



Mwangi v Kinya & another ((Suing As The Legal Representative of the Estate of Martin Mwenda Muturi)) (Civil Appeal E009 of 2023) [2024] KEHC 6541 (KLR) (28 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6541 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E009 OF 2023**

LW GITARI, J

MAY 28, 2024

BETWEEN

NICHOLAS KIBE MWANGI APPELLANT

AND

EMMANUEL KINYA AND MORRIS MUTEEMBEI RESPONDENT

**(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MARTIN
MWENDA MUTURI)**

JUDGMENT

1. The respondents in this appeal moved the trial court vide a plaint dated 1st October 2019 and filed on 3rd October 2019 seeking orders of General damages under the Law Reform Act and Fatal Accidents Act, special damages as paragraph 7 above, costs of the suit, interest at court rates on (a) (b) and (c) above and any other or better relief that the court deems fit to grant.
2. The respondents pleaded that at all material times relevant to the suit the Appellant was the registered and/or beneficial owner of motor vehicle registration no KAM 129 D Toyota corona and was the driver of the said motor vehicle on 10th February 2019. That on or about 10th February 2019 Martin Mwenda Muturi (deceased) was riding motor cycle registration No. KMCH 673 L Dayun along the Nanyuki-Meru road at Mail inane when the Appellant so negligently, recklessly and carelessly drove, controlled and/or managed motor vehicle registration No. KAM 129D that he caused the said motor vehicle to veer off its lane and violently hit the motor cycle being ridden by the deceased who sustained fatal injuries which led to his death.
3. The respondents enumerated the particulars of negligence on the part of the Appellant as driving at an excessive speed in the circumstances, driving carelessly on a public road, jay driving, driving on the wrong lane, failing to keep any or proper look out or to have sufficient regard to other motorist, failing to exercise any reasonable control of the said motor vehicle he was driving as to ensure the safety of the



- other road users and especially the deceased, failing to exercise proper control of the said motor vehicle in the said area, failing to stop, slow down, swerve or in other way so manage the said motor vehicle as to avoid veering off his lane and violently hit the deceased, driving a defective motor vehicle, causing the death of the deceased and driving while under the influence of alcohol and or any other drug substance.
4. The respondents states that they relied on the doctrine of Res Ipsa Loquitor where applicable.
 5. The respondents aver that the deceased prior to his abrupt and premature demise enjoyed good health and was leading a happy vibrant life and the said life was abruptly brought to a sudden and premature end and as a result his estate has suffered expense, loss and damage.
 6. The respondents further aver that the claim is brought under the Fatal Accident Act Cap 32 Laws of Kenya and the Law Reform Act Cap 26 Laws of Kenya. The respondents particularized the particulars to the Law Reform Act and the Fatal Accident Act.
 7. The respondents pleaded that they have instituted the suit as the legal representative of the estate of the deceased, that the deceased was aged 33 years old at the time of his untimely death and was in good health. That the deceased is survived by a wife Emmaculate Kinya , a son aged 6 years Prince Karani Mwenda and princess Gatwiri Mwenda aged 2 years.
 8. The respondent further pleaded that her husband was at the prime age working as the motor cycle rider and a farmer earning Kshs.30,000/= per month and was the sole bread winner for his family before his untimely and premature death which has caused his estate to suffer loss and damages under both the Law Reform Act and Fatal Accidents Act.
 9. The respondents particularized the particulars of special damages, death certificate Kshs 150,post mortem Kshs 5,000/,Mortuary charges Kshs 2,000 ,reasonable burial expenses Kshs 25,000/=and Legal fees for letters of administration in Meru HCC No. 2019 at kshs.60,000/= the total special damages cost is 92,150/=
 10. The Appellant filed a defence dated 14th November 2019 wherein he denied the respondents claim. The Appellant pleaded that he denied the claim that he was the registered and or beneficial owner of motor vehicle registration number KAM 129 D Toyota Corona and was the driver of the said motor vehicle on 10th February 2019 and the respondents were put to strict proof.
 11. The Appellant pleaded that they denied the occurrence in paragraph 4 of the plaint and the particulars of negligence enumerated therein and the respondent was put to strict proof. Further in the alternative and without prejudice to the foregoing the occurrence was to be proved by the respondent that the accident was not caused by any negligence on his part and the same was caused due to the negligence of the deceased.
 12. The appellant was aggrieved by the judgment and filed this appeal on the following grounds:-
 1. The learned Magistrate erred in law and fact when she failed to consider the appellant's evidence on points of law and facts on finding the appellant fully liable for the accident which is the subject matter of this suit.
 2. The learned magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 3. The Learned Magistrate erred in fact and in Law in apportioning liability at 100 % in favour of the Respondent as against the Appellants, Kshs 50,000/= for pain & suffering Kshs.200,000 /



= for loss of expectation of life, and Kshs 2,500,000/= for loss of dependency, which amount was exorbitantly high in the circumstances.

