

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CIVIL APPEAL NO. E094 OF 2024

JOSEPH KABAARA MACHARIA.....
APPELLANT

VERSUS

HARON MWANGI WAITHAKA
.....RESPONDENT

(Being an appeal from the ruling and order of Hon. E.W Wambugu - PM in Kandara CMCC No. E190 of 2023 delivered on 5th September 2024)

JUDGMENT

Background

1. This appeal arises from the ruling of the Principal Magistrate's Court at Kandara delivered on 5th September 2024 by Hon. E.W Wambugu, Principal Magistrate, in Kandara CMCC No. E190 of 2023.
2. The substratum of the suit before the trial court was a claim in negligence arising out of a road traffic accident. The plaintiff (respondent herein) pleaded that on or about 21st November 2020, while lawfully riding motorcycle registration number KMHF 089H along Thika-Kandara Road, he was involved in a collision with motor vehicle registration number KCY 526J, allegedly driven negligently by the

appellant's servant or agent. As a result of the said accident, the respondent claimed that he sustained bodily injuries and sought general and special damages together with costs and interest.

3. Upon consideration of the matter at the hearing stage, and particularly the issue of compliance with pre-trial directions, the learned trial magistrate declined to admit the appellant's list of witnesses and witness statements filed out of time.
4. Being aggrieved by this decision of the learned magistrate, the appellant lodged a memorandum of appeal dated 16th September 2024, citing the following grounds:
 - a. **THAT The Learned trial Magistrate misdirected herself and erred in law and fact by striking out the Appellant's List of Witnesses and Witness Statements.**
 - b. **The Learned trial Magistrate misdirected herself and erred in law and fact by failing to admit the Appellant's List of Witnesses and Witness Statements out of time.**
 - c. **The Learned trial Magistrate misdirected herself and erred in law and fact by appreciate that the Appellant's List of Witnesses and Witness Statements were already on record and had been served upon the Respondent's Advocate in time and admitting the same would not have caused the Respondent any prejudice.**

- d. **The Learned trial Magistrate misdirected herself and erred in law and fact by denying the Appellant an opportunity to participate in the proceedings.**
- e. **The Learned trial Magistrate misdirected herself and erred in law and fact by shutting out the Appellant from presenting his case though the Appellant was present in court.**

5. Consequently, the appellant prayed for the following orders:

- i. **That the appeal be allowed**
- ii. **That the Appellant's List of Witnesses and Witness Statements be admitted.**
- iii. **The proceedings and order of the trial Learned trial Magistrate dated 5.9.2024 be set aside.**
- iv. **The Appellant's suit in the trial Court be re-opened for hearing before a different Magistrate.**
- v. **The costs of this Appeal be awarded to the Appellant in any event.**
- vi. **The Court do grant any other or further relief as it may deem fit and just to grant.**

6. The appeal was canvassed by way of written submissions. On record are submissions dated 2nd December 2025 filed by the appellant, and submissions of even date, filed by the respondent; both of which this court has carefully considered.

Appellant's Submissions.

7. Counsel for the appellant submitted that the appellant's list of witnesses and witness statements had already been filed and served, and that their admission would not have occasioned any prejudice to the respondent. Reliance was placed on the decision in **Philip Keipto Chemwolo & Another v Augustine Kubende [1986] eKLR**, where the Court held that blunders will continue to be made and should not necessarily shut out a litigant from being heard on merit. It was contended that the trial court adopted an unduly rigid approach that defeated the ends of justice.
8. On the issue of whether the learned trial magistrate properly exercised her discretion in declining to admit documents filed out of time, the appellant relied on the principles set out in **Shah v Mbogo & Another [1967] EA 116**, that judicial discretion should be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake. It was submitted that the learned magistrate failed to consider relevant factors, including the stage of the proceedings, the absence of prejudice to the respondent, and the need to determine disputes on their merits. Further reliance was placed on **Patel v E.A. Cargo Handling Services Ltd [1974] EA 75**, where it was held that courts exist to do justice and should not impose conditions that prevent a party from presenting their case.

9. On whether the appellant was denied the right to be heard and to participate in the proceedings, counsel submitted that the effect of the impugned ruling was to shut out the appellant from presenting his defence entirely, thereby violating his constitutional right to a fair hearing as stipulated under **Article 50(1) of the Constitution**, which guarantees every person the right to have any dispute resolved in a fair and public hearing. Counsel further invoked **Article 25(c)**, which underscores that the right to a fair trial is non-derogable. The appellant also relied on the principle in **Pinnacle Projects Ltd v Presbyterian Church of East Africa Ngong Parish & Another [2019] eKLR**, where the court emphasized that a party should not be shut out from being heard unless there are compelling reasons. It was submitted that the appellant was present in court and ready to proceed, and that the refusal to admit his evidence effectively condemned him unheard, contrary to the rules of natural justice.
10. On whether the learned trial magistrate improperly elevated procedural technicalities over substantive justice, the appellant submitted that the court failed to give effect to **Article 159(2)(d) of the Constitution**, which mandates courts to administer justice without undue regard to procedural technicalities. Counsel also relied on **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2014] eKLR**, where the Supreme Court held that procedural rules are handmaidens of justice and should not be used to defeat substantive

rights. It was further submitted that the overriding objective under **Sections 1A and 1B of the Civil Procedure Act** obligates courts to facilitate the just, expeditious, proportionate, and affordable resolution of disputes. The appellant contended that the trial court's approach occasioned a miscarriage of justice and warranted the intervention of this Court.

