



**Omar v Katar & another (Appeal E012 of 2020)
[2023] KEELRC 996 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 996 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E012 OF 2020**

**AK NZEI, J
APRIL 20, 2023**

BETWEEN

SALIM MRAMBA OMAR APPELLANT

AND

OMAR KATAR 1ST RESPONDENT

SWABRA KATAR 2ND RESPONDENT

*(Being an Appeal against the judgment of the CM – Hon. Francis Kyambia
delivered on 16/12/2020 ^{at Mombasa in the ELR-CM Case No. 598/2019})*

JUDGMENT

1. The appeal before me was instituted vide a Memorandum of Appeal dated 21st December, 2020 and filed in Court on even date; and the appeal is shown to be against Mombasa Chief Magistrate’s Court Judgment delivered on 16th December, 2020 in the said Court’s Employment Case No. 598 of 2019 (Salim Mramba Omar –vs- Omar Katar & Swabra Katar). It is a first appeal.
2. The Appellant filed a Record of Appeal on 20th June, 2022 and on 28th September 2022, Counsel for the Appellant told the Court that the Record of Appeal filed in Court and served on the Respondent was complete. Rule 8(4) of the Employment and Labour Relations Court (Procedure) Rules 2016 provides:

“A memorandum of appeal shall be accompanied by copies of the proceedings, all documentary evidence relied on and a copy of the Judgment from the proceedings of the matter being appealed against.

Provided that where copies of proceedings are not filed with the memorandum of appeal, the appellant shall file such copies as soon as possible and within a reasonable time.”



3. The Appellant’s Memorandum of Appeal was not accompanied by a copy of the trial Court’s proceedings and the other documents referred to in Rule 8(4) when it was filed on 21st December, 2020. When the Appellant eventually filed a record of appeal on 20th June, 2022, he did not include a copy of the trial Court’s proceedings. Proceedings of a trial Court are pivotal in an appeal as the evidence presented before the trial Court is what a first appellate Court is required to re-examine and to re-evaluate vis-à-vis the Judgment appealed against before arriving at its own Judgment on whether or not to allow the appeal. This duty of a first appellate Court was stated in *Selle & Another –vs- Associated Motor Boat Co. Ltd & Another* [1968] EA 1231

4. The duty was also restated in *Mursal & Another v Munene* (Suing as the legal administrators of Dalphine Kanini Manesa) (Civil Appeal No. E20 of 2021) [2022] eKLR as follows:-

“ A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the Judgment and arrive at its own independent Judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and to make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand ...

A first appellate court has jurisdiction to reverse or affirm the findings of a trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for review, both on questions of fact and law ... A first appellate court is the last court of fact ordinarily and therefore a litigant is entitled to a full, fair and independent consideration of the evidence at the appellate stage. Anything less is unjust ...”

5. The summary of the foregoing is that an appellate Court, and particularly a first appellate Court, cannot consider and determine an appeal in the absence of the trial Court’s proceedings, which procedurally and ordinarily include the evidence adduced before the trial Court. An appeal presented for determination without a copy of the trial Court’s proceedings is not a competent appeal, and can only be struck off.

6. It is my finding that the Appellant’s appeal herein is incompetent, and it is hereby struck off with no order as to costs.

7. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20TH APRIL 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....for Appellant

..... for Respondent

