



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU.
CIVIL APPEAL NO.E E039 OF 2023

ANTHONY NJUGUNA GITHUA
APPELLANT

-VERSUS-

PENINAH NYAMBURA KINUTHIA1ST
RESPONDENT

GLADYS MUTHONI WANDATI..... 2ND
RESPONDENT

*(Being an Appeal from the Judgemen tand Decree of
the Chief Magistrate's court at Nakuru (Hon. P. Nyota -
SRM) in CMCC NO. 94 of 2020 delivered on 10th February
2023)*

JUDGEMENT

1. The Appeal before me is against the trial court's Judgement only on quantum of damages in the sum of Ksh. 520,500 said to have been awarded to the Respondents for soft tissue injuries sustained in a road traffic accident. The Appellant wants the court to set aside the impugned Judgment and assess damages afresh with a view to substituting the lower

court's award. I am also urged to direct that the Respondents to bear the costs of the Appeal.

2. 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."*

3. Only the 1st Respondent opposes the Appeal through her Advocates' submissions. Counsel first attacks the Appellant's Record of Appeal for missing out the lower court's Judgement and Decree. I was referred to case law in **James Murage Nguyu V. RNN (Minor suing through next friend RKK and Another (2021) eKLR** in which a similar Appeal was struck out on the ground that these particular records were crucial without which the Appeal could not be determined.
4. Secondly, the court was invited to find that the Appeal has been abandoned by dint of the failure to file submissions in support as held in **Kathini Titus V. Almicdad Parcel Services Limited & Another (2014) eKLR** cited and relied upon by Counsel.
5. The 1st Respondent submits that omission of the documents offends **Order 42 Rules 13(4)(f) of the Civil Procedure Rules 2010**, rendering the Appeal incompetent and laible for striking out.
6. The lower court's Judgement and Decree are indeed missing from the Record of Appeal herein and no explanation is offered. Contents of the Record of Appeal are provided for

under **Order 42 Rule 13 (4) (f)** 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.”

7. 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 versus 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”.

8. Pursuant to **Order 42 Rule 13(4) of the Civil Procedure Rules 2010** *supra* 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.

9. 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.”

10. The Appeal is therefore fatally defective and on this ground alone I would strike it out. Were the court to consider the merits of the Appeal , I would still find the same

unsustainable. On the authorities cited in the 1st Respondent's submissions, the injuries subject of the cause of action presented before the learned trial magistrate are soft tissue in nature. Contrary to the Appellant's claim in this Appeal, the Respondents were granted Ksh. 200, 500 in general damages, not Kshs. 520, 500. This amount is reasonable and within the current range of damages for comparable injuries as correctly opined in the 1st Respondent's submissions. Besides, the Appellant has not made submissions in support of the Appeal which in the circumstances is deemed as abandoned.

11. The upshot is that the Appeal is dismissed with costs to the 1st Respondent.

J.M NANG'EA , JUDGE.

**Judgement delivered virtually this 26th day of November 2025
in the presence of :**

The Appellant's Advocate, Absent

The 1st Respondent's Advocate, Ms Kurere.

The 2nd Respondent, Absent

The Court Assistant, Jeniffer

J. M NANG'EA, JUDGE