



REPUBLIC OF KENYA



KENYA LAW

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**Mwangi & another v Mwaniki (Suing as the legal representative
of the Estate of Peter Maina Mwaniki (Deceased) (Civil Appeal
E124 of 2022) [2024] KEHC 7338 (KLR) (19 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7338 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E124 OF 2022**

JM OMIDO, J

JUNE 19, 2024

BETWEEN

NJOROGE MWANGI 1ST APPELLANT

PAUL NCHORE 2ND APPELLANT

AND

**ANDREW FRANCIS KIRITI MWANIKI (SUING AS THE LEGAL
REPRESENTATIVE OF THE ESTATE OF PETER MAINA MWANIKI
(DECEASED) RESPONDENT**

*(Being an Appeal from the Judgement and Decree of Hon. J. A. Agonda Principal
Magistrate delivered on 29th September, 2021 in Ruiru CMCC No. E023 of 2020)*

RULING

1. This appeal emanates from the judgement and decree of Hon. J. A. Agonda Principal Magistrate delivered on September 29, 2021 in Ruiru CMCC No. E023 of 2020.
2. The grounds of appeal presented by the Appellants vide the Memorandum of Appeal June 10, 2022, upon which they seek to upset the judgement and decree of the lower court are as follows:
 - i. The Learned trial Magistrate erred in fact and law and misdirected herself in finding that the Respondent is entitled to general damages for pain and suffering of Ksh.5,000/=, loss of expectation of life of Ksh.100,000/-, loss of dependency of Ksh.1,872,000/- and special damages of Ksh.287,500/- with costs and interest.
 - ii. The Learned trial Magistrate erred in fact and law and misdirected herself in finding the Appellants 100% liable when indeed the Plaintiff (*sic*) was to blame for the accident for crossing the road without due care.



- iii. The Learned trial Magistrate erred in law and in fact and misdirected herself when she failed to consider the Appellants' submissions on both points of law and facts.
 - iv. The Learned trial Magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and liability and relevant authorities on quantum and liability cited in the written submissions presented and filed by the Appellant.
 - v. The Learned trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent (to apply principles and tenets of law applicable).
 - vi. The Learned trial Magistrate failed to apply herself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and liability thereby arriving at a decision unsustainable in law.
 - vii. The Learned trial Magistrate erred in law and fact in arriving at the said decision.
 - viii. The Learned trial Magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 - ix. The Learned trial Magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.
3. On October 4, 2023, this Court (D.O. Chepkwony, J.) directed that the appeal proceeds by way of written submissions and gave the parties herein time lines for filing their respective submissions. Submissions were filed, albeit outside the time frame that the Court granted.
 4. I have perused the record of appeal, the submissions by the two sides and the record in its entirety. I notice from the record of appeal that the Appellants have not included in it certified and signed copies of the decree and judgement of the lower court from which the instant appeal emanates.
 5. Order 42 Rule 13 of the *Civil Procedure Rules* makes provisions on the documents that must mandatorily form part of the record of appeal, which include the judgement, order or decree appealed from.
 6. The questions that then call for answers are; how is an appeal that fails to include the judgement and decree appealed from to be treated? Is there a valid appeal in such a situation?
 7. The answers to these questions are to be found, happily, in a number of previous judicial pronouncements of superior courts.
 8. In the case of *Lucas Otieno Masaye v Lucia Olewe Kidi* [2022] eKLR Ombwayo, J. stated thus:

“It was the Respondent’s submission that failure by the Appellant to attach a decree to the record of appeal was fatal to his case. A look at the record of appeal clearly shows that a decree has not been attached thereto.

Order 42 Rule 2 of the *Civil Procedure Rules* provides as follows:

“Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the Appellant shall file such certified copy as soon as possible and in any event within such a time as the court may order, and the court need not consider whether to reject the Appeal summarily under Section 79B of *Act* until a copy is filed.”



Order 42, Rule 13(4)(f) of the [Civil Procedure Rules](#), 2010 provides;

- “(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).”

The Supreme Court of Kenya, in the case of [Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others](#) [2015] eKLR held as follows at paragraph 41:

“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. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”

The Court of Appeal in [Chege v Suleiman](#) [1988] eKLR firmly stated that the issue of failure to attach the decree is a jurisdictional point, and held thus:

“But we concur positively in the submission of Mr Lakha 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 confers 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 or order, no competent appeal could be brought unless those decrees or orders were formally extracted as the basis of the appeal.” (Note the emphasis)



9. In conclusion, Ombwayo, J. 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.”

10. The omission of a judgement and decree from the record of appeal was also discussed in the case of *Emmanuel Ngade Nyoka v Kitbeka Mutisya Ngata* [2017] eKLR, where the Court of Appeal considered the issued and stated:

“Starting with the first issue, it is true that the record of appeal before the first appellate court at the time of filing did not contain the decree appealed from. This omission brought into focus the provisions of Order 42 Rule 2 of the *Civil Procedure Rules* which provides *inter alia*:

“Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the *Act* until such certified copy is filed.”

However, the respondent did not take advantage of this provision to subsequently file a certified copy of the decree so that the appeal proceeded to hearing in the absence of the decree appealed from.”

11. In the case of *Floris Pierro & another v Giancarlo Falasconi (as the administrator of the estate of Santuzza Billiotti alias Mei Santuzza)* [2014] eKLR the Court of Appeal made the following observations:

“It is common ground that the appellants filed their respective records of appeal on April 10, 2012. It is also common ground that in the said records, the appellants failed or omitted to incorporate certified copies of the order appealed against as required by Rule 87(1)(h) of this *Court's Rules*. An order appealed from is a primary document in terms of the aforesaid rule which must form part and parcel of the record of appeal. The order embodies the Court's decision. If it is not included, the Court of Appeal will be at a loss in determining what the High Court determined. It cannot be the business of this Court to tooth-comb the judgment or ruling so as to decipher the decision of the court below. That decision must be embodied in the order and or decree. Accordingly failure to include the court order or decree would render the record of the appeal to be fatally defective and liable to be struck out.”

12. Lastly, in the case of *James Murage Nguyu v RNN (Minor suing through next of friend RNK) & another* [2021] eKLR the High Court (L.W. Gitari, J.) stated thus:

“There cannot be any valid appeal where the decree and the Judgment against which the appeal is preferred has not been filed in the record of appeal. In *Ndegwa Kamau t/a Sideview Garage -v- Isika Kalumbo* [2016] eKLR and *Joseph Kamau Ndung'u -v- Peter Njuguna Kamau* [2014] eKLR Justice Ngaah struck out the appeals because the decrees that were



being appealed from had not been annexed in the respective records of appeal. In the matters the records of appeal had been filed but the decrees were not.”

13. The above decisions guide me in reaching the finding that as the decree and judgement from the lower court do not form part of the record of appeal, the record of appeal filed herein is fatally defective and liable to be struck out. I proceed to strike it out with costs to the Respondent.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 19TH DAY OF JUNE, 2024.

JOE M. OMIDO

JUDGE

For Appellants: No Appearance.

For Respondent: Ms. Wanjiru Mwangi.

Court Assistant: Ms. Njoroge.

