Oyach & another v Otieno (Civil Appeal E081 of 2021)
[2022] KEHC 14457 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14457 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL E081 OF 2021

RPV WENDOH, J

OCTOBER 27, 2022

BETWEEN

JAPHETH AKOTH OYACH ..... 1ST APPELLANT

ANTHONY MURIIKI MUGAMBI ..... 2ND APPELLANT

AND

FRANCIS OMOLLO OTIENO ..... 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 R.K 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 Manwancha is on record for the respondent.

2. By a plaint dated February 7, 2020, the respondent (former plaintiff) filed a suit against the appellants (former defendants) to recover damages for the injuries allegedly sustained 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, he was lawfully riding on a motor cycle registration number KMEG 212W from his home in Nyarach to Rongo town centre along Rongo - Homabay road; that upon reaching Makutano area, the 1st appellant's driver, servant, agent and or employee so negligently drove, managed and or controlled motor vehicle registration number KCW 016Q that he permitted the same to hit the respondent from behind and as a result, he sustained injuries and suffered both general and special damages.

3. The respondent particularised the negligence of the 1st appellant's driver servant, agent and/or employee. The respondent further pleaded the injuries and special damages suffered. The respondent claimed general and special damages together with costs and interest.

4. The appellants 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 negligence of the respondent. The appellants asked that the suit to be dismissed with costs.

5. After the hearing, the trial magistrate found in favour of the respondent and awarded him a total sum of Kshs 2,026,840/= 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 outcome, the appellants filed the instant appeal and preferred four (4) grounds of appeal as follows:-

    a. The learned trial magistrate erred in law and in fact by proceeding to assess and award the respondent damages whereas the respondent failed to prove that he sustained any and/or purported injuries in view of the fact that medical evidence adduced was insufficient and of no probative value;

    b. That the trial magistrate erred in law and in fact by awarding the respondent general damages in the sum of Kshs 2,500,000/= for a fracture which damages were excessive in the circumstances and not proved at all;

    c. The learned trial magistrate erred in law and in fact by awarding the respondent special damages in the sum of Kshs 33,550/=;

    d. That the learned trial magistrate erred in law and in fact by failing to dismiss the respondent's suit with costs to the appellant.

The Appellant Prayed:-

a. The judgement and/or decree of the trial magistrate dated September 16, 2021 be set aside and/or quashed.

b. This court be pleased to substitute an order dismissing the respondent's suit in the subordinate court *vide* the original Rongo PMCC No E6 of 2020.

c. Costs of the appeal and those incurred in the subordinate court be borne by the respondent.

d. Any such orders that the court shall deem just and expedient in the circumstances.

7. Directions on the appeal were taken that the appeal be canvassed by way of submissions.

8. The appeal is only on quantum. The appellants filed their submissions on May 24, 2022. On whether the award was inordinately high, the appellants submitted that damages must limits set out by previous and comparable decided cases and also within the Kenyan economy. To support this, the appellants referred to the decision in *Stanley Maore v Geoffrey Mwenda* Nyeri CA No 147 of 2002. It was submitted that according to the medical report of Dr Morebu, the respondent suffered injuries that were likely to incapacitate the respondent with a permanent disability of 30%; that the report was made 25 days after the accident while the injuries were fresh and there was no evidence that the said injuries would incapacitate the respondent; that the respondent was still attending medication but he did not give evidence that he is still undergoing medication or to the fact that he had healed well; that the said

injuries were minor and as at the time of the hearing, he had fully recovered since he was treated only once and discharged.

9. The appellants further submitted that the award of Kshs 2,500,000/= was inordinately high and there was no basis for the said award. The appellant submitted that the trial Magistrate erred in relying on the case of *BN (A minor suing through the next friend IMS) v Mary Chebet Koskey Chumo* and others in which the plaintiff had more severe injuries. It was further submitted that the award should be substituted with an award of Kshs 450,000/=. The appellants relied on the case of *Josephine Mwikali Muindi v Mathew W Murage* (2015) eKLR.

10. The respondent filed his submissions on June 15, 2022. On whether the trial magistrate used the wrong principles in assessing general damages, it was submitted that the respondent's doctor assessed that the respondent had sustained a 30% permanent incapacity while the appellants' doctors assessed the permanent incapacity as 25%. It was further assessed that the injury would complicate with lumbago.

11. Further to the foregoing, it was submitted that the case of *BN (A minor suing through the next friend IMS)* (supra) had almost similar injuries to the present case. The respondent submitted that the appellants had relied on the authority of *Nihon Complex Ltd & Thomas Njoroge Kirima v Joseph Kiplagat Towett* (2019) eKLR where the court awarded Kshs 1,800,000/= as damages but now wants the court to interfere with the lower court's award to Kshs 450,000/= as damages.

12. On the special damages, the respondent submitted that he produced the receipts and the same are captured at page 28 paragraph 37 and page 29 paragraph 2 - 3 of the record of appeal. The respondent urged this court to find that the trial court applied the right principles in deciding the case and the appellants' appeal should be dismissed with costs.

13. 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 v Associated Motor Boat Co. Ltd* (1968) EA 123.

14. 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 his is a jurisdiction which should be exercised with caution."

15. I have certainly 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.

16. 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..."

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 on the injuries which he sustained and testified that he is now paralyzed, he cannot work or stand. On cross - examination, he testified that he still goes to the hospital and depend on well-wishers and relatives although he has a farm and he can hire workers. The appellants did not call any witnesses in support of their case.

A perusal of the record of appeal shows that the appellant did not file 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 v 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."

The failure to file a proper record of appeal cannot be termed to be 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 v 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."

I am also constrained to observe that the appellants have filed a supplementary record of appeal dated May 25, 2022 and produced Doctor James Obondi's medical report. The said report was not initially filed by the appellants in the trial court and neither was it produced. It therefore remains that in the absence of the appellants calling any witnesses in support of their case or producing any documents, the respondent's case remained uncontested. The appellants' denied the trial magistrate an opportunity to examine the medical reports by both doctors. The trial magistrate observed as much in his judgement when he held: -

"The injuries suffered by the plaintiff which are well captured in the initial treatment notes and P3 form are no doubt serious injuries. The said injuries are not contested."

17. 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."

18. 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 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."
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> The records of appeal filed by the appellant is incomplete and therefore incompetent. From the foregone discussions; 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 an incomplete record of appeal but also, they did not sufficiently present their evidence before the trial court and the respondent's case stands unchallenged.

19. The upshot thereof is that the judgement and decree of the Hon R.K Langat dated and delivered on September 16, 2021 is hereby upheld. The appeal is dismissed with costs to the respondent.

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

R. WENDOH

JUDGE

Judgement delivered in the presence of;

No appearance for the Appellant.

Mr. Mulisa holding brief Mr. Mamwache a for the Respondent.

Nyauke Court Assistant.