



REPUBLIC OF KENYA



**Mburu & 6 others v Kirubi (Civil Appeal E246 of 2021)
[2023] KEHC 3599 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3599 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E246 OF 2021
LN MUGAMBI, J
APRIL 20, 2023**

BETWEEN

**LUCY NJOKI MBURU 1ST APPELLANT
JANE KABURA MBURU 2ND APPELLANT
JULIUS NJIRIRI MBURU 3RD APPELLANT
KENNETH MANGARA MBURU 4TH APPELLANT
SARAH WANJIKU MBURU 5TH APPELLANT
PETER MUCHIRI MBURU 6TH APPELLANT
STEPHEN KARANJA MBURU 7TH APPELLANT**

AND

MARGARET WANJIRU KIRUBI RESPONDENT

*(Being an appeal from the judgment and/or decree and orders of Hon. C.N.
Mugo at the Chief Magistrates' Court at Limuru CMCC No. 305 of 2019)*

JUDGMENT

1. This appeal arises from a suit filed in the lower court being Limuru CMCC No 305 of 2019 on November 20, 2019 by the Respondent (then the Plaintiff) as the legal representative of her late husband's estate. She claimed that on or about September 27, 2016 the deceased was lawfully travelling as a passenger in motor vehicle registration number KBH 042N when Morris Mburu Njiriri drove, managed and/or controlled the said motor vehicle so negligently that it caused an accident thereby occasioning the deceased fatal injuries. She outlined the particulars of negligence in paragraph 4 of the Plaintiff. She prayed for special damages of Kshs 76,800/=, general damages under the *Fatal Accidents Act* and the *Law Reform Act* and costs of this suit.



2. The Appellants (then defendants) filed their statement of defence on February 3, 2020 and denied the averments in the Plaint and stated that if the accident ever occurred, which was denied, and if the deceased sustained fatal injuries or suffered any loss or damage as alleged then the same was solely caused by the deceased's negligence. The particulars of the deceased were outlined in paragraph 5 of the statement of defence.
3. On September 14, 2021, the matter came up hearing with the Respondent calling two witnesses, one Corporal Martin Kago and the respondent herself. The appellants called one witness being Martin Kamau Mirie. In its judgment, the trial court found that the late Moses Mburu Njiriri, the driver, was 100% liable for the accident. The trial court awarded general damages for pain and suffering at Kshs 50,000/=, loss of dependency at Kshs 3,120,000/= and special damages at Kshs 76,600/=.
4. Aggrieved by the judgment by the lower court, the Appellants filed a Memorandum of Appeal dated December 15, 2021 and listed the following grounds of appeal:
 - a. The learned trial magistrate erred in law and in fact in holding the late Morris Mburu Njiriri to be 100% liable for the accident.
 - b. The learned trial magistrate erred in law and in fact in awarding an excessive amount as damages under loss of dependency contrary to the laid down principle of stare decisis.
 - c. The learned trial magistrate erred in law and in fact in awarding an excessive amount under loss of expectation of life against the principle of stare decisis.
 - d. The learned magistrate erred in law and in fact in awarding an excessive amount as special damages against the principle of stare decisis.
5. The appellants prayed that the judgment and decree of the Limuru Senior Resident Magistrate Honourable CN Mugo delivered on November 16, 2021 be entirely reviewed and/or set aside. They prayed that the respondent do bear costs of this appeal as well as those of the lower court.
6. The parties agreed to dispense the hearing of the appeal by way of written submissions.

Appellants Submissions

7. The Appellants filed their Submissions on January 16, 2023 and discussed four key areas of appeal. On Ground 1 of the appeal, they submitted that the only evidence the court relied on to conclude that Mr Morris Mburu Njiriri who was the driver was 100% liable for the accident was the police abstract dated October 18, 2016. The Respondent never called any eye witness to explain how the accident happened and it was an error to rely on the abstract to apportion 100% liability. They associated themselves with the decision in *Charles Kavai (Suing as the Administrator of the Estate of the Late Kevin Kioko Charles) V Bonface Mutunga & Another* (2020) eKLR wherein the learned judge stated as follows;

“A police abstract is merely evidence that a report of an accident has been made to the police. Unless it contains information regarding the investigations and their outcome, such evidence cannot without more be evidence of negligence.”
8. They said that they brought an eye witness who testified that he saw the deceased being thrown out of the vehicle through the windscreen because he had not worn his seat belt. They urged the court to be guided by the decision of *Florence Mutheu Musembi & Geoffrey Mutunga Kimiti V Francis Karenga* (2021) eKLR.



