



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NO. 313 OF 2023

LUKA NGUGI MUNGAI
APPELLANT

VERSUS

**MUNGAI KURIA MUNGAI (Suing as the Legal
Representative of the Estate of Francis Mwaura Mungai
(deceased)1ST RESPONDENT**

**THUKU MWANGI2ND
RESPONDENT**

*(Being an appeal from the Judgement of the Chief Magistrate's Court at
Nakuru (Hon. Prisca Nyotah- SRM) delivered on 18th October, 2023 in
Nakuru CMCC NO. 721 OF 2021).*

JUDGEMENT

1. The Appellant herein is challenging the said learned trial magistrate's Judgement in which she granted reliefs to the

1st Respondent, the Plaintiff in the suit before the lower court, as hereunder:

Judgement on liability- 50% : 50%

General Damages for pain & suffering under the Law Reform Act- Kshs. 30,000/=.

Damages for loss of expectation of life under the Law Reform Act- Kshs. 90,000/=.

Damages for loss of dependency under the Fatal Accidents Act -Kshs. 1,225,,000/=.

Special damages- Kshs. 121,500/=

2. The 1st Respondent was also granted the costs of the suit and interest.
3. The summary of the case before the trial court is that the 1st Respondent sued the Appellant and the 2nd Respondent for general damages, special damages, the costs of the suit and interest following a road traffic accident that occurred on 10th October 2021 in which the above named Francis Mwaura (“hereinafter referred to as “the deceased”) died. The Appellant and the 2nd Respondent were accused of negligent driving of their motor vehicle registration number KCM 624 C as a result of which it knocked down the deceased’s motorcycle registration number KMES 244

U. At the time the deceased was on the motorcycle as he waited for customers to transport for pay. He died of injuries he sustained in the mishap.

4. It would appear that only the Appellant filed defence to the suit, traversing all the material particulars of the suit and putting the 1st Respondent, who sued as a legal representative of the deceased's estate, to strict proof of the allegations. In the alternative, he attributed any accident that might be proven to have occurred to negligence on the part of the deceased.
5. The Appellant's Grounds of Appeal as stated in the Memorandum of Appeal dated 31st October 2023 may be condensed as hereunder:

a.) That the learned trial magistrate erred in law and fact in adjudging the Appellant wholly liable for the claim against the weight of evidence tendered;

b.) That the learned trial magistrate erred in law and fact in assessing and awarding to the 1st Respondent manifestly high sums of damages against the weight of evidence adduced;

And;

c.) That the learned trial magistrate erred in law and fact by failing to consider the Appellants' submissions on liability and quantum of damages awardable.

6. The Appellant therefore prays for the court to allow the Appeal and re-assess of the issues of liability and quantum of damages on the basis of the evidence adduced.
7. The parties filed written submissions *vide* the court's e-filing platform which I have perused against the record of this Appeal.
8. It is trite law that the appellate court can only interfere with the finding and/or award of the trial court if the court misdirects itself on matters of fact and/or law by failing to take relevant factors into account or by considering irrelevant factors and thus arrive at a plainly wrong decision (see the case of **Ocean Freight Shipping Co. Ltd vs Oakdale Commodities Ltd. (1997) eKLR Civil Appeal No. 198 of 1995**). The appellate court also has the duty of analyzing and re-assessing the evidence on record and reach an independent decision as observed in

the case of Selle vs Associated Motor Boat Co. (1968)
EA 123.

9. The 1st Respondent's Advocates first attack the Appeal as fatally defective contending that the Record of Appeal does not contain the Decree and proceedings of the lower court as well as the submissions of the 1st Respondent before that court, in violation of the law. Counsel argue that the omission prejudices their client and hamstring the court in determination of this Appeal. The Respondent submits that omission of the documents offends **Order 42 Rules 13(4) of the Civil Procedure Rules 2010**, rendering the Appeal incompetent.
10. 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** , omission of such crucial documents from the Record of Appeal renders such liable to be struck out. In the latter case the Court **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”.

11. The Appellant does not dispute the claim that the stated contents are missing from the Record of Appeal as filed. Indeed the record does not show that any Supplementary Record of Appeal containing the missing documents has been lodged.
12. 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.”

13. 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.

14. 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.”

15. Notes of the trial court recorded at the hearing of the suit or part thereof alongside the Decree and the 1st Respondent's submissions on the suit are missing from the Record of Appeal herein. These are crucial documents without which this court may not properly determine the Appeal, even though the Judgement of the trial court is available. On this ground alone, I would strike out the Appeal. It is unnecessary in the circumstances to consider the merits of the Appeal.
16. In the result, the Appeal is struck out with costs to the 1st Respondent.
17. Judgement accordingly.

J. M. NANG'EA - JUDGE.

Judgement delivered virtually this 13th day of March, 2026

in the presence of:

The Appellant's Advocate, Ms Nasimiyu.

The 1st Respondents' Advocate, Absent

The 2nd Respondent, Absent

The Court Assistant, Jeniffer

J.M. NANG'EA - JUDGE.

ORIGINAL