



**Machale ((Suing as the administrator of the Estate of the Late Simon Murimi Hezron)) v Ngare & 2 others (Civil Appeal 486 of 2017) [2023] KEHC 17843 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17843 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL APPEAL 486 OF 2017**

**AA VISRAM, J**

**MAY 18, 2023**

**BETWEEN**

**HEZRON MACHALE (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE SIMON MURIMI HEZRON) ..... APPELLANT  
(SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE SIMON MURIMI HEZRON)**

**AND**

**PAUL MINJIRE NGARE ..... 1<sup>ST</sup> RESPONDENT  
JOSEPH A OCHOLA ..... 2<sup>ND</sup> RESPONDENT  
FLORENCE WAHU MWAURA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment dated 5th September, 2017 of Hon. Edna Nyaloti (Mrs) Chief Magistrate in Milimani CMCC Case No. 4389 of 2007)*

**JUDGMENT**

1. This judgment determines the Appellant’s appeal filed on October 6, 2021 vide its Memorandum of Appeal dated September 12, 2017. This appeal relates to the issues of liability and quantum.
2. The Appellant is the representative of the estate of the Plaintiff before the trial court. The Plaintiff pleaded that he was involved in a road accident that occurred on July 25, 2005. According to the Appellant, the 2<sup>nd</sup> Respondent’s driver allegedly drove vehicle number KAN 133N negligently, and at a high speed, before losing control, which allegedly caused an accident occasioning fatal injuries to the Appellant.
3. The Appellant relied on the doctrine of ‘*res ipsa loquitor*’ to support his pleading that the 2<sup>nd</sup> Respondent was vicariously liable for the acts and or omission of the 1<sup>st</sup> Respondent.



4. The 1<sup>st</sup> Respondent opposed the suit vide its Defence dated August 31, 2007, in which it denied all allegations. The matter went for a full trial, and on September 6, 2017, the lower court dismissed the Plaintiff's case with costs.
5. Aggrieved by the said judgment, the Appellant has filed this appeal dated September 12, 2017 on the following grounds:
  - a. That the Learned Magistrate erred in law and fact in holding that the Plaintiff/Appellant did not prove his case against the Defendants and that the Defendants were not liable for the accident.
  - b. That the Learned Magistrate erred in law and fact by totally failing to take into account the evidence of the Plaintiff/Appellant's witnesses.
  - c. That the Learned Magistrate erred in law and fact by totally failing to appreciate that the term self-involving as used in the proceedings meant that there was no other motor vehicle involved in the accident.
  - d. That the Learned Magistrate erred in law and fact by totally failing to consider the submissions of the Appellant's counsel together with the case law in support.
6. The parties agreed to dispose this appeal by way of written submissions and accordingly, they filed and served their respective submissions dated July 8, 2022, and October 26, 2022.

#### **Appellant's submissions**

7. The Appellant submitted that PW1 testified that the initial entries in the Occurrence Book indicated that there was no passenger in the vehicle on the date of the accident, but later, it was determined that the suit vehicle was driven by a man named Paul Minjire Ngare. PW1 further stated that the entries were made on the right column of the Occurrence Book to correct the errors made on the original entry.
8. The Appellant contended that the Trial Magistrate failed to understand that the term "self-involving", in the context of the proceedings, meant that there was no other motor vehicle involved in the collision, and further, failed to appreciate that the deceased was not the driver of the suit motor vehicle.
9. In seeking to overturn the decision of the lower court on liability, the Appellant relied on the decision of the High Court in *Mary Olando Ogang v Lucas Ngode Mugunda* (2015) eKLR, where the court set aside the judgment of the lower court which had apportioned liability in self-involving accident, and instead, the court found the Defendants 100% liable.
10. On quantum, the Appellant summarized his claims as falling under the below categories, and in the following terms:-

*Law Reform Act*

  - a. General damages for pain and suffering Kshs 200,000/=
  - b. Lost years (unspecified amount)
  - c. Loss of expectation of life Kshs 200,000/=

