



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwachidete v Mwangumaye (Civil Appeal 93 of 2021)  
[2023] KEHC 2286 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2286 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 93 OF 2021  
F WANGARI, J  
MARCH 17, 2023**

**BETWEEN**

**SULEIMAN MWACHIDETE ..... APPELLANT**

**AND**

**AYANI NASSORO MWANGUMAYE ..... RESPONDENT**

*(Being an appeal from the Judgement of the Senior Resident Magistrate Hon. Sandra Ogot in Msambweni Civil Suit No. 47 of 2020 delivered vide email on 25th June, 2021)*

**JUDGMENT**

1. This is an appeal against the judgement delivered via email by Hon. Sandra Ogot, Senior Resident Magistrate on June 25, 2021. The Appellant being dissatisfied with the said judgement preferred this appeal.
2. Through a Memorandum of Appeal dated July 19, 2021, and filed on July 23, 2021, the Appellant preferred four (4) grounds of appeal in urging this court to set aside the award made in the judgement and have it re-assessed. The grounds relied on are;
  - i. That the learned trial magistrate erred in law and in fact, in holding that the appellant was 100% liable for the accident in the absence of any concrete evidence to demonstrate the same.
  - ii. That the learned trial magistrate erred in law and in fact, and misdirected herself by proceeding on wrong principles of law when assessing damages as awarded to the respondent and failed to apply precedents and proper tenets of the law applicable.
  - iii. That the learned magistrate erred in law and in fact and misdirected herself by awarding a sum in respect of general damages that were inordinately high and



excessive taking into account the injuries sustained by the respondent and in the circumstance occasioned a miscarriage of justice.

- iv. That the learned magistrate erred in law and in fact by failing to adequately evaluate the evidence and the appellant submissions, and thereby arrived at a decision unsustainable in law.
3. The appeal was admitted for hearing on 24/5/2022 and the appellant directed to prepare and serve the Record of Appeal and serve the respondents within 30 days from the date thereof. On 22/6/2022, it was directed that the appeal be canvassed by way of written submissions. The appellant was to file the written submission within 21 days from the date thereof.
4. On 19/1/2023, the parties appeared before me for conformation of compliance with the court's directions. The counsel for the appellant, Mirembe Advocate stated that their Record of Appeal was lost by the courier and he sought a further 21 days to file the Record of Appeal. It was disclosed by the counsel for the respondent, Kamau Advocate that the appellant was yet to comply with the DRs directions to have a joint account opened and decretal sum deposited, and the same was not disputed. The court directed that the appellant do file the Record of Appeal and written submissions within next 7 days.
5. The matter was again mentioned on 13/2/2023 The appellant had not filed their Record of Appeal nor their written submissions. Only the respondents had filed their written submissions. It is also on record that the counsel for the respondents reminded appellant through the advocates, via a letter dated 23/1/2023, to file the Record of Appeal and written submissions. The advocates for the appellant received the letter on 26/1/2023. Under the above circumstances and with no explanation by the appellant as to why the court's directions have not been complied with, the matter was fixed down for judgment.
6. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano. vs. Associated Motor Boat Co. Ltd* (1968) EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the Trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni – versus- Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga –versus- Kiruga & Another* (1988) KLR 348).
7. As stated herein above, the appellant did not file the Record of Appeal nor the written submissions. The respondent did file his written submissions.

### **Respondent Submissions**

8. The respondent submitted that the delay to file the Record of Appeal by the appellant is inordinate and hence prejudicial to the respondent. It was submitted that the appeal was non-existent and only qualifies for dismissal. In support of the submissions, the appellant relied on the case of *Sultan Omar Hudhefa v Ann Muthoni Ngugi* (2022) eKLR where it was held that even though there was no prescribed time limit for filing the Record of Appeal, the same should be filed soon after the service of memorandum of appeal. The application that sought to have the Record of Appeal filed out of time was dismissed.



## Analysis and determination

9. In this case, the memorandum of appeal was filed on 23/7/2021. As at the time of settling down this matter for judgment on 13/2/2023, the Record of Appeal had not been filed and no explanation was given by the appellant as to why the same had not been filed. The issue for determination is whether in the absence of the Record of Appeal, the appeal can still be determined.
10. The Supreme Court in the case of *Law Society of Kenya v. Centre for Human Rights and Democracy & 12 Others* (Sup. Ct. No. 4 of 2014) it was held that:

“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.”
11. Again, the Court, in the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* [2015] eKLR held in 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.”
12. In the absence of the Record of appeal, it is impossible to determine this appeal before this court. The appeal is therefore incompetent and defective. I therefore order as hereunder;
  - i. The appeal has no merits and is hereby dismissed
  - ii. The respondent is awarded costs of the appeal

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> DAY OF MARCH, 2023.**

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**F. WANGARI**

**JUDGE**

**In the presence of;**

Tinga Adv. h/b for Kamau Adv. for the Respondent

N/A by Appellant

Guyo, Court Assistant