Respondent's Submissions.

11. On whether the appeal is competent before this Court, it was submitted that the appeal is fatally defective for want of compliance with mandatory statutory requirements. Counsel argued that the record of appeal does not contain the order or decree appealed from, thereby rendering the appeal incomplete and incompetent. Reliance was placed on **Elvis Anyimbo Sichenga v Orange Democratic Movement & 4 Others (2016) eKLR**, where the court held that failure to attach a certified copy of the decree appealed from is not a mere technicality but a fatal omission. Further reliance was placed on **Trans Mara Sugar Co. Ltd v James Omondi Obudho [2020] eKLR**, where the court emphasized that under **Section 65(1) of the Civil Procedure Act** and **Order 42 Rule 13(4) of the Civil Procedure Rules**, an appeal must contain, *inter alia*, the judgment, order or decree appealed from, and that absence of such a document renders the appeal incompetent. It was further submitted that **Article 159(2)(d) of the Constitution** cannot cure such a substantive

omission, as the provision only applies to procedural defects and not matters going to the root of the appeal.

12. On whether the subordinate court exercised its discretion judiciously in declining to admit the appellant's documents filed out of time, the respondent relied on the principles in **Mbogo & Another v Shah [1968] EA 98**, that an appellate court ought not to interfere with the exercise of discretion unless it is shown that the court misdirected itself or that the decision is plainly wrong. It was submitted that the appellant had ample time, nearly one year from the time interlocutory judgment was set aside, to comply with pre-trial directions but failed to do so. That despite being granted a further 30 days on **14th March 2024**, the appellant only filed his documents on **3rd September 2024**, two days before the hearing, which conduct was termed inexcusable.

13. Counsel further submitted that the trial court was entitled under **Order 11 of the Civil Procedure Rules** to enforce compliance with pre-trial directions and to issue appropriate sanctions, including declining to admit documents filed outside the prescribed timelines. It was contended that allowing the appellant's documents at that late stage would have prejudiced the respondent by necessitating adjournment of the hearing and filing of supplementary responses, thereby undermining the respondent's right to expeditious disposal of the case.

14. On the appellant's reliance on **Article 159(2)(d) of the Constitution**, the respondent submitted that the provision does not provide a blanket cover for non-compliance with procedural rules. Reliance was placed on **George Kamau Kimani & 5 Others v County Government of Trans-Nzoia [2014] eKLR**, where the court held that **Article 159** cannot be invoked to cure deliberate or inordinate non-compliance with mandatory procedural requirements. It was argued that procedural rules exist to ensure orderly conduct of proceedings and cannot be disregarded at will.
15. The respondent further contended that the appellant's right to be heard must be balanced against the respondent's right to have the dispute determined expeditiously. It was submitted that the appellant had been afforded sufficient opportunity to comply with the rules but failed to do so, and therefore could not benefit from his own indolence and prayed that the appeal be dismissed with costs.

Analysis and Determination

16. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. See the cases of **Pandya v R {1957} EA 336; Ruwala v R {1957} EA 570** and

Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v. Republic [2010] eKLR where the Court of Appeal held that: -

“the duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

17. I have considered the lower court proceedings, the ruling of the trial court, the grounds of appeal, and the rival submissions filed by the parties. In my view, the issues that fall for determination are:
- i. Whether the appeal is competent in light of the Respondent’s preliminary objection regarding the absence of the order or decree appealed from**
 - ii. Whether the learned trial magistrate erred in law and fact by declining to admit the Appellant’s List**

of Witnesses and Witness Statements filed out of time.

- iii. Whether the Appellant was denied his constitutional right to a fair hearing under Article 50 of the Constitution.**

Issue One: Whether the Appeal is competent

- 18.** The Respondent raised a preliminary issue arguing that the appeal is fatally defective as the Record of Appeal does not contain a certified copy of the order or decree appealed from, relying on **Elvis Anyimbo Sichenga v Orange Democratic MovTrans Mara Sugar Co. Ltd v James Omondi Obudho [2020] eKLR.ement & 4 Others (2016) eKLR** .
- 19.** While this Court appreciates the strict position taken by those authorities, it is not oblivious to the overriding objective set out in **Sections 1A and 1B of the Civil Procedure Act**, as well as **Article 159(2)(d) of the Constitution** which commands courts to administer justice without undue regard to procedural technicalities. The omission of a decree in this case does not go to the root of the jurisdiction of this Court. The ruling being appealed against is on record, the grounds of appeal are clearly articulated, and the Respondent has had full opportunity to respond to the substance of the appeal. Consequently, this Court invokes the principles in **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2014] eKLR** where the Supreme Court held that

procedural rules are handmaidens of justice and should not be used to defeat substantive rights.

Issue Two: Whether the learned trial magistrate erred in law and fact by declining to admit the Appellant's List of Witnesses and Witness Statements filed out of time.

20. The trial court declined to admit the Appellant's witness statements which were filed two days before the hearing, well outside the 30-day timeline granted on 14th March 2024. The Respondent urged this Court to uphold the trial court's discretion, citing **Mbogo & Another v Shah [1968] EA 98** that an appellate court should not interfere unless the discretion was plainly wrong.

21. However, judicial discretion must be exercised judiciously, not whimsically. The principles guiding such discretion were recently reiterated in **Kenya Adhesive Products Limited v East African Packaging Industries Limited (Civil Appeal E101 of 2022) [2023] KEHC 22259 (KLR)**, where the court held that a judge considering whether to penalize a party for delay must consider:

(i) The period of delay;

(ii) The reason for the delay;

(iii) The arguability of the appeal;

(iv) The degree of prejudice that will be suffered by the Respondent..."

22. Applying these factors to the present appeal, It is not disputed that the appellant filed his statements on 3rd September 2024, way after the 30-day deadline. The Appellant filed before the hearing, not after. The Appellant has attributed the delay to inadvertence. As held in the old but still persuasive authority of **Philip Keipto Chemwolo & Another v Augustine Kubende [1986] eKLR,**

"blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of having his suit determined otherwise than on merit."

23. Critically, no irreparable prejudice was occasioned to the Respondent. The witness statements had already been served upon the Respondent's Advocate. Any prejudice, such as the need for a short adjournment to study the statements, was compensable by way of costs. The trial court had the less punitive alternative of admitting the documents and awarding costs to the Respondent, rather than the draconian sanction of striking them out. The trial magistrate, in declining to admit the documents, elevated procedural compliance above substantive justice. To me, this was was a misdirection.

Issue Three: Whether the Appellant was denied his constitutional right to a fair hearing under Article 50 of the Constitution.

24. The most fundamental issue is whether the Appellant was denied his constitutional right to be heard. **Article 50(1) of the Constitution** guarantees every person the right to have any dispute resolved in a fair and public hearing. **Article 25(c)** designates the right to a fair trial as non-derogable.

25. The effect of the trial court's ruling was to shut out the appellant from presenting any evidence in his defence. While the respondent argued that the appellant was indolent, this court finds that the sanction imposed was disproportionate to the infraction. In **Pinnacle Projects Ltd v Presbyterian Church of East Africa Ngong Parish & Another [2019] eKLR**, the court emphasized that a party should not be shut out from being heard unless there are compelling reasons. The appellant was present in court, ready to proceed, and his documents were on record.

26. Furthermore, this court is guided by the holding in **New Kenya Co-operative Creameries Ltd v. John Kahiato Bari & 5 others [2018] eKLR** where the Court of Appeal stated:

"The constitutional principle in Article 159 (2) (d) of the Constitution that justice shall be done without undue regard to technicalities of procedure, is also a paramount guiding principle in the administration of justice."

27. The respondent's reliance on **George Kamau Kimani & 5 Others v County Government of Trans-Nzoia [2014] eKLR** is

distinguishable. In that case, there was deliberate and inordinate non-compliance. In the instant case, despite the delay, the documents were served, and the appellant demonstrated a willingness to proceed. His right to a hearing cannot be sacrificed on the altar of procedural punctuality.

28. Having re-evaluated the record and the submissions, this court finds that the learned trial magistrate misdirected herself by failing to balance the need for procedural compliance against the constitutional imperative of substantive justice. The refusal to admit the appellant's witness statements was a disproportionate sanction that violated the Appellant's right to a fair hearing under **Article 50 of the Constitution**.

29. Consequently, the appeal succeeds.

Final Orders

30. From the foregoing, I do issue the following orders:

- i. The appeal is hereby allowed.**
- ii. The ruling and order of Hon. E.W Wambugu - Principal Magistrate delivered on 5th September 2024 in Kandara CMCC No. E190 of 2023 is hereby set aside.**
- iii. In lieu thereof, the Appellant's List of Witnesses and Witness Statements filed on 3rd September**

2024 are hereby deemed as properly filed and admitted.

- iv. The suit in Kandara CMCC No. E190 of 2023 is hereby re-opened for hearing on its merits.**
- v. To ensure impartiality and avoid any perception of bias, the matter shall be heard by a different magistrate of competent jurisdiction other than Hon. E.W. Wambugu.**
- vi. The costs of this appeal shall abide the outcome of judgment in lower court given the facts of the case..**

31. Orders accordingly.

32. Right of appeal 30 days.

DATED, SIGNED AND DELIVERED AT KAKAMEGA ONLINE THIS 29TH DAY OF APRIL, 2026.

S.N MBUNGI

JUDGE

In the presence of:-

CA: Angog'a/Velma

Ms. Maithaka for the Appellant present online.

Mr. Mwathi for the Respondent present online.

