



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NO. E328 OF 2023

CLIMAX COACHES LIMITED.....1ST
APPELLANT

JOSEPH KAGUKU MBIRI.....2ND
APPELLANT

VERSUS

ISAIAH OKOTH OGOLLA.....
RESPONDENT

{(Being an Appeal against the Judgment and Decree of the Chief Magistrate's Court at Molo (Hon. B. R. Kipyegon-PM) delivered on 26/10/2023 in CMCC NO. E254 of 2022.)}

JUDGEMENT

Grounds of Appeal

1. This appeal challenges the said Honourable magistrate's Judgment by which the Respondent was awarded Kshs. 250,000/= in general damages which the Appellants complain to be inordinately high and excessive in the circumstances of the case. Aggrieved by that decision, they lodged this Appeal vide Memorandum of Appeal

dated 21/11/2023 on grounds that the court has condensed into three as hereunder:

- 1) **That the learned magistrate erred in law and fact by awarding the Respondent a sum of Kshs. 250, 000 general damages that is inordinately high and excessive in the circumstances.**
- 2) **That the learned magistrate erred in law by failing to consider applicable legal principles guiding award of general damages.**

And

- 3) **That the learned trial magistrate erred in law and fact by making the determination on quantum of general damages against the weight of evidence.**

2. The Appellants want the Appeal to be allowed; the trial magistrate's Judgment on quantum of general damages set aside and substituted a fresh award and that the costs of the Appeal be borne by the Respondent.

Brief Background to the appeal.

3. The Respondent sued the Appellants, jointly and severally, in the lower court for *inter alia* general and special damages over a road traffic accident allegedly

involving the Appellants' motor vehicle registration number KDA 200 L in which he was travelling and another motor vehicle registration number KBD 119 P/ZC 9124. In a resulting collision between the two vehicles the Respondent attributed to negligent driving of the Appellants' vehicle, the Respondent suffered bodily injuries that provoked the suit.

4. Proceedings of the lower court don't form part of the record and so any evidence tendered by the parties is unavailable for perusal.
5. In entering Judgement for the Respondent on the claim for general damages, the learned trial magistrate referred to case law he thought to be comparable to the case before him and granted the sum of Kshs. 250,000/=.

Guiding Principles

6. It is trite that the appellate court has the duty of re-assessing the evidence and reaching its own conclusions on matters of fact and law. The court will only interfere with the trial court's findings if relevant factors were not taken into account or irrelevant factors were considered or the trial court otherwise misdirected itself. (see case

law in Selle vs Associated Boat Company [1968] EA 123 and Ocean Freight Shipping Co. Ltd vs Oakdale Commodities Ltd (1997) eKLR. The Court of Appeal for East Africa in Peters vs Sunday Post Limited [1958] EA 424 underscored the same principles delivering itself thus:

- “i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;**
- ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and**
- iii. 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.”**

7. The Respondent opposes the Appeal through his Advocates' submissions. He first attacks the Appellants' Record of Appeal for missing out the following

documents he thinks are crucial to the determination of the Appeal.;

(a) The Decree of the lower court;

(b) The proceedings recorded before the lower court;

And

(c) The Respondent's submissions before the magistrate.

8. The Respondent submits that omission of the documents offends **Order 42 Rules 13(4) of the Civil Procedure Rules 2010**, rendering the Appeal incompetent. By dint of judicial determinations in **Kakamega Election Petition Appeal No. 3 of 2018 Elvis Anyimbo Sichenga vs Orange Democratic Movement & 4 Others (20160 eKLR and Transmara Sugar Company Limited vs James Omondi Obudho (2020) eKLR** where the appealed Decree was omitted from the Record of Appeal, Counsel urge the court to strike out this Appeal with costs for incompleteness of the record.
9. The Appellants have not put in submissions.
10. Guided by the Supreme Court's judicial determination in **Supreme Court of Kenya Case No. 15 of 2014**

(Bwana vs Sylvano Buko Bonaya & 2 Others and Law Society of Kenya vs Centre for Human Rights & Democracy & 12 Others Supreme Court of Kenya No. 4 of 2014 cited and relied upon by Counsel, I am urged to strike out the Appeal.

11. Regarding the alleged defect in the Record of Appeal, the Appellants do not dispute the claim that the stated contents are missing therefrom. As rightly stated by the Respondent, contents of the Record of Appeal are provided for under **Order 42 Rule 13 (4)** of the **Civil Procedure Rules 2010** 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;**
- 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.”

12. Superior Courts have on numerous occasions addressed situations such as obtain herein where the Record of Appeal is incomplete. The Supreme Court in Law Society of Kenya vs Centre for Human Rights and Democracy & Others (Petition No. 14 of 2013) [2014] KESC 29 (KLR) held;

“[38]The Petition of Appeal on the other hand is a statement of grievance, an appeal cause against the judgment of a lower Court. 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.

[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”.

13. Pursuant to **Order 42 Rule 13(4) of the Civil Procedure Rules 2010** a court may dispense with some documents being part of the Record, but the lower court’s Judgment and the Decree flowing therefrom are among essential contents of a Record of Appeal, without which the Appeal will not be decided.

14. I am further guided by the Supreme Court’s decision in **Mwicigi and 14 others vs Independent Electoral and Boundaries Commission and 5 Others [2016] KESC 2 (KLR)** where it is stated:-

“[65]. This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so clearly intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

[66]. Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159 (2) (d) of the Constitution, which proclaims that, “ courts and tribunals shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities”. This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the Courts.”

15. Notes of the trial court recorded at the hearing of the suit or part thereof alongside the other stated documents are missing from the Record of Appeal herein. These are crucial documents without which this court may not properly determine the Appeal, even though part of the records including the lower court's Judgement are available. On this ground alone, I would strike out the Appeal.
16. On the merits, I have perused the record and considered the Respondent's submissions in this Appeal. The Appellants contend *inter alia* that assessment of general

damages was not done according to the applicable principles. On the contrary, the trial court properly guided itself, making reference to the Court of Appeal's decision in **Southern Engineering Company Limited vs Musingi Mutia (1985) KLR 730**. The superior court observed in that decision that assessment of damages is a matter of discretion which is exercised judicially according to the peculiar circumstances of each case guided by among other factors, the range of awards in comparable cases and the incidence of inflation.

17. The trial court therefore lawfully and properly exercised its discretion in assessing general damages for the soft tissue injuries the Respondent sustained .
18. In the result, this appeal also lacks merit and is dismissed with costs to the Respondent.

J. M. NANG'EA, JUDGE.

Judgement Dated, Signed and Delivered virtually this 2nd day of March, 2026.

In the presence of;-

The Appellants' advocate, Ms Kagira for Ms Nekesa.

The Respondent's advocate, Ms Sitati.

The Court Assistant, Jeniffer.

J. M. NANG'EA, JUDGE.

ORIGINAL