



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Wauyo v Hamisi (Civil Appeal E072 of 2024)
[2025] KEHC 12700 (KLR) (10 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12700 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E072 OF 2024
FN MUCHEMI, J
SEPTEMBER 10, 2025**

BETWEEN

JOHN NYONGESA WAUYO APPELLANT

AND

JOSEPH NGURE HAMISI RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. M. W. Kamau (RM/Adjudicator)
delivered on 28th March 2024 in Thika Small Claims Court SCCC No. E1018 of 2023)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator case SCCC No. E1018 of 2023 in a claim that arose from a road traffic accident whereby the court dismissed the appellant's claim on the grounds that the appellant did not prove his claim on a balance of probabilities.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 4 grounds summarized as follows:-
 - a. The learned adjudicator erred in law and in fact by finding that the appellant had not proved the identity of the person injured by the respondent on 27th July 2023.
 - b. The learned trial magistrate erred in law and in fact by failing to evaluate the entire evidence on record and make a finding that the appellant had proved his case against the respondent on a balance of probabilities and thereby arrived on wrong findings on issues before the court.
 - c. The learned adjudicator erred in law and in fact by deciding on the issues that had neither been raised by the parties on the procedure of obtaining an abstract and the P3 Form.
3. Parties disposed of the appeal by way of written submissions.



The Appellant's Submissions

4. The appellant submits that he proved that he was injured by the respondent on 27th July 2023. Whereas the respondent contended that he had knocked down a madman. No additional eye witness was called by the respondent to corroborate his evidence notwithstanding his concession that he was in the company of another person in the car. The moment the respondent disputed the identity of the victim of the said accident the burden of proof shifted to him, which he failed to discharge.
5. The appellant submits that the police abstract was issued to him as the victim of the said accident and that the medical x-ray records admitted in evidence stated the nature of injuries sustained on the particular material day by the appellant. During cross examination, there was no evidence that his recount of the chronology of events by the appellant was different from the original witness statement.
6. The appellant submits that throughout his witness testimonies there was no doubt that he was the victim of the said accident and the discrepancy mentioned by the learned adjudicator between the documents presented and the oral evidence in court as regards the injuries was not fatal to his case. To support his contentions, the appellant relies on the case of *Kenya Akiba Micro Financing Limited vs Ezekiel Chebii & 14 Others* [2012] eKLR.
7. The appellant submits that he was lawfully walking along Limuru Kwambira road at Kichinjio area near Lake Oil Petrol Station when the suit motor vehicle veered off the road before violently knocking him down. The appellant further submits that under cross examination, there is no evidence that his recount of the chronology of events was different from the original witness statement. He, therefore, argues that he proved his case on a balance of probabilities.
8. Relying on the case of *Ocean Freight Shipping Co. Ltd vs Oakdale Commodities Ltd* (1997) eKLR, the appellant argues that the learned magistrate misdirected herself by failing to take relevant factors into account as well as considering irrelevant factors therefore warranting the intervention of the instant court.
9. The appellant submits that he suffered a fracture of the left radius and fracture of the right distal fibular and proposes that an award of Kshs. 1 million would be sufficient recompense. The appellant relies on the cases of *Lawrence Wairimu Wainyoike & Another vs Joseph Letting* [2021] eKLR where the plaintiff sustained a deep cut wound to the forehead, fracture of the left clavicle, blunt injury to the chest and blunt injury to the shoulder and was awarded Kshs. 800,000/-. In *Charles Mwanja & Another vs Batty Hassan* [2008] eKLR where the plaintiff sustained a bruise on the forehead, wound on the right thumb and left wrist joint, wound on the second right finger, fracture of the right tibia and fibula and wound below the right knee. The court awarded the plaintiff an award of Kshs. 800,000/-. Further in *Nahson Nyabaro Nyandega vs Peter Nyakweba Ombaga* [2021] eKLR where the plaintiff sustained a fracture of the right tibia and cut wound on the right leg and was awarded Kshs. 650,000/- as general damages. In *Board of Trustees of the Anglican Church of Kenya Diocese of Marsabit vs NIA (Suing as the next friend of IAIS) & 3 Others* [2018] eKLR awarded a sum of Kshs. 1 million for injuries comparable to those of the appellant.

The Respondent's Submissions.

10. The respondent submits that the appellant's record of appeal lacks essential documents namely the response to the Statement of Claim, respondent's list of documents and corresponding documents, respondent's list of witnesses, respondent's witness statement, respondent's written submissions, a certified copy of the judgment, decree and typed proceedings. Pursuant to Order 42 Rule 13(4) of the Civil Procedure Rules, the omission of the said documents contravenes the law and thus the court



cannot comprehensively review and re-evaluate the findings of the lower court. Relying on the case of *Bwana vs Bonaya & 2 Others* [2015] KESC 8 KLR, the respondent submits that by failing to file the requisite documents, the appellant has deprived the court of the necessary material to determine the appeal.

11. The respondent submits that the appellant's conduct in prosecuting the appeal demonstrates a lack of diligence and commitment as the memorandum of appeal was filed on 11th April 2024 and the record of appeal was filed on 2nd February 2025, nine months down the line. Despite the extended period, the appellant failed to rectify the deficiencies in the record of appeal and no explanation has been provided for the omission of the critical documents. Thus, the respondent prays that the record of appeal to be struck out in limine for being incomplete and dismiss the appeal in its entirety.
12. The respondent submits that the appellant's case was fraught with inconsistencies regarding the identity of the injured person. The appellant testified that the accident occurred on 27th July 2023 at Kwambira, but his witness statement and police abstract contradicted this indicating that the accident occurred on 28th July 2023 at Kichinjo near Lake Oil Patrol Station. Further, the medical x-ray records produced by the appellant predate the alleged accident by at least a day, as they were dated 26th July 2023 which undermines the credibility of his claim that he was the injured person.
13. The respondent submits that his driver confirmed that an accident occurred on 27th July 2023 but denied that the appellant was involved. He stated that the accident involved an insane person who walked away after being hit. The trial magistrate noted that the absence of supporting medical notes, discrepancies in police documentation and the lack of clarity from the police officer who testified all contributed to doubt regarding the appellant's identity.
14. The respondent submits that the trial court found the respondent's testimony credible particularly in light of the appellant's inconsistent account of the accident and the direction he was heading. The trial magistrate observed that the appellant's claim that he was hit from behind conflicted with his description of the vehicle's general trajectory creating further doubt about his testimony.
15. The respondent submits that the trial magistrate thoroughly evaluated the evidence presented and she noted significant discrepancies in the appellant's evidence including conflicting dates in his testimony, witness statement, police abstract and medical records. The absence of supporting medical treatment notes for the appellant's alleged treatment further weakened his case. Thus, the learned magistrate correctly concluded that the appellant failed to prove his case on a balance of probabilities.
16. The respondent submits that the trial court made remarks on the issue of the procedure for obtaining a police abstract and P3 Form were observations aimed at evaluating the weight of the evidence presented. The learned magistrate noted procedural inconsistencies in the documents presented by the appellant, such as the police abstract being issued before the P3 Form was completed. While the observations highlighted the discrepancies, they did not form the basis of the learned trial magistrate's conclusions on liability.
17. The respondent submits that the trial magistrate correctly evaluated damages in the sum of Kshs. 500,000/- had liability been established. The respondent further submits that the appellant is only entitled to an award of Kshs. 200,000/- if the court finds that liability was established.

Issues for determination

18. The main issues for determination are:-
 - a. Whether the appeal is defective.



- b. If not, whether the appellant proved his case on a balance of probabilities.

