Makori & another v Wanyoike (Civil Appeal E289 of 2024) [2024] KEHC 7631 (KLR) (Civ) (25 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7631 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E289 OF 2024

JM OMIDO, J

JUNE 25, 2024

BETWEEN

BEATRICE KWAMBOKA MAKORI .... 1ST APPELLANT

JOHN MWANGI .... 2ND APPELLANT

AND

HANNAH WANJIKU WANYOIKE .... RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. C.A. Okumu Resident Magistrate/Adjudicator delivered on 26th February, 2024 in Milimani Small Claims Court SCC No. E642 of 2023)

RULING

1. This appeal emanates from the judgement and decree of Hon. C.A. Okumu Resident Magistrate/Adjudicator delivered on 26th February, 2024 in Milimani Small Claims Court SCC No. E642 of 2023.

2. The grounds of appeal presented by the Appellants vide the Memorandum of Appeal dated 26th February, 2024 upon which they seek to upset the judgement and decree of the lower court are as follows:

    i. The Learned Magistrate in the matter herein delivered judgement on 2nd February, 2024 in favour of the Respondent herein thus contrary to the law and the facts availing before the Honourable Court.

    ii. The Learned Magistrate erred in fact and law by entertaining the said suit, when it lacked jurisdiction as the damages sought herein are general in nature and/or damages at large and as such, are incapable of being quantified in monetary value with exact precision and specificity

before the hearing and determination of the suit as envisaged under the provisions of Section 24(d) and Section 12(1)(d) of the *Small Claims Court Act* No. 2 of 2016.

iii. The Learned Magistrate erred in fact and in law in finding by not holding the Appellants (the Respondents?) 100% liability, (sic) when the Respondent failed to prove his case against the Appellants.

iv. The Learned Magistrate erred in fact and law by failing to take into account the evidence by the Appellants and the occurrence book which provided for the circumstances of the accident that blamed the Respondent herein.

v. The Learned Magistrate erred in fact and law in finding that the Respondent was entitled to general damages of Ksh.250,000/- that were too high in view of the fact that compared (sic) to the injuries suffered by the Respondent.

vi. The Learned Magistrate erred in law and fact by failing to appreciate the long-established principle of stare decisis, precedent law thus bringing law into confusion (sic) and thereby deriving an erroneous finding/conclusion, in particular relating to damages.

vii. The Learned Magistrate erred in law and fact in failing to appreciate that the Respondent's pleadings, submissions and the evidence tendered in support thereof was incapable of sustaining the awards for general, future medical expenses and special damages.

viii. The Learned Magistrate erred in law and fact in entering judgement in favour of the Respondent against the Appellant in spite of the Respondent's miserable failure to establish her case more especially on quantum.

3. The Court directed that the appeal proceeds by way of written submissions and gave the parties herein time lines for filing their respective submissions

4. I have perused the record of appeal, the submissions by the two sides and the record in its entirety. I notice from the record of appeal that although in their Memorandum of Appeal the Appellants listed the grounds of appeal reproduced above, the only grounds that was addressed in the submissions filed are grounds (v), (vi) and (vii) above. The three grounds generally challenge the award of general damages as being inordinately high.

5. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of *Sielle v Associated Motor Boat Co. Ltd* [1969] EA. 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.

6. However, as the Appellants' submissions on the appeal are limited to quantum, my application of Section 78 of the *Civil Procedure Act* will be limited to the issue of quantum.

7. In the matter before the trial court, the Respondent (the Claimant in the lower court) produced and relied on a medical report that indicated that she sustained soft tissue injuries to the chest, back and pelvis. She complained of pain on her trunk and that she could not walk without external support and that she was not able to work.

8. The Respondent proposed an award in compensation of Ksh.400,000/- for the injuries while the Appellants opined that Ksh.40,000/- would adequately compensate the Respondent.

9. In reaching the challenged award, the learned Magistrate/Adjudicator rendered herself as follows:

> "19. The Claimant submitted on Ksh.400,000/- whereas the Respondent submitted on Ksh.40,000/-.
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> 20. In *Anas Baraza v Jesca Olala Kanani & another*, Bungoma HCCA No. 62 of 2008, where the Plaintiff had sustained painful shoulder joint, painful neck, pain on the chest and right foot and the award on appeal was reduced from Ksh.380,000/- to Ksh.250,000/-.
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> 21. In *Wairimu Njui v Baker & another*, Nrb HCCC No. 2116 of 1990 where the Plaintiff sustained head injury and soft tissue injuries to the trunk and right foot and was awarded a sum of Ksh.220,000/-.
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> 22. The Court finds that an award of Ksh.250,000/- is sufficient general damages."

10. The issue for this court to determine in the instant appeal is whether the award of Ksh.250,000/- for the injuries that the Respondent sustained was inordinately high to warrant this court to interfere with the same.

11. On the issue of quantum, I take guidance from the case of *Kemfro Africa Ltd & Another v A M Lubia & Another* [1982-1988] KAR, where the Court of Appeal observed:

> "An appellate court will not disturb an award of 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"

12. There is also the case of *Kigaraari v Aya* [1982-1988] 1KAR 768 where the court held as follows:

> "Damages must be within the limits set out in decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees."

