



**Kabaru & another v Maina (Civil Appeal E172 of 2023)
[2024] KEHC 10644 (KLR) (11 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10644 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E172 OF 2023
RC RUTTO, J
SEPTEMBER 11, 2024**

BETWEEN

PETER NJOROGE KABARU 1ST APPELLANT

BANANA HILL MATATU SACCO SOCIETY 2ND APPELLANT

AND

OBED MACHARIA MAINA RESPONDENT

(Being an appeal from the whole judgment delivered by Hon. A.N.Makau (SRM) delivered on the 31.5.2022 in Milimani CMCC no. 7797 of 2017)

JUDGMENT

A. Introduction

1. The appeal challenges the judgment delivered on the 31st May 2022 in Milimani CMCC No 7797 of 2017. It is premised on eight (8) grounds as set out in the memorandum of appeal dated 9th March 2023, as follows:
 - a. The learned trial magistrate erred in law and misdirected herself when she failed to consider the appellants' submissions on both points of law and facts;
 - b. The learned magistrate erred in law and in fact in finding the defendant 100% liable and awarding general damages; pain and suffering Kshs 10,000/=, Loss of expectations Kshs 100,000/=, loss of dependency Kshs 2,400,000/= and special damages of Kshs 3,280/= making a grand total of Kshs 2,513,280/= plus costs and interest which amount is excessive, unjust in the circumstances considering the nature of claim and the conventional awards in relation to such claim;
 - c. The learned magistrate erred in law and in fact in finding the amount awarded by assessing the same against the height of evidence on record;



- d. The trial magistrate erred in fact and in law in failing to consider the appellants'/defendants submissions on quantum.
 - e. The learned magistrate erred in law and in fact in unduly disregarding the judicial authorities cited by the appellant and instead relying on the authorities cited by the respondents which were unrelated to the actual claim by the respondent;
 - f. The learned trial magistrate erred in fact and in law in finding that the respondent was entitled to general damages of Kshs 2,513,280/= which is very high award for the injuries suffered;
 - g. The learned magistrate erred and misdirected herself as to the exact nature of the respondent's injuries and therefore erred in law in his assessment of damages which are soft tissues in nature;
 - h. The learned magistrate erred in law and in fact in unduly the evidence adduced in trial
2. The appellants seek to have the judgment of the trial court set aside and the award made therein be re-assessed. The appellant also seeks costs of the Appeal and that of the trial court.

B. Facts of the Case

3. By way of a plaint dated 24th May 2017, and amended on the 21st July 2021, the respondents herein filed for claim under the *Law Reform Act* and the *Fatal Accidents Act* seeking compensation on behalf of the estate of James Maina Mugweru(deceased). The respondent averred that the 1st appellant was the driver of motor-vehicle registration No KBR 255B Isuzu Minibus whereas the 2nd appellant was its registered owner. That on or about the 18th April 2012 at around 7.40 pm along Murang'a road, one James Maina Mugweru(deceased) was lawfully crossing the road as a pedestrian when the 1st appellant drove or managed the said vehicle permitting it to cause an accident which occasioned bodily injuries that led to the death.
4. The particulars of negligence attributed on the 1st appellant included; driving the said vehicle without due care and attention of the pedestrians on the road; failing to keep proper look out for the other road users; failing to control the vehicle or stop it from causing the accident and driving at an excessive speed.
5. It was stated that as a result of the accident, the estate of the deceased suffered loss and hence the 2nd appellant is vicariously liable for the acts and omissions of the 1st appellant.
6. The appellants filed a Memorandum of Appearance dated 3rd August 2018 drawn by Kairu & Macourt Advocates. Notably a perusal of the record show that no statement of defence, witness statement or bundle of documents were filed by the appellants. However, in their submission before the lower court, filed by the firm of Kimondo Gachoka Advocates, it is stated that the 1st and 2nd Defendant filed their statement of defence and inter alia denied negligence on their part. The respondent was put to strict proof. This being a court of record this court is guided by the record of appeal before it which depicts that no statement of defence, witness statement or bundle of documents were filed by the appellants.
7. The matter proceeded to trial with the respondent calling one witness PW1 Obed Macharia Maina who stated that the deceased was his father and he had authority to institute this suit on his behalf. That prior to the death, the deceased was a government staff at the Ministry of Foreign Affairs earning Kshs 30,000/= and that he took care of paying their school fees amongst other duties. That he was hit by a vehicle motor-vehicle registration No KBR 552D Isuzu Mini-bus. Further he stated that upon conclusion of the traffic offence the 1st appellant who was the driver was found guilty for careless driving that resulted to the death of his father. The witness blamed both the appellants and asked the court to award them compensation.



8. The appellants did not call any witness. Thereafter upon analyzing the evidence presented as well as the parties' submissions, the trial court proceeded to deliver judgment in favour of the plaintiff in the terms set out in the earlier paragraphs of this judgment. It is this judgment that aggrieved the appellant leading to filing of this appeal.

C. The Appeal

9. The appeal was canvassed by way of written submissions. The appellants submissions are dated 16th May 2024, while the respondents' submissions are dated 29th May 2024.

