



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 66 OF 2009

**PETER OTIENO OJUOK (suing as  
personal and legal representative and  
on behalf of the Estate of MARTIN OLOO OJUOK-  
(DECEASED).....**

.....**APPELLANT**

**-VERSUS-**

**CAC(CHANAN AGRICULTURAL CONTRACTORS).....RESPONDENT**

**JUDGMENT**

**(Being an appeal from the ruling of the Senior Resident magistrate's court at Rongo by D.K.Kemei dated and delivered on 30<sup>th</sup> March, 2009 in SRMCC No. 208 of 2007)**

The appellant sued the respondent in the Senior Resident magistrate's court at Rongo seeking damages following a road traffic accident that occurred on 15<sup>th</sup> December, 2006 along Migori-Kisii road involving his brother **Martin Oloo Ojuok**-deceased and a tractor registration number KAP 745 G 2B 1027 then owned by the respondent. The appellant mounted the suit as the personal and legal representative of the estate of his deceased brother. In the suit he sought damages under the **Law Reform Act** as well as **Fatal Accidents Act**, costs of the suit and interest. He blamed the fatal accident on the respondent who was the employer of the deceased. Apparently the respondent had employed the deceased as the driver of the tractor on a daily salary of Kshs. 500/=. On the material day at about 4 p.m along Migori-Kisii road at Nyarago in the course of his said employment, the brakes of the tractor failed and the deceased was unable to control and manage it and as a result, he lost control and it overturned, as a consequence the deceased suffered fatal injuries and died. To the appellant, the accident aforesaid was occasioned by breach of statutory duty of care and common law negligence on the part of the respondent, its agents and or servant towards the deceased. The appellant proceeded to give the particulars of breach of statutory duty of care and common law negligence it attributed to the respondent.

The respondent filed its defence and denied all the allegations contained in the plaint against it. As a parting shot it questioned the jurisdiction of the court to hear and determine the dispute. It took the view that the court lacked jurisdiction to hear and determine the suit pursuant to the provisions of section 16 and 58 of the work injury Benefit Act (**WIBA**). Essentially those provisions ousted the jurisdiction of the courts in dealing with disputes arising from employer/employee relationships. Such dispute were solely now in the provence of the industrial court.

The case then proceeded to full hearing with the appellant calling four witnesses. The respondent

however offered no evidence in rebuttal. In its written submissions, the respondent reiterated the issue of jurisdiction stating that the appellant had filed the case on 21<sup>st</sup> December, 2007, on which day **WIBA** was already in force. The suit ought therefore to have been referred to the office of Director established under **WIBA** or in the alternative the appellant should have waited for the office to be duly constituted and functional in order to refer it to the same where compensation would have been awarded in consonance with **WIBA**. The written submission of the appellant on record did not at all address this issue of jurisdiction. If anything, it appears that indeed the appellant gave the issue a wide berth.

In reserved judgment delivered on 1<sup>st</sup> November, 2008, the learned magistrate struck out the entire suit for want of jurisdiction holding thus “.....*The said Act came into force on 20<sup>th</sup> December, 2007 and which should have been filed in accordance with the new law aforesaid. The new law provided for the procedures to be followed by those seeking compensation for injuries sustained while in the course of their work. Consequently, I find that as at the time of filing this suit by the plaintiff this court’s jurisdiction to handle these kind of cases had already been ousted by the statute. This being the case I have no option but to order the suit struck out with costs to the defendant.....*”.

The appellant was aggrieved by the turn of events and opted to mount an application for review of the judgment and decree aforesaid before the same trial magistrate on 3<sup>rd</sup> December, 2008. The application was expressed to be brought under section 3A and 80 of the **Civil Procedure Act**, Order XLIV rules 1(1) and 3(2) of the **Civil Procedure rules** and all other enabling provisions of the law. Besides seeking the review, the appellant also prayed in the same application that if the prayer for review is granted then the court should thereafter proceed to enter judgment in the favour of the appellant and further assess the damages.

The grounds in support of the application were that there was an error or mistake apparent on the face of the record, trial magistrate had based his findings on a law which was not in existence during the trial and at the time of filing the suit, thus and in the premises the trial magistrate erred by finding that he had no jurisdiction to hear and determine the suit, that it would be fair and reasonable if the judgment and decree were reviewed and finally that the application was made in good faith, without undue delay and for the ends of justice.

The application too was supported by the affidavit of the appellant. Essentially, he deponed that upon filing the suit, he was informed by his advocates on record that **WIBA** was to come into operation on 20<sup>th</sup> December, 2007 and by virtue of section 16 and 58 thereof the court would have no jurisdiction to hear the suit. He was however informed further that by a legal Notice dated 23<sup>rd</sup> May, 2008 the earlier legal Notice was revoked and now **WIBA** was to start operating on 2<sup>nd</sup> June, 2008, almost six months later, after his suit had been filed. Thus the court had jurisdiction to hear and determine his suit since it had been filed prior to the coming into force of **WIBA**. In the premises there was an error or mistake on the face of the record since the trial magistrate relied on the Act which was not operational thus coming up with a wrong decision that he had no jurisdiction to hear and determine the suit.

In response, the respondent filed grounds of opposition to the effect that the application was incompetent and frivolous, there was no error or mistake apparent on record, the suit was rightly dismissed after a full trial and the only remedy now available to the appellant was an appeal. The case for review had not been made out, the suit was filed when **WIBA** was in force, misapprehension of law by a judicial officer can only be a ground of an appeal and not review.