13. In *Charles Oriwo Odeyo v Apollo Justus Andabwa & Another* [2017] eKLR the court held:

> "On the issue of damages, it is settled that the award of damages is within the discretion of the trial court and the Appellate court would only interfere on the particular grounds. These grounds were and are;
>
> (a) that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded, or
>
> (b) that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at wrong decision. (See *Butler v Butler* [1984] KLR 225).
>
> The assessment of damages in personal injury cases by court is guided by the following principles: -
>
> 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

2) The award should be commensurable with the injuries sustained.

3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

5) The awards should not be inordinately low or high (See *Boniface Waiti & another v Michael Kariuki Kamau* (2007) eKLR." (Emphasis mine).

14. The jurisprudence provided by the decisions above is that although the award of damages is within the discretion of the trial court, one of the grounds on which an appellate court can interfere with the assessment of the trial court is where the award is inordinately high.

15. I note from the judgement that the Learned Adjudicator was guided by previous awards for similar or comparable injuries in reaching her decision. There is nothing presented by the Appellants, in the circumstances, to show that she applied her discretion in a manner that was injudicious as she was well chaperoned by decided cases. I am not in the premises persuaded that the appeal has merit.

16. Before I wind up, let me say that I cannot help noticing that the record of appeal as filed is wanting. Order 42 Rule 13 of the *Civil Procedure Rules* makes provisions on the documents that must mandatorily form part of the record of appeal, which include the judgement, order or decree appealed from. I note that the instant record of appeal does not contain the judgement of the lower court and the decree emanating therefrom. Even the lower court's proceedings were not included in the record.

17. The questions that then call for answers are; how is an appeal that fails to include the judgement and decree appealed from to be treated? Is there a valid appeal in such a situation?

18. The answers to these questions are to be found, happily, in a number of previous judicial pronouncements of superior courts.

19. In the case of *Lucas Otieno Masaye v Lucia Olewe Kidi* [2022] eKLR Ombwayo, J. stated thus:

> " 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 decree has not been attached thereto.
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> Order 42 Rule 2 of the *Civil Procedure Rules* provides as follows:
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> > "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)."

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."

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." (Note the emphasis)

20. In conclusion, Ombwayo, J. held as follows:

> " From the foregoing it is clear that an appeal can be rendered fatally defective in the absence of a 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 to the Respondent."

21. The omission of a judgement and decree from the record of appeal was also discussed in the case of *Emmanuel Ngade Nyoka v Kitheka Mutisya Ngata* [2017] eKLR, where the Court of Appeal considered the issued and stated:

> " Starting with the first issue, it is true that the record of appeal before the first appellate court at the time of filing did not contain the decree appealed from. This omission brought into focus the provisions of Order 42 Rule 2 of the *Civil Procedure Rules* which provides inter alia:
>
> > "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 time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the *act* until such certified copy is filed."
>
> However, the respondent did not take advantage of this provision to subsequently file a certified copy of the decree so that the appeal proceeded to hearing in the absence of the decree appealed from."

22. In the case of *Floris Pierro & another v Giancarlo Falasconi (as the administrator of the estate of Santuzza Billioti alias Mei Santuzza)* [2014] eKLR the Court of Appeal made the following observations:

> " It is common ground that the appellants filed their respective records of appeal on 10th April, 2012. It is also common ground that in the said records, the appellants failed or omitted to incorporate certified copies of the order appealed against as required by Rule 87(1)(h) of this *Court's Rules*. An order appealed from is a primary document in terms of the aforesaid rule which must form part and parcel of the record of appeal. The order embodies the Court's decision. If it is not included, the Court of Appeal will be at a loss in determining what the High Court determined. It cannot be the business of this Court to tooth-comb the judgment or ruling so as to decipher the decision of the court below. That decision must be embodied in the order and or decree. Accordingly failure to include the court order or decree would render the record of the appeal to be fatally defective and liable to be struck out."

23. Lastly, in the case of *James Murage Nguyu v RNN (Minor suing through next of friend RNK) & another* [2021] eKLR the High Court (L.W. Gitari, J.) stated thus:

> " There cannot be any valid appeal where the decree and the Judgment against which the appeal is preferred has not been filed in the record of appeal. In *Ndegwa Kamau t/a Sideview Garage v Isika Kalumbo* [2016] eKLR and *Joseph Kamau Ndung'u v Peter Njuguna Kamau* [2014] eKLR Justice Ngaah struck out the appeals because the decrees that were being appealed from had not been annexed in the respective records of appeal. In the matters the records of appeal had been filed but the decrees were not."

24. The above decisions guide me in reaching the finding that as the decree and judgement from the lower court do not form part of the record of appeal, the record of appeal filed herein is fatally defective.

25. For the reasons stated above, I reach the persuasion that the appeal herein is devoid of merit. I proceed to dismiss it with costs to the Respondent.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 25TH DAY OF JUNE, 2024.

JOE M. OMIDO

JUDGE

For Appellants: No Appearance.

For Respondent: No Appearance.

Court Assistant: Ms. Njoroge.