The Appellants submissions

10. In support of the appeal, the appellant relies on its submissions to urge this court to find that loss of dependency in the sum of Kshs 2,400,000/= was excessive. They urge that the deceased occupation was not proved and therefore the trial court ought to have been guided by the Regulations of Wages Act 2015 where the minimum wage is Kshs 10,954/=. They submitted that the loss of dependency should not be awarded where there is failure to provide proof of income.
11. On the multiplier while placing reliance on *Albert Odawa v Gichumu Gitbenji*[2007] eKLR, it was submitted that it can only be used where the age of the deceased, the amount of annual or monthly dependency and the expected length of dependency is known, where these are not proved then it should fail.
12. Further on the multiplicand, the appellant submitted that the same was not proved by the respondent, and therefore a global award can be awarded instead of having an award under the head of loss of dependency.
13. In addition to the above, it was the appellant's submission that there was a double compensation under the *Law Reform Act* and the *Fatal Accidents Act*. That there ought to have considered the award under the Fatal Accident Act vis-a-vis the award under the *Law Reform Act* by taking into account a deduction between the two Acts to remedy the double award that had been occasioned. Reliance was placed on various decisions including *Patrick Barasa v Serah Wambui Karumba (suing as the legal representative of the estate of the late Albert Chebaya*[2019] eKLR.
14. The appellants urged this court to allow the appeal with costs.

The Respondents Submissions

15. In opposing this appeal, the respondent submitted that the appeal is incompetent for reason that the appellants failed to file a notice of appeal and memorandum of appeal within 14 days from the date of delivery of the judgment on 31st May 2022. Further that the Record of Appeal ought to have been prepared and filed within 30days upon the delivery of the judgment which was not the case. The Respondent submits that the appeal herein was filed on 10th March 2023 that is 10 months after delivery of judgment contrary to section 79G of the *Civil Procedure Act*.
16. In response to ground 1,3,4,5 and 8, the respondent further submitted that the appellants failed to file a defence, neither did they call any witness to rebut their evidence and therefore the trial court decision clearly reflected an analysis of the arguments, evidence and submissions by both parties. Reliance was made on the case of *Trust Bank Limited v Paramount Universal Bank Limited & 2 others* Nairobi (Milimani) HCCS No 1243 of 2001



17. In addition, it was submitted that the decision of the trial magistrate wholly reflected the analysis of the evidence and the submissions filed by both parties. The evidence adduced at the trial court was supported by the documentary evidence of the police abstract where the 1st appellant was blamed for causing the accident. That it is the defence who failed to file a statement of defense and neither did they call any witness to rebut the evidence that was on record which then remained unchallenged. To support this argument the respondent relied on the case of *Karuru Munyororo v Joseph Ndumia Murage & another* Nyeri HCCC No 95 of 1988.
18. On quantum, counsel has submitted that the cited authorities by both parties were relied on by the trial magistrate contrary to the appellants claim. While referring the court to the Court of Appeal decision in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, it was submitted that this court cannot disturb an award of damages unless it is so inordinately high or low as to present an entirely erroneous estimate, unless it is shown that the wrong principles were followed or that the evidence was misapprehended. Further that the trial magistrate exercised her discretion based on the evidence presented before the court and gave the award. They urged the court to uphold the judgment delivered on 31st May 2022 in its entirety.

D. Analysis and Determination

19. Section 78(2) of *Civil procedure Act*, provides that the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein. Therefore, my duty as the 1st appellate court is to re-evaluate and re-examine the evidence of the trial court and come to my own findings and conclusions. This principle was espoused by the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR and in *Selle & another v Associate Motor Boat Co. Ltd* 1968 EA 123.
20. I have perused the record in its totality and the submissions by both parties and based on the foregoing, I note that the respondents have raised issue on the competence of the appeal to wit that the appeal is incompetent for being filed out of time, that is 10 months after the delivery of the judgment. The appellants did not submit or respond to this issue.
21. The issue whether the appeal is competent, goes to the substratum of the matter and need to be settled in limine as it goes to the jurisdiction of the court. Any matter touching on the jurisdiction attracts a determination suo moto even where a party fails to address it either consciously or unconsciously.
22. This being a court of record this court notes that the judgment of the lower court was delivered on the 31st May 2022. The respondent avers that if the appellants were dissatisfied with the said decision, they ought to have file a memorandum of appeal within 14 days and thereafter file a record of appeal within 30 days from the date of the filing of the memorandum of appeal, which is not the case in this instant.
23. This court notes that the memorandum of appeal is dated 9th March 2023. From the Court Tracking System, the same was filed on the 10th March 2023 approximately 10 months after the delivery of the judgment. The record of appeal was filed soon after the memorandum of appeal was filed. Whereas the Record of appeal was filed within the required 30 days of filing the Memorandum of Appeal, the Memorandum of Appeal was filed out of time.
24. A further perusal of the record show that there is no evidence that the appellants sought leave and leave was granted to file the appeal out of time, and if they did the same was not brought before this court which then leaves the court with one conclusion that leave was not sought. Consequently, the competence of the Appeal before this court is in question.



25. Section 79G of the *Civil Procedure Act* provides that:

“ every appeal from a subordinate court to the High Court shall 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:

Provided 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.”

26. From the above, it is clear that all appeals from the subordinate court to the High Court must be filed within 30 days from the date of the decree or order appealed against, however in computing the thirty days, the time the lower court took to prepare the proceedings should be excluded from the 30-day period.

27. In the Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR . (Nick Salat Case) in addressing the issue of extension of time, the Supreme Court held:

“By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.

To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No 10 of 2014 has been accorded a reference number in this Court’s Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court’s perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court’s Record. (Emphasis added)

28. Drawing guidance from the above holding and dictum of the Supreme Court, this court finds this appeal a nullity and of no legal consequence since it was filed without seeking leave to file it out of time.

29. In the circumstance therefore and guided by the Supreme Court decision having found that the appeal was filed out of time and without leave of court, I proceed to Strike it out with no orders as to costs.

Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 11TH DAY OF SEPTEMBER 2024

For Appellant:

For Respondent:

Court Assistant:

