Komen v Omwembi (Civil Appeal E161 of 2022)
[2025] KEHC 6599 (KLR) (21 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6599 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E161 OF 2022

E OMINDE, J

MAY 21, 2025

BETWEEN

CAROLINE JEPKORIR KOMEN ..... APPELLANT

AND

EVANS OTIENO OMWEMBI ..... RESPONDENT

(Appeal arises from the ruling of Hon. T. Mbungua, Resident Magistrate/ Adjudicator in Eldoret Small Claims Court Civil Case No. E128 of 2022)

JUDGMENT

1. This appeal arises from the ruling of Hon. T. Mbungua, Resident Magistrate/Adjudicator in Eldoret Small Claims Court Civil Case No. E128 of 2022.

2. Through a statement of claim dated 16/08/2022, the Appellant sought for special damages of Kshs. 9,600/=, compensation and costs of the claim. The Appellant stated that on or about the 27/05/2022, she was a pedestrian along Eldoret-Kapsabet road when the Respondent, his agent, driver and or employee so negligently drove, controlled or otherwise carelessly managed motor vehicle registration number KAN 167S causing it to lose control, veering off the road and causing an accident and as a result of which she suffered severe injuries, loss of amenity and damages.

3. The Respondent filed a response, in which it denied everything pleaded in the statement of claim and in the alternative he blamed the Appellant for the accident.

4. After trial Judgment was delivered on 28/10/2022 and the trial Court dismissed the Appellant's Claim for failing to prove on a balance of probabilities that motor vehicle registration number KAN 167S was liable for the said accident.

5. Dissatisfied with the court's decision, the Appellant lodged this appeal citing 7 grounds of appeal:

1. That the learned Magistrate erred in law and fact by failing to consider that the Appellant was a lawful pedestrian when she was involved in the accident.

2. That the learned Magistrate erred in law and in fact by failing to find that the accident was wholly occasioned by the Respondent's negligence and/or driving the suit motor vehicle.

3. That the learned Magistrate considered irrelevant and extraneous factors in reaching her decision and judgment that was erroneous vis-a vis the facts of the case.

4. That the learned Magistrate erred in law and in fact in ignoring and overlooking the submissions by the Appellant in her case generally.

5. That the learned Magistrate erred in law and in fact in failing to take into account the history, full facts and circumstances in which the Appellant was involved in an accident.

6. That the learned Magistrate erred in law and in fact in rendering a judgment that was contrary to the law, facts and the weight of the evidence.

7. That the learned Magistrate erred in law and in fact in applying the wrong principles applicable in the circumstances in arriving at her decision.

Submissions

6. The court directed that the matter be disposed of by way of written submissions. The Appellant filed her submissions on 4/12/2024 while the Respondent filed on 27/02/2025.

The Appellant's Submissions

7. Counsel for the Appellant gave a brief background of the case and added that the main issue for determination is when the Appellant proved her case on a balance of probability.

8. Counsel submitted that the Appellant herein filed her Statement of Claim dated 16/08/2022 seeking judgment against the Respondent for personal injuries suffered as a result of a road traffic accident that occurred on the 27th June, 2022 for which the Respondent were wholly to blame for its occurrence.

9. Counsel further submitted that the matter proceeded to hearing on 19/10/2022 and the Appellant's witnesses testified. CW1 PC Kennedy Ouko testified that the accident occurred on 27/06/2022 at around 7:30 AM at Lexo Petrol Station area along Eldoret-Kapsabet Road involving the motor vehicle registration number KAN 167S which was parked beside the petrol station to pick a passenger when it reversed all over sudden and hit the pedestrian who sustained injuries and was rushed to Moi Teaching and Referral Hospital for treatment. He produced the police abstract as CEXH-1. Counsel added that Dr. Joseph Sokobe testified as CW2, he stated that he examined the Appellant herein relying on the discharge summary from Moi Teaching and Referral Hospital, he prepared a medical report for the Appellant and the injuries she sustained were enumerated in the said report He testified that he charged the Appellant Kshs. 6,000/= for the examination and produced said medical report and receipt as CEXH-2(a) and PEHX-2(b). During cross-examination, he testified that the estimated cost of removing implants in the Appellant is Kshs. 150,000/=and could cost Kshs. 100,000/= at a public facility.

