REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 128 OF 2015

MWANGI DANIEL .....1ST APPELLANT

JOSPHAT WAINAINA.....2ND APPELLANT

SAMUEL KIMANI WAITHAKA.....3RD APPELLANT

VERSUS

PAUL MAINA .....1ST RESPONDENT

MARY WAITHERA .....2ND RESPONDENT

(BEING AN APPEAL FROM PART OF THE JUDGEMENT OF HON. KAGENDO CMCC, IN MOLO CMCC NO 18 OF 2015 DATED 6TH OCTOBER 2015)

JUDGEMENT.

1. The deceased was involved in a road traffic accident on the 21st September 2014 along Nakuru –Eldoret road at Kamara while aboard motor vehicle registration number KAY 71YH. The said accident involved other motor vehicles namely KBA 501F and KBB 378W. The respondent sued for general and special damages as a result of the said accident.

2. The parties entered into a consent on 7th July 2015 wherein the appellants shouldered 90% liability and the respondent 10%. The appellants have filed this appeal which in essence is only on the question of quantum.

3. When the matter came up for directions the court ordered that the same should proceed by way of written submissions which the parties have complied.

APPELLANTS WRITTEN SUBMISSIONS.

4. The appellant has raised several issues relating to quantum and submitted that the award by the trial court was excessive in the circumstances. That the multiplier of 5 years and not 10 years as found by the trial court would have been appropriate in this matter considering that the deceased was 57 years old at the time of death.

5. The appellants as well attacked the trials court findings in which it did not take into account the award under the Fatal Accidents Act *vis a vis* the Law Reform Act. The court ought therefore to take note of the same and take out a deduction appropriately to ameliorate double compensation.

6. In supporting the above proposition, the appellants relied on the case of **HELLEN WARUGURU WAWERU V. KIARIE SHOE STORES LTD (2015) eKLR** among others.

7. The appellants prayed for the costs of this suit as costs follow the events as provided under **Section27 of the Civil Procedure Act.**

RESPONDENTS SUBMISSIONS.

8. The respondent while objecting to the appeal and agreeing with the trial court submitted that the appeal was defective for not complying with **Rule 42(1), (2) of the Civil Procedure Rules.** That the same does not contain the certified copy of the judgement nor the decree in which the appellants are appealing against. For this reason, therefore the same ought to be dismissed.

9. On the issue of quantum, the appellants submitted that the amount of Kshs. 940,680 was sufficient in the circumstances and that in any case it was still subject to 10% contribution thus totalling Kshs. 846,612. The trial court used a multiplicand of 10 years based on a sum of Kshs. 10,071 the gazetted minimum wage. The court took into consideration the fact that the deceased left behind a 10-year-old girl.

10. The submission that the 10 years' multiplier according to the appellants was therefore void and lacked merit as people who are unemployed have gone to the extent of working beyond 70 years.

11. The respondent on the question of whether the trial court took into consideration the awards under the Law Reform Act the Fatal Accident Act relied on the authority of **KEMFRO AFRICA LTD AND ANOTHER VS LUBIA & ANOTHER (1987) KLR** and submitted that the trial court was in all fours with the above authority. In other words, the appellants wanted the trial court or this court for that matter to engage in ***"mathematical deductions."***

12. The respondent urged this court to dismiss the appeal with costs.

ANALYSIS AND DETERMINATION.

13. The court has perused the entire record of appeal as well as the submissions by the parties herein and the related cited and attached authorities.

14. The central legal point raised by the respondent which I find is of first importance is whether the appellants appeal runs afoul **Order 42 (1), (2) of the Civil Procedure Rules and by extension section 79B of the Civil Procedure Act** as submitted by the respondent.

15. **Section 79B** places special emphasise on the decree as on the face of it the court can summarily determine the appeal. It goes on to state that;

> ***"Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily."*** (underlining mine)

16. **Order 42 rule 1 and 2** states as hereunder.

> **"42 (1)** ***Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.***
>
> ***(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.***
>
> **42, Rule 2.** ***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 time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed."***

17. Looking at the record of appeal dated 22nd April 2021 as well as the supplementary record of appeal dated 11th June 2021 the court is unable to find both certified copy of the judgement and or more importantly the decree in which the appellants are appealing against.

18. The court has also perused the lower court records and does not find any of the two documents. What decree are the appellants appealing against.? The above rules are clear and very important so that the courts could tell just by looking at the decree what an appellant is appealing against. The wording therein is mandatory and obligatory on any appellant.

19. Sub rule 2 thereof grants an opportunity to the appellant to request the court to file one in the event that it is inadvertently left out. This is for a good measure as sometimes for whatever reasons a party omits to include the decree together with the memorandum of appeal.

20. By granting an appellant a second chance, the drafters in my view were so clear of the imperativeness of the decree or the order. In the absence of it on record the appeal becomes voidable.

21. There is no evidence that the appellant extracted the decree nor made such request to the court to include though belatedly. In fact, there is nothing in opposition in respect to this ground by the appellants. Whether they took it into consideration or not the court cannot understand.

22. Again, this cannot be cured by the Oxygen Rules or the famous **Article 159 of the Constitution** as it is a document that must accompany any appeal. It is in my view not a procedural technicality especially at the level when the matter has reached a trial stage like this one.

23. In the premises, this court need not venture into the other grounds raised by the appellants as they shall not be of much significance any in determining this appeal.

24. For non-compliance with **Order 42 (1), (2)** above this appeal is hereby struck out with costs to the respondent.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 14TH DAY OF DECEMBER 2021.

H .K. CHEMITEI.

JUDGE.