4. The learned Magistrate erred in fact and in Law in finding that the Respondent was entitled to Kshs. 2,750,000/= under the Fatal Accident Act as the same was too high in view of the evidence tendered and thus the sum awarded was too high and the same is not justified.
 5. The Learned Magistrate erred in fact and in Law in holding that the Respondent had proved his case on a balance of probabilities which finding was against the height of the evidence on record.
 6. The learned magistrate erred in Law and in fact when he failed to consider the appellant's evidence on points of law and facts with regard to quantum based on the injuries sustained by the respondent.
 7. The learned magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of Law and has occasioned a miscarriage of justice.
 8. The learned Trial Magistrates erred in Law and in fact in failing to pay regard to submissions and decisions filed alongside the defendant's submission that were guiding in the amount of quantum that is appropriate and applicable on similar injuries as the case he was deciding.
 9. The learned magistrate erred in law and in fact in unduly disregarding the Appellant's evidence and facts produced in assessing liability and quantum to the respondent.
13. The appellant proposed that the appeal be allowed, that the whole judgement of Hon. E. Tsimonjero (SRM) in Meru CMCC No.278 of 2019 be set aside, that the costs of the Appeal be awarded to the Appellant and that such further orders the honourable court may deem fit to grant.
 14. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 7th July 2023 through the firm of Kimondo Gachoka & Co. Advocates while the respondent filed theirs dated 25th July 2023 through the firm of Mutegi Mugambi & Co advocates.

Appellant's Submissions.

15. The Appellant submitted on a brief background of the appeal and submitted that the appeal can be summed up to an issue of quantum and liability.
16. The Appellant pointed out that the police abstract blamed the rider for the accident and hence no liability should have attached to the Defendants in the matter. That the rider was squarely blamed for the accident.
17. It is the Appellant's submission that they rely on the proceedings as set out in the lower court case therein that liability should be vacated from the respondents. The Appellant relied in the cases of Karugi & Another v Kabiya & 3 others (1983) eKLR, Benter Atieno Obonyo v Anne Nganga & another (2021)eKLR.
18. The Appellant submitted that there was absolutely no evidence adduced as to the circumstances that would otherwise render the Appellants liable for the accident
19. The Appellant submitted that it is trite law that assessment of quantum of damages in a claim for general damages is a discretionary exercise. However, the law has set dimensions for an exercise of discretion and must be exercised judicially with wise circumspect and upon some legal principles.



20. It is the Appellant's submission that the said dimensions are vital such that when the trial court has violated a legal principle (s), the appellate court will interfere with the exercise of discretion by the trial court. That the discretion in assessing the amount of general damages payable will be disturbed if the trial court;
 - i. Took into account an irrelevant factor or
 - ii. Left out of account a relevant factor or short of this
 - iii. The amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages
21. The Appellant submitted that it is also trite law that awards must be within consistent limits and court awards for damages must be made taking into account comparable injuries or similar injuries and awards. The Appellant relied on the cases of Denshire Muteti Wambua vs Kenya power & Lighting Co. Ltd (2013)eKLR and Kigaraari vs Aya (1982-88 1KAR 768.
22. The Appellant submitted that the deceased was not assured of a longer life if the accident had not claimed his life. That the approach adopted by the lower court be disturbed as the court did not consider the vagaries and vicissitudes of life. The Appellant relied in the case of Nairobi HCCC No. 4580 of 1987 Christine Shoi & another vs East African Cement Co. Ltd & another and Leonard Wanganga Ngara & 2 others v Joyce Warurii Ndung'u & 2 others (2020) eKLR.
23. The Appellant submitted that the award of 2,500,000 is too high in the circumstances and ought to be considerably reduced given the rightful calculations.
24. The Appellant further submitted that the court is justified in disturbing the award and he relied in the case of Kemfro Africa Limited T/A Meru Express Services & Gathongo Kanini v A.M Lubia & Olive Lubia (1982-88) 1 kar 727.
25. It is the Appellant's submission that comparable awards should be considered. The Appellant relied on the case of Dora Mwawandu Samuel(Suing on her behalf and on behalf of the estate of Samuel Muweliani Jumamosi-deceased v Shabir M. Hassan (2021)Eklr and Moses Wetangula & Another v Eunice Tikika Rengetiang(2018)Eklr.
26. The Appellant submitted that a global sum of Ksh 700,000 will be in order considering the age of the deceased in comparison to those in the authorities cited herein.
27. The Appellant further submitted that it is trite law that costs follow the event. The appellant prayed for costs of the Appeal be based on Section 27 (1) of the *Civil Procedure Act*.
28. It is the Appellant's submission that the court upholds the appeal, and disturbs the judgement of the trial court.

Respondent's Submissions.

