



**Kamau v King'ara (Civil Appeal 4B of 2020)
[2024] KEHC 11651 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11651 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL 4B OF 2020
AC MRIMA, J
OCTOBER 3, 2024**

BETWEEN

DAN KAMAU APPELLANT

AND

PETER NG'ANG'A KING'ARA RESPONDENT

(Being an appeal from the Judgment of Hon. V.W Wandera (C.M) in Kitale Chief Magistrates Court Civil Case No. 173 of 2013 delivered on 17th January 2013)

JUDGMENT

Background:

1. Peter Ng'ang'a King'ara, the Respondent herein, sued Dan Kamau, the Appellant herein, at the lower Court for compensation arising from a road traffic accident. The Appellant challenged the suit and lodged a Counter-claim.
2. In a synopsis, the Respondent, through the Complaint dated 11th June 2013, pleaded that on 11th August 2010, he was a licenced Motor Cyclist riding his motorbike along Mumia Highway from Kitale town towards Endebes while the Appellant was riding his motorcycle headed in the opposite direction.
3. It was his case that as a result of the Appellant's careless and negligent riding, a head-on collision occurred occasioning him serious bodily injuries including loss of part of the left finger, fracture of the middle finger, a fractured base of the middle finger, closed injury to the left heel, a cut wound to the left knee and a cut on the right face.
4. The Respondent pleaded that as a result of his injuries, he was left with ugly scars, hypertension, stiff left-hand fingers, a hand grip that had been reduced by over 90% and permanent incapacity assessed at 35%.



5. The Respondent pleaded for special damages for medication, motorcycle repair, medical report and general damages for pain, suffering, loss of amenities and reduced abilities.
6. In his Defence and Counter-claim dated 12th July 2013, the Appellant pleaded that the accident was not caused by his negligence. It was his case that the injuries the Respondent may have sustained were wholly caused or substantially contributed by his negligence.
7. The Appellant pleaded that the Respondent rode into his path without paying due regard to his own safety, overtook or attempted to do so when it was unsafe to, carelessly rode on the wrong side of the road and failed to abide by Highway Code and the provisions of the Traffic Act.
8. It was the Appellant's case that as a result of the Respondent's negligence, he suffered deep cut wound on the left knee, deep cut wound on the left leg, abrasions on the palm and bruises on both elbows. He prayed for special damages for medical expenses and medical report and damages to the motorbike as well as general damages for pain suffering and loss of amenities.
9. Upon considering the evidence, the Learned trial Magistrate found that the Respondent herein had established his case. He was awarded general damages for pain and suffering in the sum of Kshs. 1,300,000/- and special damages of Kshs. 65,993/-.

The Appeal:

10. The Appellant was dissatisfied with the findings of the trial Court. Through the Memorandum of Appeal dated 30th January 2020, he sought to have the entire judgment of the trial Court set aside on the following grounds: -
 1. That the learned Magistrate erred in law and in facts in awarding damages that were manifestly excessive in the circumstances and inordinately high as the amount to an erroneous estimate of damages/injuries suffered by the Respondent.
 2. That the learned Magistrate erred in law by considering irrelevant or immaterial facts which had been pleaded and or proven by evidence as required by law.
 3. That the learned trial Magistrate erred in both law and in fact by failing to consider the submissions by the defence counsel and the evidence adduced.
 4. That the learned trial Magistrate erred in law and in fact by proceeding to award general damages in favour of the Respondent in total disregard of the Appellant's evidence submissions.
 5. That the trial learned Magistrate erred in all points of law and in fact in as far as both liability and award of damages is concerned.
 6. That the trial learned Magistrate erred in law and in fact by holding that the appellant is liable contrary to the overwhelming evidence adduced by the Appellant and the legal authorities in the support of the submissions.

The Submissions:

11. The Appellant urged his case further through written submissions dated 8th December 2023. In urging the position that the trial Court failed to properly appreciate the evidence on record, the Appellant submitted that the evidence of PW1 and PW4, an eye witness, were contradictory on how the accident happened.



