



**Nairobi Plastics Limited v Munialo & another (Suing as the administrators of the Estate of John Anderson Karano Omoit - Deceased) (Civil Appeal E773 of 2023) [2024] KEHC 13125 (KLR) (Civ) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13125 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL**  
**CIVIL APPEAL E773 OF 2023**  
**AM MUTETI, J**  
**OCTOBER 17, 2024**

**BETWEEN**

**NAIROBI PLASTICS LIMITED ..... APPELLANT**

**AND**

**CELESTINE MUNIALO & ESTHER AUMA OMOIT ..... RESPONDENT**  
**SUING AS THE ADMINISTRATORS OF THE ESTATE OF JOHN ANDERSON**  
**KARANO OMOIT - DECEASED**

*(Being an appeal against a decree emanating from the judgment of HON. MUTHONI MWANGI Senior Resident Magistrate, which was delivered on 11th July 2023 in Milimani CMCC No. 1063 of 2022)*

**JUDGMENT**

**Introduction**

1. The appeal arises out of a decision of the learned Honourable Senior Resident Magistrate Ms. Muthoni Mwangi in Nairobi CMCC No.1063 of 2022 in which she held the appellant 100% liable for the accident giving rise to the suit and proceeded to award the sum of Kshs.5,571,756 to the respondent.
2. The appellant aggrieved by the said decision filed a memorandum of appeal dated 10<sup>th</sup> August 2023 in which she raised the following grounds:-
  1. That the learned trial Magistrate erred in law and in fact in the manner that - 20 she assessed the evidence on liability and in reaching a conclusion that the Appellant was 100% to blame for the accident.



2. That the learned trial Magistrate erred in fact and in law in failing to critically analyze the evidence on the issue of liability as was led by the Appellant and in using a standard of proof that was inappropriate to the case.
  3. That the Learned trial Magistrate erred in law and in fact in failing to consider the Appellants' submissions on liability and in so doing she arrived at an erroneous decision.
  4. That the learned trial Magistrate erred in law and in fact in awarding excessive general damages that was inappropriate to the case.
  5. That the learned trial Magistrate erred in law and misdirected herself when she failed to consider the Appellant's submissions on liability and quantum.
3. The issues that the appellant wishes to be determined by this Court are:-
- i. Whether the evidence tendered by the respondent was sufficient to establish 100% liability over the accident against the appellant.
  - ii. Whether the learned Honourable Magistrate's assessment of damages was in accordance with the known principles of law applicable in fatal injury claims.
  - iii. Whether the quantum of damages was reasonable and proportionate.
4. Parties to this appeal agreed to have it disposed of by way of written submissions which they have filed.

## **Analysis**

### **Appellant's Case**

5. The appellant has submitted on this Court's duty as a first appellate Court. In support of that submission she has cited the case of *Selle & Another Vs. Associated Motor Boat Co. Ltd & Others*. [1968] EA 123
6. In considering the appeal this Court is to re-evaluate and analyze the evidence tendered before the Magistrate and draw its own conclusions giving due allowance to the fact that this Court did not have the opportunity to hear the witnesses.
7. The burden of proof in this matter lay with the respondent and therefore the duty of this Court is to ascertain whether the respondent discharged that burden of proof to the required standard See *Britestone PTE Ltd Vs. Smith & Associates Far East Ltd* [2007] 4 SLR (R) at 59 in which Rajeh JA stated, "The Court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard proof imposed upon him."
8. The standard of proof in all Civil proceedings being on a balance of probabilities, the appellant contends that the respondent did not discharge the evidential burden thus the finding of 100% liability against her was not supported by the evidence.
9. The appellant further submits that even if the Court were to find that the appellant was to blame wholly for the accident, the damages awarded by the Court below were not comparable to similar cases and were inordinately high.
10. The appellant in his submission urges that the Lower Court should have awarded Kshs.100,000 for pain and suffering, Kshs.80,000, under the head of loss of expectations of life and Kshs.2,041,236 for loss of dependency.



11. The appellant has cited numerous authorities in support of their submission on each of the respective heads, which I have duly considered.

