**Yusuf v Agroline Hauliers Ltd & another (Civil Appeal 97 of 2016)**
**[2024] KEHC 1265 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1265 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KAKAMEGA**

**CIVIL APPEAL 97 OF 2016**

**PJO OTIENO, J**

**FEBRUARY 9, 2024**

**BETWEEN**

**RASHID YUSUF ..... APPELLANT**

**AND**

**AGROLINE HAULIERS LTD ..... 1ST RESPONDENT**

**FREDRICK LUTTA WERE ..... 2ND RESPONDENT**

***(Being an appeal from the Judgment of Hon. C.A.S Mutai (PM) in Butere MCCC No. 192 of 2014)***

## JUDGMENT

1. By way of a plaint dated 24th October, 2014, the appellant sued the respondents under the tort of negligence and prayed for both special and general damages, costs and interest of the suit.

2. The appellant's case was pleaded that on 6/3/2013 he was riding Motor Cycle Re. Number KMCX 564U, registered in the name of the 2nd respondent, when he collided with Motor Vehicle Registration Number KAR 166S/ZB 7491, registered in the name of the 1st respondent, as a result of which collision, he sustained injuries comprising of a compound fracture of the right femur and a cut wound on the right thigh. The appellant attributed the accident and the resultant injuries and thus loss and damage to the negligence of the respondent and pleaded the particulars of such negligence.

3. In a statement of defence dated 9th December, 2014, the 1st respondent denied the appellant's claim and stated that if at all the accident ever occurred, then it was occasioned by the sole or contributory negligence of the appellant.

4. In its determination, the trial court found and held that the accident was not occasioned by the negligence of the respondents and absolved the respondents from any liability resulting in the appellant's case being dismissed with costs.

5. Aggrieved with the decision of the trial court, the appellant lodged the memorandum of appeal dated 1st November, 2016 faulting the decision on four grounds, all of which essentially assert that the finding that the case was never proved to the required standards was the outcome of failure to properly assess and appraise the evidence and failure to apply the applicable principles. In its own words the memorandum allege that;

    a. That the learned trial magistrate erred in reaching a finding that was against the weight of evidence adduced.

    b. That the learned trial magistrate erred in his assessment of facts and evidence on record and consequently failed to apply the correct principles in determining the apportionment of liability between the parties instead of entirely blaming the appellant.

    c. That the learned trial magistrate erred in dismissing the appellant's case and failed to apply the principles applicable in apportioning liability in arriving at his judgment.

    d. That the learned trial magistrate erred in fact and in law in holding that the appellant had failed to prove the case on a balance of probability.

6. For the above reasons, the appellant prays that the judgment of the trial court be reviewed and/or be set aside and the dismissal order substituted with an order allowing the claim and assessing and awarding the damages due.

7. The appeal has been canvassed by way of written submissions in which submissions

**Appellant's Submissions**

8. It is his submission that the trial court erred in absolving the respondents of liability yet the appellant testified that the tractor was widely loaded with bells and that at the time of the accident the tractor's headlights were off which evidence was corroborated by DW1, the driver of the tractor, during cross examination. He submits that the respondent failed the expectation as a reasonable driver and that the appellant proved his case on a balance of probabilities.

9. He further submits that PWII, not being the investigating officer, could not tell the circumstances of the occurrence of the accident as he was only limited to the details of the abstract and that he did not visit the scene of the accident.

10. He contends that when there is no concrete evidence to determine who is to blame for an accident between two drivers, both should be equally to blame and he cites the court of appeal decision in Hussein Omar Farah v Lento Agencies CA NAI Civil Appeal 34 of 2005 (2006) eKLR in that regard. He thus prays that this court awards him general damages in the sum of Kshs. 1,300,000/- together with special damages as proved in the trial court and costs of the appeal.

**1st Respondent's Submissions**

11. It is their submission that the subject appeal is incompetent for the reason that judgment was delivered in 30/9/2016 and the appeal was filed on 1/11/2016 two days out of time thus contravening the provisions of section 79G of the *Civil Procedure Act*.

12. They further submit that the failure by appellant to attach decree to the record of appeal is fatal and cites the case of *Lucas Otieno Masaye v Lucia Olewe Kidi* (2022) eKLR where the court held as follows;

> " From the foregoing it is clear that an appeal can be rendered fatally defective in the absence of a decree. The Appellant herein has not attached a copy of the decree it follows therefore that his appeal is incompetent and should be and is hereby struck out with costs to the Respondent."

13. They further reiterate the importance of attaching a record of appeal by citing the provisions of order 42 rule 2 of the *Civil Procedure Rules* which provides that without a copy of the decree the court ought to summarily reject the appeal and order 42 rule 13(4)(f) which lists the contents of a record of appeal to include a decree.

14. On who is to blame for the accident, it is their submission that PWII was dangerously ferrying three pillion passengers contravening section 60(1) of the *Traffic Act* and that they had come from a disco in town and they were all intoxicated. They claim PW2 further testified that PW1 had been riding a motor cycle for two years without holding a valid driving license and that during the cross examination pf PW2 he stated that according to the sketch maps the motor vehicle was on the left facing Mumias from Bungoma whereas the appellant states that the motor vehicle was on the tight facing Mumias.