9. On Ground 2 of the appeal, they submitted that the court erred by using a sum of Kshs 30,000/= as the multiplicand when nothing had been adduced in evidence to prove the earnings. They stated that the court erred in finding that the deceased was the owner of Bank Printing Services when in fact there was nothing on record to authenticate these allegations. It is trite law that a certificate of registration of a company and the Company's CR-12 are prima facie sufficient proof of ownership of the company and they urged this court to find that the mere averment that the deceased was the founder cannot meet the threshold set in law. Further the trial court relied on undated letters and statement of accounts relied on by the Respondent that did not relate to the company which was allegedly owned by the deceased. Based on the inconsistencies they urged that the court should have been guided by the Regulation of Wages (General) (Amendment) Order, 2018 for printing machine operators from a municipality at KES 16,907.90/= is ideal and consistent with stare decisis.
10. On Ground 3, the appellants submitted that the Respondent was unable to provide explanation for the disparities in names that were indicated on the receipts presented from the radio. They urged this court to find that the claim for burial expenses remain unproved and as such, this court should review the award of special damages to exclude the claim for burial expenses. They cited the decision in *Maritim & Another V Anjere* (1990-1994) EA 312 referred to by Justice P Nyamweya in *Hassan Osman Ali & Another V Multiple Hauliers (EA) Limited* (2017) eKLR where the court stated that:

“It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.”
11. They urged the court to set aside the judgment delivered in the following terms: General Damages for pain and suffering – Kshs 100,000/=, Loss of Expectation of Life – Kshs 100,000/=, Loss of dependency – Kshs 1,758,421.60/= and Special damages – Kshs 40,750/=.

Respondent's Submissions

12. The Respondent filed her submissions on January 17, 2023 and submitted that the appeal before this court is incompetent and ought to be struck out as it is an affront to and contravenes mandatory provisions of the law. The Appellants had failed, refused and/or neglected to attach a decree of the lower court which is mandatory and thus divests of this Honourable Court's jurisdiction to deal with this appeal. She cited Section 65(1)(b) of the Civil Procedure Act and Order 42 Rule 13(4)(f) of the Civil Procedure Rules and the Court of Appeal decision in *Chege V Suleiman* (1988) eKLR where it was 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.”
13. She urged that the court has no other option but to strike out the appeal herein and vacate the stay orders already in place as the Honourable Court lacks jurisdiction to hear and determine the appeal on merit.



14. On the issue of liability, she submitted that the trial court clearly addressed the issue regarding liability and cannot be faulted as the deceased was not the driver of the motor vehicle and thus was not in control of how the same was being managed and/or controlled. She stated that the alleged eye witness was not inside the motor vehicle at the time of the accident and thus could not ascertain his allegations that the deceased passenger did not have his safety belt on. She continued that the vehicle having rolled severally to a point that the passenger was thrown out of the vehicle is proof that the vehicle must have been driven at a high speed. She associated with the decision in Wilter Chemutai V We Tilley Mutabiga Limited & Another (2017) Eklr And Boniface Waiti & Another V Michael Kariuki Kamau (2007) eKLR.
15. She submitted that she was able to prove that her late husband ran his own printing business and even presented statement of account from Equity Bank. She continued that whereas the appellants fault the trial magistrate for awarding excessive amount under loss of expectation of life, it must not be lost that the amount the Honourable Court awarded to the respondent is what had been proposed by the appellants in their submissions. She termed that the ground of appeal on special damages as misplaced as the trial magistrate had the opportunity to analyse all the receipts produced in support of this claim as is the law.