10. Counsel further submitted that the Appellant herein testified in court as PW3, she adopted her written statement as her evidence in chief and it was her testimony that she was a lawful pedestrian on the foot path along Eldoret- Kapsabet Road when the Respondent's motor vehicle registration number KAN 167S which was so negligently driven, controlled and/or managed causing it to lose control and knock

down the Appellant, she was severely injured and rushed to Moi Teaching and Referral Hospital for treatment where she expended Kshs.350,000/= and that she still continues to receive treatment as she is yet to fully recover.

11. Counsel relied on the holding in the case of Peter Kanithi Kimunya v Aden Guyo Haro [2014] eKLR where it was held: "A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was 'reported' at a particular police station."

12. Further, Counsel contended that the trial magistrate failed to take into account the history, full facts and circumstances in which the Appellant was involved in an accident and based her decision solely on the testimony of the PW1 and the police abstract which he produced as CEXH-1 which is contrary to the law as doing so left out the uncontroverted testimony and evidence of the Appellant and the CW2.

13. Counsel maintained that the Appellant's evidence on record stood uncontroverted by the Respondent despite being given the opportunity to do so and it is starkly clear that he is solely liable for the occurrence of the said accident and the subsequent injuries suffered by the Appellant. As such, the Appellant managed to prove her case on a balance of probabilities against the Respondent and the trial court misdirected itself in holding otherwise.

14. In conclusion, Counsel submitted that the Appellant's evidence on record stood uncontroverted by the Respondent despite being given the opportunity to do so and it is stark clear that he is solely liable for the occurrence of the said accident and the subsequent injuries suffered by the Appellant. As such, Counsel urged that the Appellant managed to prove her case on a balance of probabilities against the Respondent and the trial court misdirected itself in holding otherwise.

The Respondent's Submissions

15. On whether the appeal herein is defective and incompetent for failure to attach a certified copy of decree, Counsel submitted that the Appeal as is before this court, is defective and incompetent for failure by the Appellant to file a certified copy of the Decree. Counsel urged that the appeal is defective and incompetent and should be struck out. Counsel cited Order 42 Rule 2 of the Civil Procedure Rules in regard to the issue of attaching a certified copy of the decree. Counsel also relied on the case of Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR where the Court held as thus at paragraph *41*:

> Without a record of appeal, a Court cannot determine the appeal cause 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 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."

16. Counsel also cited the case of Chege v Suleiman [1988] eKLR and the case of Lucas Otieno Masaye v Lucia Olewe Kidi (2022) eKLR in that regard. He urged that the Appeal herein is defective and incompetent before this court, hence ripe for dismissal as the failure to attach a certified copy of the Decree being appealed against is fatal as opined by the superior courts.

17. On whether the trial Magistrate erred in dismissing the Appellant's suit in the trial Court, Counsel submitted that the Police Officer (CW 1) - PC Kennedy Ooko testified that an accident involving the Appellant herein and a Motor vehicle occurred on 27/6/2022. He testified that there was an error on the Police Abstract issued to the claimant dated 5/7/2022 as to the particulars of the registration number of the motor vehicle involved in the accident. It was his contention that the motor vehicle

that was involved in the accident is motor vehicle registration number KAW167S and not KAN 167S. He therefore made an amendment to the Police Abstract to the effect that the said Abstract should read registration of the motor vehicle to be KAW167S and not KAN167S as indicated in the police Abstract. The same was produced as C. Exh.1.21.

