



REPUBLIC OF KENYA



**Mburu v Omido (Civil Appeal E268 of 2024)
[2025] KEHC 8280 (KLR) (Civ) (11 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8280 (KLR)

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

CIVIL

CIVIL APPEAL E268 OF 2024

JM NANG'EA, J

JUNE 11, 2025

BETWEEN

JONATHAN MWANGI MBURU APPELLANT

AND

ROSEMARY ANDISI OMIDO RESPONDENT

*(Being an appeal from Judgement and Decree of the Honourable M.L.W
Gitari (RM) delivered on 9th December, 2023 in SCCC No. 4422 of 2023)*

JUDGMENT

1. The claim before the lower Court was instituted over injuries the Respondent suffered in a road traffic accident which occurred on 22nd June, 2023 whilst the Respondent was a pedestrian along Ruaka-Ndenderu road, Nairobi. The Appellant's motor vehicle registration number KCS 185 L allegedly knocked down the Respondent owing to careless or negligent driving thereby occasioning her bodily injuries.
2. The Appellant traversed the allegation of negligent driving and injury attributed to him, putting the Respondent to strict proof.
- 3.

The matter was heard in full , and the lower Court delivered judgment in favour of the Respondent in the following terms;

Liability –Apportioned equally between the parties in the ration of 50%:50%.

General damages for pain & suffering -Kshs. 300,000.

Future medical costs - Ksh. 131,000.



Special damages of - Kshs. 3,550.

Total: Ksh. 434, 550, subject to apportionment of liability as determined.

The costs of the claim and interest at court rates from the date of delivery of the judgment.

4. The Appellant was dissatisfied with the outcome and preferred this appeal vide Memorandum of Appeal dated 22nd February , 2024 on 5 grounds that can be summarized into 1 thus:

That the learned trial magistrate erred in law and fact in assessing manifestly excessive general damages relative to the Respondent's injuries while overlooking the Appellant's submissions and relevant guiding legal principles.

5. The Appellant therefore prays that the Appeal be allowed and the judgment of the Trial Court set aside and damages re-assessed. The Appellant also seeks the costs of the Appeal and in the lower court action.
6. Learned Counsel for the parties filed written submissions citing various decided cases in support of their respective positions. Being an appeal from the Small Claims Court's decision, this court is mandated to consider only issues of law arising , by dint of section 38 of the Small Claims Courts Act.
7. This being a first appeal, this court cannot interfere with factual findings of the Trial Court unless it is shown that the court considered irrelevant factors or disregarded relevant factors. (see *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123 }. The Court of Appeal for East Africa in *Peters vs Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:

- “i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
- iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”

8. I have carefully gone through the Record of Appeal as well the original record of the trial court availed to this court . I have neither seen a certified copy of the lower court's Judgement nor typed Proceedings before that court. The Decree emanating from the impugned judgement is not also included in the Record of Appeal.

9. Contents of the Record of Appeal are provided for under Order 42 Rule 13 (4) of the Civil Procedure Rules 2010 thus:-

“....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.”
10. Superior Courts have on numerous occasions addressed situations such as obtain herein where the Record of Appeal is incomplete.
11. The Supreme Court in *Law Society of Kenya versus Centre for Human Rights and Democracy & Others* (Petion No. 14 of 2013) [2014] KESC 29 (KLR) held;
- “(38) ...The Petition of Appeal on the other hand is a statement of grievance, an appeal cause against the judgment of a lower Court. 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.
- (39) If an intending appellant were to present the Court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the Court to determine ‘the appeal’ on the basis of these two, such an appeal would be incomplete and hence incompetent. Indeed, this is the gist of Rule 33 (1) of the Supreme Court Rules”.
12. Pursuant to Order 42 Rule 13(4) of the Civil Procedure Rules 2010 a Court may dispense with some documents being part of the Record, but the lower court’s judgment and the decree flowing therefrom are among essential contents of a Record of Appeal, without which the Appeal will not be decided.
13. I am further guided by the Supreme Court decision in *Mwigi and 14 others vs Independent Electoral and Boundaries Commission and 5 Others* [2016] KESC 2 (KLR) where it is stated that:-
- “[65]. This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so clearly intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.
- [66]. Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159 (2) (d) of *the Constitution*, which proclaims that, courts and tribunals shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities”. This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the Courts.”



Determination.

14. The omission is not just a procedural technicality excusable under Article 159 (2) (d) of *the constitution*. It is a matter of substance and it therefore follows that there is no competent Appeal for consideration. I need not in the circumstances determine the merits of the Appeal. Instead, the Appeal is hereby struck out with costs to the Respondent.
15. Judgement accordingly.

J. M. NANG'EA, JUDGE

JUDGEMENT DELIVERED VIRTUALLY THIS 11TH DAY OF JUNE 2025

In The Presence Of:

The Appellant's advocate, Mr Kabita for Ms Nanjira.

The Respondent's advocate, Mr Chahilu.

The Court Assistant, Jeniffer.

J. M. NANG'EA, JUDGE.

