



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

H.C.C.C 135 OF 2008

LEONARD MACKENZIE (*Suing as the Administrator of the Estate of the*
LATE JOYCE MUMO MACKENZIE**PLAINTIFF/ APPLICANT**

VERSUS

1. THE ATTORNEY GENERAL

2. THE COMMISSIONER OF POLICE

3. DENNIS PSAMUT

4. BENJAMIN NGILA

5. DAVID KAMBI **DEFENDANT/RESPONDENT**

RULING OF THE COURT

1. The **Notice of Motion** application before the court is dated 24th March 2016 and is filed pursuant to **Order 45 (1)** of the **Civil Procedure Rules Section 3 A** of the **Civil Procedure Act** and other relevant laws. The application seeks to secure the following prayers: -

1. **THAT** the judgment dated 15th October 2012 and decree dismissing the suit be reviewed.

2. **THAT** the judgment dated 15th October 2012 and decree be set aside.

3. **THAT** costs be in the cause.

2. The application is based on grounds that there are errors on the face of the record and that it is in the interest of justice that the said judgment and the decree be reviewed.

3. The application is supported by affidavit of **Leonard Mackenzie** sworn on 24th day of March 2016.

4. The Applicant's case is that the said judgment which was annexed as 'A' to this application was based on errors which should be corrected by this court.

5. The application was served upon the Respondents but they did not show up for the same when the matter came up for hearing. There is an affidavit of service filed on 15th July 2016.

6. The brief history of the application is that on the 2nd February 2005, the deceased, **Joyce Mumo**

Makenzie while driving her worker to hospital in motor vehicle registration **Number KAL 747 R**, was fatally shot by the 3rd, 4th and 5th Defendants who were police officers in their cause of duty. Following the death of the deceased, **Inquest Number 1 of 2005** was carried out by the **Resident Magistrate's Court at Tawa**. On 7th August 2007, the court made the orders that the cause of death was established and linked to the shoot out by the three police officers who fired their guns at the scene, that no evidence was adduced to show who among the three officers shot the deceased, that there was no evidence to show that the action by the three officers was unlawful or actuated by malice aforethought that would warrant a charge of murder and that the case was of mistaken identity and on the basis of the findings the file was closed.

7. Following an application for revision on 21st July 2009, **Justice Lenaola** overturned the decision of the **Resident Magistrate's Court** and ordered that the **DCIO Machakos** do arrest the three police officers and establish who to charge for the offence of manslaughter and the orders for **Revision Case No. 8 of 2009** were issued on 30th day of September 2009. The Applicant filed **Civil Suit No. 135 of 2008** dated 10th July 2009 against the Defendants jointly and severally for special and general damages, interest and costs. Failure by the 1st and 2nd Defendants to carry out investigations into which police officer shot the deceased prompted the Applicant to file **Petition No. 99 of 2011** dated 31st May 2011. The Petition sought declarations that the Petitioner's rights under **Article 26, 46 and 47** of the **Constitution** had been denied and violated. The Petition also sought orders that the 1st and 2nd Defendants be compelled to initiate investigations against the police officer who shot the deceased. **Honourable Lady Justice Jaden** delivered the judgment in **Petition No. 99 of 2011** on 30th November 2015 and found that it was not in dispute that the deceased died as a result of gunshot wounds inflicted by the Police Officers; the deceased and her estate had a right to fair administrative action, right to life, right to security and right to the protection of the law under **Articles 47, 26 and 46** of the **Constitution** respectively; the 1st and 2nd Respondents could only be blamed for failure to carry out further investigations as per the Ruling of **Justice Lenaola** and that the 1st and 2nd Respondents were compelled to initiate investigations on the police officer who shot the deceased.

8. The judgment in **Civil Suit No. 135 of 2008** which is the subject of this application for review was delivered on 15th October 2012. The learned Judge found that the police were being driven by a victim of the robbery and when he shouted "*ndio hawa*" the police officers were in no position to disbelieve him and they shot at the occupants of the vehicle.

9. The Applicant submitted that during the inquest PW3, the person driving the deceased, did not give evidence that he shouted "*ndio hawa*". None of the police officers, PW3, PW5, PW6 and PW7 gave evidence that PW3 shouted "*ndio hawa*". The Applicant submitted that the learned Judge did not refer to the proceedings and findings of the inquest court so that the judgment could be considered a conscientious decision after careful and meticulous examination of all the issues. The Applicant submitted that the failure to refer to the testimony of the witnesses constituted an error so readily discernible on the face of the record without requiring much probing or copious explanations to ascertain.

10. The Applicant's case is that failure to consider the findings of the inquest is a self evident error which this court should correct.

11. I have carefully considered this application and the submissions by the Applicant. In my view, the issues for determination are these:-

i. Whether the parameters under Order 45 Rule 1 of the Civil Procedure Rules have been met.

ii. Whether the court was in order to treat sections of the proceedings in the inquest as hearsay evidence.

