REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL APPEAL NO. 8 OF 2016

BENJAMIN MWANGI.....APPELLANT

VERSUS

DAVID NDEMA MBASU.....RESPONDENT

(Being an Appeal from the Ruling in Kitui Principal Magistrate's Court

Civil Suit No. 735 of 2006 by A. G. Kibiru P M on 21/06/11)

J U D G M E N T

1. **David Ndema Mbasu,** the Respondent, was in an ox-cart on the **22nd** day of **May, 2004** when motor-vehicle Registration **No. KAM 233R Toyota Matatu Hiace** owned by **Josphat Mwangi Kariuki** but was being driven by **Benjamin Mwangi,** the Appellant, collided with it hence knocking down the Respondent. As a result he suffered injuries. He blamed the Appellant and his Co-Defendant of negligence and sought to be compensated. The Defendants failed to enter appearance and/or file a defence therefore an interlocutory Judgment was entered against the Appellant and his Co-Defendant jointly and severally. The matter proceeded to formal proof. Judgment was entered in favour of the Respondent. Costs were assessed and a Decree and Certificate of Costs were issued which was followed by execution.

2. On the **9th** day of **March, 2011** the Appellant filed an application seeking an unconditional leave to defend the suit. The application was premised on grounds that the Judgment obtained was irregular as there was no service of summons and plaint. The application was opposed. It was contended that service was proper.

3. The learned trial Magistrate considered the application and declined to disturb the Judgment and consequential orders hence dismissed it.

4. Aggrieved by the decision of the Court, the Appellant appealed on grounds that: Reasons advanced for setting aside the ex-parte Judgment were not considered; the draft defence that was annexed was not considered; triable issues raised were not considered; and that the learned Magistrate was openly biased against the Appellant, he considered extrinsic matters and as a result he fettered his discretion to act judiciously.

5. The Appeal was canvassed by way of written submissions.

6. It was urged on behalf of the Appellant that the Judgment was irregular as he only came to learn of the suit during attachment of his motor-vehicle, an argument that was not considered by the Court. That the averment of the Process Server that he went to an undisclosed place in **Gatanga Division** in **Thika District** and was shown the Appellant by a stranger named **Maina** was not proper service.

7. That the trial Court failed to consider triable issues raised in the draft defence. On the issue of irregular default Judgment the Appellant relied on **Mombasa Civil Appeal Number 6 of 2015, James Kanyiita Nderitu & Another vs. Marios Philotas Ghikas & Another (2016) eKLR (Coram: Makhandia, Ouko & M'inoti, JJ.A)** the Court of Appeal stated thus:

> ***"If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex de bito justitiae. Such a judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process."***

8. The Respondent on his part submitted that the Ruling appealed against is not included in the Record of Appeal, an omission that has left both the Respondent and the Court in the dark as to what the Appellant's Appeal is all about. That this rendered the Appeal incompetent.

9. On the merits of the Appeal it was urged that the Appellant denied that his residence was not in **Gatanga Division** of **Murang'a County** but in **Ithanga Division** of the same County and had a rented premises in **Thika Town.** That the Appellant failed to produce evidence to prove the allegations therefore the Court was correct in upholding the Process Server's affidavit as the Appellant did not seek to have the Process Server cross examined. To emphasis this fact he relied on **Order 5 Rule 16** of the **Criminal Procedure Rules 2010,** and the case of **National Bank of Kenya Limited vs. Ndzai Katona Jonathan HCCC No. 775 of 2002** where it was held that where the Defendant denied service and the Plaintiff affirms it, the normal way of determining such an issue would have been for the Process Server to have been cross examined on his Affidavit of Service. Unfortunately, no party requested for such cross examination.

10. That the alleged bias and non-consideration of triable issues by the Magistrate was not proved.

11. I have re-considered what transpired in the Lower Court in order to come up with my own conclusions.

12. It is urged that failure to include the Ruling appealed from was fatal to the Appellant's case. In the case of **Floris Pierro & Another vs. Giancarho Falasconi (As the Administrator of the Estate of Satuzza Billoti alias Mei Santuzzi (2014) eKLR** it was stated thus:

> ***"An appeal that fails to include the extracted order and or decree appealed from is incurable and the only recourse available is to strike it out, as the order or decree appealed from is a primary document in terms of Rule 87(1)(h) of the Courts Rules and must be part and parcel of the record of appeal."***

13. **Order 42 Rule 13(4)** of the **Civil Procedure Rules (Rules)** provide thus:

> ***"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;***
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> ***(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)."***

14. The Judge is duty bound to ensure that necessary documents provided by the Rule are served on either party. This must be done before directions are given for hearing of the matter. What is applicable in the instant case is the Order/Ruling that prompted the Appellant to appeal. A perusal of the Record of Appeal shows the inclusion of a Ruling found at **Page 86.** However, after reading the submissions of both Counsels it is apparent that it is not the impugned Ruling. The Ruling that was not included was relevant such that its omission was fatal.

15. The main contention herein is that the service of summons to enter appearance and Plaint were irregular. It was averred in the Affidavit of Service that service was personal as the Appellant was pointed out by his neighbor whose name was given. Natural justice would require a party be heard but where the individual disregards judicial process then he cannot fault the trial Court. This was a case where the allegation of the Process Server should have been disapproved but no evidence to the contrary was adduced. In the circumstances the trial Magistrate could not be alleged to have been biased.

16. Without going into many details, it is apparent that the Appeal is incompetent and as a result I hereby strike it out with costs.

17. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **21st** day of **November, 2018.**

L. N. MUTENDE

JUDGE