12. It was his submission that from the Police Abstract, it was the Respondent who was driving carelessly.
13. The Appellant disputed the award of Kshs. 1,365,993/- for general damages as manifestly excessive based on the Court of Appeal decision in *Kimatu Mbuvi T/A Kimatu Mbuvi Bros -vs- Augustine Munyao Kioko* 2006 eKLR where it was observed the Court is justified in disturbing an award of damages where it is found that it is inordinately high or low as to represent an entirely erroneous estimate.
14. The appellant submitted that the Court of Appeal decision in *Simon Muchemi Atako & Another -vs- Gordon OSore* (2013) eKLR where the Court awarded each of the Appellants Kshs. 120,000/- as general damages for pain and suffering ought to have been the guiding precedent.
15. The Appellant submitted that the injuries suffered by the Respondent were less severe and the evidence availed was that there was still room for further treatment which had not been utilised.
16. The Appellant urged that an award of Kshs. 50,000/- was adequate in the event this Court was inclined to grant it.

The Respondent's case:

17. The Respondent challenged the Appeal through written submissions dated 5th February 2024. From the outset, it fronted the position that the Appeal was incompetent since the Record of Appeal did not contain a copy of the decree.
18. The Respondent stated that the Appellant did not extract the decree of the judgment of 30th January 2020 and neither had it obtained a certified copy for purposes of the instant appeal.
19. The Respondent submitted that an appeal is against a decree or order not a Judgment or Ruling.
20. The Respondent relied on the decision of Court of Appeal at Nyeri in *Civil Appeal No. 47 of 1998 Joseph Nderitu Githinji -vs- Esther Wanjiru Githinji* where the Court struck out the Record of Appeal because it did not include the decree of the subordinate Court.
21. The Respondent further cited the Court of Appeal decision in *Bwana Mohammed Bwana -vs- Silvano Buko Bonaya & Others* 2015 eKLR where the learned Judges observed that without a record of Appeal, a court cannot determine the appeal before it. Thus, if a requisite bundle of document is omitted the appeal is incompetent and defective for failing to meet the requirements of the law.
22. On the substance of the Appeal, the Respondent submitted that the trial Magistrate properly evaluated the evidence and arrived at the right conclusions.
23. The Respondent submitted that at page 114 of the Record of Appeal, there is evidence that both motorcyclists were riding without insurance cover and that the Appellant was to be charged with a traffic offence of careless driving.
24. It, however, was his case that the claim that his motorcycle was uninsured was disproved when he produced his insurance cover.
25. As regards the injuries, the Respondent submitted that the doctor's evidence was to the effect that there would be an improvement to the injury caused by amputation of the index finger if an operation were to be done.
26. It was its case that the inconsistencies that came out during trial did not go to the root of the case while some were as a result of typographical errors.



27. In buttressing the propriety of the decision of the lower Court, the Respondent submitted that the Court was right in making the finding that the Appellant solely relied on the evidence of PW6 to support its counterclaim and did not call any eye witness to corroborate his evidence.

Analysis:

28. From the above discourse, the issues that arise for determination are;
- i. Whether the appeal is competent.
 - ii. Depending on (i) above, whether the appeal is merited.
29. The Court will, hence, consider the foregoing issues sequentially.

Competency of the appeal:

30. Before delving into the core function of this Court, namely, appreciating and reassessing the evidence afresh, it is first necessary to determine the competence of the appeal.
31. The Respondent claimed that the Appellant's failure to include the decree arising from the impugned Judgement was fatal to the Appeal.
32. Having carefully perused both the lower Court file and the Appeal file, it is indeed a fact that the decree was not extracted.
33. An appeal to the High Court from the Subordinate Court is provided for by Section 65(1) of the Civil Procedure Act. It states;

Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court-

- (a) (Deleted by 10 of 1969, Sch.);
 - (b) from any original decree or part of a decree of a subordinate court, other than a magistrate's court of the third class, on a question of law or fact;
 - (c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.
34. Order 42 Rule 13(4) of Civil Procedure Rules provides for the contents of the Record of Appeal following terms: -

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).

