REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

[CORAM: MRIMA, J.]

CIVIL APPEAL NO. 72 OF 2019

1. KELVIN MUNENE NGOLIA

2. TERESIA NKIROTE.....APPELLANTS

-VERSUS-

NABEA KANARI.....RESPONDENT

(**Being an appeal on quantum of damages from the judgment and decree**

by Hon. G. Sogomo, Principal Magistrate in Tigania Principal Magistrate's

Civil Suit No. 66 of 2016 delivered on 17/10/2017)

JUDGMENT

1. The Respondent herein, **Nabea Kanari**, was walking off the Meru-Maua Road at Karama Market when she was involved in a road traffic accident. Motor vehicle registration number **KBR 890V** make **Toyota Wish** was the offending vehicle. It was under the control of the 1st Appellant herein, **Kelvin Munene Ngolia** and was owned by the 2nd Appellant herein, **Teresia Nkirote**.

2. Resulting from the accident the Respondent suffered injuries on his left leg. He was rushed to hospital where he was admitted and treated. The leg was later amputated. The Respondent filed ***Tigania Principal Magistrate's Civil Suit No. 66 of 2016*** (hereinafter referred to as '**the suit'**) against the Appellants. He sought for damages.

3. The suit was heard and judgment rendered on 17/10/2017. The trial court found the Appellants jointly and severally wholly liable. Damages were assessed at Kshs. 3,965,588/40.

4. The Appellants were partly dissatisfied with the judgment. A Memorandum of Appeal was filed on 28/06/2019; about two years post judgment. It was on the quantum of damages. Three grounds of appealed were preferred.

5. Directions were taken and the appeal was disposed of by way of written submissions. All the parties duly complied. The Appellants contended that the award of damages was inordinately high. They sought a review. They also relied on several decisions in urging this Court to allow the appeal.

6. The Respondent opposed the appeal. He stated that the Appellants had already paid him Kshs. 3,000,000/= out of the decretal sum and as such he did not understand the essence of the appeal. He nevertheless submitted that the awards were commensurate to the injuries sustained. He referred to several decisions in opposing the appeal.

7. The duty of the first appellate Court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). The Court must nevertheless appreciate that it 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 the appellate Court is shown demonstrably that the trial court acted on wrong principles in reaching the findings. That was the holding in **Mwanasokoni -versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348).**

8. I have carefully perused and understood the contents of the pleadings, the proceedings, the judgment, the record of appeal, the grounds of

appeal, the submissions and the decisions referred to by the parties. I must point out that the trial court captured the contents of the pleadings and the evidence in its judgment so well. I herein incorporate the same as part of this judgment by reference.

9. I noted some arnomalies on the record of appeal. Although the issues were not taken up by the parties I will still deal with them as they go to the substance and competency of the appeal. It is about the absence of the decree and the order granting leave to appeal, if any, as part of the record of appeal.

10. I have also perused the lower court file. I came across a decree extracted from the judgment. I did not however come across any order granting leave to appeal.

11. I will now deal with the effect of the absence of the decree and the order granting leave to appeal, if any, in the record of appeal.

12. Section 65(1) of the **Act** is the basis of appeals from the surbodinate courts to the High Court. It provides as follows: -

> **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 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.**

13. Appeals from orders are provided for in **Sections 75** and **76** of the **Act** and **Order 43** of the **Rules**. **Order 42 Rule 1** of the **Rules** provide that an appeal to the High Court shall be in the form of a Memorandum of Appeal signed in the same manner as a pleading.

14. Once an appeal is lodged aforesaid, a Record of Appeal is then filed. The contents of the Record of Appeal are provided for in **Order 42 Rule 13(4)** of the **Rules** as follows: -

> **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:**
>
> > **(a) the memorandum of appeal;**
> >
> > **(b) the pleadings**
> >
> > **(c) the notes of the trial magistrate made at the hearing;**
> >
> > **(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;**
> >
> > **(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;**
> >
> > **(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal;**
>
> **Provided that-**
>
> > **(i) a translation into English shall be provided of any document not in that language;**
> >
> > **(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).**

15. A Record of Appeal is essentially supposed to be complete with all necessary documents. Courts have severally dealt with cases of incompleteness of Records of Appeal.

16. The Supreme Court in ***Civil Application No. 20 of 2014 Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others (2014) eKLR*** referred to its earlier finding in ***Law Society of Kenya vs Centre for Human Rights and Democracy & Others, Supreme Court Petition No. 14 of 2013*** as follows: -

> **[16] For a competent appeal to lie before this Court it must comply with the provisions of Rule 33(1) of the Supreme Court Rules, 2012 which provides that:**
>
> > **An appeal to the Court shall be instituted by lodging in the registry within thirty days of the date of filing of the notice of appeal –**

a. a petition of appeal;

b. a record of appeal; and

c. the prescribed fee.

