



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU Civil Appeal 61 of 2008

SIMON KENYA MUCHIRI.....APPELLANT

VERSUS

SAMUEL KIMANI MAIGUA.....RESPONDENT

REVIEW - Power to review is directed by S. 80, Civil Procedure Act (Cap. 21 Laws of Kenya) - regulated by Order XLIV rule 1 of the Civil Procedure Rules - Evidence on record whether new and important matter or evidence.

JUDGMENT

The appellant has appealed to this court on seven (7) grounds, namely -

1. *The learned Magistrate gravely erred in law and fact in sitting in appeal of her own decision contrary to the rules of natural justice.*
2. *The learned trial magistrate erred in law and fact in failing to find that the respondent had not satisfied any of the mandatory conditions set out under order XLIV Rule 1 of the Civil Procedure Rules to warrant orders of review of the court's judgment delivered on 4th July 2007.*
3. *The learned trial magistrate erred in failing to find that the issues raised by the respondent could only be raised on appeal and not by way of an application for review.*
4. *The learned trial magistrate erred in allowing the respondent to challenge a decree, which he had already satisfied by paying the decretal amount albeit to his counsel.*
5. *The learned trial magistrate erred in law and fact in failing to find that the respondent was guilty of laches and material non disclosure and that his notice of motion application dated 10th March 2008 was an afterthought, unmerited and a gross abuse of the court process.*
6. *The learned trial magistrate erred in failing to consider the appellants submissions.*
7. *The learned trial magistrate misapprehended the law and facts and arrived at an erroneous conclusion.*

The appeal was argued before me on 3rd February 2010 by **Mr. Mwangi**, Counsel for the Appellant. **Mr. Matiri** appeared for the Respondent. The appeal raises only one issue for determination whether learned Principal Magistrate erred in law in reversing her earlier judgment under the application for judicial review. As expected, in these matters, the two Counsel took opposing views. Counsel for the Appellant urging that on the grounds of appeal the appeal be allowed, while Counsel for the Respondent urged that the appeal had no merit and should be dismissed with costs. There was however no dispute on the facts.

The Appellant herein was the Plaintiff in Nakuru CMCC No. 165 of 2005. The Respondent was the Defendant. The record shows that liability had been apportioned at 90% against the Defendant and 10% as against the Plaintiff, and a sum of Shs 100,000/= in general damages, less 10% contributory negligence and Shs 2,500/= special damages was agreed upon. A consent order was duly entered, only to be set aside by another consent order subsequently entered into, and duly recorded in court. The matter subsequently went to hearing and again according to the record the Plaintiff testified, was cross-examined, and thereafter closed his case. The Defendant/Respondent offered no evidence. The Respondent however filed submissions to the effect that the Plaintiff's evidence that he was a passenger was not proved and that the Respondent did all that he could to avoid a head-on collision with the Nissan Matatu and thereby landing in a ditch. Counsel for the Respondent also submitted that in the event the court found the Respondent liable, should award the appellant Shs 400,000/= by way of general damages.

On his part Counsel for the Appellant submitted that the Appellant had proved its case on the balance of probability and prayed that the Respondent be 100% liable for the subject accident. He proposed a figure of Shs 300,000/= general damages, relying on the decision of Khamoni J. in **Nyeri HCCC No. 320 of 1998 Catherine Wanjiru & 3 Others -vs- Gibson Theuri Gichubi**.

In her judgment, the trial court awarded the Appellant Shs 202,500/= as general and special damages plus costs as already stated above. Following execution proceedings the entire decretal sum was paid to the Respondent's Advocates. For reasons which are not apparent on the record, the Respondent applied to court for review of the judgment and in a Ruling delivered on 17th April, 2005, the learned trial magistrate reversed her entire judgment and dismissed the Appellant's suit with costs against the Appellant. The sole issue for determination in this appeal is therefore whether or not the learned trial magistrate erred in law and fact in the said Ruling.

The jurisdiction of review of any judgment, decree or order is founded upon **Section 80** of the **Civil Procedure Act**, and is regulated by **Order XLIV rule 1** of the **Civil Procedure Rules**. **Section 80** provides -

S. 80, *Any person who considers himself aggrieved -*

- (a) *by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*
- (b) *by a decree or order from which no appeal is allowed by this Act;*

may apply for review to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order XLIV, rule 1 of the **Civil Procedure Rules** reiterates the provisions of Section 80 (a) and (b) and goes on to provide -

... 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 order made, or an account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires 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."

