Gakuru & another v Njoroge & another (Suing as the Legal Representatives of the Estate of the Late Isaac Thuo Njoroge) (Civil Appeal E005 of 2022) [2025] KEHC 12628 (KLR) (17 July 2025) (Judgment)

Neutral citation: [2025] KEHC 12628 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E005 OF 2022

GL NZIOKA, J

JULY 17, 2025

BETWEEN

GEORGE MUTHII GAKURU ..... 1ST APPELLANT

GEORGE MUTHIE ..... 2ND APPELLANT

AND

MARGARET MBAIRE NJOROGE ..... 1ST RESPONDENT

SIMON NJOROGE KAMAU ..... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE ISAAC THUO NJOROGE

(Being an appeal from the decision of Honourable Daffline Nyaboke Sure; Senior Resident Magistrate delivered on 12th January 2022 vide Naivasha Chief Magistrate Civil Case No. E031 of 2021)

JUDGMENT

1. By a plaint dated 22nd February 2021, the plaintiffs sued the defendants seeking for judgment against the defendants jointly and severally for the following orders;

    a. Damages under the Fatal Accident Act (Cap 32) Laws of Kenya and damages under the *Law Reform Act*, (Cap 26) Laws of Kenya, special damages, costs and interest of letters of administration.

    b. Special damages of Kshs 60,700

    c. Any other relief this court may deem fit to grant

2. The plaintiff suit arose as a result of an accident that occurred on or about the 19th day of July 2020, wherein one Isaac Thuo Njoroge (herein "the deceased") was fatally injured. It is the plaintiffs case that, the deceased was walking lawfully off Nairobi-Naivasha road and on reaching the Flyover area, the defendant and/or its driver drove a motor vehicle registration No. KCG 188A carelessly and/or negligently, that, he caused it to hit the deceased, fatally injuring him. The particulars of negligence attributed to the defendant's agent are tabulated at paragraph 4 of the plaint.

3. The plaintiff averred that as a result of the said accident the deceased's dependents listed at paragraph 7 of the plaint suffered loss and damage. It is averred that, the deceased was 34 years old, a trader, earning Kshs 17,000 per months and maintained the afore said dependents.

4. However, the claim was opposed by the 1st defendant vide a statement of defence dated 24th May 2020. The defendant denied the allegation that, the agent drove the subject vehicle in a negligent manner and caused the fatal accident. The particulars of negligence attributed to the defendant's driver were also denied.

5. However, on a without prejudice basis, the 1st defendant averred that, if the accident occurred, which was denied then it was solely caused by the negligence of the deceased and/or that, the deceased substantially contributed thereto. The particulars of negligence attributed to the deceased are indicated at paragraph 5 of the statement of defence. It was the defendant's plea that, the suit be dismissed with costs.

6. The matter proceeded to full hearing noting and that the 2nd defendant did not enter appearance and/or filed a defence. Consequently, an interlocutory judgment was entered against him on 7th September 2021.

7. The plaintiff's case was supported by the evidence of (PW1) No. 88419 PC Peter Ruso an officer stationed at Magumu police station who produced the police abstract and the plaintiff (PW2) Margaret Mbaire who fully relied on the statement filed alongside the plaintiff.

8. The 1st defendant relied on the evidence of the 2nd defendant George Muthii Gakuru who was driving the subject motor at the material date.

9. At the conclusion of the trial, the trial court rendered a decision vide a judgment dated 12th January 2022, and apportioned liability in the ratio of 30:70% in favour of the plaintiffs as against the defendants.

10. The judgment on quantum was entered in the following terms;

    a. Pain and suffering ..... Kshs 100,000

    b. Loss of expectation of life ..... Kshs 100,000

    c. Loss of dependency ..... Kshs 1,344,000

    Total sum ..... Kshs 1,544,000

    Less 30% ..... Kshs 1,080,800

    d. Special damages ..... Kshs 39,350

    Total sum awarded ..... Kshs 1,120,150

11. However, the defendants (herein "the appellants") are aggrieved with the decision of the trial court, and appeal against it on the following grounds;

a. That the learned trial Magistrate erred in law and in fact in finding that the plaintiffs had proved their case on negligence against the appellants.

b. That the learned trial Magistrate erred in law and in fact in finding that the defendant/ appellants were partially liable for the accident in issue.

c. That the learned trial Magistrate erred in law and in fact in failing to accord due regard to the defendant/appellants evidence on record and written submissions in arriving at its judgment on liability.

d. That the learned trial Magistrate erred in law and in fact in awarding Kshs. 1,344,000 under loss of dependency which was inordinately high in the circumstances.

e. That the learned trial Magistrate erred in law and in fact in relying on the wrong multiplicand hence arriving at an erroneous decision.

f. That the learned trial Magistrate erred in law and in fact in awarding special damages in the sum of Kshs. 8,800 which had not been specifically pleaded.

g. That the learned trial Magistrate erred in law and in fact in failing to accord due regard to the appellant's submissions on quantum on applicable principles for assessment of damages.

h. That the learned trial Magistrate erred and misdirected herself in law and in fact misapplying the principles applicable to assessment of damages.

