



REPUBLIC OF KENYA



KENYA LAW
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**Kimundi & another v Omondi (Civil Appeal E933 of 2022)
[2025] KEHC 8626 (KLR) (Civ) (20 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8626 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E933 OF 2022

WM MUSYOKA, J

JUNE 20, 2025

BETWEEN

MICHAEL MUINDI KIMUNDI 1ST APPELLANT

JAMES KINUTHIA NGURE 2ND APPELLANT

AND

JOSEPH OMONDI RESPONDENT

*(Appeal from the judgement and decree in Milimani
CMCCC No. 4630 of 2018, of 28th October 2022)*

JUDGMENT

1. The suit at the trial court was commenced by the respondent, against the appellants, for special damages of Kshs. 968,786.00. The dispute arose out of a motor traffic accident, which happened on 9th June 2016, along Jogoo Road, Nairobi. There was a collision of two motor vehicles, registration makes and numbers KCD 572X and KCF 383P. The respondent owned KCF 383P, while the appellants owned and controlled KCD 572X. The respondent attributed negligence on the part of the appellants, as the cause of the collision. He averred that his vehicle had been damaged extensively.
2. The appellants filed a joint defence, in which they denied everything pleaded in the plaint. In the alternative they attributed liability on the respondent, and on a third party, the owners or operators of a motor vehicle registration mark and number KBB 043M.
3. I am not too sure whether any proceedings were ever conducted in this matter, and a judgement delivered, for I see no copies of typed proceedings nor a certified copy of a judgement, in the record of appeal herein, dated 3rd May 2024.



4. Anyhow, the grounds of appeal, in the memorandum of appeal, dated 14th November 2022, allude to such a judgement being delivered, on a date which is not disclosed, and the appeal herein ostensibly arises from that alleged judgement. The grounds revolve around the amount of special damages being unjustified; the court departing from the applicable principles for assessing special damages; the court failing to find that the evidence presented could not sustain the award made on the pleaded claim; and making an award that was grossly excessive and inconsistent with the evidence and case law.
5. Directions were given on 8th May 2024 and 2nd May 2025, for canvassing of the appeal based on written submissions. Both sides have filed written submissions.
6. The submissions by the appellants rest only on liability. They argue that the material presented did not establish liability against them. They cite sections 107 and 119 of the *Evidence Act*, Cap 80, Laws of Kenya, and *Midans Services Limited & Another vs. Ronald Kapute* [2022] eKLR.
7. The respondent argues on the award of special damages, negligence and whether the appeal should be allowed. He largely supports the decision by the trial court. He cites *Kenya Airports Authority vs. Otieno Ragot & Company Advocates* [2024] eKLR, *George & Another vs. Babu* [2024] eKLR, *Embu Road Services vs. Riimi* [1968] EA 22, *25 Mzuri Muhidin vs. Nazzar Bin Seif* [1961] EA 201, *Menezes Stylianicers Ltd CA No. 46 of 1962*; *Joel Muga Opija vs. East African Sea Food Limited* [2013] eKLR, *EWO vs. Chairman Board of Governors – Agoro Yombe Secondary School* [2018] eKLR and *Fred Matiang’i; the Cabinet Secretary, Ministry of Interior and Coordination of National Government vs. Miguna Miguna & 4 Others* [2018] eKLR.
8. Although the parties, in their written submissions, have plunged into arguing points on the substance of the appeal, there is a preliminary issue that they should have addressed, and that is whether the appellants have placed on record material that would assist me make the sort of determination that they invite me to make.
9. At paragraph 3 of this judgement, I have stated that I have not seen, in the record of appeal, copies of the proceedings and the judgement of the trial court. The only document, of substance, in terms of what is required under Order 42 rule 13(4) proviso (ii), is the decree. Yet, the decree is just a skeleton. It only carries figures of what the court awarded. It does not establish the evidence that was presented by the parties, and how that evidence was handled by the court before it came to its final determination, which then forms the substance of the decree.
10. The memorandum of appeal challenges the award of special damages, on the basis that it is unjustified, the court did not apply the known well-established principles on assessment of the loss complained of, and it did not find that the evidence of the respondent could not sustain the award sought. There is also the ground that the court failed to assess contributory negligence. These issues cannot be resolved by looking at or perusing the decree only. They are addressed in the judgement. The judgement recites the evidence collected from the witnesses, analyses it, applies the law to it, before it makes the various awards. Without a copy of the judgement, I cannot possibly determine any of the grounds listed in the appeal. Without a copy of that judgement, the material submitted upon, by the parties, is of no use. I cannot determine whether the award was excessive, or the court departed from the age-old principles for assessment of loss, or the court failed to assess contributory negligence, among others.
11. The memorandum of appeal challenges the findings and holdings of the trial court. It challenges the reasoning and logic of the court. None of these are in the decree.
12. The default would have been ameliorated by the availing of the original trial court records. Those original trial court records were not made available. I have nothing before me, therefore, to guide me on how the trial court arrived at its conclusions and final determination, from which I should have been



able to evaluate, on merits, the case that the appellants have set out in their memorandum of appeal and written submissions.

13. I believe I have said enough to establish that the appeal herein was fatally wounded, by the failure of the appellants to provide a copy of the judgement of the court in the record of appeal. The appeal is fatally deficient. It is for dismissal, and I hereby dismiss the same, with costs to the respondent. Orders accordingly.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA ON THIS 20TH DAY OF JUNE 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Caroline, Court Assistant, Milimani, Nairobi.

Ms. Azenga Alenga, Legal Researcher.

Advocates

Mr. James T. Makori, Advocate for the appellants.

Mr. Cheruiyot, instructed by JK Kibicho & Company, Advocates for the respondent.

