



## Editorial Summary

1. *Civil Appeal*
2. *Subject of Subordinate court case*

### *TORT*

- 2.1 *Running Down cause*
- 2.2 *Female adult and another knocked down by a motor vehicle registration No. KTN 077*
- 2.3 *Original 1<sup>st</sup> defendant driver convicted in a Traffic court case for offence.*
- 2.4 *Original 1<sup>st</sup> defendant sued together with original 2<sup>nd</sup> defendant, the registered owner of the motor vehicle and original 3<sup>rd</sup> defendant the beneficial owner of the motor vehicle.*
- 2.5 *Denial of ownership of the motor vehicle by original 2<sup>nd</sup> defendant.*
- 2.6 *Subordinate court enters judgment against defendants No. 1 and 2 only.*
- 2.7 *Original 2<sup>nd</sup> defendant files review application to the Hon. Trial Magistrate decision.*
- 2.8 *Application declined by Hon. Trial Magistrate.*
- 2.9 *Original 2<sup>nd</sup> defendant files appeal against ruling to High Court.*

2.10 *Issue being that of ownership of the motor vehicle*

3. *Appeal to High Court:*

- i) *Court held original 2<sup>nd</sup> defendant not owner of motor vehicle*
- ii) *Appeal allowed and judgment against original 2<sup>nd</sup> defendant set aside. Case against original 2<sup>nd</sup> defendant dismissed.*

4. *Application Notice of Motion 12<sup>th</sup> October 2011*

- i) *Application by original plaintiff*
- ii) *Judgment be reviewed.*
- iii) *Court to determine relationship of original 2<sup>nd</sup> defendant to original 3<sup>rd</sup> defendant*

5. *In Reply:*

- i) *Advocate for original 2<sup>nd</sup> defendant (appellant)*  
*No objection to the application provided award and Findings of court is not changed.*
- ii) *Advocate for original defendant/respondent*  
*Opposed the application on ground – now new facts and or evidence was raised.*

6. *Held:*

- a) *Review brought correctly – “for any other sufficient reason.”*
- b) *Review allowed.*
- c) *court judgment to read:*  
*liability against 1<sup>st</sup> and 3<sup>rd</sup> original defendant jointly and severally with the 3<sup>rd</sup> original defendant*

*being vicariously liable.*

- d) *Whereas the matter before the High Court on appeal was on review, the main judgment has not been appealed against.*
- e) *Judgment on liability and quantum remain the same and will not be interfered with unless appealed against.*
- f) *That there be 30 days of appeal from the court's review orders on the judgment of the subordinate court by original 1<sup>st</sup> and 3<sup>rd</sup> defendants under Section 65 and 79G of the Civil Procedure Act.*

7. *Case Law:*

8. *Advocates :*

- i) *K.G. Mwangi instructed by M/s B.W. Kamunge & Advocates for appellant*
- ii) *L.K. Waweru instructed by M/s L.K. Waweru & Co Advocates for 1<sup>st</sup> and 2<sup>nd</sup> respondents*
- iii) *P C Sang instructed by M/s Kiage & Co Advocates for 3<sup>rd</sup> appellant*

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**MISC. CIVIL APPL NO. 589 OF 2009**

**BILL WINTER SAFARIS LTD ..... APPELLANT/**

**VERSUS**

**CAROLINE NANJALA WEKESA ..... 1<sup>ST</sup> RESPONDENT**  
**CHARLES KANGETHE KIBUU ..... 2<sup>ND</sup> RESPONDENT**  
**JULIUS MBURU ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**I. INTRODUCTION**

1. The application, Notice of Motion dated the 12<sup>th</sup> October 2011 seeks orders of reviewing this court's judgment that was determined on the 8<sup>th</sup> June 2011.
2. The reasons for review being that there was an error on the face of the record, inter alia.

3. A brief background of the judgment facts, is that one Caroline Nanjala Wekesa, a female adult and another were run down by a motor vehicle registration number KTN 077, on the 7<sup>th</sup> December 2004. As a result of the accident she sustained injuries and sued the driver of the said vehicle, one Charles Kangethe Kibui (herein referred to as the original 1<sup>st</sup> defendant), the registered owners of the motor vehicle

M/s Bill Winter Safaris (herein referred to as the original second defendant) and the beneficial owner of the said vehicle are Julius Mburu herein referred to as the original 3<sup>rd</sup> defendant.

4. After trial before the subordinate courts, the Hon. Trial Magistrate established that an accident did indeed occur. It was further established by that court that the driver/1<sup>st</sup> defendant of the motor vehicle was charged before the Traffic Court, found guilty and convicted for the traffic offence. He was fined Ksh. 4000/= in default 4 months imprisonment.

5. In determining liability in the subordinate court case, the Hon. Trial Magistrate came to the findings that the persons to blame for the accident was the driver original 1<sup>st</sup> defendant and the official registered owner of the said motor vehicle the original 2<sup>nd</sup> defendant. The Hon. Magistrate by implication found no liability on the part of the original 3<sup>rd</sup> defendant who was the beneficial owner.