12. The appeal was disposed of vide filing of submissions. The plaintiff submissions dated 1st January 2023, argued that the trial Magistrate erred in finding that the respondents proved their case to the required standard. The appellant cited the case of; Benter Atieno Obonyo vs Anne Nganga & another [2021] eKLR where the High Court held that the standard of proof in civil cases is on a balance of probabilities and that under section(s) 107, 108 and 109 of the *Evidence Act* (Cap 80) Laws of Kenya the burden of proof of any particular fact lies on the person who wish the court to believe its existence.

13. That, in the present case, the respondents' evidence did not establish negligence on the part of the appellants. That (PW2) Margaret did not witness the accident nor could she recall when it occurred, while (PW1) PC Russo did not produce a sketch plan to show how the appellants are liable and that the police abstract indicated the accident was pending investigations.

14. Further the 1st appellant gave uncontroverted evidence that the deceased was drunk and crossed the road abruptly and without care. That the driver swerved in an attempt to avoid the accident in vain and that the deceased was the author of his misfortune for failing to observe the Highway Code.

15. On the issue of quantum, the appellants submitted that as the deceased died shortly after the accident a sum of Kshs. 20,000 is sufficient as general damages for pain and suffering.

16. On loss of dependency, the appellant submitted that, there was no proof that the deceased was aged 34 years old dealt and earned Kshs. 7,000. That the amount of Kshs. 7,000 was plucked from the air and grossly inflated.

17. Furthermore, the multiplier of twenty-four (24) years adopted by the trial court did not take into consideration the vagaries and vicissitudes of life and proposed a multiplier of five (5) years to be adequate. The appellant relied on the case of; Leonard Wanganga Ngara & 2 others v Joyce Warurio Ndungu & 2 others [2020] eKLR where the High Court quoted with approval the case of; Nairobi HCCC No. 4580 of 1987 Christine Sho & Another vs East African Cement Co. Ltd & another and

held that although the plaintiff could have worked to the age of fifty-five (55) years but there was a chance he could have died earlier due to the vagaries of life.

18. The appellants further submitted that, the trial court made a double award by failing to deduct the award under the *Law Reform Act* from the award under the *Fatal Accidents Act*. The appellants relied on the case of; Dismas Muhami Wainarua v Spoon Kasirimo Maranta (suing as the administrator and or personal representative of the Estate of Partinini Supon (deceased) [2021] eKLR, where the High court held that there cannot be an award under both legislations where the beneficiaries are the same and deducted the award under loss of expectation of life from the total award.

19. The appellants further relied on the case of; Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenje (deceased) vs Kiarie Shoe Store Limited [2015] eKLR where the Court of Appeal dealt with the issue of double compensation and stated that duplication occurs when the beneficiaries of the estate of the deceased under the *Law Reform Act* and dependents under the *Fatal Accidents Act* are the same and consequently the claim for lost years and dependency will go to the same person.

20. That the Court of Appeal further stated that, it is sufficient for the lower court to show that in reaching a figure under the *Fatal Accidents Act*, it considered the awarded under the *Law Reform Act* for non-pecuniary loss as there is no requirement in law to engage in mathematical deductions.

21. The appellants argued that, there was no indication that the trial court took into account its award under the *Fatal Accidents Act* vis a vis the award under the *Law Reform Act*.

22. On the issue of the dependency ratio of 2/3, the appellants submitted that, the there was no proof that the deceased was married to the respondent or that had children no birth certificates were availed. The appellants relied on the case(s) of; Dismas Muhami Wainarua v Spoon Kasirimo Maranta (suing as the administrator and or personal representative of the Estate of Partinini Supon (deceased)(Supra) and Abdalla Rubeya Hemed vs Kayuma Mvurya & Another [2017] eKLR where it was held that a claimant must prove dependency on the deceased by evidence. The appellant proposed a multiplier or dependency ratio of 1/3

23. The appellant submitted that the calculation of loss of dependency, be as follows: 6,736.30x2/3x5x12 = Kshs. 269,452

24. Lastly, the appellant submitted that, costs follow the event and prays for costs based on section 27 (1) of the *Civil Procedure Act*, (Cap 21) Laws of Kenya.