18. On cross examination, Counsel contended that he conceded to not being the Investigating Officer and that he did not visit the scene of the accident. He was also put to task to point out if indeed the investigating officer, one PC Mugure visited the scene and how long after the accident was the scene visit conducted. He admitted he did not have the police file and sketch maps. He admitted that the matter was pending under investigation and that he could not tell if the driver of the Motor vehicle KAN 167S or rather KAW 167S as per CExh.1, was charged for causing the accident. Finally, he admitted that he could not tell the circumstances clearly as he was not the one who visited the scene of the accident.

19. Counsel further submitted that the Appellant testified as CW3 -She adopted her witness statement as her evidence in chief. She briefly testified that she was standing off the road at the Lexo Petrol station stage when a motor vehicle whose registration number she could not recall, reversed and hit her whereupon she sustained injuries.

20. On cross-examination, Counsel added that she maintained that she was standing and not walking and this clearly is inconsistent with her statement tendered in court as her evidence in chief. She admitted that she did not hear the reverse beep of the unknown motor vehicle as it reversed as she was focusing her attention on the oncoming traffic from Kapsabet towards Eldoret with the view of boarding one of the matatus passing by. She further was not aware that the motor vehicle KAN 167S had undergone an inspection at the police station after the accident and that the inspection showed that the motor vehicle was not damaged at the back at all.

21. Counsel urged that the Appellant admitted that she was required to be vigilant while on the road and that on being hit, she was injured on her right hip.

22. On whether negligence on the part of the Respondent was proved on a balance of probabilities and was the trial Court in error, Counsel denied that the same was not proved. Counsel maintained that the burden of proof lies with he who alleges the existence of a fact. Counsel relied on Sections 107, 108 & 109 of the *Evidence Act*, Cap. 80 of the Laws of Kenya. Counsel contended that the Police Officer who testified was not the Investigating Officer, he admitted that he did not visit the scene of the accident and conceded during cross examination that he could not tell the circumstances of the accident. Counsel thus maintained that the evidence of the Police Officer can therefore be only condemned as hearsay.

23. Counsel added that the said witness made an amendment to the particulars of registration of the subject motor vehicle to be registration number KAW 167S and not KAN 167S. Counsel contended that this is clearly inconsistent with the pleadings lodged by the claimant. Further, Counsel submitted that the claimant could not recall the registration number of the subject motor vehicle she alleged had knocked her down while reversing. Counsel contended that the said motor vehicle KAW 167S is not owned by the Respondent. Counsel added that upon inspection motor vehicle registration number KAN 167S was not found to have any damages on the back.

24. Counsel maintained that the testimony of the Appellant was inconsistent with her pleadings in the course of trial and it is submitted that there are too many gaps that have been left for the court to speculate. Counsel submitted that the said motor vehicle KAW 167S is not the Respondent's and neither was it in his possession on the material date of the accident.

25. Counsel urged that where there is inconsistency in the pleadings, documentation and testimony advanced in court, the court should question the same. Counsel added that this is not believable as it is taken that the Appellant is forum shopping in this court. Counsel maintained that the version of events must be backed by documentation which if there is any inconsistency, then the same is not believable. Counsel relied on the case of John Onteri Momanyi v Motor Boutique Limited [2018] eKLR where the learned Judge invoked the provisions of Section 107 and 108 of the *Evidence Act* and placed the burden of proof upon the one who approached the court for redress as below;

> " Section 108 of the *Evidence Act* further provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. On proof of a particular fact, Section 109 of the *Evidence Act* states that such proof lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. Since it is the claimant who approached the court for redress, it is he who carries the burden of proof that he was dismissed. It is only after this is proved by the claimant that the Respondent would be called upon to justify the grounds of termination. This is the essence of Section 47(5) of the *Employment Act* as read together with Sections 107,108 and 109 of the *Evidence Act*."

26. Still relying on the case of John Onteri Momanyi (Supra), Counsel added that while addressing the issue of contradictory evidence and in choosing not to believe the version advanced by the claimant, the Court held as below;

> " The Court returns that the claimant's contradictory evidence and case cannot be trusted."