6. Being aggrieved by this judgment, the original 2<sup>nd</sup> defendant

M/s Bill Winters Safaris filed a review before the same subordinate court. The issue before the trial magistrate was on the ownership of the said motor vehicle. The 2<sup>nd</sup> defendant therefore sought to have the judgment of the Hon. Magistrate reviewed on grounds that the said motor vehicle no longer belonged to them. That possession had passed on to the original third defendant Julius Mburu.

7. The Hon. Trial Magistrate dismissed this review application on the

28<sup>th</sup> September 2009. The original 2<sup>nd</sup> defendant filed an appeal against this ruling on the 27<sup>th</sup> October 2007 to this High Court of Kenya at Nairobi.

8. When the appeal came before this court for hearing, the only issue was, “who is the correct owner of the motor vehicle registration

KTN 077 between the original 2<sup>nd</sup> defendant, as the registered owner and the original 3<sup>rd</sup> defendant as the beneficial owner?

9. By the judgment of this court dated 8<sup>th</sup> June 2011, I determined the issue and found that the original 2<sup>nd</sup> defendant M/s Bill Winters Safaris Ltd were not the owners of the said motor vehicle at the time the accident occurred. The original plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> original defendants conceded to this fact, and this matter was finalized.

## II APPLICATION 12<sup>TH</sup> OCTOBER 2011

10. The original plaintiff, Caroline Nanjala Wekesa, filed the review application dated 12<sup>th</sup> October 2011, to the said judgment of

8<sup>th</sup> June 2011. She sought to then know if the original 2<sup>nd</sup> defendant is not liable for this said accident, then who should be held liable?

11. The advocate for the original 2<sup>nd</sup> defendant did not oppose the application on grounds that this court’s findings should not be interfered with. The advocate for the original 1<sup>st</sup> and 3<sup>rd</sup> defendant argued that the application before this court seeks review of the court’s judgment. The rules for review have not been met by the applicant and as such the application should be dismissed.

### III FINDINGS

12. Order 45 of the Civil Procedure Rules provides a litigant to apply for a review against a decree or order of the court.

13. The rule reads:-

**1. Any person considering himself aggrieved:-**

**a) By a decree or order from which an appeal is allowed but from which no appeal has been preferred or**

**b) by a decree or order from which no appeal is hereby allowed is permitted to apply for a review of the judgment of the court. This must be done without unreasonable delay.**

14. The original 2<sup>nd</sup> defendant applied for a review in the subordinate courts without unreasonable delay. They had by then filed no appeal before applying for a review.

15. The original plaintiff has filed for review without unreasonable delay.

16. The grounds in which a review is to be made is provided for in the 2<sup>nd</sup> part of Order 45 namely:

**“and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order was made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason deserves to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”**

17. The original plaintiff wished that this court clarifies who then is liable for the said accident, besides the original 1<sup>st</sup> defendant/driver? She had the option of taking this court's judgment back to the original court for further determination or file a review to this High Court on the same question.

18. Under Order 45 Civil Procedure Rules, the correct reasons for a review would be:

***“for any other sufficient reasons.”***

19. I believe that the original plaintiff had demonstrated sufficient reasons and therefore did file the application correctly before this court.

20. My findings and determination as a result of my judgment of

8<sup>th</sup> June 2011 is as follows:

***The original defendant No. 1 and driver of the motor vehicle at the time of the accident together with the original defendant No. 3 the beneficial owner of the vehicle are liable for the accident.***

21. There was sufficient evidence before the trial magistrate to show that the vehicle had been finally sold to the original 3<sup>rd</sup> defendant in kind/in exchange for a piece of land). The original 3<sup>rd</sup> defendant admitted to this.

22. The court's judgment is therefore reviewed to read that:

***Judgment be and is hereby entered in favour of the original plaintiff on liability against the original 1<sup>st</sup> defendant and the original defendant jointly and severally with the original third defendant being***

***vicariously liable.***

23. What was before me was a review ruling. The main judgment has never been appealed against and I do not have a mandate to interfere with the said judgment unless there is an appeal filed against the issue of apportionment of liability and quantum.

24. To this end, I would hold that there be a right of appeal of the subordinate court's judgment against the original 1<sup>st</sup> and

3<sup>rd</sup> defendants to be 30 days from this court's judgment (Section 65 and 79G Civil Procedure Act.)

25. There will be no orders as to costs.

DATED THIS 30<sup>TH</sup> DAY OF NOVEMBER 2011 AT NAIROBI

M.A. ANG'AWA

JUDGE

*Advocates* :

i) *K.G. Mwangi instructed by M/s B.W. Kamunge & Advocates for appellant*

ii) *L.K. Waweru instructed by M/s L.K. Waweru & Co Advocates for 1<sup>st</sup> and 2<sup>nd</sup> respondents*

iii) *P C Sang instructed by M/s Kiage & Co Advocates for 3<sup>rd</sup> appellant*