25. However, the respondents in submissions dated 9th January 2023, and 20th May 2024, argued that, the appellants failed to file their submissions within thirty (30) days as directed by the court and therefore are deemed to have abandoned the appeal.

26. The respondent cited section 1A (3) of the *Civil Procedure Act* that imposes a duty on the parties to comply with directions and orders of the court. Further reliance was placed, and relied on the case of; Kampala Financial Services Ltd vs Muwanga Grace & Another Civil Suit No. 228 of 2013 where the High Court of Uganda held that where a court order is issued a party cannot choose to ignore and/or obey it in part it amounts to contempt and the party is liable to have its matter dismissed and may further be subject to other penalties including a fine and or imprisonment.

27. The respondents further submitted that, the record of appeal was incomplete for failure to include the trial court decree raising a legal issue as to the competence of the appeal and cited section 65 of the *Civil Procedure Act* that provides that an appeal shall lie to the High Court from any original decree or

part of a decree of a subordinate court and section 79G of the *Civil Procedure Act* that provides that an appeal shall be filed within thirty (30) days from the date of the decree or order appealed against.

28. The respondents further cited Order 42 Rule 2 of the Civil Procedure Rules, 2010 which provides where no certified copy of the decree or order is filed with the memorandum of appeal the appellant shall file it as soon as possible within such time as the court may order. Furthermore, Order 42 Rule 13 (4) provides that the order or decree is one of the documents required to be on record before an appeal is allowed to proceed for hearing.

29. The respondents submitted that, the omission to include a certified copy of the decree in the record of appeal renders an appeal incompetent. They relied on the case of; Bwana Mohamed Bwana vs Silvano Buko Bonaya & 2 Others [2015} eKLR where the Supreme Court stated that, Rule 87 prescribes the contents of the record of appeal and specifies the requisite documents to form the bundle accompanying the memorandum of appeal. That the Supreme Court held that, if a requisite document is omitted from the bundle, the appeal in incompetent and defective for failing to meet the requirements of law, and that an incompetent appeal divests a court of jurisdiction to consider the factual or legal controversies embodied in relevant issues.

30. The respondents further relied on the case(s) of; South Nyanza Sugar Co. Ltd vs Simeona A. Opola [2020] eKLR, Rachel Wambui Nganga & another vs Rahab Wairimu Kamau [2020] eKLR, Constatine Ngiracha Gibai vs Peter Boke Nyamohanga [2020] eKLR, and Lucas Otieno Masaye vs Lucia Olewe Kidi [2022] eKLR where the High Court and Environmental and Lands Court have discussed in length the subject and held that omission of a certified decree appealed against from the record of appeal renders the appeal incompetent.

31. The respondents further submitted that, the 1st appellant admitted that the accident occurred at a market place, and if he was driving at 50km/per hour then the vehicle ought to have stopped upon applying emergency brakes taking into account that he had seen the deceased at or about three (3) meters.

32. Further, there was no plausible explanation for the accident and therefore the trial court cannot be faulted for finding that the 1st defendant was driving at an excessive speed in a built-up area and was thus correct in finding that the respondents had proved negligence against the appellants.

33. On the issue of the multiplicand, the respondents argued that the trial Magistrate considered the evidence and submissions by the parties and agreed with the appellants' submissions on the deceased income. That whereas the respondents submitted the deceased income was Kshs. 17,000 and the appellants submitted it was Kshs. 6,736.30. That the trial court adopted the sum of; Kshs, 7,000 and gave reasons for her decision and how she arrived at the award.

34. On special damages, the respondents submitted that, (PW2), Margaret produced a receipt of Kshs, 8,800 as plaintiff exhibit 12, however, the receipt was omitted from the record of appeal. That, the respondent pleaded special damages of Kshs. 30,000 being funeral expenses that include morgue, embalmment and other charges and therefore the trial court was right in awarding the Kshs. 8,800 as part of the Kshs. 30,000.

35. Further, that there are exceptions to the general rule that special damages ought to be strictly proved. That, the deceased died at Kenyatta National Hospital and therefore his remains were to be transported and interred in a coffin and other attendant expenses during burial. The respondents relied on the case of; Francis Odhiambo Nyunja & 2 others vs Jospehine Malala Owinyi (suing as the legal administrator of the Estate of Kevin Osore Rapando (deceased) [2020] eKLR where the court considered the decision of the Court of Appeal in the case of; Premier Dairy Limited vs Amarjit Shah Sagoo & another [2013]

eKLR and Capital Fish Kenya Limited vs The Kenya Power and Lighting Company Limited [2016] eKLR where it was held that it would not be a breach of the general rule that special damages should be specifically pleaded and proved where a claimant is awarded special damages where they have no receipts on matters of common notoriety such as funeral expenses where the bereaved family are not concerned with record keeping.