In summary therefore the conditions for review of a judgment, decree or order are these -

- (a) *there is discovery of new important matter or evidence;*
- (b) *that important matter or evidence even after due exercise of diligence was not within the knowledge of the applicant, or*
- (c) *if it was within the knowledge of the applicant could not be produced at the time of the trial; or*

- (d) *there was an error or mistake upon the face of the record; or*
- (e) *any other sufficient reason, and*
- (f) *if any of those grounds is present, the application for review be made without unreasonable delay.*

In this case, the Notice of Motion dated 10th March 2008 (*the application for review*) was based upon one ground, *that there is an error apparent on the face of the record*" According to the Supporting Affidavit of the Respondent (*Samuel Kimani Maigua*), sworn on 10th March 2008, the error on the face referred to the testimony of the Appellant that he blamed the accident, the subject matter of the suit on the driver of motor vehicle registration number KAE 195T and not his motor vehicle registration number KAT 069M in which he (*the Respondent*) was together with the Appellant.

In his Replying Affidavit sworn on 17th March 2008, and filed on 19th March 2008, the Appellant accused the Respondent of material non-disclosure and laches and that he is not entitled to the orders sought.

The Motion for review was predicated upon the ground that there was an error apparent on the face of the record. An error in law on the face of an award or judgment means that a Judge can find in the award or judgment actually incorporated or set out (therein, as for instance by the trial court, or an arbitrator, stating the reasons or grounds for his judgment, some legal proposition or fact, which is the basis of the award or judgment, which the Judge or higher court can find is erroneous.

I have perused carefully the evidence of the Appellant before the trial magistrate, and I am unable to find or see anywhere in that his evidence, or any where else in the record, ... the Respondent's averment - "*that the Plaintiff in his evidence and/or testimony clearly blamed the accident subject matter of this suit on the driver of motor vehicle registration number KAE 195T*". This is what I find at p. 3 of the proceedings (p. 11 of the record),

"... I have recovered from the injuries now. The vehicle I was in was driven at very high speed. The accident occurred suddenly. I blame the driver of the vehicle that hit the vehicle I was in."

The above record corresponds and conforms with the Respondent's averment in paragraph 6 - ... "***that I was in the motor vehicle registration number KAT 069M together with the Plaintiff.***

Clearly therefore factually there was evidence that the Appellant blamed the driver of motor vehicle No. KAE 195T, for the accident - that is the vehicle which hit the vehicle in which the appellant and the Respondents were in.

The fact the appellant blamed the driver of motor vehicle KAE 195T is not however ground for review of the judgment.

In the case of **ORIGO & ANOTHER vs. MUNGALA [2005] 2 KLR 307**, the Court of Appeal held inter alia that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for an appeal.

In that case the trial court had dismissed an appellant's application for an adjournment to call a crucial witness, one Roda. Their application for review on the grounds of discovery of new and important evidence was dismissed on the ground that issue of the crucial witness could hardly be described as discovery of new and important matter or evidence. The Appellants did not show that they had discovered new or important matter or evidence. The witness existed and was known to the parties.

In the instant case, the evidence of the Appellant's vehicle - "*was driven at very high speed*" or that "*I blame the vehicle that hit the vehicle I was in...*" was always on record. The fact that the trial magistrate ignored it in her judgment could not have made it new and important matter or evidence or still less an error on the face of the record. It may indeed be a ground of appeal but not for review.

The Appellant succeeds on this ground.

The Appellant would also succeed on another ground, the application for review was not brought without unreasonable delay.

When anything is to be done within a reasonable time or as in this case, "*without unreasonable delay*" the question of what a reasonable time or unreasonable delay, must necessarily depend on the circumstances of the particular case, and is therefore a question of fact. In **REFRIGERATION CONTRACTORS LTD vs. LIETA [2005] 2 K.L.R. 506**, the Court of Appeal held that given the unusual circumstances and the fact that the problem arose from the initial error of the trial - the delay (*of three months*) was not so unreasonable as to warrant dismissal of the application for review on this ground. Similarly two years delay was said in the circumstances not to be unreasonable - **ORIRO VS. SEKO [1984] K.L.R. 238**.

In the instant case, there are no unusual circumstances which would justify the bringing of the application for review after six months. There was no application for stay of execution. The application was brought after execution was effected, and the decretal sum paid over to the Respondent's Advocates who refused to deposit the sum either in a joint account with the Appellant Advocates or deposit it in court pending the hearing and determination of the application for review.

I would agree with the Appellant's contention that the trial magistrate erred in law and fact in failing to find that the Respondent was guilty of laches and material non-disclosure, the notice of motion for review, unmerited and a gross abuse of the process of court.

I would consequently allow the appeal herein, set aside and vacate the Ruling delivered by the trial court on 17th April 2008 in Nakuru CMCC No. 165 of 2005.

I direct the decretal amount awarded by the trial court in its judgment of 4th July 2007 be paid to the Appellant together with interest at court rates from said date, and costs in this appeal and the lower court.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 22nd day of April, 2010

M. J. ANYARA EMUKULE

JUDGE