



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIVASHA

CORAM: R. MWONGO, J.

CIVIL APPEAL NO. 90 OF 2015

JEREMIAH AND BROTHERS CONTRACTORS.....1ST APPELLANT

BENSON WANJAU KAHU.....2ND APPELLANT

VERSUS

SIMON NJOROGE MAINA.....RESPONDENT

(Being an appeal from the judgment of the Honorable S Muchungi (R.M) delivered on the 4th September, 2015 in Naivasha CM 691 of 2013)

JUDGMENT

Background

1. The appellants challenge the quantum of damages awarded in the lower court. The appellant raises the following issues:

- a. That the trial magistrate erred in law and fact by awarding manifestly excessive damages of Kshs. 250,000/= for soft tissue injuries; and
- b. Whether the trial court erred in not considering the appellants' submissions of quantum;
- c. That the award goes against the grain of conventional awards for cases with similar injuries

2. In the lower court, the parties recorded a consent on liability in the ratio of 90:10 in favour of the plaintiff against the defendants. On that basis the trial court made an award as follows:

General damages	-	Kshs. 250,000/=
Less 10% Contribution	-	Kshs <u>25,000/=</u>
	-	Kshs. 125,000/=
Special damages	-	Kshs <u>107,653/=</u>
Total		Kshs 232,653/=

3. The respondent in his submissions raised an issue he considers to be of a jurisdictional nature: namely, that the fact that the appellant did not extract a decree or order and include it in the record of appeal renders the appeal incompetent. He cited the cases of **Chege v Suleiman [1988] eKLR** and **Nancy Wamuyu Gichobi v Jane Wawira Gichobi Civil Appeal No 15 of 2013** where the courts determined that the absence of a decree renders an appeal fatally defective.

4. In **Chege v Suleiman** the Court of Appeal held:

“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.

5. In the Supreme Court it was held in **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.”

6. The Civil Procedure Act provides as follows in **Section 65(1)(b)**:

“(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;.....”

7. Order 42 Rule 2 of the Civil Procedure Rules provides that:

“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.”

8. However, **section 2** of the **Civil Procedure Act** defines “decree” and, in my view, resolves the question as to whether a decree must be filed with the appeal. It provides as follows:

“decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include— (a) any adjudication from which an appeal lies as an appeal from an order; or (b) any order of dismissal for default: Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;

Thus, it is clear that under statute, the use of the word “decree” is in reference to an appeal, also includes a judgment.

9. Likewise, a judge is required to ensure that before s/he allows an appeal to go for hearing, s/he must be satisfied that the documents accompanying it include a judgment or decree. This is provided in **Order 42, Rule 13(4)(f)** of the **Civil Procedure Rules, 2010** that states:

“(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:

10. Thus, for purposes of an appeal, a judgment is equated to a decree, as one of the requisite documents that should be availed. In **Danson Muriithi Ayub v Evanson Mithamo Muroko [2015] eKLR** the court dealt with the issue of a decree stating:

“The respondent in his submissions gave the definition of a decree to include a judgment which is true but the act clearly

specifies that the definition of a decree includes judgment but only for “purposes of appeal” and not for purposes of execution, Order 22 of the Civil Procedure Rules provides ways by which a judgment is reduced to a decree for purposes of execution”

11. In light of the foregoing, I am satisfied that the judgment annexed to the memorandum of appeal in this case is sufficient to enable the appeal to be properly heard. The judgment clearly states the amounts of the awards of damages made by the trial court and no doubt arises thereon. Accordingly, the respondent’s argument on incompetence of the appeal fails.

Award of general damages

12. I now deal with the award of general damages which was challenged, liability having been resolved and the same having been apportioned by consent.

13. The duty of the court in a first appeal was well stated in **Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123** in the following terms:

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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 this 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” (Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).

14. With the above principles in mind, I must take the caution, whilst subjecting the evidence herein to re-appraisal, that this court did not have the opportunity of seeing and hearing the witnesses first hand. Further, that it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

15. The plaintiff’s injuries were described in the report 22nd August 2013 by Dr. Theophilus Wangata. The injuries were: laceration to the fronto-parietal region of the scalp leaving a 10x8cm scar; laceration to the pinna of the right ear leaving a 5cm scar; friction burns to the right flank leaving a 10cm scar; and blunt trauma to the right shoulder.

16. For these, the plaintiff had sought 500,000/- in the trial court, relying on **Habiba Abdi Mohamed v Peter Maleve [2002]eKLR** and **Vincent Cheruiyot Rono v Mombasa Maize Millers Ltd [2006]eKLR**. Habiba Abdi’s case does not indicate the injuries suffered, but in **Vincent Chruiyot’s** case the injuries were: deep cut in the face; multiple pain on both legs arms and shoulders; abrasion to right lower chin; backache and chest pain; painful right shoulder.

17. The defendant proposed an award of 60,000/- relying on **Pamela Ombiyo Okinda v Kenya Bus Services Ltd** (uncited), and **Samuel Mburu Ngáari & Others v Wangiki Wangare & Another [2014]eKLR**.

18. The trial court clearly, and properly in my view, evaluated the authorities presented, compared the injuries and then made an award concluding:

“The injuries are not minor even though they may be classified as soft tissue in nature. I...note that the plaintiff was not awarded any permanent disability apart from mentioning that he is at risk of developing osteoarthritis of the right shoulder”.

19. On appeal the appellant the appellant relied on the following cases:

- **George Mugo & Another v AKM (Minor suing through Next Friend and mother of AKM)[2014]eKLR** where the court reduced an award from 300,000/- to 90,000/- for blunt injuries to left shoulder, blunt chest injury, bruises of left wrist region and blunt injury to left arm.

-**George Kinyanjui T/A Climax Coaches & Anor v Hussein Mahad Kuyale [2016]eKLR** where the court reviewed a soft tissue injuries award from 650,000/- to 109,890/- after noting that the award included loss of molars which the court was not satisfied were injuries sustained in the accident.

-**Ndungu Dennis v Ann Wangari Ndirangu & Another [2018]eKLR** where the court reduced an award to 100,000/- for soft tissue injuries to lower right leg and back.

20. Having carefully evaluated and compared the injuries sustained in the authorities, I am satisfied that the trial court properly evaluated and compared the injuries. I also note that some of the injuries in the present case resulted in cuts that left scars and were not mere blunt trauma. To that extent, I agree with the trial court that they are more grave than those reflected in the authorities cited by the appellant.

Disposition and Administrative directions

21. All in all, I am not persuaded that the trial court’s award was inordinately high or that wrong principles were applied. I affirm the trial

court's award, and hereby dismiss the appeal with costs.

22. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams video-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

23. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

24. Orders accordingly.

Dated and Delivered in Nairobi by videoconference this 8th Day of October 2020

RICHARD MWONGO

JUDGE

Attendance list at delivery:

1. No representation for Kairu McCourt for the Appellant

2. Ms Matutu for the Respondent

3. Court Clerk.....