



REPUBLIC OF KENYA



KENYA LAW
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**Mwanzia v Francis (Civil Appeal E013 of 2022)
[2024] KEHC 1958 (KLR) (20 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1958 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E013 OF 2022**

RK LIMO, J

FEBRUARY 20, 2024

BETWEEN

SYLVIA MUNEE MWANZIA APPELLANT

AND

WAYUA FRANCIS RESPONDENT

JUDGMENT

1. This is an appeal that arose from the judgement of Hon. M. Kimani delivered on 3rd February 2022 vide Kitui Chief Magistrate Court Civil Case No. 362 of 2017. This appeal also relates to Civil Appeals No. E013 of 2022 and E014 of 2022 both of which also emanated from the decision of the same court.
2. The appeals were in respect to Kitui CMCC Civil Suit No. 362 of 2017, 365 of 2017 and 363 of 2017 which were in respect to a Road Traffic accident that occurred on 12th November 2016 involving the respondent who was travelling aboard a tuk-tuk registration number KTW A 861T as passengers. The said tuk-tuk collided with motor vehicle registration number KAS 820S and the respondents got minor injuries and sued the appellant as the owner of the said tuk-tuk. The trial court with consent of parties used Civil Case No. 363 of 2017 as a test case on liability and proceeded on quantum on the test of the case and the two related cases. The Appellant was found 100% liable for the accident and the trial court made the following awards on damages: -
 - a. Kitui CMCC No. 363 of 2017 General damages 140,000.00
Special damages 3,580.00
Total 143,580.00
 - b. Kitui CMCC No. 362 of 2017 General damages 150,000.00
Special damages 5,880.00
Total 155,880.00



- c. Kitui CMCC No. 365 of 2017 General damages 140,000.00
Special damages 5,580.00
Total 145,580.00
3. The Appellant felt aggrieved on liability and filed the three (3) appeals herein and for the purposes of the determination, this court with the concurrence of the parties used this appeal (Civil Appeal No. E012 of 2022) as the lead file. The decision herein will therefore apply to Civil Appeals No's E013 of 2022 & Civil Appeal No. E014 of 2022. This is because the grounds raised in the appeal are similar.
 4. The grounds are:
 - i. That the Learned Magistrate erred in law and fact in finding that the Appellant was negligent or at all in the absence of any concrete evidence to demonstrate the same.
 - ii. That the Learned Magistrate erred in law and fact in failing to appreciate the defence of the appellant and thereby arriving at an erroneous conclusion of condemning the Appellant to a 100% liability and no particulars of negligence has been proved at all.
 - iii. That the Learned Magistrate erred in fact in failing to appreciate the long established principle of stare decisis and arriving at an erroneous conclusion relating to liability and damages.
 5. The Appellant sought to set aside the decision of the trial court on liability and substitute it with what she calls "fair" but has not given an explanation as to what they mean by "fair". Nevertheless, this court has been called upon to determine this appeal.
 6. In her written submissions done through counsel, the Appellant faults the trial court's decision citing that the court fell into error by finding that the Appellant was liable for the accident. The Appellant submits that evidence tendered indicated that the Appellant's tuk-tuk was hit by the motor vehicle from behind as such, the Respondents failed to prove the particulars of negligence levelled against the Appellant as enumerated in their respective plaints. They submit that the Respondents are bound by their pleadings and have cited the cases of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR and *Independent Electoral & Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others* [2014] eKLR on the principle that a party is bound by its pleadings.
 7. The Appellant has cited the Court of Appeal decision in the case *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR where the appellate court's position on the standard of proof it was held as follows;

"It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."
 8. The Respondent has opposed this appeal through written submissions by counsel dated 4th March 2023 and were filed on 7th March 2023. The Respondents submit that the appeal is fatally defective as the trial court's judgment and decree are missing. They have cited the Supreme Court's decision in *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* (2014) eKLR an appeal from the Court of Appeal where the appellate court had struck out an appeal for the reason that a decree attached to



the record had not been certified, contrary to Rule 87 (1)(h); and (c) of the Rules of that Court and that certain evidence of the respondents' eight witnesses was missing as well. The Supreme Court upheld the decision by the Appellate court and held as follows: -

“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.”

9. The Respondents have also cited the Court of Appeal decision in Salama Beach Hotel Limited & 4 Others v Kenyariri & Associates Advocates & 4 Others [2016] eKLR where the appellate court held as follows on the fate of an appeal anchored on a non-extracted order;

“As held in Floris Pierro & Another v Giancarlo Falasconi (as the administrator of the estate of Santuzza Billiotti alias Mei Sanatuzza) [2014] eKLR; an appeal that fails to include the extracted order and or decree appealed from is incurable and the only recourse available is to strike it out, as the order or decree appealed from is a primary document in terms of Rule 87 (1) (h) of this Court's Rules and must form part and parcel of the record of appeal.”

