted the Appeal herein before it had satisfied itself that the decree the Appellant was appealing from had been filed and it would thus be unfair to visit its omission on the Appellant herein for no fault of his own.

20. For the foregoing reasons, the upshot of the court's decision was that although the Appellant's Petition of Appeal that was lodged on 27th July 2017 was incompetent for want of annexing of the certified copy of the decree to his Record of Appeal, he is hereby directed to file and serve a Supplementary Record of Appeal annexing the necessary documentation by 26th June 2018."

24. In Paul Karenyi Leshuel V Ephantus Kariithi Mwangi & Another (2015) eKLR, the court elucidated the essence of a decree as part of the record of appeal by stating as follows:

> " the Court of Appeal .... In Civil Appeal No. 7 of 1998, Municipal Council Of Kitale – versus- Fedha (1983) eKLR held that failure to include the decree appealed from in the record of appeal rendered the appeal incompetent ..... One may ask why so much importance is attached to this document: the answer appears to me that an appellate court can only uphold or overturn what has been demonstrated to exist ..... much as this requirement is contained in the rules, it is not, in my humble view, a requirement that can merely be dismissed as a procedural technicality that maybe swept under the carpet; the question whether or not there is indeed an appeal which calls for the appellate court to exercise its jurisdiction in that respect goes to the root of the appeal itself for without an appeal, properly so called, any attempt to invoke and exercise that jurisdiction would be in vain."

25. In this case, a look at the record of appeal shows that the proceedings before the trial court as well as the impugned judgment have been attached thereto at pages 53-61 and pages 62-64 respectively. The certified copy of the decree is however not attached to record of appeal despite it being mandatorily required. The Appellant did not respond to this issue in their submissions meaning that it remained uncontroverted. Guided by the holding of the Supreme Court and the Court of Appeal cited above, I find that the failure by the Appellant herein to include a decree from the trial court in the record of the present appeal is fatal renders the appeal incompetent.

**Whether the Respondent was entitled to compensation arising from the subject accident**

26. Turning to the grounds raised in this appeal, I am minded of the fact that this is a first appeal. As a first appellate court, is the primary duty of this Court at this stage is to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. This duty was emphasized in the case of Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR where the court stated as follows with regard to the duty of the first appellate court:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"

27. In Peters v Sunday Post Ltd [1958] E.A. 424, the Court held that;

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide."

28. The Respondent who testified as PW1 denied that his property was on a road reserve. He stated that his structure had been there since 1990 when the road was not yet tarmacked. That the road was later tarmacked and that before they built the road, all structures on the road reserve were removed. PW1 told the trial court that he blamed the driver who was driving the subject motor vehicle for the accident claiming the motor vehicle was being driven on high speed. On cross-examination, PW1 however admitted that he could not tell the speed that the motor vehicle was being driven as he did not witness the accident occurring.

29. PW1 further stated that the value of the damaged property according to a professional valuer was Kshs. 771,300/= and produces in evidence photographs of the damaged property, copy of the insurance certificate (sticker) of the subject motor vehicle, the title deed for L.R. No. Amwathi/Maua/7430, notice to sue, receipt for the valuation, and map of the land as P. Exhibits 1, 2, 3, 4, 6, and 7 respectively.

30. PW2 was Peter Mungathia Karai who adopted his statement dated 17th October, 2091 as his evidence in chief. On cross-examination, PW2 told the court that he witnessed the accident and that he knew the Respondent. He stated that the Respondent's shop was about 3 metres from the road.

31. PW3 was Cyprian Kirera Riungu, a valuer working with Roma Valuers and based in Meru Town. He confirmed that he received instructions from the Respondent on 24th April, 2019 to inspect and report on the damage on the Respondent's properties on L.R. No. Amwathi/Maua/7430. That on 25th April, 2019, he visited the said property, inspected it and made a report on the same that is dated 26th April, 2019. He produced the said report in evidence as P. Exhibit 5.

32. On cross-examination, he stated that he could ascertain all the items in his report as he saw them. That he valued everything he saw including kitchenware, fittings and shelves, foodstuffs as well as items in the bedroom. He further stated that he could not take photos of some items as they were in pieces.

33. For the defence case, the Appellant testified as the only witness in support of his case. He adopted his statement as his evidence in chief and told the court that he indeed knocked down a structure. He termed the structure as illegal and stated that he did not go to check the structure after the accident. On cross-examination, he stated that he could not go to check on the state of the house after the accident because he had also knocked down a person who later died. When asked about his allegations of the structure being illegal, the Appellant was categorical that he could not ascertain the said claims.

