REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL APPEAL NO 26 OF 2010

THE KENYA ANTI CORRUPTION COMMISSION.....APPLICANT

VERSUS

GILAS OJWANG KWOBA (Suing as legal representative of the deceased)

PATRICK MAKOKHA.....RESPONDENT

(From the Decree and Order of E.O Obaga Principal Magistrate Busia in Busia PMCC No 255 of 2010)

J U D G E M E N T

This is an appeal by the Kenya Anti-corruption Commission. In a suit the Respondent Gilisasa Ojwang Kwoba had claimed general damages and special damages out of a fatal road accident which occurred on 14th August 2007 along Kisumu – Busia Road. In the accident Patrick Makokha died. The plaintiff who was an uncle and with whom the deceased resided brought this suit as the legal representative of the deceased.

It is clear from the record and the appellant has not denied it, that at the beginning or middle of the proceedings, the parties voluntarily entered a consent judgement on liability at 70% to 30% in favour of the plaintiff. The only issue that the lower court had to decide was the quantum of damages.

In his evidence the respondent/plaintiff had testified that the deceased was his nephew who resided with him together with his mother. That he took out a grant of letter of administration of the deceased's estate to authorize him to sue on behalf of the deceased's estate.

The trial court awarded the plaintiff damages as follows;-

Pain and suffering	– 20,000
Loss of expectation of life	- 80,000
Loss of dependency	- 840,000
Total	940,000
Less 30% contributory negligence	282,000
Balance	658,000

The court also award plaintiff costs and interest.

The defendant/appellant was not satisfied with the award and filed this appeal raising the following grounds of appeal:-

> **1.** That the learned Principal Magistrate erred in law and in fact by holding that the deceased earned an income of kshs 3500/= when no such proof/evidence was tendered at the hearing.
>
> **2**. That the learned Principal Magistrate erred in law and in fact by failing to take into account in the damages suffered under Law Reform Act and off-setting the same from the damages suffered under the Fatal Accident Act and thus awarding the Respondent double benefit.
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> **3**. That the learned Principal Magistrate erred in law and in fact in failing to appreciate that the persons mentioned under para 7 of the plaint under the heading, "Particulars pursuant to the estate," are neither dependants nor beneficiaries according to statute and hence no benefits accrue to them.
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> **4**. That the learned Principal Magistrate erred in law and in fact by making award of damages that was manifestly excessive under the various heads and not in line and/or conformity with the prevailing awards for similar claims.
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> **5**. That the learned Principal Magistrate erred in law and in fact by admitting and relying on copies of documents/exhibits which were neither primary documents no secondary documents as per the provisions of section 64 to 68 of the Law of Evidence Act.
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> **6**. That the learned Principal Magistrate erred in law and in fact in failing to take into account the submissions filed by counsel for the appellant and relied entirely on the submissions filed by the Respondents counsel.
>
> **7.** That in arriving at his decision the learned Principal Magistrate did so in a speculative manner and failed to exercise his discretion within the applicable principles of assessment of damages and pick out the proper dependants and beneficiaries of the estate of the deceased, if any, and cause the division of the award to be made. His failure to adhere to the foregoing has occasioned a serious miscarriage of justice and ought to be reversed.

The parties chose to proceed through written submissions. I have carefully perused both parties written submissions. In their arguments the Respondent took up the ground rejecting the appeal before the court as incompetent and sought that the court first and foremost strikes out the appeal. The respondent asserted that the Memorandum was undated and that it was unaccompanied with a certified extract of copy of the decree and/or order appealed from.

Examination of the appeal record confirms the following – The memorandum was received and filed in this court on 13/5/2010. That is confirmed by the court received stamp. It appears to be property signed, most probably by the proprietor of the firm of Muma Nyagaka and Company. That should out the argument by the Respondent that the memorandum was not signed at the time of filing and was not therefore competent.

A close scrutiny will reveal a different situation. The date on it is not 13/5/2010 when it was received and filed in court but the 24/5/2010 – Eleven days after the memorandum was filed. Clearly therefore, the memorandum was signed 11 days after it was filed, meaning it was unsigned when it was filed on 13/5/2010.

In my view, failing to date a document which the Law requires to be dated before being filed, is a fundamental omission which goes to the root of its validity. Lack of such signature at the critical time, in this case, the time of filing, invalidates the document. The conclusion I come to on the issue of failure to sign the memorandum of appeal is that it invalidated the same. No later signing of the same would cure it.

The second issue raised is that the memorandum of appeal was not accompanied by an extracted certified copy of the decree or order appealed from. Order 34 rule 2, formerly order XLI Rule 1A of the Civil Proceudure Rules provides –

> "When 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".

My understanding and finding to this point is that the appellant who files a memorandum of appeal without annexing an extracted certified copy of the decree or order appealed from must, before the hearing of the appeal, extract the same and file it with the memorandum. The requirement is imperative and failure to do so will certainly render the appeal fatally incompetent.

The original position was that any memorandum of appeal which was filed without and extracted certified copy annexed to it, was fatally incompetent. This was said to be so because the certified decree or order is the formal expression of any decision of a civil court which is not a decree. An appeal would therefore not lie from such decision where no formal expression of a decision has not been filed. That is how the old East African Court of Appeal explained in Mohammed Bhai Company Limited 19EACA at page 38 – The same was held in a later case of Old East African Trading Company Limited Vs Jetha, 23 EACA where it was held thus–

> "As no order has been extracted at the time of lodging the appeal there was nothing to appeal from. The appeal was incompetent and there was no Jurisdiction to hear it".

It seems to me therefore that the present position as expressed by order 34 rule 2, is a mitigation of the original position as expressed in the old case cited above. While originally failure to file a memorandum of appeal with a certified copy of an extracted decree or order made the appeal incompetent, now an appellant has leeway to file the extracted decree or order at any time before the hearing of the appeal.

In this no extracted certified decree or order was annexed at the time of filing or any time after, but before the hearing. This means that this appeal has no formal expression of the judgement against which the appeal is brought. Put in the language used by the Court of Appeal in the earlier cited case, Old East African Trading Company Limited, there was nothing to appeal from.

In conclusion of this issue therefore this appeal is incurably incompetent and liable for striking out. It is not therefore necessary to consider other grounds of appeal as the above two points of Law disposes of this appeal.

ORDER

The appeal is struck out and dismissed with costs.

Dated and Delivered at Busia this 10th day of February 2011.

D.A ONYANCHA

JUDGE