10. On liability, the Respondents submit that they proved their case against the Appellant. They submit that they were passengers on the Appellant's tut-tuk and had no control over how it was driven. They have cited the cases of Boniface Waiti & Another v Michael Kariuki Kamau [2007] eKLR and Rose Makombo Musanju v Night Flora alias Nightie Flora & Another [2016] eKLR where the court's placed 100% liability on drivers of motor vehicles involved in accidents on the basis that passengers had no control over how motor vehicles were driven.
11. The role of this court as the first appellate court is to re-evaluate the evidence or reconsider the evidence tendered and draw own conclusions.
12. The respondent has opposed this appeal on two points. One is on technicality of omission by the Appellant to include the decree she is appealing from in the record of appeal and secondly on the merit of the appeal itself.
13. This court has gone through the record of appeal filed and from the onset the appellant's counsel appears to have shot themselves on the foot from the filing of the appeals to their prosecution. They simply got mixed up and looking at prayers sought in the appeals one is left uncertain as to what reliefs are really being sought.
14. There are three appeals arising from the same cause of action but there are three different files and, in my opinion, pleadings filed by the Appellant are quite disorganized. Counsel filed the Record of Appeal in Civil Appeal No. E012 of 2022 on 7th December 2022 which does not contain the judgment or decree. In the same file Civil Appeal No. E012 of 2022, there is another Record of Appeal filed on 24th January 2023 where parties are Sylvia Munece Mwanzia v Joyce Mumbi Makuli but documents attached are for Sylvia Munece Mwanzia v Wayua Francis who are the parties in Civil Appeal No. E013 of 2022. As a result, there is no Record of Appeal filed in reference to Civil Appeal No. E013 of 2022 and there are two Records of Appeal for Civil Appeal No. E012 of 2022. The other appeal being Civil Appeal No. E014 of 2022. there is a Record of Appeal in the file but there is no evidence that the same was lodged at the registry as it does not have a court stamp. Granted there is evidence that parties probably encountered a delay in procuring proceedings as the court directed the appeal to be filed within 45 days on 20th June 2022 and a certified copy of proceedings was issued on 22nd September 2022 but even so, the Record in Civil Appeal No. E012 of 2022 was only filed on 7th December 2022.



Counsel did not annex/file a copy of the trial court's judgment or decree from which the appeal arose from in any of the three appeals before this court.

15. It is apparent that the gist of the Respondent's opposition is based on the *Court of Appeal Rules* that explains why he has relied on the decisions of that court.
16. The rules of the Court of Appeal in respect to what a Record of Appeal should comprise do not apply to this court expressly. The provisions of Order 42 Rule 13 (4) only provide that an appeal can only be set down once this court is satisfied certain documents are on record and documents include the judgement, order or decree appealed from. So where a copy of the judgement is availed, it is sufficient for the appeal to be entertained.
17. This court has gone through the record forwarded from the lower court and finds out that both typed and handwritten judgement are on record. The pleadings and proceedings are also there. The appellant could have done better in compiling their records of appeal because what is filed in the two appeals do not contain either the judgement or the decree which could have been an oversight but since the lower court files contain the judgements as I have observed, the omission is not fatal because at the end of the day decisions of court should lean towards substance rather than technicalities. The provisions of Article 159 (d) of the *Constitution* of Kenya is very clear on the same.
18. I have looked at the proceedings from the lower court and find that on the question of liability, the appellant really cannot fault the trial court. This because despite applying to enjoin a third party whom she blamed for the accident, she did not take any action to serve the said third party and the trial court was correct to find that she could not attribute blame to a party who was not a party in the proceedings. The Appellant was under legal obligation to effect service on the third party if she had reasons to believe that the said party was either partly to blame or solely to blame. She failed to serve and that omission was fatal to her claims against that third party. She therefore left herself with the sole responsibility for the accident. She cannot fault the trial court for finding her 100% liable for the accident. There was evidence from the police that the accident was reported to have occurred but the police officers were uncertain as to who was to blame between the tuk-tuk driver/rider and the driver of the motor vehicle registration No. KAS 820C. There was no evidence tendered by the investigating officer and since the Appellant took out third party proceedings against the driver/owner of motor vehicle registration No. KAS 820C but failed to effect service, she had to shoulder the blame as I have already observed.
19. This court could have rendered itself on the question of quantum but since the same was never raised or canvassed, my hands are tied. Suffices to state that justice is served on the diligent and those who knock at the doors of justice and not the indolent.

In the premises, this finds no merit in this appeal and the same is dismissed with costs. As observed above, this decision will also apply to Civil Appeal No's E013 of 2022 and E014 of 2022.

DELIVERED, DATED AND SIGNED AT KITUI THIS 20TH DAY OF FEBRUARY, 2024.

HON. JUSTICE R. LIMO

JUDGE