The Law

19. The Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of this court under Section 38 of the *Small Claims Court Act*, set out the duty of the second appellate court in the case of *Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited* [2020] eKLR as follows:-

I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

20. In distinguishing between matters of law and fact the Court of Appeal stated in *Kenya Breweries Ltd vs Godfrey Odoyo* [2010] eKLR as follows:-

I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of retrial and facts must be revisited and analysed a fresh. See *Selle and Another vs Associated Motor Boat Company Limited and Others* (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

21. Section 38 of the Act provides:-

A person aggrieved by the decision or an order of the court may appeal against that decision or order to the high Court on matters of law.

22. I have perused the grounds in the memorandum of appeal and noted that the grounds relate primarily to questions of fact. The appellant is aggrieved that the learned adjudicator found that the appellant failed to prove his claim in establishing that he was injured in the accident that occurred on 27th July 2023. The grounds raised by the appellant are on matters of fact which will require this court to scrutinize and re-evaluate the evidence once more. The jurisdiction of this court sitting as an appellate court is founded on the provisions of Section 38 of the *Small Claims Court Act* which provides for appeals matters of law only.

23. The only grounds of appeal I find relevant pursuant to Section 38 are that the record of appeal is defective for being incomplete and that the trial magistrate deliberated on issues not raised by the parties. Order 42 Rule 13(4) of the Civil Procedure Rules provides:-

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 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 (a), (b) and (f).

24. On perusal of the record of appeal, the appellant failed to file the respondent's pleadings and a certified copy of the judgment and the decree. On further perusal of the court record, the appeal was admitted and directions were given by the court for the appeal to be canvassed vide submissions. In any appeal, the respondent is served with the record of appeal before directions for hearing the appeal are given. The respondent has a duty upon perusal of the record to inform the court that the record is incomplete. If this happens to be so, the court gives the appellant a chance to rectify the discrepancy by filing a Supplementary record of appeal. The issue here is why the respondent failed to raise the issue at the right time if the appellant did not notice the discrepancy.

25. It is noted that the lower court record is before this court and contains all the documents missing from the record. It is my considered view that no prejudice was occasioned to the respondent in the hearing and determination of the appeal. This court is guided by the decision in *South Nyanza Sugar Co. Ltd vs Daniel Obara Nyandoro (2010) eKLR* where the court stated:-

In my view, it will amount to miscarriage of justice for this court to strike out the appeal for the reason as advanced by Mr. Ogweno when the appeal had already been admitted and directions taken in the presence of counsel for both parties. In any event, the lower court record is before this court and no prejudice will be occasioned to the respondent by reference to the same. In addition, it will be against the spirit of the overriding objectives of the *Civil Procedure Act* as stated under Section 1A and 1B for this court to summarily reject the appeal for want of decree.

26. Therefore it is my considered view that the appeal herein is not fatally defective for failure to file some of the pleadings.

27. One of the grounds of appeal was that the learned adjudicator dealt with issues that neither parties raised concerning the procedure of obtaining an abstract and P3 Form. I have perused the lower court record and noted that the trial magistrate in finding that the appellant did not prove his case on a balance of probabilities evaluated the evidence and noted fundamental discrepancies in the P3 Form which had no OB reference. The learned adjudicator further stated that the police abstract was issued prior to the filing in of the P3 Form and kept at the station. Despite that evidence, the police officer did not produce the said police abstract before court. The learned adjudicator noted that all these factors put together created doubt as to whether the appellant was the party injured on the material day. It



is noted that the respondent had disputed the identity of the appellant as the injured person during the accident.

28. It is my considered view that the learned adjudicator did not deal with issues that were raised by any of the parties. What the court did was to evaluate the evidence and demonstrated the discrepancies on the identity of the appellant as the injured party in the accident that occurred on 27th July 2023. The appellant has not established the grounds of appeal herein.

29. Accordingly, I find that the appeal lacks merit and it is hereby dismissed with costs to the respondent.

30. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 10TH DAY OF SEPTEMBER 2025.

F. MUCHEMI

JUDGE