12. The starting point is **Order 45 Rule 1** of the **Civil Procedure Rules, 2010**. One of the reasons that necessitate a review and one that the Plaintiff/Applicant has relied on is error apparent on the face of

record.

13. The question therefore is what an error apparent on the face record means. In the case of **Draft and Develop Engineers Limited –vs- National Water Conservation and Pipeline Corporation, Civil Case No. 11 of 2011**, it was held that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out.

14. In the **Court of Appeal** case of **National Bank of Kenya Limited –vs- Ndungu Njau Civil Appeal No. 211 of 1996 eKLR**, the Court held that 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. Using this standard, the Applicant submitted, and correctly so in the finding of this court, that failure to consider the findings of the inquest is a self-evident error on the consideration of the evidence laid before the Court. The Judge reached factually incorrect conclusions of the findings of the inquest to exonerate the Defendants of wrong doing. The learned Judge made a finding that no duty of care arose and as such, the police officers were not negligent. The learned Judge erred in failing to note that the inquest court had conclusively found that the three police officers were responsible for the death of the deceased. The learned Judge also failed to note that the ruling by **Justice Lenaola** directed that the police officers be charged with manslaughter; a ruling that the 1st and 2nd defendants never appealed from. In addition, the learned Judge did not take into account the findings of the **High Court** in **Petition No. 99 of 2011** which found that the rights of the deceased had been violated. On the basis of the findings of the inquest court and the ruling by **Justice Lenaola** and judgment by **Justice Jaden**, the learned Judge ought to have found that there was *prima facie* evidence of negligence. This was a substantial point of law such that there could reasonably be no two opinions entertained about it. The view held by the learned Judge was not a possible one and the judgment can only be characterized as one vitiated by an error apparent on the face of the record.

15. The Applicant submitted that **Justice Jaden** having held that the Defendants violated the rights of the deceased, the inevitable conclusion was that the duty of care was properly activated. The error is so obvious and substantial that failure to correct it would infringe the Applicant's right to due process and damage the integrity of the judicial process.

16. The Applicant relied on the sworn testimony and findings of the inquest court. This was not hearsay evidence. The Defendants did not challenge the sworn testimony and findings of the inquest court. Basing his claim on the inquest that had been carried out was not hearsay evidence. The Applicant submitted that he sought to rely on those findings of the inquest to buttress his claim on behalf of the estate of the deceased. This court is satisfied with this submission.

17. In **Independent Medico Legal Unit –vs Attorney General of the Republic of Kenya Application No. 2 of 2012** the **East Africa Court of Justice** held that for an error to be an "error apparent" it must be an error which strikes one on mere looking at the record, and would not require any long drawn process of reasoning on points where there may conceivably be two opinions. It must be a patent, manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish, and a review of a judgment will not be considered except where a glaring omission or a patent mistake or grave error has crept into that judgment through judicial fallibility.

18. The Applicant submitted that on the face of the record, the learned Judge made patent errors by basing the findings on incorrect set of facts and assumptions of law without due regard to the previous findings by **Justice Jaden** and **Justice Lenaola**. The court wrongly absolved the Defendants of the wrongful death of the deceased and has robbed her estate of compensation for a death that cannot be legally justified. This was an error apparent on the face of the record.

19. The Applicant submitted that the application was made within reasonable time as **Order 45 Rule (1)** provides that an application for review should be made without unreasonable delay. The judgment the

Applicant seeks to review was issued on 15th October 2012. The apparent delay in filing the application was occasioned by the fact that the Applicant was awaiting the judgment in **Petition No. 99 of 2011** between the Applicant and the 1st and 2nd Defendants. The judgment was issued on 30th November 2015 and as such the application for review was made within reasonable time. The Applicant also submitted that the explanation for the delay was proper and the court ought to exercise its discretion in favour of the Applicant.

20. In the finding of this court there are errors apparent on the face of the record to justify the review of the judgment and decree herein, and I hereby allow the application as prayed.

21. The result of this finding is that the judgment of the said court on the issue of liability is hereby reviewed and reversed, with the result that the decision of the judge on award and damages, had he found for the Plaintiff, is hereby confirmed.

22. In her submissions **M/s Kethi Kilonzo** had no issues with the damages which the judge said he would give had he found for the Claimant. Those damages amounted to Shs. 1,688,680.00. To this was to be added the costs of the suit.

23. The said judgment is herein reviewed in terms of the finding on liability with the result that the Plaintiff in that judgment (the Applicant herein) shall be entitled to Shs.1,688,680.00 with costs. The costs of this application shall be in the cause.

24. Orders accordingly.

Dated and delivered at Machakos this 28th day of September 2016.

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E. OGOLA

JUDGE