29. The respondents submitted that the appeal is incomplete for lacking requisite documents filed in the lower court file. The respondents relied on Order 42 Rule 13 (4) of the Civil Procedure Rules.
30. The respondents submitted that the appellant has filed a record of appeal and has left out the following documents the plaintiff's submission, judgement of the lower court being appealed against, decree and an order allowing them leave to file the appeal out of time.
31. The respondents cited the case of Bwana Mohammed Bwana vs Buko Bonaya & 2 others (2015) eKLR, Law Society vs Centre for Human Rights and Democracy & others, Supreme court petition No.14 of



- 2013 and in the case of Chuka Civil Appeal No. E001 of 2020 Annita Kaari Njeru vs CIC General Insurance Ltd(unreported).
32. The respondents submitted that from the foregoing the appeal is incompetent and is therefore defective and it ought to be struck out with cost.
 33. The respondents submitted on ground I that the Appellant did not call any evidence to rebut the evidence of the respondent who called PW1 and PW2 and produced PEXHS 1-8 in support of their case.
 34. It is the respondents' submission that the appellants action of filing only a defence and failing to call any evidence to rebut their case meant that their case on liability was unchallenged and uncontested. The respondents cited the cases of North end Trading Company Limited(Carrying on the business under the registered name Kenya Refuse Handlers Limited vs City Council of Nairobi (2019)eKLR, Motex knitwear Limited vs Gopitex Knitwear Mills Limited Nairobi (milimani) HCCC no. 834 of 2002 and Singh Bahra and Another vs Raju Govindji HCCC no.548 of 1998.
 35. The respondent submitted that the Appellant cannot fault the trial magistrate for holding him fully liable for the accident since their case was unchallenged.
 36. The respondent submitted that on ground 2 and 3 they rely on their submissions on ground one above and state that the magistrate had no other option as the Appellant failed to give any evidence.
 37. The respondent submitted on pain and suffering that the court did not err in awarding Kshs 50,000 for pain and suffering. The respondent relied on the case of Samuel Mutitu Nderitu (Suing on his own behalf and as legal representative of the estate of Gladys Muringi Nderitu Deceased vs Erastus Matahi Mugambi (2021)eKLR.
 38. The respondents submitted that the court by awarding Kshs.200,000 was reasonable and within range and they are guided by the cases of Philip Sumba Julaga (Suing as administrator and personal representative of the estate of James Julaga Sumba (2019)KLR and Moses Akumba and another vs Hellen Kavis Thogo(2017)eKLR.
 39. The respondents submitted that from the finding in the above authorities they urged the court not to disturb as it was not inordinately high.
 40. It is the respondents' submission that the trial magistrate awarded 2,500,000 and they relied in the case of AINU SHAMISI HAULIERS LIMITED VS MOSES SAKWA & ANOTHER (Suing as the Legwa Representative of Ben Siguda Okatch(deceased) 2021eKLR.
 41. The respondents submitted that the trial magistrate took into consideration the issue of inflation and excised his discretion to award Kshs 2,500,000 for the deceased who died aged 33 years and had 2 children. The respondents relied on the case of Mary Njeri vs Peter Macharia & Another (2016) eKLR.
 42. The respondents further submitted that the award of damages is the discretion of the court and the learned trial magistrate used his discretion to award Kshs.2,500,000/= which figure is not ordinarily high. That it is trite law that the appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous.
 43. It is the respondents' submission that the award of Kshs.2,500,000 for a 33 years old compared to an award of Kshs 4,000,000 for a person aged 60 years is not inordinately high.



Analysis and Determination

44. I have perused the record of appeal and the grounds of appeal. I have also considered the submissions made and the authorities cited. This being a first appeal, I am obliged to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusion reached by the learned trial magistrate were justified on the basis of the evidence presented and the law. This was settled in the case of *Selle & another Vs Associated Motor Boat co. Ltd* (1968) EA 123.
45. The issues I find for determination as I can deduce is whether failure to attach the judgement/decree to record of appeal is fatal
46. It was the Respondent's submission that failure by the Appellant to attach a decree to the record of appeal was fatal to his case. A look at the Record of appeal clearly shows that a judgement/Decree has not been attached thereto.
47. 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.”
48. 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).”



49. The Supreme Court of Kenya, in the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* [2015] eKLR held as follows at paragraph 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.”

50. 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.”

Conclusion

51. From the foregoing it is clear that an appeal can be rendered fatally defective in the absence of a judgement/ decree. The Appellant herein has not attached a copy of the decree it follows therefore that his appeal is incompetent and should be and is hereby struck out with costs. The court need not consider the other issues in the appeal as there is no competent appeal before it. The appeal to this court from the lower court is against the decree and orders. There is no competent appeal before me. The appeal is struck out with costs.

DATED, SIGNED AND DELIVERED AT MERU THIS 28TH DAY OF MAY 2024.

L.W. GITARI

JUDGE

28/5/2024

Parties -Absent

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

