



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**MACHAKOS LAW COURTS**

**CIVIL APPEAL NO. E011 OF 2020**

**LEONARD MUNYAO KAMBA ----- 1<sup>ST</sup>**

**APPELLANT**

**THE REGISTERED TRUSTEE AFRICA**

**BROTHERHOOD CHURCH ----- 2<sup>ND</sup>**

**APPELLANT**

**VERSUS**

**CLINTON ONYIEGO MOGAKA -----**

**RESPONDENT**

*(Being an Appeal from the Judgement and Decree of the  
Chief Magistrate's court at Machakos ( Hon. A.G Kibiru - CM) in  
CMCC NO. 27 of 2019 delivered on 07.10.2020)*

**JUDGEMENT**

**Grounds of appeal and reliefs sought**

1. The Appeal before me is against the trial court's Judgement on liability for the claim in which the court adjudged the 1<sup>st</sup> Appellant wholly liable directly while the 2<sup>nd</sup> Appellant assumed vicarious liability. The Appeal as brought by the 2<sup>nd</sup> Appellant was determined by Ruling of this court delivered on 27<sup>th</sup> November 2024. This Judgement therefore only relates to the 1<sup>st</sup> Appellant's appeal.
2. Aggrieved by the lower court's Judgement, the 1<sup>st</sup> Appellant filed a Memorandum of Appeal upon grounds that may be condensed to only one ground namely;

**THAT the Learned Trial Magistrate erred in law and fact by finding the 1<sup>st</sup> appellant wholly liable against the weight of evidence, and further failed to find the Respondent guilty of contributory negligence.**

3. It is proposed that the Appeal be allowed and the impugned Judgement on the 1<sup>st</sup> Appellant's liability set aside.

### **Guiding legal Principles**

4. This being a first Appeal I am required to reconsider the evidence adduced, evaluate it and draw my own conclusions on both matters of fact and/or law while bearing in mind that I did not hear and see the witnesses testifying {(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.”**

### **Brief Background to the Appeal**

5. The Respondent sued the Appellants in the lower court for negligent driving of Motor Vehicle Registration Number KBA 812K, in which he was a passenger, as a consequence of which the vehicle collided with another Motor Vehicle Registration Number KCN 912T thereby occasioning him bodily injuries.
6. Only the 1<sup>st</sup> Appellant entered appearance in the suit and filed defence. Upon full trial, the Appellants were found wholly directly and/or vicariously liable for the tortious act or omission and compensatory damages were assessed and awarded to the Respondent. The 1<sup>st</sup> Appellant challenges the lower court's Judgement only on the issue of liability for the claim.
7. Learned Counsel for the 1<sup>st</sup> Appellant and the Respondent filed submissions on the Appeal. The former contends that the Respondent ought to have also been

found guilty of contributory negligence. He holds the view that the Respondent did not discharge his statutory burden of proof pursuant to the Provisions of **Section 108 of the Evidence Act.**

8. The 1<sup>st</sup> Appellant also blames the Contractor who was undertaking road works at the scene of the accident for negligently placing construction materials.
9. For the foregoing reasons and submissions *inter alia*, the 1<sup>st</sup> Appellant prays that his Appeal be allowed.
10. The Respondent opposes the Appeal through his Advocates' submissions. He first attacks the 1<sup>st</sup> Appellant's Record of Appeal for missing out the following documents he thinks are crucial to the determination of the Appeal.
  - a) **An application for selection of a test suit filed in the lower court;**
  - b) **The Respondent's submissions in the lower court;**

**c) Warrants of attachment the trial court issued in execution of its judgement and/or decree;**

**And**

**d) Typed proceedings before the Magistrate's Court recorded on 26/01/2022, 2/3/2022 and 25/5/2022.**

11. The Respondent submits that omission of the documents offends **Order 42 Rules 13(4) of the Criminal Procedure Code**, rendering the appeal incompetent. By dint of the Supreme Court's judicial determination in **Supreme Court of Kenya Case No. 15 of 2014 (Bwana vs Sylvano Buko Bonaya & 2 Others and Law Society of Kenya vs Centre for Human Rights & Democracy & 12 Others Supreme Court of Kenya No. 4 of 2014** cited and relied upon by Counsel, I am urged to strike out the Appeal.
12. On the merits of the Appeal, the Respondent fully supports the trial magistrate's decision on causation of the accident giving rise to the cause of action.

