



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER E196 OF 2024

**GETRUDE MUMBI WAINAKA -----
APPELLANT**

VERSUS

**HENRY NDUGIRE NDUNG'U -----
RESPONDENT**

*(Being an appeal arising from the Ruling of Hon. E. S. Soita
(SRM) made on 12th August 2024 in Nakuru CMCC No. E184 of
2022)*

JUDGEMENT

Background of Appeal

1. The Appellant was the Defendant in the lower court's case, sued for negligence in driving of her motor vehicle Registrar Number KDA 636 L (Volkswagen

Toureg) leading to material damage to motor vehicle registration number KDB 728 N Toyota Succeed belonging to the Respondent, the Plaintiff in the suit.

2. The Appellant filed defence rebutting all the material particulars of the suit including the claim of negligence. The Respondent's evidence was recorded but the Appellant failed to offer evidence for the reason that her witness who was to testify failed to communicate with her Advocates. The Appellant's Advocates were then compelled to close the defence case without calling evidence.
3. The learned trial magistrate rendered judgement in favour of the Respondent on 6th February 2024 ordering his compensation in the sum of Kshs. 165,130/= (all inclusive) for the loss occasioned to him.
4. The Appellant reacted by filing a Notice of Motion dated 23rd May 2024 before the trial court for the following reliefs;

- 1. Spent.**
- 2. Spent.**
- 3. THAT the Honourable Court be pleased to issue an order staying the execution of the judgement and Decree in NAKURU CMCC E184 OF 2022 HENRY NDUGIRE NDUNGU VS GETRUDE MUMBI WAITHAKA pending the hearing and determination of the Appeal against the Ruling of the Appellant's Notice of Motion Application dated 23rd May 2024 dismissing the Appellants Application to set aside the said judgment and re open the Defence case.**
- 4. THAT the costs of this application abide the outcome of the suit.**

5. By Ruling delivered on 12/8/2024, the learned trial magistrate faulted the Appellant for belatedly bringing the Application, three months after the court's judgement of 6th February 2024. It is pointed out in the lower court's judgement that the Appellant herself did not swear an affidavit in support of the Application dated 20th May 2024, leaving the task to the Legal Officer of her insurer.

6. The lower court further observed *inter alia* that despite being afforded sufficient opportunity to offer defence evidence no witness turned up to testify.
7. The Appellant's Application was therefore found to be lacking in merit and was dismissed with costs. This is the order that provoked this Appeal.

Grounds of Appeal

8. By Memorandum of Appeal dated 11th September 2024 the Appellant advances the following grounds in support of the Appeals;

- 1. THAT the learned trial magistrate was in error of law and fact in failing to set aside its judgment.**
- 2. THAT the learned trial magistrate was in error of law and fact in failing to re-open the Appellant/Defence case.**
- 3. THAT the learned trial magistrate was in error of law and fact in disregarding the grounds and reasons put forth as to why the Appellant/Defendant was unable to**

attend court and testify.

4. THAT the learned trial magistrate was in failing to have any or any due regard to the Appellant/Defendant proposed evidence showing clearly that the Respondent/Plaintiff was blamed by the police following the accident.

5. THAT the learned trial magistrate was in error of law and fact in failing to re-open the Appellants case to allow evidence showing that the Police Abstract produced by the Respondent/Plaintiff was a forgery.

6. THAT the learned trial magistrate was in error of law in shutting its eyes to the demands of justice and fairness.

9. The Appellant in the premises seeks these reliefs;

a) THAT the ruling of the trial court dated and delivered on 12th August, 2024 be quashed.

b) THAT this Honourable Court be pleased to allow the Appellant application dated 23rd May, 2024 and re-open the Appellant/Defendant case

and/or recall of any witness as justice of the case may demand.

c) THAT costs of this appeal be borne by the Respondent.

10. Learned Counsel for the parties filed written submissions. I shall consider all the Grounds of Appeal together. It is trite that the appellate court has the duty of re-assessing the evidence and reaching its own conclusions on matters of fact and law. The court will only interfere with the trial court's findings if relevant factors were not taken into account or irrelevant factors were considered or the trial court otherwise misdirected itself. (see case law in **Selle vs. Associated Boat Company [1968] EA 123** and **Ocean Freight Shipping Co. Ltd vs. Oakdale Commodities Ltd (1997) eKLR**. 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 it; 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.”*

The Parties’ Submissions

11. Learned Counsel for the Appellant submit that a decision whether or not to re-open a case is in the discretion of the court. Counsel cite case law in **Raindrops Limited vs County Government of Kilifi (2020) eKLR** in support of this proposition. The court notes in this decision that the court’s discretion is exercised judiciously according to the peculiar circumstances of each case before the

court, while ensuring that the right to fair hearing under **Article 50 of the Constitution** is not compromised.

12. The Appellant's Advocates further make reference to **Order 18 Rule 10 of the Civil Procedure Rules, 2010** which provides;

"The Court may at any stage of the suit recall any witnesses who had been re-examined and may, subject to the law of evidence for the time being in force, put such questions to him as the court thinks fit."