Analysis and Determination

16. Having read and considered the submissions together with the memorandum and record of appeal and the law applicable, I reckon that these are the issues that come up for determination of this appeal:
 - i. Whether this court has jurisdiction to determine the appeal;
 - ii. Whether the appeal is merited;
 - iii. Who should pay the costs of this appeal?
17. This being a first appellate court, it was held in *Selle vs Associated Motor Boat Co* [1968] EA 123 that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
18. This court nevertheless appreciates that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings.
19. As it is well known in law, jurisdiction is everything and where a court finds that itself lacking it must drop its tools immediately. This was stated in the classic case of *The Owners of the Motor Vessel “Lillian S” Vs Caltex Oil (Kenya) Ltd* (1989) KLR 1 where Nyarangi JA held as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no



power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

20. The Respondent has stated that the appellant has failed to attach a decree to the Record of Appeal which is contrary to the provisions of Section 65(1)(b) of the *Civil Procedure Act* and Order 42 Rule 13(4)(f) of the *Civil Procedure Rules* and said failure is fatal as the provision is stated in mandatory terms. Section 65(1)(b) of the *Civil Procedure Act* provides that except where otherwise expressly provided by this Act, and subject to such provisions as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court from any original decree or part of a decree of a subordinate court, on a question of law or fact.
21. Order 42 Rule 13(4)(f) of the *Civil Procedure Rules* provides;
 - "4. Before allowing the appeal to go for hearing, the judge shall be satisfied that the following documents are on the 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)."
22. From the above cited provisions of law it is clear that a record of appeal shall be admitted for hearing once the court is satisfied that the requisite documents are on record. Such record must include the judgment, order or decree appealed from. The appellants have attached to the record of appeal the certified copy of judgment delivered on November 23, 2021 at pages 65 to 76. There is however no extracted order or decree of the record of appeal.
23. My appreciation of the said Order 42 Rule 13(4)(f) of the *Civil Procedure Rules* and the cited decision of the Supreme Court is that an appeal that lacks the legally specified documents is incompetent in law. A decree from which the appeal is being preferred is a key document that must be included in the record of appeal.



24. In the Court of Appeal decision of *Chege Vs Suleiman* (1988) eKLR the Court of Appeal was categorical that omission of decree in the record of appeal was a jurisdictional matter. It stated:
- “... This is not a procedural but a jurisdictional point...Since the appeal could only lie against decree or order, no competent appeal could be brought unless those decrees or orders were formally extracted as the basis of appeal...”
25. This position was upheld by the Supreme Court case of *Bwana Mohamed Bwana Vs Silvano Buko Bonaya & 2 Others* (2015) eKLR where it referred to the case of *Law Society of Kenya v Centre for Human Rights and Democracy & 12 others* Sup Ct No 4 of 2014 and held thus:
- “...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 Constitution where appeal is incompetent. An incompetent appeal divests a Court of jurisdiction to consider factual or legal controversies in the relevant issues...”
26. My perusal of the record of appeal has confirmed that the Appellants did not extract and attach the formal decree as part of the documents that formed the record of this appeal. Guided by the ratio in the two precedents from the Court of Appeal and the Supreme Court that I have reproduced above, my finding is that this appeal is fatally defective and the only prudent option available to me is to strike it out with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 20TH DAY OF APRIL, 2023.

L.N MUGAMBI

JUDGE

In Presence of:=

Coram- (ON-LINE)

Before L.N. Mugambi Judge

Court Assistant- Alice

Appellant-

Respondent-

Appellant Advocate- Nderitu holding brief for Makokha for applicant.

Respondent Advocate- Njehu for Respondent.

Ruling delivered digitally to be transmitted by the Deputy Registrar to the Parties Advocates on record through their respective email addresses.

L.N. MUGAMBI

JUDGE

Mr. Njehu – We apply that security deposited in court for the performance of decree be released to the advocates for the Respondent.

M/s Nderitu – we are opposing the application. We can take a date for direction on that.

Court – stay of execution for 30 days of the order herein granted.



L.N. MUGAMBI

JUDGE

20.4.23

