



**Tabasamu Enterprises & another v Wangare (Civil Appeal
E153 of 2022) [2025] KEHC 8189 (KLR) (9 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8189 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E153 OF 2022
JM NANG'EA, J
JUNE 9, 2025**

BETWEEN

TABASAMU ENTERPRISES 1ST APPELLANT

TIMOTHY OTENYO 2ND APPELLANT

AND

PETER MWANGI WANGARE RESPONDENT

(Being an appeal from Judgement and Decree of the Chief Magistrate's Court at Nakuru (Hon. RUTH KEFA CHEBISIO (PM) delivered on 19/10/2022 in Nakuru CMCC NO. 313 OF 2017)

JUDGMENT

Grounds of Appeal and reliefs sought

1. By a Memorandum of Appeal dated 05/11/2022 and filed on 08/11/2022, the Appellants fault the said trial court's Judgment on grounds that may be summarized as hereunder:
 1. That the Learned Magistrate erred in law and fact in awarding the Respondent exorbitant general and special damages in the circumstances of the case considering the injuries the latter sustained.
 2. That the Learned Magistrate erred in law and fact in determining the issue of liability against the weight of evidence adduced.And
 3. That the Learned Magistrate erred in law and fact by failing to consider the appellants' submissions on quantum of damages awardable in the case.
2. The Appellants therefore seek the following orders;



- i) That the Appeal herein be allowed.
- ii) That the Judgement of the lower court delivered on 19/10/2022 be set aside and substituted with proper finding/judgement. (sic)
- iii) The Respondent to pay costs in the lower court and in this particular appeal.

Analysis and determination

3. Only learned Counsel for the Respondent filed submissions which I have perused together with the trial court's record. In the impugned judgment, the trial magistrate found the appellants, the defendants in the suit before the lower court, 90% liable for the claim with the Respondent, the Claimant, assuming the remainder 10% responsibility. The trial court also awarded the Respondent Kshs. 500,000 and Kshs. 12,150 in general and special damages respectively. The Respondent was further granted the costs of the suit.
4. Based on medical evidence presented before the trial court, the Respondent suffered fracture of the mid shaft right humerus and soft tissue injuries to the right hand, left cheek and left leg. The injuries allegedly arose in a road traffic accident in which the 1st appellant's motor vehicle registration number KAQ 004 Y is said to have lost control owing to negligent steering by the 2nd defendant as beneficial owner and/or driver thereof resulting in personal injuries to the Respondent who was a pedestrian.
5. Counsel for the Respondent submit that the trial court cannot be faulted on its findings on both the issues of liability and quantum of damages assessed and awarded. I am referred to various decided cases in support of Counsel submissions.
6. It is trite law that the appellate court has the duty of re-assessing the evidence adduced before the trial court and reach its own conclusions on matters of fact and law. The court will only interfere with the trial court's findings if relevant factors were not taken into account or irrelevant factors were considered or the trial court otherwise misdirected itself. (see case law in *Selle vs Associated Boat Company* [1968] EA 123 and *Ocean Freight Shipping Co. Ltd vs Oakdale Commodities Ltd* (1997) eKLR. 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.”
7. 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.
8. From the record it is evident that the Appellants made a request for typed proceedings, certified copy of judgment and decree vide letter dated 23rd October, 2023 and it is not shown if the court received



the letter. The Record of Appeal was, however, filed on 4th June, 2024 without the certified typed Proceedings, Judgment and Decree.

9. On 25/11/2024 the Appellants indicated that they wished to file a Supplementary Record of Appeal but were experiencing difficulties because of their frozen bank accounts. The court gave them 7 days to put in the Supplementary Record, and the parties were also directed to file their respective submissions. The Supplementary Record of Appeal expected to contain the lower court's Judgment, Proceedings and Decree had not been filed by the time of writing this judgement. The Appellants have not also filed their submissions as noted hereinabove.
10. 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.”

11. Superior Courts have on numerous occasions addressed situations such as obtain herein where the Record of Appeal is incomplete.
12. The Supreme Court in *Law Society of Kenya vs 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”.

13. 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.



14. 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

15. 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.

J. M. NANG'EA

JUDGE

JUDGEMENT DELIVERED VIRTUALLY THIS 9TH DAY OF JUNE 2025 IN THE PRESENCE OF:

The Appellants' Advocate, Ms Nanjira for Mr Kabita.

The Respondent's Advocate, Ms Obura.

The Court Assistant, Jeniffer

J. M. NANG'EA

JUDGE

