



REPUBLIC OF KENYA



**Oyach & another v Otieno (Suing as the Administrator and Legal Representative of the estate of Joyce Anyango Ojunga (Civil Appeal E082 of 2021) [2022] KEHC 14316 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14316 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CIVIL APPEAL E082 OF 2021  
RPV WENDOH, J  
OCTOBER 27, 2022**

**BETWEEN**

**JAPHETH AKOTH OYACH ..... 1<sup>ST</sup> APPELLANT**

**ANTONY MURIKI MUGAMBI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**FRANCIS OMOLLO OTIENO (SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF JOYCE ANYANGO OJUNGA ..... RESPONDENT**

*(An Appeal from the Judgement and Decree of the Hon. R. K. Langat, Principal Magistrate dated and delivered on 16/9/2022 in Rongo PMCC No. E6 of 2020)*

**JUDGMENT**

1. The appellants, Japheth Akoth Oyach and Anthony Muriiki Mugambi preferred the instant appeal dated September 19, 2021 against the judgement of Hon RK Langat (PM) Rongo, dated and delivered on September 16, 2022. The firm of Masire Mogusu & Co Advocates is on record for the appellant while the firm of Omonywa Manwacha is on record for the respondent.
2. By a plaint dated February 9, 2020, the respondent (plaintiff in lower court) the legal representatives of Joyce Anyango Ojunga (Deceased) estate, filed the suit against the Appellant (defendants in lower court) to recover damages for fatal injuries sustained by the deceased in an accident which allegedly occurred on or about December 19, 2019. It was the respondent's case that on or about December 19, 2019, the deceased was a lawful pillion passenger on motor cycle registration number KMEG 212W heading to Rongo Town Centre along Rongo - Homabay road; that upon reaching Makutano area, the 1<sup>st</sup> appellant's driver, servant, agent and or employee so negligently drove, managed and or controlled motor vehicle registration number KCW 016Q in a careless manner that he permitted the same to



hit the said motor cycle from behind and as a result the deceased sustained fatal injuries which she succumbed to. It was further pleaded that the 2<sup>nd</sup> defendant was vicariously liable for the tortuous acts committed by the 1<sup>st</sup> defendant on the deceased.

3. The respondent particularised the negligence of the 1<sup>st</sup> appellant's driver servant, agent and/or employee. The respondent pleaded that the deceased sustained personal injuries accompanied by pain and suffering and loss of life. Further, the respondent particularized the dependants of the deceased and pleaded that prior to her death, the deceased was enjoying good life at the age of 40 years was a businesswoman carrying her business at Rongo Market selling cereals, vegetables and other shop products. The respondent also particularized the special damages suffered and asked the trial court to award general damages under the Fatal Accident Act and Law Reform Act, costs of the suit and interest.
4. The appellant filed a statement of defence dated November 23, 2020. The appellants denied the occurrence of the accident and averred that the accident of December 19, 2019 was occasioned by the negligence of the respondent. The appellants further particularized the deceased's negligence and attributed the occurrence of the accident on the rider of motorcycle registration number KMEG 212W. The appellants prayed that the suit to be dismissed with costs.
5. After the hearing, the trial Magistrate found in favour of the respondent and awarded her estate a total sum of Kshs 2,032,800/= as damages, costs and interest from the date of judgement. On the issue of liability, the parties recorded a consent in favour of the respondent at 80:20.
6. Aggrieved by the award, the appellants filed the instant appeal and preferred eight (8) grounds of appeal as follows:-
  - i. The learned Magistrate erred in law and in fact by awarding general damages which were excessive in the circumstance;
  - ii. The learned trial Magistrate erred in law and in principle in adopting wrong approach in computation of general damages under various headings and by departing from the trends contained in the authorities cited by the appellants which were binding on him and adopting a method which was erroneous in the circumstances and thereby occasioning a miscarriage of justice;
  - iii. The trial Magistrate erred in law and in fact by computing damages under the Law Reform Act, loss of expectation of life and fatal accident in contravention of the practice and trend laid down by both the superior courts and Court of Appeal in decisions and/or precedents dealing with claims in respect of victims of fatal accidents;
  - iv. The trial Magistrate based his judgement on extraneous issues which were never pleaded nor proved before him to give an award of Kshs 2,000,000/= as a global award for general damages under the Fatal Accident Act without proof of dependency or likelihood of dependency thereby reaching an erroneous decision;
  - v. The trial Magistrate erred in law and in fact in disregarding and/or failing to take into account the appellant's written submissions which had articulated weighty and relevant issues of law and facts thereby arriving at an erroneous decision both in law and in principle;
  - vi. The trial Magistrate erred in law and in fact in awarding the respondent special damages in the sum of Kshs 341,000/= without adequate proof;
  - vii. The trial Magistrate misdirected himself by relying on the receipts which were in contravention of Section 19 of the Stamp Duty Act to assess the special damages;



- viii. The learned Magistrate erred in law and in fact by failing to dismiss the respondent's suit with costs to the appellant.