27. Counsel further contended that the Appellant did not witness the motor vehicle hitting her, it was her testimony under oath that she only found herself on the ground and could not fathom how the accident occurred, she could not tell the registration number of the alleged motor vehicle that hit her, no witness was called to court. Counsel urged that how sure are we then, considering the inconsistency of the pleadings and further aversions that the motor vehicle was KAW 167S and not KAN 167 and that the Respondent's motor vehicle was actually at the scene of the accident and involved in the accident.

28. Counsel urged the Court to be guided by the case of Simpson vs. Peat (1952) 1 ALL ER 44 where it was held that errors of judgement do not amount to careless driving and that the mere fact that an accident occurs does not follow that a particular person has driven dangerously or without care and attention. Counsel submitted that, that was the same position in Rambhai Shivabhai Patel & Another vs. Brigadier-General Arthur Corrie Lewin [1943]10 EACA 36 where it was held that the mere occurrence of an accident is not in itself evidence of negligence and that there must be reasonable evidence of negligence.

29. Counsel added that a case such as the present one would fail for failure by the Appellant to prove that the accident was caused by the negligence of the Respondent. Counsel maintained that the Appellant failed to meet the standard of proof with regard to evidential burden, that is the circumstances and particulars of the Respondent's negligence and/or accident and/or the motor vehicle that was involved. Counsel added that the Claimant was required in order to succeed in his claim, to discharge an evidential burden in relation to the fact(s) in the issue.

30. Counsel urged that the Appellant failed to discharge her burden of proof as required by the law and subsequently, the claim failed as a result and the Court herein should affirm the said decision and dismiss the appeal with costs to the Respondent. Counsel maintained that the trial Court did not err in dismissing the Appellant's suit as the Appellant failed in her duty to create a nexus between herself,

the Respondent and motor vehicle registration number KAW 167S which the Respondent denied owing and as such could not be held liable for any acts or omissions related to the said motor vehicle registration number KAW 167S.

31. Counsel submitted that in the unlikely event the appeal succeeds, the Appellant pleads to have sustained the following injuries as a result of the alleged road traffic accident; fracture right neck femur and soft tissue injuries.

32. Counsel added that Dr. Sokobe (CW2) testified and restated that the Claimant sustained a fracture of the femur neck together with soft tissue injuries. Counsel further submitted that the medical report produced in Court confirms that there was no incapacitation/disability assessed as such in the unlikely event the Court finds that the Appellant proved her case in the trial Court then an award of Kshs. 350,000/= will suffice in view of the injuries sustained by the Claimant.

33. Counsel relied on the case of PAS V George Onyango Orodi [2020] eKLR where an award of Kshs. 400,000/= was upheld in respect of a Respondent who had sustained a fracture of the right femur and was further admitted in hospital for 3 weeks. Counsel submitted that the cited authority is comparable to the injuries sustained by the Claimant and that the claimant in the matter herein unlike the Plaintiff in the cited authority, was not admitted in hospital and therefore a lesser degree of severity of the injuries sustained by the claimant herein thus Kshs.350, 000/- or less, this being a Small Claims Court matter, would suffice.

34. Additionally, Counsel relied on the case of Juma Hajee Properties v Hamidu Malio Kilio & 2 others [2020] eKLR where an award of Kshs.1,200,000/= was substituted with Kshs.500,000/= for the following injuries sustained; Blunt trauma to the scalp which was tender with bruises, Blunt trauma to the neck which was tender, Blunt trauma to the pelvis which was tender, The right thigh was swollen and tender, He sustained a fracture of the right femur (Double fracture of the right femur), Bruises on the right leg which was tender, A deep cut wound on the left thigh1which was tender and 6cm long, Bruises and lacerations on the left knee and left leg which were tender. Counsel added that the injuries cited in the authority herein were more severe injuries including three fractures (one being that of the femur) whereas the Claimant herein only sustained a single fracture.

