



Onganya & another (Suing as the Legal Representatives of the Estate of the Late Abraham Onganya) v Nyamu (Civil Appeal E278 of 2022) [2025] KEHC 11513 (KLR) (Appeals) (31 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11513 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

APPEALS

CIVIL APPEAL E278 OF 2022

AC MRIMA, J

JULY 31, 2025

BETWEEN

RHODA NYANGASI ONGANYA 1ST APPELLANT

GILBERT NDONGA ONGANYA 2ND APPELLANT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE
ABRAHAM ONGANYA**

AND

FLORENCE NJOKI NYAMU RESPONDENT

(Being an appeal from the judgment and decree of the Hon. S. Muchungi (SRM) in Nairobi Chief Magistrates Court Civil Suit No. 6103 of 2015 delivered on 8th April 2022)

JUDGMENT

Background:

1. Through the Plaintiff dated 2nd October 2015, Rhoda Nyangasi & Gilbert Onganya the 1st and 2nd Appellants herein, being the legal representative of the Estate of Abraham Onganya (hereinafter ‘the deceased’) sought compensation from Florence Njoki Nyamu, the Respondent herein, for fatal injuries the deceased sustained from a road traffic accident.
2. The Appellant pleaded that the deceased was a fare paying passenger in the motor vehicle, registration KBR 517, (hereinafter ‘The motor vehicle’) belonging to the Respondent.



3. The Respondent challenged the suit through the Statement of Defence dated 18th February 2016. She denied both the claim that he was the registered owner of the motor vehicle and that the deceased was a fare paying passenger in the said vehicle.
4. In the alternative, the Respondent claimed that the accident occurred as a result of the negligence of the deceased it was its case that he failed to sufficient regard for his own safety aby buckling up and by distracting the driver on the motor vehicle.
5. In his Judgement, the learned trial Magistrate was of the finding that the Appellants failed to prove negligence and how the doctrine of *res-ipsa loquitor* applied in the circumstances of the case. he observed that vicarious liability was not proved wholly dismissing the Appellant's claim.
6. The Appellants were aggrieved, hence the instant appeal.

The Appeal:

7. Through the Memorandum of Appeal dated 4th May 2022, the Appellants sought to set aside the entire judgment on the following grounds: -
 1. That the learned Trial Magistrate erred in law and in fact by failing to satisfactorily appreciate and correctly apply the doctrine of *res-ipsa loquitor*.
 2. That the learned Trial Magistrate failed to appreciate that the burden was on the Respondent to prove that the doctrine of *res-ipsa-loquitor* and the doctrine (sic) was not applicable to the deceased.
 3. That the learned Trial Magistrate erred in law and in fact in holding that the Appellants had failed to prove that the doctrine of *res-ipsa loquitor* was applicable in their case thus arrived at a wrong conclusion.
 4. That the learned Trial Magistrate erred in law and in fact by concluding that the Appellant had failed to prove negligence on the Respondent's driver.
 5. That the learned Trial Magistrate erred in law and in fact in holding that the Appellants had failed to prove that the Respondent was vicariously liable.
 6. That the learned trial magistrate erred in law and in fact in failing to appreciate that the deceased was a mere fare paying passenger and the Respondent could not escape liability.
 7. That the learned trial magistrate erred in law and in fact by failing to find that the burden of proof shifted to the Respondent to prove that the accident did not happen as alleged by the Appellants.
 8. That the learned trial magistrate's decision was against the weight of the evidence.
 9. That the learned trial magistrate erred in law and in fact in failing to appreciate the appellant's evidence, written submissions and the extensive authorities submitted and ended up arriving at a wrong decision.

The Submissions:

8. The Appellant urged its case further through written submission dated 19th March 2025. It was its case that the occurrence of the accident and the deceased's death was not contested since it was substantiated by the police abstract and the certificate death.