13. In **Peter Ng'ang'a Muiruri vs Co-operative Bank of Kenya Limited & 2 Others (2012)**

eKLR also relied upon by the Appellant, it was underscored that a court has a duty to find out the truth by unearthing any mystery that may assist the court to arrive at a just decision.

14. The Appellant therefore urges the court to allow her to re-open the case in the interests of justice.

15. The Respondent counters through his Advocates' submissions that re-opening of the case in the

circumstances is not warranted. I am referred to the judicial determination in **Benjo Amalgamated Limited vs Kenya Commercial Bank Limited** [2000] eKLR where the court cautioned;

“Once a matter is closed and judgement is rendered, the re-opening of a case must be exercised sparingly and upon compelling evidence. Courts cannot be made to act as a fall back for litigants who slumber in prosecuting their cases.”

16. Counsel further allude to the case of **Kassan vs Bank of Baroda (Kenya) Limited** (2002) eKLR where re-opening of a case was refused on account of 3 years unexplained delay to bring the Application. The court observed in that case that;

“A litigant who, through Counsel or otherwise, elects to close their case cannot later turn around and seek to re-open it merely because the outcome was unfavourable.”

17. According to the Respondent, the right to fair hearing guaranteed by the **Constitution in Article 50** is not absolute but must be exercised within the

bounds of procedural fairness and equity to both parties [(see **Jaldesa Tuke Dabelo vs IEBC & Another (2015) eKLR** and **Patricia Cherotich Sawe vs IEBC & 4 Others [2015] eKLR** cited and relied upon by Counsel].

18. The Court is told that the Appellant had all the chance to present her case and should not be allowed to fill gaps in the case that might have emerged in the trial. Counsel also pitch tent on case law in **Samuel Kiti Lewa vs Housing Finance Cooperation of Kenya Limited** where the following observation was made;

“.... in my view if the Plaintiff was allowed to re-open his case to so prove it that a document produced by the defendant is different to the one he had would amount to allowing the Plaintiff to fill the gaps in his evidence. That would be prejudicial to the defendants.”

19. The Respondent thus submits that re-opening of the case would occasion serious prejudice to him.

Analysis and Determination

20. In support of the Appellant's Application dated 23/5/2024 seeking to re-open the case after Judgement, the Legal Officer of her insurer explained that the Appellant's driver could not be procured to testify because his contacts and whereabouts were unknown.
21. Furthermore, the Appellant's insurer (Britam General Insurance Company Limited) is said to have concluded after investigations that the Respondent's motor vehicle registration number KDB 728N was in fact to blame for the accident giving rise to the cause of action herein. The police are also said to have found out after the impugned Judgement was entered, that the Respondent's driver was culpable and another abstract report dated 20th December 2021 was issued.
22. The Appellant contended in the Application that this information only came to their attention after the lower court had rendered its judgement. The court was told that the new evidence would have a direct

influence or impact on the court's verdict, hence the Application before the lower court.

23. The Respondent objected to the Application through an Affidavit in reply for more or less the same reasons as canvassed in this Appeal.

24. The record shows that the Appellant's case came up for hearing in the lower court on 16th May 2023 after the Respondent had closed his case. Her Advocate sought adjournment on the ground that their witness could not communicate owing to "network problem". Counsel undertook to have the witness appear in court physically on another hearing date. The Respondent did not object and hearing was put off to 24/10/2023. The Appellant's Advocate informed the court that the witness was not picking their calls and decided to close their case.

Determination

25. Having read through the record and Counsel submissions on the Appeal, the issue for

determination is whether the lower court lawfully and properly declined to re-open the case after judgement. As restated in case law cited by the parties, re-opening a case after judgement as the court is urged to do in the instant matter is a measure that is resorted to very sparingly because of costs and prejudice that could be occasioned.

26. The Appellant chose to close her own case when she failed to contact her witness. She did not give evidence in support of the Application made before the lower court seeking re-opening of her case. Evidence supporting the Application was offered by her insurer who informed the court that the defence witness had become available and there is new evidence obtained by the insurer after private investigations indicating that the Respondent's vehicle was to blame for the accident. The police also purportedly issued a new abstract report ascribing blameworthiness to the Respondent. It was not, however, shown why this evidence was

unavailable at the time of hearing of the case before the lower court. The police abstract report tendered during hearing of the case was also issued by the police after presumably investigating circumstances attending to the accident.

27. Pursuant to the provisions of **Sections 1A and 1B of the Civil Procedure Act** embodying the overriding objective of the Act in the administration of justice, courts should aim at achieving a just efficient and affordable determination of disputes in the wider interests of justice. This objective would not be attained by allowing re-opening of the case in the particular circumstances of this matter. A good case warranting re-opening of the case has not be made out.
28. In the result, the Appeal is dismissed with costs to the Respondent.

J. M. NANG'EA, JUDGE.

Judgement delivered virtually this 23rd day of

February, 2026.

In the presence of:

Appellant's Advocate, Ms Kimathi for Ms Karanja

Respondent's Advocate, Mr. Mbugua

Court Assistant (Jeniffer)

J. M. NANG'EA, JUDGE.

ORIGINAL