35. In Civil Application No. 20 of 2014 Bwana Mohamed Bwana -vs- Silvano Buko Bonaya & 2 Others (2014) eKLR, the Supreme Court, in reference to its earlier finding in Law Society of Kenya -vs- Centre for Human Rights and Democracy & Others, Supreme Court Petition No. 14 of 2013 discussed the competence of an appeal in the following terms: -

- (16) For a competent appeal to lie before this Court it must comply with the provisions of Rule 33(1) of the Supreme Court Rules, 2012 which provides that:

An appeal to the Court shall be instituted by lodging in the registry within thirty days of the date of filing of the notice of appeal –

- (a) a petition of appeal;
- (b) a record of appeal; and
- (c) the prescribed fee.

(17)

- (36) The use of the word ‘shall’ in Rule 33(1) suggests the mandatory nature of the rule, requiring strict adherence to the completeness of the rule. Thus, a strict reading of rule 33(1) leads to the conclusion that an appeal comprises the Petition, the Record of Appeal, and the prescribed fee.

(37)

- (38) The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the appeal before it.

- (39) If an intending appellant were to present the Court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the Court to determine ‘the appeal’ on the basis of these two, such an appeal would be incomplete and hence incompetent. Indeed, this is the gist of Rule 33(1) of the Supreme Court Rules.

36. In Kyuma vs Kyema (1988) KLR 185 the Court of Appeal discussed Section 79G of the Civil Procedure Act and the attendant implication of the words decree and order thereon.

37. Section 79G provides as follows: -

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.



38. The Learned Court of Appeal Judges then observed thus;

The question is what documents must the appellant file within thirty days or within the time lawfully extended by the certificate of delay” Since the question contemplates that the appeal is against a decree or order, the appellant is obliged to apply first, Memorandum of Appeal in the form set out in appendix F No. 1 of the Civil Procedure Rules and second, a copy of the formal order of the court, if available. Rule 1A of Order 41 permits this latter document to be filed as soon “as possible and in any event within such a time as the court may order”. Therefore a certificate of delay within the true intendment of section 79G must certify the time it took to prepare and deliver to the appellant “a copy of the order” of the magistrate. But the certificate of delay exhibited by the appellant, did not speak of a decree or order. No such order was sought or extracted. What the appellant, in error, sought and what the court dutifully supplied, were the proceedings and judgment.

39. In Civil Appeal 56 of 2018, Antony Muthamia Ngurwe & another v Jane Nkatha Kathurima (suing on behalf of the Estate of the Late John Kimathi Kathurima) [2019] eKLR this Court weighed in on the import of Section 65 as read alongside Section 79G of the [Civil Procedure Act](#) and observed thus: -

20. I will also add my voice on the subject. First, from the reading of Section 65(1) of the Act it is the decree or part thereof that is appealed from the subordinate court to the High Court. Second, under Order 42 Rule 13(4) of the Rules a Court may dispense with any document to be part of the Record of Appeal except the memorandum of appeal, the pleadings and the judgment, order or decree appealed from and in appropriate cases the order giving leave to appeal. Third, the saving grace under Article 159(2)(d) of [the Constitution](#) is inapplicable in this case. That is because the provision only applies to matters relating to procedure or form and not the substance thereof. Fourth, despite clear provisions on extension of time the Appellants never sought for any extension of time to file the decree neither did they explain any difficulty in obtaining the decree.

21. The Record of Appeal is therefore incomplete. In the words of the Supreme Court in Civil Application [No. 20 of 2014](#) Bwana Mohamed Bwana (supra) ‘such an appeal would be incomplete and hence incompetent.’ The appeal is for rejection.

40. Drawing from the above, it is evident that since no decree was extracted as to be part of the record, then the appeal lacks competency.

Disposition:

41. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.

42. In the end, the following final orders do hereby issue: -

- a. The appeal is incompetent and is hereby struck out.
- b. The Appellant shall bear the costs of the appeal.

Orders accordingly.



DELIVERED, DATED AND SIGNED AT KITALE THIS 3RD DAY OF OCTOBER, 2024.

A. C. MRIMA

JUDGE

Judgment Delivered Virtually And In The Presence Of: -

Mr. Majanga, Counsel for the Appellant.

Mr. Kiarie, Counsel for the Respondent.

Chemosop/Duke – Court Assistants