36. Lastly, the respondents submitted that the appellants failed to demonstrate how the trial Magistrate erred and/or misapplied the applicable principles of assessment of damages. That, the trial Magistrate was not bound by the parties' submissions as assessment of damages is an exercise of judicial discretion and the trial Magistrate gave detailed reasons for her decision. The respondents urged the court not to interfere with the assessment of damages and uphold and affirm the awards, That the appeal be dismissed with costs.

37. At the conclusion of the argument of the parties, I have considered the appeal in light of the materials before the court and recognize that the role of the appellate court as stated by the Court of Appeal in the case of; Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123, is to re-evaluate the evidence afresh and arrive at its own conclusion.

38. The court thus observed: -

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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, this 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. Pursuant to the aforesaid, I note that several preliminary issues have arisen in the submissions. The first issue is whether the appellant's submissions are properly on record. The respondent in submissions filed on the 9th of January 2023, argue that the appellants filed their submissions outside the period stipulated by the court. However, the appellants argue that the court allowed them and admitted their submissions out of time.

40. Upon peruse of the court file I note that, the appellants did not file their submissions within the time that the court gave, and delayed for a period of over three months. However, subsequently the court allowed the appellants' submissions on record, which necessitated the respondent seeking for leave to file further submissions and indeed filed further submissions. The parties thereafter dispensed with highlighting of submissions. To that extent the appellants are properly on record.

41. The second issue relate to the competence of the appeal. The respondent heavily canvassed the issue from paragraph 8 to paragraph 16 of their submissions. The respondent argues the decree that is the subject of this appeal from is not included in the record of appeal. Consequently, the record of appeal is incomplete.

42. The record herein reveals that two sets of records of appeal have been filed. The first record of appeal is dated 19th October 2022. From the table of content there is no decree included.

43. The afore record include inter alia; written submissions, copy of certified type proceedings, copy of judgment but no decree.

44. A further consideration, of the second and supplementary record of appeal I note that all it contains is a copy of the plaint and no decree. Notably, the court commencement judgment writing it was that the record of appeal was incomplete and in particular the plaint in the first record of appeal was incomplete.

45. In fact, it is the incomplete plaint that informed the filing of the supplementary record of appeal to provide another copy of the plaint that reflects inter alai the prayers the plaintiff was seeking for in the trial court.

46. In addition, the court noted that the defendant's/appellant's submissions in the trial court were included in the record of appeal. Notably, even at this stage of writing this judgment, those submissions are not available and neither were they included in the supplementary record of appeal.

47. The question that arises is: Is the record of appeal herein complete? And what are the legal consequences of failure to avail a complete record of appeal and/or the decree? The respondent has submitted and correctly so on the law on the record of appeal in particular the content thereof. The provisions of; Order 42 Rule 13 of the Civil Procedure Rules states that the record of appeal shall contain: -

    (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).

48. The inclusion of a decree in the record of appeal is mandatory, consequently, if there is no decree, then record of appeal is incomplete, of course the appeal is incompetent. How then is the court able to determine the appeal on such a record?

49. It suffices to note that, the appellants have the legal duty to file a complete record of appeal to challenge a judgment of the trial court. Further an award on quantum is assessed basically on submissions by the parties, as such without the benefit of the defendant's submissions, it is hard to appreciate what arguments were advanced on quantum in the trial court.

50. The only knowledge of what the defendant submitted in the trial court is gathered from the judgment of trial court, where the analyses the submissions of the parties.

51. The question still remains why didn't the appellants provide the subject submissions and/or decree? It suffices to note that, the respondents raised the issue of lack of a decree in the record of appeal in their

first submissions dated 9th January 2023, and although the appellant's submissions are dated 1st January 2023, but were filed in February 2023, which then clearly indicates that by the time the appellants were filing their submissions, the respondent had already filed their submissions and raised this issue.

52. But it will surprise you, that the appellant decided to turn a blind eye on it and didn't even submit on it.? Consequently, without a complete record of appeal, the court cannot even move one more step. And in my considered opinion, there is inadequate material before this court to enable it to decide the appeal on merit.

53. That then means that there is no valid appeal before the court, as such the appeal is deemed incomplete, incompetent, and struck out accordingly with costs to the go to the respondents.

54. Those then are the orders of the court.

DATED, DELIVERED AND SIGNED ON THIS 17TH DAY OF JULY 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:

N/A by the appellants

Mr. Musa Machage for the respondents

Ms. Hannah: court assistant