9. It was their case that the Respondent through her own admission, owned the vehicle and the Registration Certificate showed as much.
10. On the issue of negligence, the Appellants, while relying various authorities, among them the decision in *Uchumi Supermarket Limited & another vs Boniface Ouma Were* [2021] eKLR, the one in *BM - vs- Machakos County* (Civil Appeal E059 of 2022) [2023] KEHC 20447 (KLR) and *Mwaka v Karua & another* (Civil Case E261 of 2022) [2024] KEMC 29 (KLR) submitted that the doctrine of *res-ipsa loquitor* applied in the case since the deceased was a passenger and had no role to play in the occurrence of the accident.
11. It was its position that since the deceased was a passenger, he was owed a duty of care by the driver. To that end, reference was made to the Respondent's motor accident claim form in the Supplementary Record of Appeal and the Investigation Report by Linksoft Insurance Investigations which indicated that the motor vehicle was extensively damaged and proved that it rammed into the rear of a truck.
12. In the alternative to the foregoing, the Appellant submitted that this court can adopt the thinking of the court in *BM v Machakos County* (Civil Appeal E059 of 2022) [2023] KEHC 20447 (KLR) where it observed that where there is no evidence as to how an accident, both drivers ought to be blamed for the same as none can escape liability.
13. On quantum, the Appellant urged this court to adopt Kshs. 50,000/- for pain and suffering since the deceased died on the spot, Kshs. 150,000/- for loss of expectation of life and Kshs, 1,797,118 for loss of dependency on the basis of 2/3 dependency ratio, his basic salary and his age.

The Respondent's case:

14. Florence Njoki Nyamu challenged the Appeal through written submissions dated 2nd April 2025.
15. She was not in dispute as to the events that precipitated the dispute. However, she stated that the appellant who were not eye witnesses did not call any witnesses. Therefore, no evidence was adduced to prove negligence.
16. The foregoing notwithstanding, the Respondent submitted that the appeal was fatally incompetent for failing to include in their record of appeal and supplementary of appeal the decree of the trial court contrary to Order 42 Rule 2 of the *Civil Procedure Rules*.
17. As regards the supplementary record of appeal, the Respondent submitted that it was filed without leave of court, a position that renders it inadmissible as part of the record.
18. On the merits of the appeal, the Respondent fronted the argument that there was no evidence whatsoever that proved negligence. It asserted that the appellants did not prove that the Respondent's car collided with a motor vehicle KTS 001 from behind. It was its case that the Appellants failed to call police officers from Kikutu Police Station who responded to the accident as witnesses who would have shed some light on what happened.
19. It was its case that there were survivors on the accident and the Appellants did not secure any of them to attend court to give an account to what happened.
20. With the foregoing, the appellant submitted that the trial court correctly applied the doctrine of *res ipsa loquitor* when it observed that the facts of the case did not raise *prima facie* inference that the accident was caused by the negligence of the Appellant's driver.
21. The Respondent cited the authority in *Fauzia Shaban & Another -vs- Sheila Properties Limited and Another* (2020) eKLR where the doctrine *res-ipsa-loquitor* was stated to apply in instances on self-



involving accidents where vehicles over turn upon hitting a stationary object and there can be no reasonable explanation on the part of the driver other than negligence.

22. The respondent did not submit on quantum.

Analysis:

23. Having carefully considered the record, the parties' respective submissions and the decisions referred to, the issues that emerge for determination are as follows: -

- i. Whether the appeal is competent.
- ii. Depending on (i) above, whether the supplementary record of appeal is properly before this Court.
- iii. Whether the appeal is merited.

24. Before embarking on the primary duty of this Court of reassessing and reanalysing the issues in contention, it is first essential to ascertain the issue of competence of the appeal. I have perused both the trial Court file and the appeal file with a lot of care. There is no doubt the formal decree was not extracted and filed.

25. Section 65(1) of the [Civil Procedure Act](#) provides for an appeal to the High Court from the Subordinate Court. It states;

Except where otherwise expressly provided by this [Act](#), and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court-

- (a) (Deleted by 10 of 1969, Sch.);
- (b) from any original decree or part of a decree of a subordinate court, other than a Magistrate's Court of the third class, on a question of law or fact;
- (c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.

