



**Wekulo v Masinde & another (Civil Appeal 33 of 2019)
[2024] KEHC 12217 (KLR) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 12217 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 33 OF 2019
PJO OTIENO, J
SEPTEMBER 30, 2024**

BETWEEN

HANNINGTON MUTALI BARASA WEKULO APPELLANT

AND

AINEA MASINDE 1ST RESPONDENT

WEST KENYA SUGAR COMPANY LIMITED 2ND RESPONDENT

RULING

1. The second respondent/Applicant has approached the court seeking the review of the judgment dated and delivered on the 26.05.2023, and holding the two respondents jointly and severally liable, for reasons among others that; the court failed to take into account the need to apportion liability between the two and that it presents an error apparent on the face of the judgment. It is then added that the suit giving rise to the appeal was selected as a test suit and an apportionment of liability will quicken and ease. the speedy determination of the other suits in the series. The judgment is viewed as erroneous and a good candidate for review.
2. Even though an affidavit of service was filed showing adequate service on the other parties, neither the appellant for the 1st respondent filed nay responses thereto. That leaves the application unchallenged. Being unchallenged however does not relieve a court of law from looking at the merits of the matter.
3. The gist of the application is the question of when a joint and several finding on liability for a tort need be entered by the court. This question is as old as the common law itself. Many times, it is not always the correctness of the court’s decision that is in issue, but the fear and apprehension of the consequences of such finding when implemented.
4. The evidence led at trial was that the 1st respondent’s motor vehicle rammed onto a winch operated by the 2nd respondents motor vehicle resulting the injuries to the appellant. It was settled by the



judgment on appeal that both respondents were negligent and liable through their respective drivers. Both respondents were thus found ‘liable to the appellant jointly and severally being joint tortfeasors.’

5. The court of appeal in *Joseph Wang’ethe v Ew* [2019] eKLR, while considering when tortfeasors would be deemed joint held and said:-

The next question that we must address is whether the appellants were jointly and severally liable for the negligence. In “*Charlesworth and Percy on Negligence*” 12th edition at para 3-87, it is stated:

“Wrongdoers are deemed to be joint tortfeasors, within the meaning of the rule, where the cause of action against each of them is the same, namely that the same evidence would support an action against them individually. There must be concurrence in the act or acts causing damage not merely a coincidence of secret acts which by their conjoined effect cause damage. Accordingly, they will be jointly liable for a tort which they both commit or which they are responsible because the law imputes the commission of the same wrongful act to two or more persons at the same time.”

In this case, the minor suffered injuries as a result of the wrongful acts of both 1st and 2nd appellants. The cause of action against each appellant was supported by the same evidence. Their position can be equated to injuries suffered in a collision involving two vehicles arising from the negligence of each of the drivers, and for which the two drivers will be jointly and severally liable. In the circumstances, the 1st and 2nd appellants were jointly and severally liable and the respondent is at liberty to recover the damages awarded from all of them as apportioned, or only one of them.

6. From the foregoing, the facts pleaded and proved pointed irresistibly to a finding of joint and several liability against the two respondents. A reading of the record reveals not an obvious and glaring error apparent on the face of the record to invite review.
7. The fear that the appellant may chose either of the respondents as target for fulfilment of the decree should not be the only basis of seeking review. The respondent who may find itself as bearing the burden of having to meet the decree in full is not left without a remedy. He has the right to seek indemnity or contribution by moving the court appropriately. In *Hellen Njenga v Wachira Murage & Another* [2015] eKLR, in which the High Court quoting another High Court decision, *Dubai Electronics vs Total K. Limited & Others*, HCCC Nrb CC 870/98 stated as follows:

“... the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them.”

8. More importantly, if the view taken in the application is that the court was wrong in its appreciation and exposition on when to render a joint and several liability, the remedy is on appeal and not review. In *National Bank of Kenya Ltd vs Ndungu Njau* [1997] eKLR the court was explicit on the bounds of the jurisdiction and power on review when the court said:-

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. I will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review.”



He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise, we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it.”

9. It follows that the request for review is of no merit. The same is dismissed with no orders as to costs because no resistance was filed to the application.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 30TH DAY OF SEPTEMBER, 2024

PATRICK J O OTIENO

JUDGE

