



**Kanyaa v Ndeto (Civil Appeal E89 of 2021)
[2024] KEHC 3607 (KLR) (26 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3607 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E89 OF 2021**

**MW MUIGAI, J
MARCH 26, 2024**

BETWEEN

RAPHAEL MISIKA KANYAA APPELLANT

AND

SHEDRACK MUTUA NDETO RESPONDENT

*(Being and appeal from the Judgment and decree of the Honourable B.
Bartoo (P.M) delivered on 27th May 2021 in Machakos CMCC 62 OF 2020)*

JUDGMENT

Plaint

1. The cause of action is said to have arisen on 22.12.2019 along Machakos-Kangundo road near Massmart when the Plaintiff was riding his motor bike registration number KMEZ 123 when the Defendant, his servant or agent drove Tuktuk registration number KTWB 317Y so negligently that he joined the road abruptly and took a U turn thereby knocking down the Plaintiff causing him to sustain severe bodily injuries.
2. The injuries were particularized as Blunt head injury, blunt neck injury, blunt chest injury, blunt injury left knee, cut wound (stitched), blunt injury to abdomen, blunt injury left hand, blunt injury right leg and blunt injury left femur. The Plaintiff contended that the Defendant was vicariously liable for the accident and sought special damages of Kshs 56,200, general damages for pain, suffering & loss of amenities, costs of the suit and interest from the court.
3. The Defendant entered appearance and filed a defence on 3.06.2020 and denied the contents of the Plaintiff and contended that the accident was caused by the negligence of the Plaintiff.
4. The Plaintiff filed a reply to defence on 5.06.2020 wherein he reiterated the contents of the Plaintiff.



Hearing

5. At the hearing, the Plaintiff called 2 witnesses.
6. Shedrack Ndetostated that he was in an accident near Massmart which involved a Tuktuk and a motorcycle. The Tuktuk was KTWB 317Y belonging to Raphael, the defendant. He sustained injuries. He reported to Machakos Police station. He blamed the Defendant for driving towards Kangundo, the Tuktuk was off the road facing the left side. He said the Tuktuk just emerged and went to the left lane and did a U turn. He was on the right way and the driver could have warned him for him to pass first. He said he did not have any blame.
7. He produced the following documents;
 - a. Copy of records
 - b. Treatment card
 - c. Police abstract
 - d. P3 form
 - e. Demand letter
8. Upon cross examination, he said that he was on the right way and was at 20km/h. He said he did not expect a U turn and he was hit in the middle of the road. He went back to his business. He said he had healed but still experiences pain at the cut area.
9. In re-examination he said he tried to reverse but he was hit.
10. PW2 was the doctor, he produced the medical report and said that the patient was on painkillers and his abdomen was stitched. He complained of chest pain and had soft tissue injuries.
11. The defendant did not call any witness.

Trial Court Judgment

12. The Trial court delivered its judgment on 27.5.2021 and found that the Defendant was 100% liable for the accident as the evidence of the Plaintiff remained unchallenged. The defendant caused the accident as he did not give way and failed to give due regard to other road users.
13. The Trial court awarded general damages of Kshs 320,000 and general damages of Kshs 56,200.

The Appeal

14. Dissatisfied by this judgment, the Appellant filed a memorandum of Appeal on 11.06.2021 seeking to have the judgment set aside and/or varied and costs of the Appeal.
15. The appeal is founded on the grounds that;
 - a. The Learned Trial Magistrate erred in law and in fact when she held that the Appellant did not file submissions yet the same were filed on time and also sent to her personal email hence failed to consider the Appellant's submissions and authorities on points of law and facts on damages payable as quantum to the Respondent.
 - b. The learned Magistrate erred in law and in fact in awarding excessive and underserved general damages to the Respondent.



- c. The learned Trial Magistrate’s decision was unjust, against the weight of evidence and was based in misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 - d. The learned Trial Magistrate erred in law and in fact in unduly disregarding the submissions and judicial authorities cited by the Appellant and by instead relying on the authorities cited by the Respondent which were excessive in the circumstances.
16. The Appeal was canvassed by way of written submissions.

