



Onyango v Ndegwa & 2 others (Suing as Administrators of the Estate of Moses Ndegwa Ndungu - Deceased) (Civil Appeal E992 of 2022) [2025] KEHC 11589 (KLR) (Civ) (28 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11589 (KLR)

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

CIVIL

CIVIL APPEAL E992 OF 2022

JM NANG'EA, J

JULY 28, 2025

BETWEEN

JACKSON OMONDI ONYANGO APPELLANT

AND

JOHN NDUNG'U NDEGWA, ESTHER NJAMBI MUGO & WINNIE WAMBUI NJOGU (SUING AS ADMINISTRATORS OF THE ESTATE OF MOSES NDEGWA NDUNGU - DECEASED) RESPONDENT

(Being an appeal from the Judgement of the Chief Magistrate's Court at Nairobi, Milimani Law Courts (Hon. S.N Muchungi (MS) - SRM) delivered on 11th November 2022 in CMCC NO. E989 OF 2022)

JUDGMENT

1. The appellant herein is challenging the above named learned trial Magistrate's judgement in which she granted reliefs for the respondents, who were the plaintiffs in the suit before the lower court , as hereunder:
 - i. Judgement on liability- 100 % in favour of the respondents
 - ii. Damages for pain & suffering under the Law Reform Act- Kshs. 50,000.
 - iii. Damages for loss of expectation of life under the Law Reform Act- Kshs. 200,000.
 - iv. Damages for loss of dependency under the Fatal Accidents Act - Kshs. 2,931,746.40.
 - v. Funeral expenses - Kshs.80,000
 - vi. Grand Total - Kshs.3,769,050,000



2. The respondents were also granted the costs of the suit and interest.
3. The summary of the case before the trial court is that the respondents sued the appellant for general damages, special damages of Kshs. 38,500, the costs of the suit and interest following a road traffic accident that occurred on 13th December 2020 in which the above named Moses Ndegwa Ndung'u ["hereinafter referred to as "the deceased"] died. The appellant and/or his driver was accused of negligently driving motor vehicle registration number KCA 281 J as a result of which it lost control and knocked down the deceased who was a pedestrian along Kangundo Road thereby occasioning him fatal injuries.
4. The appellant and his co-defendant filed a joint defence traversing all the material particulars of the suit putting the respondents, who sued as legal representatives of the deceased's estate, to strict proof of the allegations. In the alternative, they attribute any accident that may be proven to have occurred to negligence on the part of the deceased.
5. The appellant's 12 Grounds of Appeal as stated in the Amended Memorandum of Appeal dated 14th December 2022 may be condensed into two as hereunder:
 - a. That the learned trial magistrate erred in law and fact in finding the Appellants wholly liable against the weight of evidence.
and
 - b. That the learned trial magistrate erred in law and fact by assessing and awarding to the respondents manifestly high sums of damages against the weight of evidence adduced and applicable guiding legal principles.
6. The appellant therefore prays for the judgement of the trial court to be set aside and the quantum of damages re-assessed. The Appellant also wants the Respondents to bear the costs of the appeal.
7. It would appear that only the Respondents filed written submissions vide the court's e-filing platform which I have perused against the record of this appeal.
8. It is trite law that the appellate court can only interfere with the finding and/or award of the trial court if the court misdirects itself on matters of fact and/or law by failing to take relevant factors into account or by considering irrelevant factors and thus arrive at a plainly wrong decision [see the case of Ocean Freight Shipping Co. Ltd v Oakdale Commodities Ltd. [1997] eKLR Civil Appeal No. 198 of 1995]. The appellate court also has the duty of analyzing and re-assessing the evidence on record and reach an independent decision as observed in the case of *Selle v Associated Motor Boat Co.* [1968] EA 123. The Court of Appeal for East Africa in *Peters v 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."



9. I have carefully gone through the Record of Appeal as well as the original record of the trial court availed to this court. I have neither seen a certified copy of the lower court's Judgment nor typed Proceedings before that court. The Decree emanating from the impugned judgement is not also included in the Record of Appeal. Even the original record of the trial court has not been availed for the court's perusal.
10. From the record it is shown that the Appellant made a request for typed proceedings, certified copy of judgment and decree vide letter dated 15th January 2024 but it is not shown if the court received the letter. The Record of Appeal was, however, filed without the certified typed Proceedings, Judgment and Decree.
11. On 22nd April 2024 the Appellant was directed to file a Supplementary Record of Appeal including the missing documents within a given period but there has been no compliance to date. He has not also filed his submissions as noted hereinabove.
12. 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."

13. Superior Courts have on numerous occasions addressed situations such as obtain herein where the Record of Appeal is incomplete.

The Supreme Court in *Law Society of Kenya v Centre for Human Rights and Democracy & Others* [Petition 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".



14. 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.

15. I am further guided by the Supreme Court decision in Mwicigi and 14 others v 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

16. 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.

17. Judgement accordingly.

JUDGEMENT DELIVERED VIRTUALLY THIS 28TH DAY OF JULY, 2025

J. M. NANG'EA

JUDGE.

In the presence of:

The Appellant's Advocate, Mr Kabita

The Respondents' Advocate, Mr Kagura

The Court Assistant, Jeniffer.

