



**Akile & another v Mugo (Civil Appeal E013 of 2023)  
[2024] KEHC 6538 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6538 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
CIVIL APPEAL E013 OF 2023**

**LW GITARI, J**

**MAY 23, 2024**

**BETWEEN**

**HILLARY MUNENE AKILE ..... 1<sup>ST</sup> APPELLANT**

**MARY WANJIKU KIRAGURI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MARTIN MUTWIRI MUGO ..... RESPONDENT**

*(Appeal from the Judgment of the Chief Magistrate's Court at Chuka delivered  
by Hon. Joyce M. Gandani on the 4th July 2023 in Civil Suit No.E093 of 2021)*

**JUDGMENT**

**Background:**

1. This appeal arises from a decision of the Chief Magistrate's Court Chuka, Civil Case Number E093/2021. The claim in the suit was for personal injury filed by the respondent Martin Mutwiri Mugo against the appellants. The 1<sup>st</sup> appellant was the driver of motor vehicle registration number KCD 729 F which was involved in a road accident along Mungoni-Ntuntuni road. The respondent who was involved in the said accident sustained life threatening injuries. The second appellant was the registered owner of the motor vehicle KCD 729 F.
2. The respondent filed a plaint in the lower court which was later amended on 1<sup>st</sup> July 2021 as per the Judgment of the trial magistrate at page 113 of the record. The respondent was claiming general damages for injuries sustained following the road traffic accident on 24/1/2020 against the appellants.



3. The appellants opposed the claim by the plaintiff in a statement of defence dated 20/6/2021 and urged the court to dismiss the suit with costs. The parties however entered a consent on liability on 21/2/2012 in the following terms:-

“By consent:

1. Judgment on liability be entered in favour of the plaintiff against the defendant in the ratio of 80:20.
2. The Plaintiff’s witness statement be adopted by consent without calling the witness.”
3. Plaintiff’s supplementary list of documents dated 24/6/2022 be adopted as plaintiff’s exhibit 1-13
4. Parties to file submission within fourteen (14) days.”

5. The learned trial magistrate proceeded and passed Judgment as follows:-

- a. Pain and Suffering -Ksh.1,800,000/- less 20% plaintiff’s liability ratio Ks.360,000/- = 1,460,000/- plus costs of the suit.

6. The appellants were dissatisfied with the Judgment and filed a memorandum of appeal based on the following grounds:-

- i. That the Honourable trial magistrate misdirected herself as to the facts of the case thus arriving at an erroneous decision.
- ii. That the Honourable trial magistrate erred in law and in fact by awarding general damages that were inordinately high as to constitute a miscarriage of justice in the circumstances of the case.
- iii. That the Honourable trial magistrate erred in fact and in law in failing to consider the Appellants’ documents that were filed and produce in court.
- iv. That the Honourable trial magistrate erred in fact and in law in failing to consider the Appellants’ submissions and authorities on quantum and hence, arriving at an erroneous decision.
- v. That Honourable trial magistrate’s judgment as a whole is not supported by the evidence that was tendered in court by the parties.

7. The appellant pray that the appeal be allowed, the award of general damages be set aside and the same be reduced.

Costs to the appellant.

8. The appeal was canvassed by way of written submissions. The only issue which arises for determination is whether this court should interfere with the award of quantum of damages by the trial magistrate.

#### **Analysis and Determination:**

9. This is the first appellate court and the law is now well settled that the court has a duty to subject the entire evidence to a fresh and exhaustive examination and reach its own independent finding while



bearing in mind that it did not have an opportunity to see the witnesses and leave room for that. Section 78 of the *Civil Procedure Act* (Cap 21 Laws of Kenya) to be referred to as “*The Act*.” provides as follows:

- “(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
- (a) to determine a case finally;
  - (b) to remand a case;
  - (c) to frame issues and refer them for trial;
  - (d) to take additional evidence or to require the evidence to be taken;
  - (e) to order a new trial.
- (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this *Act* on courts of original jurisdiction in respect of suits instituted therein.”

10. In the case of *Selle & Another -v- Associated Motor Boat Company Limited* (1968) E.A 123 and Another the court held that a 1<sup>st</sup> appellate court is mandated to evaluate the evidence before the trial court as well as the Judgment on whether or not to allow the appeal. The first appellate court is expected to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it but to bear in mind that it did not have the opportunity of seeing the witnesses and make an allowance for that.

11. An appeal is an important exercise of rights of the parties and the court must exhaustively consider all the facts which were before the trial court and come up with its own independent finding. The parties on appeal have a legitimate expectation that the appellate court will subject the evidence to a fresh and exhaustive consideration and come up with its own finding. The first appellate court therefore proceeds as if it is conducting a retrial. It follows that all the evidence which was before the trial court must be presented before it for a fresh consideration.