34. Having considered the evidence on record and the rival submissions, and having undertaken a fresh scrutiny of the evidence as required of a first appellate court, it is my finding that the Respondent proved on a balance of probabilities his proprietary rights over the damaged property and in view of the testimonies of both the Appellant and PW2, it is only logical to reach the conclusion that it was as a result of negligence on the part of the Appellant that the accident occurred. I therefore do not find any fault in the finding of the trial court in respect of its assessment of liability. The Appellant is 100% liable to make good the damage caused by his vehicle.

**Whether the award made by the trial court was justified**

35. Having established liability, I now come to the assessment of damages. The Respondent's case is that his shop and property was damaged and some items lost. He relied on the valuation report P.Exhibit 5 which was produced PW3.

36. The Appellant, on the other hand, terms the valuation report adduced by PW3 as being inconclusive and speculative. He agreed that the structure was damaged and needed repairs but disputed the valuation of the assessment of loss. In his view, the Appellant submitted that the opinion was not independent but rather that it was influenced by the wishes of the Respondent.

37. In the case of Stephen Kinini Wang'ondu v. The Ark Limited [2016] eKLR the court (Mativo J. as he then was) expressed itself as follows with regard to expert evidence:

> " The fundamental characteristic of expert evidence is that it is opinion evidence. Generally speaking, lay witnesses may give only one form of evidence, namely evidence of fact. To be practically of assistance to a court, however, expert evidence must also provide as much detail as is necessary to allow the court to determine whether the expert's opinions are well founded.
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> While the test for admissibility of expert evidence differs from jurisdiction to jurisdiction, judges in all jurisdictions face the common responsibility of weighing expert evidence and determining its probative value."

38. As far back as 1995, the Court of Appeal in Dhalay v. Republic (1995 – 1998) EA 29 held as follows with regards to expert evidence:

> " Where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert, is not soundly based, then a court is not only entitled but would be under a duty, to reject it." (Emphasis added).

39. In the case of the case of Stephen Kinini Wang'ondu (supra), the court went on to hold as follows:

> " While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. [11] Four consequences flow from this.
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> Firstly, expert evidence does not "trump all other evidence".[7] It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.[9]
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> Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing.[12] A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.
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> Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.
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> Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.[12]"

40. The Court of Appeal in I N N v M S C [2018] eKLR, (Visram, Wanjiru Karanja & Koome (as she then was) JJA) considered the two decisions and held in that case that :

> " (PW2), a forensic examiner testified that upon examining the signature alleged to have been affixed by the respondent on the transfer documents and her specimen signatures, he found that they differed. He went on to produce a report which set in detail the manner in which the examination was conducted, the differences noted and the conclusion. Being an expert witness and there being no evidence contradicting his observations, we, like the trial court, find no reason for rejecting his evidence. The fact that he was retained by the respondent, to us, did not water down the probative value of his evidence. Unless there was more to substantiate the appellant's contention that he was biased or partial, there was no basis to discount his evidence. Our position is fortified by the case of Dhalay vs. Republic (1995 – 1998) EA 29 where this Court expressed:
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> > "Where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert, is not soundly based, then a court is not only entitled but would be under a duty, to reject it." [Emphasis added]"

41. In his submissions, the Respondent in this case referred this Court to page 3 of the valuation report where it shows that the source of information used for the valuation included international valuation standards 2017, inspection of the premises damaged and demolished, construction costs handbook of April 2019, quality surveyors' journals among others. Further, at page 4 of the valuation report, it was indicated that the items that got lost and could not be ascertained were not considered in the report.

42. Here, the allegations of the Appellant on the said valuation report are unfounded. The Appellant did not produce a valuation report or any evidence whatsoever to the contradict contents in the Respondent's valuation report. In addition, the Appellant in his cross-examination admitted that after the accident, he never stopped to check the structure he had knocked down. It is actually on record that the Appellant stated that "If anything got damaged, it's the owner who can say."

43. The trial magistrate applied the correct principles of fact and law in arriving at finding that the value of the damage on the property of the Respondent was well demonstrated in evidence.

44. As for costs, it is trite that costs follow the event. The trial court was thus equally correct to award costs of the suit and interest to the Respondent.

**Conclusion**

45. The upshot of the above, in my view, is that the trial court applied the correct principles and took into account relevant factors in entering judgment as per prayer a, b, and c, of the Respondent's amended Plaint dated 19th July, 2021. The awarded sum was reasonable in the circumstances and there is no reason for the appellate Court to disturb the award on quantum.

**Orders**

46. Accordingly, for the reasons given above, the court finds that the appeal has no merit and it is dismissed.

47. The appellant shall pay the costs of the appeal to the Respondent.

Order accordingly.

**DATED AND DELIVERED ON THIS 19TH DAY OF DECEMBER, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Ms. Gitari for the Appellant.

Mr. Njindo for the Respondent.