26. Order 42 Rule 13(4) of [Civil Procedure Rules](#) provides for the contents of the Record of Appeal following terms: -

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;



Provided that-

- (i) a translation into English shall be provided of any document not in that language;
- (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

27. The Supreme Court has also had a say the subject. In Civil Application No. 20 of 2014 *Bwana Mohamed Bwana -vs- Silvano Buko Bonaya & 2 Others* (2014) eKLR, the Learned Judges, in reference to their earlier finding in *Law Society of Kenya -vs- Centre for Human Rights and Democracy & Others*, Supreme Court Petition No. 14 of 2013 discussed the competence of an appeal in the following terms: -

(16) For a competent appeal to lie before this Court it must comply with the provisions of Rule 33(1) of the *Supreme Court Rules, 2012* which provides that:

An appeal to the Court shall be instituted by lodging in the registry within thirty days of the date of filing of the notice of appeal –

- (a) a petition of appeal;
- (b) a record of appeal; and
- (c) the prescribed fee.

(17)

(36) The use of the word ‘shall’ in Rule 33(1) suggests the mandatory nature of the rule, requiring strict adherence to the completeness of the rule. Thus, a strict reading of rule 33(1) leads to the conclusion that an appeal comprises the Petition, the Record of Appeal, and the prescribed fee.

(37)

(38) 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*.

28. In *Kyuma -vs- Kyema* (1988) KLR 185 the Court of Appeal discussed Section 79G of the *Civil Procedure Act* and the attendant implication of the words decree and order thereon.

Section 79G provides as follows: -

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.



29. The Learned Court of Appeal Judges then observed thus;

The question is what documents must the appellant file within thirty days or within the time lawfully extended by the certificate of delay” Since the question contemplates that the appeal is against a decree or order, the appellant is obliged to apply first, Memorandum of Appeal in the form set out in appendix F No. 1 of the Civil Procedure Rules and second, a copy of the formal order of the court, if available. Rule 1A of Order 41 permits this latter document to be filed as soon “as possible and in any event within such a time as the court may order”. Therefore a certificate of delay within the true intendment of section 79G must certify the time it took to prepare and deliver to the appellant “a copy of the order” of the magistrate. But the certificate of delay exhibited by the appellant, did not speak of a decree or order. No such order was sought or extracted. What the appellant, in error, sought and what the court dutifully supplied, were the proceedings and judgment.

30. In Civil Appeal 56 of 2018, Antony Muthamia Ngurwe & another -vs- Jane Nkatha Kathurima (suing on behalf of the Estate of the Late John Kimathi Kathurima) [2019] eKLR, yours truly had the occasion to speak to the subject and the import of Section 65 as read alongside Section 79G of the Civil Procedure Act as follows:

20. I will also add my voice on the subject. First, from the reading of Section 65(1) of the Act it is the decree or part thereof that is appealed from the subordinate court to the High Court. Second, under Order 42 Rule 13(4) of the Rules a Court may dispense with any document to be part of the Record of Appeal except the memorandum of appeal, the pleadings and the judgment, order or decree appealed from and in appropriate cases the order giving leave to appeal. Third, the saving grace under Article 159(2)(d) of the Constitution is inapplicable in this case. That is because the provision only applies to matters relating to procedure or form and not the substance thereof. Fourth, despite clear provisions on extension of time the Appellants never sought for any extension of time to file the decree neither did they explain any difficulty in obtaining the decree.

21. The Record of Appeal is therefore incomplete. In the words of the Supreme Court in Civil Application No. 20 of 2014 Bwana Mohamed Bwana (supra) ‘such an appeal would be incomplete and hence incompetent.’ The appeal is for rejection.

31. Deriving from the from the foregoing, this Court need not make any further inquiries. The decree is not part of both the records at the trial and the appellate Courts and since that requirement was not waived or dispensed with, then it follows that the appeal is incurably incompetent. As such, all the subsequent issues fall by the wayside.

32. In the premises, the following final orders hereby issue: -

- a. The appeal is incompetent and is hereby struck out.
- b. The Appellants shall bear the costs of the appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF JULY, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:



Miss Ndege, Learned Counsel for the Appellant.

Amina/Michael – Court Assistants.