12. Having said that, before determining the issue before me, an examination of the appeal would suffice. Under the *Act*, appeals lies from original decrees Section 79 of the *Act* provides as follows:-

“The provisions of this Part relating to appeals from original decrees shall, as far as may be, apply to appeals -

- (a) from appellate decrees; and
- (b) from orders made under this *Act* or under any special or local law in which a different procedure is not provided.”

13. It follows that an appeal must be of necessity be from the decree issued by the sub-ordinate court. Order 42 (2) of the *Civil Procedure Rules* provides as follows:-

- “(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.”



14. A party is therefore required to file the decree together with the memorandum of appeal and if not, file it as soon as it may be directed by the court. Under Order 42 Rule 13 (4) *Civil Procedure Rules*, a decree is one of the documents which must be filed by the appellant. In a persuasive decision in the case of *Paul Kurunyi Lesbuel –v- Ephantus Kariithi Mwangi & Another* (2015) eKLR Justice Ngaah stated:-

“The Court of Appeal (Kneller, Hancox JJ A & Platt Ag as they then were-) in Civil Appeal No.7 of 1983 *Municipal Council of Kitale –v- Fedha* (1983) eKLR held that failure to include the decree appealed from in the record of appeal rendered the appeal incomplete. The Judges went to State that the omission could not be cured by including the decree in a supplementary record, because in their view, a supplementary record cannot comprise the documents which ought to have been included in the original record in the first place.

While the Judges in the *Municipal Council of Kitale* case may have had the provisions of Civil Procedure in mind, the same principle that informed their decision in that case applied with equal force to an appeal against a decision from an election court. The decree appealed from is as relevant and necessary in an appeal arising from an election petition as much as it is in any other appeal arising from (an) ordinary Civil Appeal one may ask why so much importance is attached to this documents, the answer appears to me to be that an appellate court can only uphold or overturn what has been demonstrated to exist.”

The Judge further went on to say-

“Much as this requirement is contained in the rules, it is not in my humble view a requirement that can be dismissed as a mere technicality that may be swept under the carpet, the question whether or not there is indeed an appeal which called for the appellate court to exercise its jurisdiction in that respect goes to the root of the appeal itself, for without an appeal properly so called, any attempt to invoke and exercise that jurisdiction would be in vain.”

15. The issue of an incomplete record of appeal was also addressed by the Supreme Court in the case of *Bwana Mohamed Bwana –v- Silvano Buko Bonaya & 2 Others* (2015) eKLR where the court held that.....

“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 requirement of the law. A Court cannot exercise its adjudicatory powers conferred by the 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. This same position was held by the Court of Appeal where in the case of *Chege –v- Suleiman* (1988) eKLR stated emphatically that the issue of failure to attach the decree is jurisdictional point. The court held as follows:-

“But we concur positively in the submission by Mulakha that this is not a procedural but a jurisdictional point. Those holdings were founded on a proper interpretation of Section 66 of the *Civil Procedure Act* which converts 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 order no competent appeal could be brought unless those decrees or orders were formally extracted as the bases of the appeal.”



17. I am well guided by the above decisions. Order 42 rule 13(4) *Civil Procedure Rules* provides as follows:-

“(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:

- (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).”

18. Under Sub-rule (a) (b) & (f) in a Memorandum of Appeal pleadings, the Judgment, order or decree appealed from, and the order (if any) giving leave to appeal, are documents which must be filed in an appeal. Where they are not filed, there is no competent appeal worth consideration by the appellate court. I have perused the record of appeal and have satisfied myself that two most important documents were not filed. One is the decree. The other vital document which was not filed in the amended pleadings. The record shows that the pleadings were amended. The effect of the amendment is that the initial pleadings were replaced with the amended ones. The pleadings filed on the record of appeal are the ones dated 2/6/2021 which were replaced by the amended pleadings, the amended pleadings are missing from the record. A pleading is defined under the Act as a pleading. It states:

“‘pleading’, includes a petition or summons and the statement in writing of the claim or demand of any plaintiff and of any defence thereto and of the reply of the plaintiff to any defence or counter claim of a defendant.”

19. A pleading is a pleading which must be filed in the Memorandum of Appeal. The appellant did not file the pleadings as the ones filed were abandoned and an amended one filed. It is well settled in the above decisions that an appeal is fatally defective if the decree and the pleadings are not included in the record of appeal. This is not a technicality which can be wished away as it is an issue of jurisdiction as an appeal to this court from the sub-ordinate courts is against decrees and orders. In the absence of the decree, there is no competent appeal before this court.

20. I need not consider the issue for determination as there is no competent appeal before me. In the circumstances I order that the appeal be struck out with costs.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 23<sup>RD</sup> DAY OF MAY 2024.**



**L.W. GITARI**

**JUDGE**

**23/5/2024**

The Judgment has been read out in open court.

**L.W. GITARI**

**JUDGE**

**23/5/2024**

