



REPUBLIC OF KENYA



**Zoa Taka Limited & another v Kyalo (Civil Appeal E031 of 2022)
[2025] KEHC 1606 (KLR) (Civ) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1606 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E031 OF 2022

REA OUGO, J

FEBRUARY 27, 2025

BETWEEN

ZOA TAKA LIMITED 1ST APPELLANT

JAMES GITAU KURIA 2ND APPELLANT

AND

DENNIS KYALO RESPONDENT

*(Being an appeal from the judgment delivered on 17th March 2021 Hon
A.N Makau (MS) in Nairobi CMCC Civil Suit No 11532 OF 2018)*

JUDGMENT

1. The background to this appeal was that the respondent sustained severe bodily injuries on 29/5/2017 while cycling as a result of the appellant's driver being negligent causing his vehicle to ram into the respondent. The respondent claimed to have fractured the right lateral malleolus (ankle fracture) and his right leg was also swollen, painful and tender. Liability was determined at 100% against the appellant and the same has not been challenged in this appeal.
2. The trial court made the following award in damages:
 - a. General damages Kshs 850,000/-
 - b. Special damages Kshs 3,550/-
3. The appellant dissatisfied the with the award of damages filed this instant appeal on the following grounds:
 1. That the learned Honourable Magistrate erred in fact and law in disregarding the appellants evidence on record being the second medical-legal report prepared by Dr Wambugu which



clearly controverted the first medical-legal report produced by the plaintiff from Kinoo Medical Clinic produced for the plaintiff herein when the same had been duly filed in court and not challenged.

2. That the learned honourable Magistrate erred in law and fact in disregarding the appellant's evidence that the respondent suffered soft tissue injuries without incapacitation and proceeded to erroneously award general damages for pain and suffering on the basis of injuries of the nature of a fracture with a 5% incapacitation.
 3. That the learned Honourable Magistrate erred in law and fact in awarding excessive general damages for pain and suffering to the tune of Kshs 850,000/-.
 4. That the learned honourable magistrate erred in law and fact when she expressly stated in her judgment that she found no further medical evidence on the plaintiff when the aforementioned medical report had been duly filed and therefore on record.
 5. That the learned honourable magistrate erred in law and fact by awarding damages against the weight of the evidence thereby awarding excessive general damages.
4. The appellants submit that the decree being filed by way of a supplementary record of appeal, and with the leave of the Deputy Registrar, the court should consider the appeal. They cited the case of *Autoports Freight Terminal Limited v Kenya Ports Authority* [2019] eKLR where the Court of Appeal stated:

“Turning to the applications to strike out the appeal on account of the omission to include a certified decree, and for failure to seek the deputy Registrar's leave to file the supplementary record, it is not in dispute that when the record of appeal was filed on 19th June 2018, a certified copy of the decree was omitted. It is also not in dispute that upon being alerted through the motion to strike out that the decree had not been certified, the respondent immediately obtained a certified copy and filed it by way of a supplementary record of appeal. In so doing, it overlooked obtaining leave of the deputy Registrar to file the supplementary record.

In determining the issue, the question for us to consider is whether the respondent's inadvertence was fatal to the appeal. In the case of *Truphosa Cheredi Mudembei & another vs John K. Malembi* (supra) this Court stated;

“As regards, the omission to include a certified copy of the decree, this had been admitted. Much as we do not condone sloppiness on the part of parties, we are of the view that this is an omission that is not fatal. The document can be introduced through a supplementary record of appeal.”

Clearly there was an omission in including the certified decree, which omission cannot be considered fatal. This is because a certified decree can be introduced, as counsel for the applicant has appreciated, through a supplementary record. But the applicant's main complaint is that in order to introduce it after the lapse of fifteen days, the respondent ought to have sought leave of the deputy Registrar...”

5. They also cited the case of *Systems Reliability Limited & Another v Yaya Towers Limited* [2018] eKLR.
6. The appellants faulted the trial court for failing to examine the medical report by Dr G.K. Mwaura and Dr Wambugu. The report of the former was that the respondent sustained a fracture of the right



lateral malleolus with a 5% permanent degree of incapacity, while the latter was of the view that the respondent only sustained soft tissue injuries.

