



Chege & another v Emurai & another (Suing as the legal representative of the Estate of Joseph Ekaiewol - Deceased) & another (Civil Appeal 100 of 2019) [2024] KEHC 13565 (KLR) (4 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13565 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 100 OF 2019
SM MOHOCHI, J
NOVEMBER 4, 2024**

BETWEEN

SAMWEL MBUU CHEGE 1ST APPELLANT

PAUL NJIHA MAINA 2ND APPELLANT

AND

ANN AKAYO EMURAI & JAMES MAISON (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOSEPH EKAIEWOL - DECEASED) 1ST RESPONDENT

JOSEPH KABUCHO CHEGE 2ND RESPONDENT

(Being an Appeal from the whole Judgement delivered by the Honourable Eunice Kelly – Senior Resident Magistrate on 24th May 2019 in Nakuru CMCC NO. 739 OF 2013)

JUDGMENT

1. The Appellants were the 2nd and 3rd Defendants in a suit wherein the 1st Respondent by Plaintiff dated 31st May, 2013 brought this suit as the legal representatives of the estate of the late Joseph Ekai Ewoi claiming compensation from the 1st and 2nd Appellants and the 2nd Respondent who failed to enter appearance and default judgment was entered against him. The claim arose as a result of the late Joseph Ekai Ewoi death arising out of a road traffic accident that occurred on the 13th of April 2013 along the Njoro - Molo road at Kimakia area.
2. The 1st Respondents claimed damages under the *Fatal Accidents Act* (CAP 32), for the benefit of the estate of the deceased. Damages under the *Law Reform Act* (CAP 20) costs and interest on costs at the Court rates.
3. The 2nd Respondent and the 1st Appellant were vicariously enjoined for the Acts of the 2nd Appellant.



4. The 1st and 2nd Appellants filed their statement of defence dated 18th September 2013, denying any liability and blamed the occurrence of the accident on the deceased and that the accident was contributed too by negligence on the part of the deceased.
5. The Matter proceeded to a full hearing with the 1st Respondent calling three (3) witnesses and relying on a bundle of documentary evidence. The 1st and 2nd Appellants on their part elected to close without calling any witnesses opting to file written submissions.
6. At the conclusion of the trial by a judgment dated 24th May 2019, the Court found in favor of the 1st Respondents as follows;
 - a. Liability 100%
 - b. General Damages for pain and Suffering Kshs 20,000/-
 - c. Damages under the Law Reform Act Kshs 719,400/-
 - d. Loss of Expectation of Life Kshs 100,000/-
Total Kshs 839,400/-
 - e. Costs and interest from the date of judgment.
7. Feeling Aggrieved of the aforesaid judgment, the Appellants contested against the whole judgment on the following grounds: -
 - a. That, the learned magistrate erred in law and in fact in holding the Appellants herein 100% liable without considering the evidence and the submissions on liability on behalf of the Appellant while considering her judgment.
 - b. That, the Learned Magistrate erred in law and fact in disregarding the evidence adduced by the Appellants thereby arriving at a wrong decision as to liability to be shouldered by the Appellant.
 - c. That, the learned magistrate erred in law and in fact in awarding a high amount of Kshs. 874,150/- as quantum of damages without considering the evidence and the submissions on general damages given on behalf of the Appellant while considering her judgment.
 - d. That, the Learned Magistrate erred in law and fact in disregarding the evidence adduced by the Appellants thereby arriving at a wrong decision as to the quantum payable to the plaintiff.
8. The Appellants therefore prayed that;
 - a. Judgment be entered pursuant thereto be set aside
 - b. That the appeal be allowed as prayed.
 - c. Costs of this appeal and of the judgment in the subordinate Court be awarded to the Appellant.
9. This Appeal was admitted on the 14th March 2024 as being ripe for hearing by way of filed written submissions, the Appellant had not filed any written submissions by the time of preparation of this judgment.
10. As for the 1st Respondent they filed their written submissions on the 15th May 2024 contending that the Appeal is fatally incompetent warranting striking out for not having a copy of the judgment or decree which was being Appealed against.



