



**Thiriku & another v Kikuli (Civil Appeal E493 of 2022)
[2024] KEHC 13478 (KLR) (Civ) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13478 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E493 OF 2022

TW OUYA, J

NOVEMBER 6, 2024

BETWEEN

ANDREW KARIMI THIRIKU 1ST APPELLANT

FRANCIS NJURU KAMAU 2ND APPELLANT

AND

VINCENT MAYANI KIKULI RESPONDENT

*(Being an Appeal against the Judgement and decree of Hon. M.W. Murage
(SRM) delivered on 10.06.2022 in Nairobi CMCC No. 2561 of 2020)*

JUDGMENT

Background

1. Vincent Mayani Kikuli (hereafter the Respondent) filed the suit against Andrew Karimi Thiriku and Francis Njuru Kamau (hereafter the 1st and 2nd Appellants) vide the plaint dated 4.05.2020 seeking inter alia, general and special damages in respect of injuries allegedly sustained by the Respondent on/or about 21.01.2020 arising from a road traffic accident involving the Respondent and the motor vehicle registration number Kxx 0xxT (the subject motor vehicle) allegedly belonging to the 1st Appellant at all material times, and being driven by the 2nd Appellant on the material date.
2. Upon service of summons, the Appellants entered appearance and filed their joint statement of defence dated 21.07.2020 denying the key averments in the plaint and liability.
3. The trial court ultimately rendered its judgment in favour of the Respondent and against the Appellants, thereby awarding the former damages totaling the sum of Kshs. 2,183,550/-.



The Appeal

4. Being dissatisfied with the aforementioned judgment, the Appellants moved the court by way of the present appeal (vide the memorandum of appeal dated 4.07.2022) to challenge it, premised on the following grounds:
 - I. That the Learned Magistrate in the matter herein delivered Judgment on 10.06.2022 in favour of the Respondent herein thus contrary to the law and facts availing before the Honourable Court.
 - II. That the Learned Magistrate erred in fact and law by finding that the Respondent was entitled to damages of Kshs. 2,183,550/- for injuries sustained by the Plaintiff that were too high in view of the fact that compared to the injuries suffered by the Respondent.
 - III. That the Learned Magistrate erred in Law and Fact in failing to appreciate the long established principle of stare decisis, precedent law thus bringing law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to damages.
 - IV. That the Learned Magistrate erred in Law and Fact in failing to appreciate that the Respondent's pleadings and the evidence tendered in support thereof was incapable of sustaining the award of damages.
 - V. That the Learned Magistrate erred in Law and Fact in entering judgment in favour of the Respondent against the Appellant in spite of the Respondent's miserable failure to establish his case. (sic)
5. The Appellants consequently sought the following orders on appeal:
 - I. That the Appeal be allowed with costs.
 - II. That the Judgment delivered by Honourable M.W. Murage (Miss) Senior Resident Magistrate sitting at Milimani in Civil Suit No. 2561 of 2020 and delivered on 10.06.2020 with all other consequential orders be set aside.
 - III. That costs of the Appeal be borne by the Respondent.
 - IV. That such further orders may be made by this Honourable Court may deem fit to grant. (sic)

Submissions

6. Directions were given for the appeal to be canvassed by way of written submissions. However, it is apparent from the record that at the time of writing its decision, the Appellants had not complied with the said directions.
7. On his part, counsel for the Respondent firstly submits that the appeal is incompetent and unmerited for the reasons that the record of appeal lacks certain relevant documents; namely the typed proceedings, the lower court judgment and resultant decree; thereby making it incomplete. That on this premise, the appeal ought to be dismissed solely on this ground, with costs. In submitting so, counsel cites the decision in *Jayantkumar Vrajlal Shab & Shiksha Devidas v Midco Holdings Limited & Summit Textiles (E.A) Limited* [2003] KECA 135 (KLR) where the Court of Appeal struck out the appeal in that instance, on related grounds.
8. Counsel nevertheless proceeded to address the merits of the appeal by submitting on the twin issues of liability and quantum. On the subject of liability, counsel anchors his submissions on the decision in



Mash East Africa Limited v Kamau [2024] KEHC 2118 (KLR) to argue that the Respondent having proved his case on a balance of probabilities, the trial court acted correctly by finding the Appellants fully liable. Counsel further argues that the said Appellants did not tender any material to controvert the Respondent's case, in any event.

9. Regarding quantum, it is the submission by counsel that the trial court upon considering the nature of injuries sustained by the Respondent coupled with relevant authorities cited in the Respondent's submissions, arrived at a reasonable award on general damages. Counsel buttresses this argument by citing *inter alia*, the case of Peter Oduor Shikuku v Magnum Engineering & General Contractors Limited & East African Breweries Limited [2021] KEHC 1539 (KLR) and the case of Charles Komoso Toton v Reuben Cherutich Chebon & Another [2012] KEHC 3441 (KLR) where the respective courts awarded the sums of Kshs. 2,000,000/- and Kshs. 1,600,000/- respectively, for comparable injuries. Counsel therefore urges this court to dismiss the appeal accordingly.

Analysis And Determination

10. This court has considered the material on record as pertains to the appeal.
11. As earlier mentioned, the Respondent has raised a preliminary yet pertinent issue concerning competency of the appeal. The court will therefore first address itself on the said issue, which will in turn determine whether it will be necessary to delve into the merits of the appeal.
12. The issue of competency of appeal rides primarily on the argument that the record of appeal is incomplete, the same having omitted to include various crucial documents. Upon perusal of the record of appeal filed in respect of the present appeal, this court observed that the same does not include the typed and certified lower court proceedings; the lower court judgment and the resultant decree. In the court's view, the aforementioned documents are crucial in nature and therefore ought to form part of the record of appeal.
13. Upon further perusal of the record, it is apparent that the appeal had previously been listed for dismissal for want of prosecution pursuant to a notice to show cause. However, when the matter came up in court for hearing thereof on 21.07.2023, counsel for the Appellants sought and was granted leave by the court, to file and serve a complete record of appeal within a period of 30 days from the mentioned date, failing which the appeal would be dismissed for want of prosecution. The record shows that subsequently, the matter was placed before the Deputy Registrar, Hon. S. Motari, on 6.05.2024 upon which further directions were given for the filing of a supplementary record of appeal to include the missing documents as well as written submissions by the Appellants, within a period of 14 days therefrom, following which the Respondent herein would have 7 days to file his written submissions; with the matter being referred for Rapid Results Initiative (RRI).
14. It is apparent that notwithstanding the above-mentioned directions, the Appellants did not comply and neglected to attend court thereafter. Suffice it to say that, in the absence of the above-mentioned relevant documents which are primary in nature and necessary for consideration of the merits of the appeal; coupled with the absence of the lower court file; this court is unable to effectively and accurately adjudicate the issues arising on appeal.
15. The court thus finds that on the basis of incompleteness of the record of appeal and/or compliance by the Appellants in regularizing the record of appeal accordingly, the present appeal is hereby rendered incompetent.



Disposition

16. In the end therefore, the appeal is hereby struck out for being incompetent, with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 6TH DAY OF NOVEMBER, 2024

HON. T. W. OUYA

JUDGE

For Appellant.....Kabita

For Respondent..... No appearance

Court Assistant.....Martin