15. They contend that the appellant failed to prove negligence and that the trial court rightfully dismissed the appellant's case in which regard they place reliance on the case of *Evans Muthaita Ndiva v Father Rino Meneghello & Another* [2004] eKLR where the court held as follows;

> " The plaintiff gave evidence but failed to prove negligence on the part of the defendant. The court of appeal upheld the decision of Khamoni J. whereby he had ruled that no evidence had been adduced to prove the case on a balance of probability. In this case before me the plaintiff was not an eye witness to the accident He could not prove negligence on the part of the defendants. The defendant did not call any evidence especially so to prove that the defendant indeed were negligent. I would therefore struck out and dismiss this suit against the 1st and 2nd defendants."

**Issues, Analysis and Determination**

16. The court has considered the grounds of appeal, the proceedings of the lower court and the submissions by both the appellant and the 1st respondent and discerns the following issues for determination: -

    a. Whether the subject appeal was filed out of time and its effect on the appeal?

    b. Whether failure to attach a decree to the record of appeal is fatal?

    c. Whether the subject appeal is merited?

17. Whether or not an appeal is filed within time goes to its competence and thus a jurisdictional question that must precede the inquiry into the merit. The same having been raised in the submissions, must be dealt with first and as a preliminary point.

18. Section 79G of the *Civil Procedure Act* stipulates that an appeal from subordinate courts to the high court ought to be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

19. The section further provides that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

20. The judgment of the lower court was delivered on Friday the 30/9/2016 while the memorandum of appeal was lodged on Tuesday the 1/11/2016. That action was taken on the 32nd day after the Judgment and was beyond the 30-day period provided by section 79G of the Act. A perusal of the file reveals no indication that the appellant ever sought and obtained leave to file the appeal out of time. There is equally no certificate of delay filed by the appellant. Without leave to file the appeal of time, I find the appeal to be improperly before this court and in so arriving I am guided by the supreme court decision in *Kenya Hotel Properties Limited v Attorney General & 5 other*s [2021] eKLR where the court held as follows;

> " As to whether we should deem the filed Supplementary Record of Appeal as proper before us, our position, as held in the Nick Salat Case, is that the appropriate remedy for curing a delay in filing an appeal is to seek an Order from the Court, extending the time within which to file the same. In *County Executive of Kisumu v County Government of Kisumu & 8 others*, SC. Civil Appl. No. 3 of 2016; [2017] eKLR, this Court found that an appeal filed out of time without leave of this Court is irregular and this Court will not invoke 'novel' principles so as to validate such a petition and deem it properly filed. The applicant has not demonstrated why we should depart from the said principles."

21. When filed out of time, the appeal avails itself for being struck out even at the suo motto instance of the court. The appeal is thus struck out with costs to the respondents.

22. The foregoing should dispose the appeal but there is another preliminary point raised regarding the completeness of the record of appeal by which the respondent contends that the record fails to incorporate the decree and is thus defective. Reliance is placed on Order 42, Rule 13(4)(f) of the Civil Procedure Rules, 2010 providing for the requisite documents the court must satisfy itself to be available on its record before it allows the appeal to proceed to hearing.

23. The court interprets the rule to put an obligation upon the judge and not the appellant. In fact, the rule does not obligate the parties to file a record of appeal. To this court, there is no mandatory legal requirement for parties to file a record of appeal in the High court akin to the law that obligates before the court of appeal. Before this court, all a judge requires before admitting an appeal to hearing is the trial court file containing the notes recorded and the document enumerated under Rule 13(4). When confronted with the same point in *CMA – CGM Kenya Limited v Diamond Gate General Trading Llc & 4 others*[2019] eKLR the court delivered itself in the following words:-

> " On the second limb alleging shoddy compilation of the record that equally has no legal foundation because no law provides how a Record of Appeal before this court must be compiled. What we now routinely call a record of appeal before the high court is a rule of convenience developed out of practice and largely copying from the Court of Appeal Rules but with no legal underpinning. I say no legal underpinning because Order 42 rule 13(4) merely obligates the court, and not the appellant, to ensure that the enumerated documents are in the court file. That must be seen to demand that the record at trial be availed and thus contrasts with Rule 87, *Court of Appeal Rules*, which obligates the appellant to prepare and serve the record and defines what must be contained therein.

> To this court, those objections are in the nature of technicalities, which should never sway a court of law from persisting and endevouring to hear a party's appeal on the merits. They lack merit and substance and are therefore disregarded as untenable".

24. Based on the court's interpretation of the rules applicable to this appeal, it finds that the point is wholly misconceived and cannot be the basis to strike out the appeal. This position is held by the court well aware that the respondent has cited to court the holding by the Court of Appeal in *Chege v Suleiman* [1988] eKLR where the court reiterated that in the court of appeal, incomplete record is not a procedural but a jurisdictional point founded on a proper interpretation of section 66 of the *Civil Procedure Act*. The court of appeal decision is grounded on the provisions of its rules and not the rule the respondent relies upon

25. Having struck out the appeal, it serves no meaningful purpose to delve into the consideration for its merits. In conclusion, flowing from the reasons set out above, this appeal is determined to be improperly before this court and it is thus struck out with costs.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 9TH DAY OF FEBRUARY, 2024**

**PATRICK J. O. OTIENO**

**JUDGE**

In the presence of:

Mr. Omani for the Appellant

Ms. Mugasia for the Respondents

Court Assistant: Polycap Mukabwa