Salim v Gitonga & another (Civil Appeal E345 of 2023)
[2025] KEHC 16038 (KLR) (7 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16038 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E345 OF 2023

J NGAAH, J

NOVEMBER 7, 2025

BETWEEN

SALIM MOHAMED SALIM ..... APPELLANT

AND

COLONELIUS MWANGI GITONGA ..... 1ST RESPONDENT

STEPHEN NDEGWA ..... 2ND RESPONDENT

JUDGMENT

1. This appeal arises from the judgment and decree of the lower in Mombasa Chief Magistrates' Court Case No. E1493 of 2021 (Hon. Nyariki (Senior Resident Magistrate) delivered on 4 April 2023.

2. The suit in the court below was a running down case in which the appellant sought damages as a result of the injuries he sustained and the loss he incurred owing to the road traffic accident.

3. The respondents defended themselves against the appellant's claim and filed a defence in that regard.

4. At the conclusion of the of the case, the learned magistrate held the respondents to have been solely responsible for the accident. He entered judgment against them and awarded Kshs. 185,000/= as general damages and Kshs. 2,550/=as special damages. The appellant was also given costs.

5. The appellant was not satisfied with the judgment of the court on quantum and to be precise, in the memorandum of appeal dated 24 November 2023, he has sought to impeach the judgment on the following grounds:

> " 1. That the Learned Magistrate erred in law and in fact in awarding a sum that is manifestly too low in General Damages compared to the injuries sustained by the Appellant.

2. That the Learned Magistrate erred in law and in fact in failing to consider the uncontested evidence on Special Damages and as such awarded an amount that was manifestly too low in special damages."

6. The appellant prays that this court allows the appeal and, in particular, he seeks for fresh assessment of the award on damages. He also wants the costs of the appeal.

7. Whether the appellant's appeal is meritorious or not is a question that can only be answered by this Honourable Court after fresh evaluation of the evidence at the trial and the court coming to its own conclusions. In Mwanasokoni v Kenya Bus Services Ltd (1985) eKLR it was held that although an appellate court on appeal will not lightly differ from the judge at first instance on a finding of fact, it is undeniable that the appellate court has the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. In so holding, the Court of Appeal followed the decision of the House of Lords in Sotiros Shipping v Sauviet Sohold, The Times, March 16, 1983 where it was held:

> "It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate Court they should be ever mindful of the advantages enjoyed of the trial judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and, equally important, what was not said."

8. Again, in Peters v Sunday Post Ltd (1958) EA 424, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O'Connor, P said at p 429:

> "It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness."

9. Thus, I have the obligation, in exercise of my appellate jurisdiction, to evaluate the evidence at the trial and make my own factual findings which may either be consistent with or vary from those conclusions reached by the lower court. Nonetheless, I have to bear in mind that the lower court had the advantage, which this Court does not have, of seeing and hearing the witnesses.

10. But in order to execute this task, there must be proceedings of the lower court on record of appeal for, without them, it would be impossible for the court to re-evaluate and assess the evidence afresh; the court can only evaluate and assess the evidence before it. It is for this reason that Order 42 rule 13(4) (c) of the Civil Procedure Rules makes it mandatory for the record or appeal to include the notes taken by the trial court and which notes, no doubt, include the testimony of witnesses and, proceedings generally. This rule reads as follows:

> (4) 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—
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> (c) the notes of the trial magistrate made at the hearing;

11. The proceedings in the lower court have been omitted from the record of appeal in this appeal. This omission is not only in breach of order 42 rule 13(4) (c) of the Civil Procedure Rules but also, as noted, I am not disposed to evaluate the evidence presented in the lower court if that evidence is not available in the record of appeal.

12. Without belabouring the point, the purported appeal before me is incompetent and fatally defective. It is hereby struck out. The respondent has neither appeared nor taken any other step in this appeal and, therefore, I make no order as to costs. Orders accordingly.

SIGNED, DATED AND DELIVERED ON 7 NOVEMBER 2025

NGAAH JAIRUS

JUDGE