



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CIVIL APPEAL NO. 22 OF 2017**

**KISAKA JOHN GIDEON & ANO.....APPELLANTS/RESPONDENTS**

**VERSES**

**JOHN ENDEKU ONZERE.....1<sup>ST</sup> RESPONDENT/APPLICANT**

**BERNARD LIDANYA MADEGWA .....2<sup>ND</sup> RESPONDENT**

**OBIRI VUHUNJI.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The application dated **6<sup>th</sup> August, 2019** by the Applicant and supported by the affidavit of **FRANCIS GACATHI** advocate seeks to have the judgment of this court dated **23<sup>rd</sup> July, 2019** reviewed to the extent that the issues of costs and liability be removed as against the applicant. According to the application, the applicant who was the Respondent in the appeal was simply a fare paying passenger and not in any way in control of the motor vehicles that caused the accident.

2. The second and 3<sup>rd</sup> Respondents have filed grounds of opposition dated **20<sup>th</sup> September, 2019** as well as the Appellants. The submissions filed by the parties as well as the attached authorities have also been perused by the court.

3. The provisions of Order 45 rules 1 and 2 of the Civil Procedure gives this court the mandate to carry out a review in the event that there is an error apparent on the face of the record.

4. The issue raised by the applicant is well captured under paragraph 16 of the judgement which I stated as follows;

**“in the premises, the appeal is hereby allowed. The trial court judgement on liability is hereby set aside to the extent that the Appellants are jointly and severally absolved from any liability. Liability at 100% is hereby apportioned against the Respondents. “**

5. Obviously the applicant was not an Appellant in this appeal. The Appellants were **JOHN KISAKA GIDEON** and **JOHN BARASA** and the Respondents were **BERNARD LIDANYWA MADEGWA** and **OBIRI VUHUNJI**. Since the appeal succeeded against the Respondents, the Applicant **JOHN ENDEKU ONZERE** ought not to have borne any responsibility in terms of liability as well as costs.

6. It is not true as submitted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in their grounds of opposition dated 20<sup>th</sup> September, 2019 that this matter is *res judicata* as the clarification is simply to do with the issue of liability between the owners of the two vehicles. The Applicant was simply a fare paying passenger.

7. In the premises, the application is hereby allowed and order that liability at 100% is against the Respondents and for avoidance of doubt **BERNARD LIDANYA MADEGWA AND OBIRI VUHUNJI** and not **JOHN ENDEKU ONZERE**. The costs awarded shall be met by the two mentioned Respondents and not the Applicant.

8. Each party shall meet its own costs in this application.

**Dated, signed and delivered in open court this 18<sup>th</sup> day of December, 2019.**

---

**H. K. CHEMITEI**

**JUDGE**

**18/12/19**

**In the presence of:-**

**Parties Absent**

**Court Assistant - Silvia**

**Ruling delivered in open court.**