**The appellant prayed:-**

- i. The appeal be allowed and the judgement and/or decree of the trial Magistrate dated September 16, 2021 be set aside and/or quashed.
- ii. This court be pleased to substitute an order dismissing the respondent's suit in the subordinate court vide the original Rongo PMCC No E27 of 2020.
- iii. The court be pleased to substitute thereof and give an order reviewing the quantum.
- iv. Costs of the appeal and those incurred in the subordinate court be borne by the respondent.
7. Directions were taken that the appeal be canvassed by way of submissions.
8. The appellants filed their submissions on May 24, 2022. On whether the Magistrate erred by awarding Kshs 2,000,000/= a lump sum award as opposed to assessing damages under various heads without proof of dependency, it was submitted that there was no proof adduced in evidence on the earnings of the deceased earned from her business and therefore the award of a global amount was unwarranted. It was the appellants' submission that the award of a lumpsum amount in fatal accidents applied to minors for the reasons that the future of a minor is unpredictable. The end result is that the learned Magistrate erred in awarding an excessive amount of Kshs 2,501,000 in general damages.
9. On the loss of dependency, the appellants submitted that since no proof of income was adduced, a basic income of Kshs 3,000/= should be adopted and under this heading, a sum of Kshs 240,000/= should be awarded. It was further submitted that the respondent stated that the deceased was his wife but did not produce any document to show the same and the birth certificates of the alleged children. The appellants relied on the case of *Gerald Mbale Mwea vs Kariko Kihara & Another* (1997) eKLR where the court stated that the issue of dependency is always a question of fact to be proved by he who asserts it. The appellants asked this court to dismiss the claim dependency.
10. On pain and suffering, it was submitted that the evidence of the respondent was that the deceased died instantly at the scene. The appellants relied on the findings in *James Mukolo Elisha & Another vs Thomas Martin Kibisu* (2014) eKLR where the court failed to make an award on a person who died instantly.
11. On loss of expectation of life, the appellants proposed an award of Kshs 100,000/=. Further, it was submitted that the total award under loss of expectation of life and pain and suffering should be discounted from the total award because awarding the same would mean that the deceased's estate would benefit twice. The appellants relied on the case of *William Momanyi vs Zipporah Kwamboka Abunda* Kisii HCCA No 93 of 2004.
12. The appellants urged this court to consider that the trial court proceeded on the wrong principles in awarding damages and substitute the award with a total of Kshs 641,000/=.
13. The respondent filed his submissions dated 15/6/2022. On whether the trial Magistrate used the wrong principles in assessing general damage, the respondent submitted on the different heads on quantum. On pain and suffering, it was submitted that the record shows that the deceased died at the scene of the accident. The respondent asked the court to uphold the award of Kshs 50,000/=. On loss of expectation of life, the respondent submitted considering the rate of inflation, an award of Kshs 150,000/= would suffice.



14. On loss of dependency, the respondent submitted that the deceased had four children of whom 3 are minors. It was the testimony of the respondent that they relied on the deceased. The respondent relied on the case of Nyeri HCCA No 26 of 2018 *Mary Wanjiru Mugwe vs Peter Gatoto Ng'ang'a & David Mwangi Gatoto (Suing as the administrators of the estate of Caroline Mukubi Gatoto)* where the court held that the realities of life in unemployment even after completing university. The respondent submitted that the retirement age is 60 years and the deceased had 20 years to work and considering that the deceased was 40 years, she would have worked for 70 years and therefore the award of Kshs 2,000,000/= should be upheld.
15. On the special damages, it was submitted that the figure of Kshs 341,000/= was supported by receipts. The respondent asked this court to find that the trial Magistrate applied the right principles in deciding the case and the appeal should be dismissed with costs.
16. This being the first appellate court, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. See the decision in *Selle & Another vs Associated Motor Boat Co Ltd* (1968) EA 123.
17. It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in *Mbogua Kiruga v Mugecha Kiruga & another* [1988] eKLR where the Court of Appeal held: -
 

“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”
18. I have read, understood and considered the appeal, the proceedings in the trial court and the submissions by both parties. The main issue for consideration is whether the trial court followed the correct principles in assessment of damages.
19. On the duty of the appellate court to assess and interfere with damages, the principles are well settled. The Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR set out the parameters under which an appellate court will interfere with an award in general damages when it held that: -
 