Fatal accident Act

  - a. Loss of dependency Kshs 9,000,000/=
  - b. Funeral expenses Kshs 60,000/=



- c. Special damages Kshs 35,200/=
- Total Kshs 9,495,000/=

11. The Appellant based his claims as stated above on the age of the deceased, who was 27 years old at the time of death, and his earning of Kshs 1,500/= per day. He proposed a multiplier of Kshs 45,000/= and submitted that the deceased would have worked up to his late seventies. Further, the appeal cited the decision of the High Court Case of *Julian Njeri Muriithi v Veronica Njeri Karanja & Another* (2015) eKLR, in which the court awarded Kshs 200,000/= as damages for pain and suffering for a person who died 3 days after the accident which killed him. And further, stated that because the deceased was a businessman, he was not limited to the normal retirement age, and could have worked up to his late 70s.

### Respondent's submissions

- 12. The Respondent submitted that the Appellant filed an incomplete record of appeal on September 2, 2021, since the certified copy of the decree was missing from the list of documents.
- 13. The Respondent relied on the decision of the Court of Appeal in *James Obere Ockotch v EA Building Society & Others* CA ,2 of 1996 where the Court of Appeal held:-

“if the Record of Appeal does not contain certified copy of decree, the appeal is incompetent.”

- 14. The Appellant has introduced new documentary evidence in its Record of Appeal which was not before the trial court. In particular, the document referred to as "Statement Under Inquiry of Paul Minjere Ngare" has been introduced for the first time to mislead the Court.
- 15. The Appellants chose to complete their case without the production of the police file, and the only police records offered in evidence were the Occurrence Book and the Police Abstract.
- 16. As regards quantum, the Respondent submitted that even if the Appellant had proved his case on a balance of probability, a multiplier of 23 ought to be used. The Appellant suggested an award based on the following figures: Kshs 100,000/= for loss of life; and Kshs 400,800/= for amount arising under a dependency ratio.

### Analysis and Determination

- 17. Upon perusal of the record and written submissions together with the authorities cited therein by both parties, the primary issue for determination is whether the Record of Appeal is incompetent and ought to be struck out?
- 18. Section 65(1)(b) of the *Civil Procedure Act* provides:-

“

“(1) 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—

.....

(b) from any original decree or part of a decree of a subordinate court, on a question of law or fact;



.....”

19. 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.”

20. 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).”

21. 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.”



22. Further to the above, the decision of the Court of Appeal in *Chege v Suleiman* [1988] eKLR held that the failure to attach the decree is a jurisdictional point. The court pronounced itself in the following terms:

“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.”

23. For the sake of completeness, on my own accord, I have considered whether or not such failure amounts to a technicality, curable by Article 159 of *the Constitution*. In relation to the same, I am guided by the decision of the High Court in *Kilonzo David t/a Silver Bullet Bus Company v Kyalo Kiliku & another* [2018] eKLR held as follows:-

“Despite the provisions of Article 159 (2) (d) of *the Constitution* of Kenya, 2010 that mandates courts to administer justice without undue regard to procedural technicalities, this court took the firm view that omission to include the decree or order to be appealed from in the Record of Appeal was not a procedural technicality for the reason that the word “shall” in Order 42 Rule 2 of the *Civil Procedure Act* contemplates that the furnishing of the decree or order is mandatory and cannot be wished away.”

24. Based on the law as set out above, it is clear to me that Order 42, Rule 13(4)(f) above requires the judgment and decree appealed from to be part of the record. I have perused the record in entirety and I am unable to find a certified copy of the decree attached, as is mandatorily required.

25. Further, having noted the submissions of the Respondent, the Appellants chose not to respond to this issue by way of reply, which it had the right and ample opportunity to do so.

26. Having found that the appeal is incompetently before me, I do not think it would be appropriate to address the issues set out in the Memorandum of Appeal. It is trite, that where a court has no jurisdiction, it ought not take a further step.

27. Based on the reasons stated above, I find and hold that the appeal is incompetent and the same is accordingly struck out with costs.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 18<sup>TH</sup> DAY OF MAY 2023**

**ALEEM VISRAM**

**JUDGE**

**In the presence of;**

..... for the Appellant

..... for the Respondents