### **Respondent's Case**

12. The respondent on her part called PW2 Jackson Odago who testified that on the material date of 18<sup>th</sup> September 2021, he had gone to deliver shoes to his client along Lunga Lunga Road when he witnessed a lorry registration No. KCT 629W make a sudden turn and hit a motor cycle which was approaching from Likoni Road. The lorry was driving from Lunga Lunga.
13. According to the witness the motor vehicle caused the deceased to suffer fatal injuries.
14. Upon cross-examination the witness testified that the lorry driver attempted to drive it from the scene but vigilant boda boda riders gave chase.
15. The witness went further to state that the lorry encroached the other side of the road by making a sharp turn thus hitting the motor bike.
16. The respondent also called PW3 PC Naomi Nyamweya from Makongeni Police Station who testified that there was an accident that occurred on 18<sup>th</sup> September 2021 along Lungalunga Road involving motor cycle Registration No. KMDP 919R make Boxer and a lorry Registration No. KCT 919W make Mitsubishi.
17. The witness went further to testify that after the accident the motor vehicle did not stop and the police later intercepted it and arrested the driver. The driver was arrested and granted police bond on 22/9/2021.
18. The witness confirmed that she was the investigating officer. She produced the police abstract dated 3/11/2021.
19. The driver of the lorry was not charged.
20. On cross-examination the witness denied the suggestion put to her that the deceased caused the accident by hitting the lorry.
21. The officer was firm in her evidence that the driver of the lorry was to blame for the accident.
22. The appellant in her defence called the driver of the lorry who denied causing the accident.
23. The witness for the appellant admitted that his vehicle had small dents at the cabin and scratches. He did not however explain how the dents were caused on the motor vehicle.
24. The respondent in her submission relying on the evidence on record submitted that the appellant was solely to blame for the accident and urged the Court to uphold the finding of 100% liability.
25. I have re-evaluated the evidence independently and I have come to the conclusion that the Learned Honourable Magistrate was right in arriving at the conclusion that the appellant was liable for the accident.
26. The defence by the appellant was a classic case of a mere denial.
27. The appellant was not able to challenge the evidence of PW2 who was an eye witness to the accident.
28. I do therefore agree with the respondent's submission on liability.
29. The appeal on the issue of liability therefore fails.



## Jurisdiction

30. The respondent has also taken up an important issue which merits consideration by this Court. The respondent has submitted that the appeal is fatally defective and should be dismissed.
31. According to the respondent the failure to annex a decree in the record of appeal renders the entire appeal incompetent and incapable of being acted upon by this Court.
32. I have perused the record meticulously and I have not come across a decree.
33. The index appearing on the second page of the record does not also list the decree as of the documents included in the record.
34. The failure to annex a decree has been found in an avalanche of decisions to be a fatal omission by an appellant. In *Nicholas Muriuki Mutubi Vs. Mwaniki Mbii* [2022] KEELC 15727 (KLR) 29<sup>th</sup> June 2022 the Court had this to say on the failure to annex a decree:-
35. The issue of the decree as being a fundamental document goes to the root of the jurisdiction of the Court to hear the appeal.
36. The Court of appeal in *Chege Vs. Suleiman* (1988) eKLR found the failure to attach a decree as being a jurisdictional issue and proceeded to render itself 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.”
37. The Court cannot in the circumstances of this appeal entertain the same on the account of this failure.
38. Order 42 Rule 13 (4) makes it mandatory that the decree must be included in the record before the appeal is heard.
39. On the 24<sup>th</sup> July 2024 when the matter came up before me, MS. Kanyi Advocate appeared for the appellant and confirmed to the Court that all parties had complied by filing their submissions.
40. Undeniably therefore counsel must have had gained sight of the Respondents submissions.
41. The appellant did not however seek time to put in the decree before the Court could retire to consider the appeal.
42. Counsel for the appellant sought a date for judgment thus the issue of the decree was not addressed by the appellant.
43. Be that as it may, jurisdiction of a Court can raise on its own motion even without being prompted by a party.
44. In this case the respondent raised it and it was not responded to.
45. The finding of the Court is that the appeal is incompetent and cannot therefore succeed.
46. Having found so, the Court finds no reason to consider the issue of quantum since the entire appeal is a non-starter. See *Owners of Motor Vessel Lillian Vs. Caltex Oil Ltd* 1989.



47. The omission of a decree is a costly fatal mistake.

**Determination**

48. In the end the appeal is struck out with costs to the respondent.

**DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 17<sup>TH</sup> DAY OF OCTOBER 2024.**

**A. M. MUTETI**

**JUDGE**

In the presence of:

Kiptoo: Court Assistant

Ms Kanyi for the Appellant

Mogira for the Respondent