35. With regard to future medical expenses Counsel, submitted that whereas the Appellant availed a medical report indicating that she shall be in need of Kshs. 150,000/=for future treatment, it is submitted that the same was not pleaded and the same should not be awarded. Counsel contended that court cannot award that which was not pleaded in the statement of claim. Counsel relied on the case of Tracom Limited & v Hasssan Mohamed Adan [2009] eKLR where it was held as follows: -

> " ...We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Ltd v Gituma (2004) 1 EA 91, this Court, stated: -"And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. Counsel maintained that the same was not pleaded and/or stated in the Statement of Claim and the court should not be invited to speculate and the same should be disregarded.

36. Regarding special damages, Counsel submitted that the Claimant seeks Kshs. 9,600/= as Special Damages being costs for procuring a Medical Report, treatment and search. It is trite law that special damages ought to be specifically pleaded and proved. Counsel urged that the said award can only be

made where original receipts were produced in proof of the same and as such, the sum of Kshs. 6,550/ = would suffice.

37. In conclusion, Counsel submitted that the Appellant having failed to prove her case on a balance of probabilities then suit in the trial court stands dismissed and the Court herein is invited to affirm the decision of the trial adjudicator and proceed to dismiss the Appeal with costs.

Analysis and Determination

38. This being the first appellate court, the court shall go by the guiding principle for the first appellate court as was set out in the case of Selle v Associated Motor Boat Co. [1968] EA 123 where the court stated as follows: -

> The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

39. On the Appeal filed, the only issue for determination would be whether the Appellant proved her case on the balance of probabilities. However, before delving into the merits of the said Appeal, the Court needs to determine whether or not, as submitted by Counsel for the Respondent, the Appeal as filed by the Appellant is defective and incompetent for failure by the Appellant to annex a copy of the decree that is appealed against as is required by the provisions of Order 42 Rule 2 of the Civil Procedure Rules and ought therefore to be struck out. Counsel relied inter alia on the decision of the Supreme Court in the case of Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR(Supra) the relevant paragraph of which I reproduce as hereunder;

> Without a record of appeal, a Court cannot determine the appeal cause 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 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."

40. Before delving into the provisions of Order 42 Rule 2, it is necessary that the provisions of Order 42 Rule 1 be considered for reasons that it is this Rule that states with clarity what is to be appealed against. It states as follows;

> Rule 1. Form of appeal [Order 42, rule 1]
>
> (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
>
> (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

Rule 2. Filing of decree or order [Order 42, rule 2]

> 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 time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.

41. As clearly stated in those excerpts of the provisions of Order 42 Rule 1, an Appeal can only be against a decree or an order of the Court. Either of these two must therefore be extracted from a judgement of the Court and availed with the Record of Appeal for an Appeal to qualify to be competent. In this regard, the decision of the Court of Appeal in the case of Chege v Suleiman [1988] eKLR (Supra) is therefore instructive and very relevant in circumstances where an order or decree of the court has not been availed. The Learned Judges stated as hereunder;

> " .... We concur positively in the submission of Mr Lakha that this is not a procedural but a jurisdictional point. Those holdings were founded on a proper interpretation of the *Civil Procedure Act* which confers a right of appeal from the High Court to this Court from "decrees and orders of the High Court". And those holdings were predicated on the fact that since the appeal could only lie against a decree or order, no competent appeal could be brought unless those decrees or orders were formally extracted as the basis of the appeal."

42. In the instant Appeal, I have perused the Record of Appeal. There is no Decree emanating from the impugned judgement of the lower court that has been filed with the Record of Appeal. The circumstances pertaining in the instant Appeal therefore are very much in concert with those in the authorities herein cited. I am in this regard satisfied that the Appeal as filed is defective and incompetent as submitted by Counsel for the Respondent. In the circumstances, I need not then delve into the merits of the Appeal for reasons of the defect that has rendered it incompetent in limine. The Appeal is therefore struck out in its entirety with costs to the Respondents.

READ DATED AND SIGNED AT ELDORET ON 21ST MAY 2025

E. OMINDE

JUDGE