Submissions

17. The Appellant in its submissions dated 8.08.2023 and on the issue of quantum contended that the injuries in the P3 form, the medical report and the Complaint were the same, soft tissue injuries therefore the award of Kshs 320,000 was high and an award of Kshs 100,000 would be sufficient. Reliance was placed on the cases of *Jeniffer Mathenge VS Patrick Muriuki Maina* [2020] e KLR, *Ndungu Dennis vs Ann Ndirangu & Another* [2018] eKLR, *HB(Minor suing through mother & next friend DKM) Jasper Nchonga Magari & Anther* [2021] eKLR and *Eva Karemi & Sothers vs Koskei Kieng & Another* [2020] eKLR .
18. The Respondent filed submissions on 05.10.2023 and contended that he sustained soft tissue injuries and no other medical report was availed to counter this evidence thus the same remained unchallenged. It was submitted that the appellant had failed to satisfy the grounds for interfering with the award of general damages. The cases of *Catholic Diocese of Kisumu vs Sophia Achieng Tete* [2004] eKLR and *Jabane vs Olenja*, Civil Appeal no 2 of 1986 Kisumu were relied upon.
19. As regards competency of the Appeal, the Respondent relied on Order 42 Rule 13 (4) and submitted that the Appeal should be struck out as the decree was not in the record of appeal. Reliance was also placed on the case of *Rachael Wambui Nganga & Another vs Rabab Wairimu Kamau* [2020] eKLR.

Determination

20. The Court has considered the memorandum of Appeal, the lower court record and the submissions on record and find these to be the issues for determination;
- a. Whether failure to attach a decree in the record of appeal is fatal
 - b. Whether the award of damages should be interfered with
 - c. Who should be awarded costs of the Appeal.
21. This being an appeal and this Court having not had the chance to see the witnesses testify and see their demeanor, the duty to reevaluate and re analyze the evidence is placed upon it. This court is guided by the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”



22. Accordingly, I have re-evaluated the evidence that was presented before the lower court. The apportionment of liability, special damages and costs is not contested.
23. The first issue that has mainly been raised by the Respondent on whether failure to file a decree together with the record of appeal is fatal, the same is provided for under Order 42 Rule 2 of the [Civil Procedure Rules](#) provides as follows:-

“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.”

Order 42, Rule 13(4)(f) of the [Civil Procedure Rules](#), 2010 provides;

- “(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:
- 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).”

24. The fatality was discussed by the court of Appeal in the case [Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others](#) [2015] eKLR where the court rendered itself as follows;

[40] In the case of [Law Society of Kenya v. Centre for Human Rights and Democracy & 12 Others](#) Sup. Ct. No. 4 of 2014, this Court held that:

“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.”



- (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. In the Nigerian Supreme Court case, *Ocheja Emmanuel Dangana v Hon. Atai Aidoko Aliusman & 4 Others*, SC. 11/2012, Judge Bode Rhodes-Vivour, JSC highlighted pertinent issues of jurisdiction:

“A court is competent, that is to say, it has jurisdiction when–

1. it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another, and
 1. the subject matter of the case is within its jurisdiction, and no feature in the case prevents the court from exercising its jurisdiction; and
 2. the case comes before the court initiated by the (due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction” (emphasis supplied).

- (42) The foregoing passage sets proper context for the Appellate Court’s Ruling in the instant matter (at page 14) when it properly concluded that, due to non-compliance with the mandatory provisions of Rule 87(1), it lacked jurisdiction to entertain the appeal.

25. The Court of Appeal in *Chege v Suleiman* [1988] eKLR firmly stated that the issue of failure to attach the decree is a jurisdictional point, and held thus:

“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.”



26. I have perused the record of Appeal and no decree has been attached. Therefore the appeal can be rendered fatally defective and incompetent and should be and is hereby struck out.
27. In lieu of the forgoing, the second issue cannot be determined by this Court. The Appeal is thus dismissed with costs to the Respondent.

It is ordered.

JUDGMENT DELIVERED, DATED & SIGNED IN OPEN COURT IN MACHAKOS ON 7TH MARCH, 2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE

IN THE PRESENCE/ABSENCE OF:

MR. KIMONDO - FOR THE APPELLANT

MR. A. K. MUTUA - FOR THE RESPONDENT

GEOFFREY/PATRICK - COURT ASSISTANT(S)

(JUDGE BEREAVED)

JUDGMENT RELEASED TO REGISTRY ON 26/3/2024.

M.W.MUIGAI

JUDGE