[17] …….

[**36] The use of the word 'shall' in Rule 33(1) suggests the mandatory nature of the rule, requiring strict adherence to the completeness of the rule. Thus, a strict reading of rule 33(1) leads to the conclusion that an appeal comprises the Petition, the Record of Appeal, and the prescribed fee.**

[37] …….

[38] The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the appeal before it.

17. The Court further held, at paragraph 39, that:

***[*39] If an intending appellant were to present the Court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the Court to determine 'the appeal' on the basis of these two, such an appeal would be incomplete and hence incompetent. Indeed, this is the gist of Rule 33(1) of the Supreme Court Rules.**

18. Ngaah, J in ***Nyeri High Court Civil Appeal No. 51 of 2013 Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kalumbo (2016) eKLR*** dealt with how the Court of Appeal in **Kyuma vs Kyema (1988) KLR 185** dealt with the interpretation of **Section 79G** of the **Act**. Before looking at what the Court said I will first reproduce the said Section.

19. The Court of Appeal then held as follows: -

The question is what documents must the appellant file within thirty days or within the time lawfully extended by the certificate of delay" Since the question contemplates that the appeal is against a decree or order, the appellant is obliged to apply first, Memorandum of Appeal in the form set out in appendix F No. 1 of the Civil Procedure Rules and second, a copy of the formal order of the court, if available. Rule 1A of Order 41 permits this latter document to be filed as soon "as possible and in any event within such a time as the court may order". Therefore a certificate of delay within the true intendment of section 79G must certify the time it took to prepare and deliver to the appellant "a copy of the order" of the magistrate. But the certificate of delay exhibited by the appellant, did not speak of a decree or order . No such order was sought or extracted. What the appellant, in error, sought and what the court dutifully supplied, were the proceedings and judgment".

20. Sitati, J in **Kakamega Election Petition Appeal No. 3 of 2018 Elvis Anyimbo Sichenga v Orange Democratic Movement & 4 Others (2016) eKLR** dealt with the same issue in an election petition appeal from the surbodinate court. In that appeal the Record of Appeal did not include the decree of the judgment appealed against. The Learned Judge held as follows: -

32. What then am I saying about the failure by the appellant to attach a certified copy of the decree appealed from? I am saying that that omission is not a mere technicality for if it were so, the drafters of the rules would not have made its attachment a mandatory requirement. I am therefore satisfied that the applicant has satisfied this court that the said omission is fatal to the petition and I so find.

21. I will also add my voice on the subject. **First,** from the reading of **Section 65(1)** of the **Act** it is the decree or part thereof that is appealed from the surbodinate court to the High Court. **Second**, under **Order 42 Rule 13(4)** of the **Rules** a Court may dispense with any document to be part of the Record of Appeal except the memorandum of appeal, the pleadings and the judgment, order or decree appealed from and in appropriate cases the order giving leave to appeal. **Third,** the saving grace under **Article 159(2)(d)** of the **Constitution** is inapplicable in this case. That is because the provision only applies to matters relating to procedure or form and not the substance thereof. **Fourth**, despite clear provisions on extension of time the Appellants never sought for any extension of time to file the decree neither did they explain any difficulty in obtaining the decree.

22. The Record of Appeal is therefore incomplete. In the words of the Supreme Court in ***Civil Application No. 20 of 2014 Bwana Mohamed Bwana*** (supra) '*such an appeal would be incomplete and hence incompetent.'* I will however excuse the Appellants on the aspect of the decree. I say so because the decree was extracted and filed with the Memorandum of Appeal. It is also in the lower court record, but was not made part of the record of appeal. I will therefore deem the record of appeal to contain the decree.

23. Turning to the order granting leave to appeal, none is one record both before this Court and the lower court. The appeal was filed around 2 years after judgment. The order granting leave, if any, became one of the most crucial documents. Its absence renders a void between the judgment and the appeal lodged 2 years later. The record of appeal is hence incomplete. That makes the appeal incompetent.

24. Having said so, there is no competent appeal for consideration. The appeal is therefore struck out with costs.

25. Orders accordingly.

SIGNED BY:

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED and DELIVERED at MERU this 30th day of October, 2019.

A. MABEYA

JUDGE

Judgment delivered in open Court and in the presence of: -

.....for the Appellants.

.....for the Respondent.

..... Court Assistant