7. The appellants submit that an award in the range of Kshs 50,000-200,000/- was sufficient compensation. They faulted the trial court for making an award of Kshs 850,000/- without demonstrating the cases with comparable injuries, which she relied upon. The appellant cited the cases of Nelson Ngugi Njoki v Laurel Investments Limited [2016] eKLR where an award of Kshs 60,000/- was made for soft tissue injuries.
8. In *Nashon Chege v Stephen Makabila & Another* [2018] eKLR and in *Alumasa v Mutiso & another* (Civil Appeal E024 of 2020) [2022] KECH 3085 (KLR) (4 May 2022) (Judgment) Kshs 150,000/- and Kshs 300,000/- were awarded respectively.
9. The respondent in his submissions, argue that failure to attach a decree to the record of appeal was fatal. They argue that the law requires the judgment and decree appealed to be part of the record. They cited section 65 (1) (b) of the *Civil Procedure Act* and Order 42 Rule 13(4) of the Civil Procedure Rules to support its position. The Supreme Court in *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* [2015] eKLR the court observed that if the requisite bundle of documents is omitted, the appeal is incompetent and defective for failing the requirements of the law. According to the court, an incompetent appeal divests a court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues. In this appeal, no certified copy of the decree was attached as mandatorily required.
10. The respondent submitted that it is evident that his injuries were severe and grievous. He sustained soft tissue injuries and a fracture of the right lateral malleolus (ankle fracture) and the degree of permanent incapacity was assessed at 5%. In *Jecinta Wanjiku v Samson Mwangi* [2006] eKLR the plaintiff was awarded Kshs 1,000,000/- for comparable injuries (fracture acetabular rim right hip, fracture of the right knee and post traumatic osteoarthritis right knee);
and in *Mwaura Muiruri v Suera Flowers Limited & Another* [2014] the court awarded Kshs 1,450,000/- for comminuted fractures of the right humerus upper and lower thirds of the tibia and compound double fractures of the right leg upper and lower 1/3 tibia fibula. The respondent submit that the trial magistrate was not only reasonable but also fair.

Analysis And Determination

11. Before delving into the issue raised by the grounds of the appeal, the respondent has argued that the appeal is incompetent as the decree was not filed within the record of appeal. However, in this case, the appellant filed a supplementary record of appeal where he included the decree appealed from with the leave of court. The Court of Appeal in *Teachers Service Commission v Kamau & 19 others* [2023] KECA 990 (KLR) faced with a similar issue observed as follows:

“15. In the case of *Richard Ncharpi Leiyagu vs Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR, this Court pronounced itself on the issue of an incomplete record of appeal as follows:

“Whereas we underscore the importance of a party filling a complete Record of Appeal, we are of the view that the respondents too could have filed the documents that were left out; but more importantly the respondents could have applied to strike out the appeal. Raising the issue at the hearing cannot aid the respondents because nowadays pendulums have swung and the courts



have shifted towards addressing substantive justice and no longer worship at the altar of technicalities.”

16. In our considered opinion, the omission of the decree from the record of appeal does not, of itself, obstruct the course of justice. Secondly, the said defect is curable, if an appropriate application was made and was thereafter canvassed successfully.”
12. The Court of Appeal in *Intercounties Importers and Exporters v Teleposta Pension Scheme Registered Trustees & 5 others* [2021] KECA 44 (KLR) the applicant sought the striking out this appeal on grounds that the record of appeal as filed was incomplete, the court in dismissing the application directed that a supplementary record of appeal be filed to bring on board any relevant documents that may have been omitted from the record which may assist in the just and fair disposal of the appeal. Therefore, the appellant having filed the supplementary record with the decree with the leave of court, I am constrained to find that the appeal is proper before the court.
13. I now turn to consider the merits of the appeal. The only issue raised by the appeal is whether damages awarded by the trial court was excessive. The Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR set out the parameters under which an appellate court will interfere with an award in general damages when it held:

‘An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...’
14. The respondent after the accident went to Athi River Shalom Community Hospital. The discharge summary reveals that he suffered a fracture of the lateral malleolus and soft tissue injuries. The report by Dr Mwaura confirms that he sustained soft tissue injuries and a fracture of the right lateral malleolus. He also assessed a permanent degree of incapacity at 5%.
15. According to Dr Wambugu the respondent had soft tissue injuries as no x-rays were taken then. Dr Wambugu further noted that if he did suffer any fracture, then it has fully recovered. The discharge summary reveals that they did an x-ray of the tibia fibula and foot.
16. The argument by the appellant that the respondent only sustained soft tissue injuries is unmerited in the face of the discharge summary which indicates that the respondent sustained a fracture. Therefore, the report by Dr Mwaura captures an accurate picture of the respondent’s injuries.
17. The appellant cited authorities with less severe injuries while the respondent relied on authorities with awards for more severe authorities.
18. In *Savanna International Ltd v Muka* (Civil Appeal 31 of 2018) [2022] KEHC 675 (KLR) (14 June 2022) (Judgment) the claimant sustained fracture medial malleolus of the left ankle joint and soft tissue injuries and was awarded Kshs. 400,000/=. The court in *Menengai Oil Refineries Limited v Bundi* [2024] KEHC 11122 (KLR) awarded Kshs 500,000/- where the plaintiff sustained a left medial malleolus fracture with disability assessed at 20%. In view of the recent cases with comparable injuries I find that the award of Kshs 850,000/- was excessive. It is my considered view that the award of Kshs 500,000/- for pain and suffering is commensurate with the injuries suffered by the Respondent.
19. In the end, I find that the appeal is meritorious and therefore set aside the award of the trial magistrate on general damages and substitute it with an award of Kshs 500,000/-. The appellant shall have the costs of the appeal.



DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF FEBRUARY 2025.

R. OUGO

JUDGE

In the presence of:

Miss Keiro - For the Appellant

Miss Kisiangani - For the Respondent

Wilkister - C/A

