



REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT VOI

AT VOI LAW COURTS

CVIL APPEAL NO 16 OF 2017

BETWEEN

KILONZO DAVID T/A SILVER BULLET BUS COMPANY.....APPELLANT

VERSUS

KYALO KILIKU.....1ST RESPONDENT

AUTOSOL (K) LIMITED.....2ND RESPONDENT

(Being an Appeal from the judgment of the Honourable E.M Kadima (Resident Magistrate delivered on the 23rd February 2017)

REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE COURT'S AT VOI

CVIL SUIT NO 76 OF 2011

KYALO KILIKU.....PLAINTIFF

VERSUS

KILONZO DAVID T/A

SILVER BULLET BUS COMPANY.....1ST DEFENDANT

AUTOSOL (K) LIMITED.....2ND DEFENDANT

RULING

INTRODUCTION

1. In his judgment delivered on 23rd February 2017, the Learned Trial Magistrate, E.M Kadima, Resident Magistrate, entered judgment in favour of the 1st Respondent against the Appellant and 2nd Defendant jointly and severally for Kshs 1,562,900/= made up as follows:-

General damages	Kshs 1,500,000/=
Special damages	Kshs 2,900/=
Future medical expenses	Kshs 60,000/=

Kshs 1,562,900/=

Plus costs and interest from the date of judgment until payment in full.

2. Being dissatisfied with the Judgment of the said Learned Trial Magistrate, on 27th July 2017, the Appellant filed its Memorandum of Appeal dated 22nd July 2017. The Appellant relied on five (5) Grounds of Appeal. Its Written Submissions were dated 5th February 2018 and filed on 19th February 2018 while those of the 1st Respondent were dated 2nd March 2018 and filed on 5th March 2018.

3. When the parties appeared before the court on 5th March 2018, they requested for a Judgment date herein having relied entirely on their respective Written Submissions. The ruling herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

4. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

5. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

6. Having the aforesaid holding in mind and having looked at the Appellant’s Memorandum of Appeal and the parties’ respective Written Submissions, it appeared to this court that the following questions are what had been placed before it for determination:-

- a. Whether or not the Appeal should be struck out for having been incompetent;**
- b. Whether or not the Learned Trial Magistrate erred in apportioning liability equally as against the Appellant and the 2nd Respondent herein;**
- c. Whether or not the Learned Trial Magistrate awarded damages that were high and manifestly excessive warranting interference by this court.**

7. As a preliminary issue, this court deemed it prudent to address itself to the competence or other issue of the Appeal herein before it could delve into the issues of liability and quantum.

8. The 1st Respondent argued that the Appeal was incomplete because the Appellant did not enclose a copy of the decree that he was appealing from. He referred this court to Order 42 Rule 2 of the Civil Procedure Rules that 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 the court may order, and the court need not consider whether to reject Appeal summarily under Section 79B of Act until copy is filed.”

9. He added that the importance of the order or decree being appealed from being part of the documents that must be contained in the Record of Appeal could also be discerned from Order 42 Rule 13 (4) which stipulates 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 during 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 document whatsoever put in evidence before the magistrate;**
- f. The judgment, the 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).”**

10. He placed reliance on the cases of **Kyuma vs Kyema [1988] KLR**, **Ndegwa Kamau t/a Sideview Garage vs Isika Kalumbo [2016] eKLR**, **Kulwant Singh Roopra vs James Nzili Maswii [2014] eKLR** and **Joseph Kamau Ndungu vs Peter Njuguna Kamau [2014] eKLR** where the common thread was that an Appeal will be struck out if its Record of Appeal does not contain the order or decree that is being appealed from.

11. The Appellant did not seek leave of this court to respond to this issue that was raised in the Respondent's Written Submissions. The Respondent's submission on this issue thus remained uncontroverted.

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.

13. Indeed, this court's position was buttressed by the fact that Order 42 Rule 13 (4) (f) of the Civil Procedure Rules provides that before allowing the appeal to go on hearing, the court shall satisfy itself that the judgment, the order or appeal appealed from forms part of the court record.

14. A perusal of the Record of Appeal showed that the Appellant enclosed the certified copies of the proceedings. There was, however, no certified copy of the decree. There was also no copy of the letter requesting for the certified copies of the proceedings and decree. There was no evidence from the lower court file that the Appellant applied for a Certificate of Costs and Decree.

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.

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.

17. Further, the court has power under Order 42 Rule 2 of the Civil Procedure Rules to grant leave to an appellant to file such certified copy of the decree as soon as possible and in any event within such time that it may order.

18. In addition, the decision of **Kyuma vs Kyema** (Supra) that Ngaah J relied upon in striking out the appeals therein was decided in 1988, way before the promulgation of the Constitution of Kenya, 2010 which mandates courts to administer justice without undue regard to technicalities.

19. Accordingly, having considered the Written Submissions, it was the finding and holding of this court that although there was merit in the 2nd Respondent's argument that the Appeal herein, it was in the interest of justice that the Appellant be given his day in court.

DISPOSITION

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.

21. The Appellant is hereby further directed to take a mention date at the High Court of Kenya Voi Registry within the next fourteen (14) days for the Presiding Judge High Court of Kenya Voi to give further orders and/or directions for the disposal of the Appeal herein.

22. Orders accordingly.

DATED at NAIROBI this 12th day of June 2018.

J. KAMAU

JUDGE

READ, DELIVERED and SIGNED at VOI this 20th day of June 2018

F. AMIN

JUDGE