The application came up for interpartes hearing before the learned magistrate on 26<sup>th</sup> February, 2009 and it was canvassed. In a ruling delivered on 30<sup>th</sup> March, 2009, the application was dismissed with costs to the respondent, the learned magistrate holding thus:-

***“.....This ruling was delivered on 22<sup>nd</sup> May, 2008 and the following day (23<sup>rd</sup> May, 2008) the minister in charge of labour signed legal notice number 60 of 23<sup>rd</sup> may, 2008 making commencement date of the New Act to be 2<sup>nd</sup> June, 2008. It would appear that this court had not become aware of the***

*existence of the new legal notice number 60 of 23<sup>rd</sup> May, 2008 and hence relied on the previous legal notice number 13 of 2007 which had already been revoked. It is the norm that all courts should be abreast with all the statutes and in this case the new legal notice escaped its attention and which led to the dismissal of the applicants suit. This being the case I cannot agree with defence submissions that the proper course for redress is by way of an appeal and not review as this court will be sitting on and appeal against its own judgment. For the foregoing observation I come to the finding that the applicants notice of motion dated 3<sup>rd</sup> December, 2008 lacks merit. The same is ordered dismissed with costs to the respondent.....”.*

It is this ruling which triggered this appeal. The appellant faults the ruling on four grounds to with:-

- “1. The learned magistrate erred in law and fact in holding he cannot review his own judgment even after finding that there was an error apparent on the face of the record on the part of the honourable magistrate.*
- 2. The learned honorable magistrate erred in law and fact in arriving at the decision without any legal and or evidential justification.*
- 3. The learned honourable magistrate erred in law and fact in arriving at wrong decision without any authority to support his decision.*
- 4. The learned honourable magistrate erred in law and fact in total disregard to the legal submission by the appellant.....”*

When the appeal came before me for directions on 30<sup>th</sup> November, 2010, **Mr. Ojala** for the appellant and **Mr. Odhiambo** for the respondent agreed amongst other directions to canvass the appeal by way of written submissions. They subsequently filed and exchanged written submissions which I have carefully read and considered alongside cited authorities.

It is trite law that a litigant seeking a review under the then Order XLIV rule 1 of the **Civil Procedure** rules has to satisfy the court to which the application for review has been made that there has been a discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time; or that there was some mistake or error apparent on the face of the record, or that there is any other sufficient reason. The foregoing notwithstanding, the application has to be mounted without undue delay.

As stated in the case of **National Bank of Kenya Limited Vs Ndugu Njau C.A No. 211 of 1996 (UR)** *“... A review may be granted wherever 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. It will not be 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. Misconstruction of a statute or other provisions of law cannot be a ground for review. In the instant case the matters in dispute had been fully canvassed before the learned judge. He made a conscious decision on 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 ...”.*

In this case it is conceded by both parties that the learned magistrate was not aware nor was he made aware of the commencement date for **WIBA**. Indeed in his ruling, the learned magistrate’s acknowledges that fact. He goes a head to lament thus *“...it is the norm that all courts should be abreast with all statutes and in this case the new legal notice escaped its attention and which led to the dismissal of the applicants suit.....”* The learned magistrate went on nonetheless to disagree with the respondent’s submissions and which submissions he reiterated in this appeal, that the proper cause for redress for the appellant was by way of an appeal. However, despite the foregoing the learned magistrate surprisingly

still went a head to dismiss the application as lacking in merit. I must confess that I have been unable to follow the learned magistrate's reasoning leading to the dismissal of the application. To my mind that reasoning could only have led to one and only one result, the success of the application. The learned magistrate agreed in principle with the submissions of the appellant that the court was not aware of the existence of the new legal Notice dated 23<sup>rd</sup> May, 2008 which made it clear that the commencement date for **WIBA** was 2<sup>nd</sup> June, 2008 almost seven months after the appellant had filed the suit. The magistrate admitted in his ruling that he had relied on the previous legal Notice number 13 of 2007 in arriving at his judgment. Yet that legal notice had actually been revoked. Clearly then that is an error on the face of the record on that part of the court. Despite that admission, still the learned magistrate proceeded to dismiss the application without giving any legal basis or justification. It would have been proper for the trial magistrate to give his reasons why he could not allow the application even after agreeing with the appellant that there was an error on his part for not being aware that the act on which he based his finding in dismissing or striking out the suit was not in existence and the court had jurisdiction to hear and determine the suit then.

This was a fit and proper case for Review . It is not a case where there was an erroneous conclusion of law or evidence by the learned magistrate as will form the basis of an appeal and not review as urged by the respondent. Neither is it a mere error of law. It is an error on the face of the record.

Accordingly, the authorities cited by the respondent in support of its contention that the appellant's remedy lay in an appeal and not review application are irrelevant. Indeed as stated in **Mulla**, the Indian Code of Civil Procedure 13<sup>th</sup> Edition at page 1672 “....**To warrant a review of an error alleged to be on the face of a record such an error ought to be so clear as to be without any disputes. Where the very existence of error on a record is contestable by parties such a matter is a ground which should be canvassed on an appeal.....**” In this case the existence of the error is not in dispute. It is admitted.

In the result, I allow the appeal with costs, set aside the order of dismissal by the magistrate dated 30<sup>th</sup> March, 2009. In substitution I allow the application dated 3<sup>rd</sup> December, 2008 as presented with costs. Let the suit be heard a fresh before another magistrate in the same station with competent jurisdiction other than **Hon. D. Kemei**. The appellant shall otherwise have costs of this appeal.

**Judgment dated, signed and delivered** at Kisii this 31<sup>st</sup> March, 2011.

**ASIKE-MAKHANDIA**  
**JUDGE**