Analysis and Determination

11. As the first Appellate Court, this Court is obliged to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano. vs. Associated Motor Boat Co. Ltd* (1968) EA 123). 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. This was the holding in *Mwanasokoni – versus- Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga –versus- Kiruga & Another* (1988) KLR 348).
12. This Court has perused and understood the Lower Court file, the contents of the instant pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions relied upon by the parties.
13. The Memorandum of Appeal dated 31st May 2019 was filed on the 12th June 2019 up to and including the 15th June 2021. The Appeal lay unprosecuted for a period of one year and three months and the Respondent moved Court for dismissal of the Appeal for want of prosecution which application was unsuccessful.
14. On the 27th September 2021 the Record of Appeal was filed and it inter alia contained the following;
 - a. Memorandum of Appeal dated 31st May 2019;
 - b. Plaint;
 - c. Verifying Affidavit;
 - d. Verifying Affidavit;
 - e. Plaintiff list of witnesses;
 - f. Plaintiffs List of Documents;
 - g. Copy of the Demand letter dated 27/4/2013;
 - h. Copy of the Limited Grant of Letters of Administration Ad Litem dated 19/06/2013;
 - i. Copy of the letter from the chief dated 13/6/2013;
 - j. Copy of the Death Certificate dated 4/06/2013 25-January, 2012;
 - k. Copy of the Police Abstract;
 - l. Copy of receipt of coffin and cross dated 17/04/2020.;
 - m. Copy of receipt for mortuary and Post-Mortem 19/04/2013;
 - n. Copy of the Claimants National Identity Cards;
 - o. Copy of the Claimants witness statement;
 - p. Copy of Motor Vehicle Records from the KRA and receipt of KShs. 550/- dated 15th July, 2013;
 - q. Copy of the Child Health Card;
 - r. Copy of the Defendants Memorandum of Appeal dated 28th August 2013
 - s. Copy of the Defendants Supplementary list of witnesses dated 29th September 2017;
 - t. Copy of the Defendants Supplementary list of documents dated 29th September 2017;



- u. Copy of the drivers witness statement supporting affidavit dated 11th February 2012;
 - v. Copy of the defendant's written submissions dated 21st February 2019;
 - w. Copy of Plaintiff's letters to the Executive Officer dated 25th October 2019; and
 - x. Copy of Plaintiff's letters to the Executive Officer dated 27th January 2021.
15. The Court Notes that, the Appeal is filed without including the judgment, order or decree appealed from, this is despite the Appellant filing a Supplementary Record of Appeal dated 25th August 2023 and filed on the 30th August 2023 which contained typed proceedings and a certified copy of an Interlocutory Ruling dated 25th January 2019.
 16. This Court further notes that the Trial Court file contains a copy of the Judgment dated 24th May 2019.
 17. A cursory look at the Copy of Plaintiff's letters to the Executive Officer dated 25th October 2019, Copy of Plaintiff's letters to the Executive Officer dated 27th January 2021 reveals that the Appellants sought to be supplied with the decree and copies of certified judgment. It remains unclear as to why ultimately the Appellant failed to file the same.
 18. I am thus consequently enjoined, to deal with the consequence of failure to file the decree, in the record of appeal.
 19. Section 65(1) of the Act is the basis of appeals from the subordinate Courts to the High Court. It provides as follows: -
 - “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.”
 20. Appeals from orders are provided for in Sections 75 and 76 of the Act and Order 43 of the Rules. Order 42 Rule 1 of the Rules provide that an appeal to the High Court shall be in the form of a Memorandum of Appeal signed in the same manner as a pleading.
 21. Once an appeal is lodged aforesaid, a Record of Appeal is then filed. The contents of the Record of Appeal are provided for in Order 42 Rule 13(4) of the Rules as follows: -
 - “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).”

22. A Record of Appeal is essentially supposed to be complete with all necessary documents. Courts have severally dealt with cases of incompleteness of Records of Appeal.

23. The Supreme Court in Civil Application No. 20 of 2014 *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* (2014) eKLR referred to its earlier finding in *Law Society of Kenya vs Centre for Human Rights and Democracy & Others*, Supreme Court Petition No. 14 of 2013 as follows:

[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) 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.

24. The Court further held, at paragraph 39, that:

(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.

25. *Ngaah, J* in *Nyeri High Court Civil Appeal No. 51 of 2013 Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kalumbo* (2016) eKLR dealt with how the Court of Appeal in *Kyuma vs Kyema* (1988)



KLR 185 dealt with the interpretation of Section 79G of the Act. Before looking at what the Court said I will first reproduce the said Section.

“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. The Court then held as follows: -

“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”.

27. The Record of Appeal is therefore incomplete hence incompetent as was held in Civil Application No. 20 of 2014 Bwana Mohamed Bwana (supra) ‘such an appeal would be incomplete and hence incompetent.’

28. Therefore, I find no competent appeal for consideration. The appeal is therefore struck out with costs to the Respondents.

It is so ordered

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 4TH DAY OF NOVEMBER, 2024.

MOHOCHI S.M

JUDGE