‘An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...’
20. In *Sheikh M Hassan v Kamau Transporters* (1986) eKLR the Court laid down the guidelines for assessing damages for lost years under the *Law Reform Act*. These guidelines are: -
  - a) “The sum to be awarded is never a conventional one but compensation for a pecuniary loss.
  - b) It must be assessed justly and with moderation,



- c) Deduct the victims' living expenses during the "lost years" for they would not form part of the estate.
  - d) A young child's present or future earnings in most cases would be nil.
  - e) An adolescent would usually be real, assessable and small.
  - f) Calculate the annual gross loss.
  - g) Apply the multiplier (estimated number of "lost working years" accepted as reasonable in each case).
  - h) Deduct the victim's probable living expenses of a reasonably satisfying enjoyable life for him or her."
21. The suit was heard on August 5, 2017 with the respondent testifying as PW1. In support of his case, he produced in evidence several exhibits and his witness statement. He testified that the deceased suffered fatal injuries; that the deceased was a business person selling cereals and fruits and she used to earn around Kshs 15,000/= per month; that the deceased used to assist in terms of school fees and food and she was in good health. The respondent testified that he used Kshs 341,000/= for the burial. The appellants did not call any witnesses in support of their case.
22. A perusal of the record of appeal shows that the appellant did include all the Records of Appeal, the documents produced in evidence by the respondent in support of his case. Order 42 Rule 13 (4) (e) of the *Civil Procedure Rules* requires that all the affidavits, maps and other documents whatsoever put in evidence before the Magistrate should form part of the documents in the record of appeal. I have perused the original file and the documents produced in evidence by the respondent are in the file. The consequence of an incomplete record of appeal was settled by the Supreme Court in the case of *Bwana Mohamed Bwana vs Silvano Buko Bonaya & 2 Others* (2015) eKLR the learned Judges observed that:-
- "Without a record of appeal a Court cannot determine the appeal 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 the 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."
23. The failure to file a proper record of appeal cannot be termed as a mere technicality curable under Article 159 of the *Constitution of Kenya*. Where there is a clear procedure laid out in the law, the same must be adhered to. In *Raila Odinga vs IEBC & Others* (2013) eKLR, The Supreme Court held: -
- "Article 159 (2) (d) of the Constitution simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural requirements as they seek justice from court."
24. The record of appeal as filed is incomplete and thereafter incompetent.
- I am also constrained to observe that the appellants did not call any witnesses in support of their case. In the absence of the appellants calling any witnesses or producing any documents, the respondent's



case remained uncontested. The appellants denied the trial Magistrate an opportunity to examine the cases of both parties. The trial Magistrate observed as much in his judgement when he held: -

“The Counsel on record entered into consent on the issue of liability and thus this court was left with the issue of assessment of damages based on the evidence of the plaintiff and the pleadings on record.”

25. In *Motex Knitwear Limited v Gopitex Knitwear Mills Limited Nairobi* (2009) eKLR Lesiit, J citing the case of *Autar Singh Bahra and Another v Raju Govindji*, HCCC No 548 of 1998 held that:-

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counterclaim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

26. In *North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers Limited v City Council of Nairobi* (2019) eKLR it was held: -

It is my view, that a party to a case having filed his pleadings should call evidence where the matter is considered to proceed by way of evidence. It is trite law that where a party fails to call evidence in support of its case, the party’s pleading are not to be taken as evidence, but the same remain mere statements of fact which are of no probative value since the same remain unsubstantiated pleading which have not been subjected to the required test of cross-examination. A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff’s case. The failure to call evidence means that the evidence adduced by the plaintiff remain uncontroverted and therefore unchallenged. In such a situation the plaintiff is taken to have proved its case on a balance of probability in absence of the defendant’s evidence. In the instant case, the plaintiff gave evidence, which was not challenged, proved documents in support of her claim. I find the plaintiff’s evidence to be credible and I am satisfied the plaintiff pleaded and proved her claim for special damages.”

27. From the foregone discussion, it is correct to conclude that the respondent’s case was not challenged in any way. It remained uncontested and the appellants cannot use submissions or an appeal as an avenue to litigate their case. The appellants’ appeal is not only incompetent for want of a complete record of appeal, but also, they did not sufficiently present their evidence before the trial court and the respondent’s case stands unchallenged. The upshot is that the appeal lacks merit and is hereby dismissed.

**DATED, DELIVERED AND SIGNED AT MIGORI THIS 27TH DAY OF OCTOBER, 2022.**

**R. WENDOH**

**JUDGE**

**Judgement delivered in the presence of;**

Mr. Ongori holding brief for Appellant

Mr. Mulisa holding brief Mr. Omonywa for the Respondent.

**Nyauke Court Assistant.**