13. In adjudging the 1<sup>st</sup> Appellant wholly liable, the trial court faulted him for veering onto the lane of the third party motor vehicle registration number KCN 912 P. The court also reasoned that no finding can be made against the Contractor said to have been carrying road works at the scene. It was opined that the 1<sup>st</sup> Appellant ought to have joined the contractor as a third party which was not done. Contribution by any other party to occurrence of the accident was not accordingly established.

#### **Analysis and determination**

14. Regarding the alleged defect in the Record of Appeal, the 1<sup>st</sup> Appellant does not dispute the claim that the stated contents are missing therefrom. 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.”**

15. 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 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’’.**

16. 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.
17. I am further guided by the Supreme Court decision in **Mwicigi and 14 others vs Independent Electoral**

**and Boundaries Commission and 5 Others [2016]**

**KESC 2 (KLR) where it is stated:-**

**“[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.”**

18. Notes of the trial court recorded at the hearing of the suit or part thereof alongside the other stated documents are missing from the Record of Appeal herein. These are crucial documents without which this court may not properly determine the Appeal, even though part of the proceedings as well the Judgement and Decree are available. On this ground alone, I would strike out the Appeal.
19. On the merits, I have perused the record and considered the parties' submissions in the lower court and in this Appeal. The 1<sup>st</sup> Appellant submits that the issue of liability was not determined according to the applicable standard of proof on a balance of probability. In **Kanyangu Njogu vs Daniel Kimani Maingi (2000) eKLR** and **William Kabogo Gitau vs George Thuo & 2 Others (2010) 1 KLR 526** it was held that where the court is to decide between two probabilities a balance of probability is shown if there is evidence that

one probability is more probable than not. This is the legal position as also held in the case of **Palace Investments Ltd vs Geoffrey Kariuki Mwenda & Another (2007) eKLR.**

20. In **Naftaly Muiruri Macharia vs Samuel Maina & Another (2018) eKLR** and **Janerose Auma Ochumba vs John Nyangi & Another (2021) eKLR** no liability for occurrence of the subject road traffic accident was attributed to the claimant who, as is the case here, was a passenger in the vehicle.
21. In **Ribiru vs Ndung'u (suing on behalf of the Estate the Late Joram Ndung'u Mwaniki) & 2 Others ( Civil Appeal No. 37 of 2023 ) (2024) KEHC 339 (KLR) ( 25 January 2024) ( Judgement )** it was observed that interference with a trial court's judgement on liability for a claim can only happen in exceptional circumstances, for instance where wrong principles are invoked or proper legal principles are not taken into account.

## **Determination**

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22. In this matter, there is no ground on which to fault the learned trial magistrate. It was the 1<sup>st</sup> Appellant who veered onto the lane of the vehicle the Respondent who was only a passenger was travelling in. He also failed to institute third party proceedings against the said road Contractor if it is his case that he was to blame. There is no basis on which to find the Respondent liable for contribution in the circumstances.
23. The upshot is that the Appeal is dismissed. The lower court's Judgement wholly ascribing liability against the 1<sup>st</sup> Appellant is not to be faulted and shall stand. The 1<sup>st</sup> Appellant shall bear the costs of the Appeal.

**J. M. NANG'EA , JUDGE.**

**Judgement delivered virtually this 9<sup>th</sup> day of October, 2025 in the presence of:**

The 1<sup>st</sup> Appellant's Advocate, Absent

The 2<sup>nd</sup> Appellant's Advocate, Ms Mwaura

The Respondent's Advocate, Ms Gicharu

The Court Assistant, Jeniffer

**J. M. NANG'EA , JUDGE.**

Original