Kisingo v Mulela (Civil Appeal E0207 of 2021) [2025] KEHC 6058 (KLR) (7 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6058 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E0207 OF 2021

G MUTAI, J

MAY 7, 2025

BETWEEN

AGOSTINO KISINGO ..... APPLICANT

AND

ROBERT MULINGE MULELA ..... RESPONDENT

RULING

1. In a judgment delivered on 31st October 2024, this court (per Ng'arng'ar, J) enhanced the award from Kes.1,000,000/- to Kes.1,500,000/- as general damages for pain and suffering and loss of amenities. The Appellant/Appellant was aggrieved by the said decision. He contended that the court didn't consider his appeal on the loss of earning capacity and that it found erroneously that a claim for loss of earning capacity wasn't pleaded.

2. The Appellant/Applicant thus filed the Notice of Motion dated 26th November 2024, through his advocates, Messrs. Njoroge Mwangi & Co Advocates, vide which he sought the following orders: -

    a. That this honourable court be pleased to set aside its decision declining to consider the grounds of appeal on the assessment of damages on loss of earning capacity on its judgment delivered on 31st October 2024;

    b. That the honourable court be pleased to reconsider and review its decision with view of considering the appeal on loss of earning capacity and making a final decision on its merits by assessing the damages on the same; and

    c. That the costs of the application be provided for by the respondent.

3. In the supporting affidavit sworn on 20th November 2024, the Appellant/Applicant's counsel, Mr Shadrack Kazungu, contended that the Appellant/Applicant suffered severe injuries which would affect his ability to earn a living. Mr Kazungu deposed that the prayer for loss of earning capacity was

pleaded. He urged that the court made an error apparent on the face of the record in its finding that the said claim hadn't been pleaded. He thus urged that the application be allowed.

4. The application was opposed. The Respondent filed a replying affidavit sworn by Joseph N Ngigi, learned counsel for the Respondent, on 16th December 2024, in which he deposed that the application had no merit as the prayer for loss of earnings capacity was the subject of the appeal and that it was addressed in the impugned judgment. He deposed that there was no error apparent on the face of the record in the judgment and prayed that the application be dismissed.

5. The application was canvassed through written submissions, with both parties filing written submissions.

6. The submissions of the Appellant/Applicant are dated 7th February 2025. The said party urged the court to allow the application. Counsel urged that there was a glaring error on the face of the record which ought to be corrected.

7. The submissions of the Respondent are dated 31st March 2025. The Respondent's counsel submitted, relying on the case of Stephen Gathua Kimani vs Nancy Wanjiru trading as Providence Auctioneers [2016]eKLR, that there was no ground to review the judgment and that the application was wholly without merit and ought to be dismissed. It was contended that this Court properly considered the prayer for loss of earning capacity and made a reasoned determination.

8. I have considered the submissions of the parties and the documents before me. The sole issue for determination is whether there is an error apparent on the face of the record, and if so, whether I should review the judgment. To determine this question, I must consider the statutory underpinnings of the court's power of review.

9. Order 45 Rule 1 of the Civil Procedure Rules provides that:-

> " 1.
>
> (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,
>
> 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 made, or on 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. (emphasis added).

10. From the foregoing provision of the Rules, it is clear that the grounds upon which review may be sought are:-

1. Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time the decree was passed or the order made;

2. Mistake or error apparent on the face of the record; and

3. For any sufficient reason.

The Rules are emphatic that the application for review must be made without unreasonable delay.

11. As already stated, the applicant seeks the review of the impugned decision of this court on the ground that there is an error apparent on the face of the record. What amounts to an error apparent on the face of the record is settled. In Republic v Medical Practitioners & Dentists Board & Another & another; MIO1 on behalf of MIO2 (a Minor) & another (Interested Party); Kingángá (Exparte) [2021] KEHC 298 (KLR) Mativo J stated as follows:-

> " 39. The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1. To put it differently, an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/ tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/ decision..."

12. In Muyodi vs Industrial & Commercial Development Corporation & another [2006] 1 EA 243, the Court of Appeal stated that:-

> " ...In Nyamogo & Nyamogo vs Kogo (2001) EA 174, this Court said 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. There is real distinction between a mere erroneous decision and an error apparent on the face of record. 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. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."

13. In Zablon Mokua v Solomon M. Choti & 3 others [2016] KEHC 683 (KLR), Lady Justice Wilfrida Okwany referred to the decision of the Court in Chandrakhant Joshibhai Patel -v- R [2004] TLR, 218, where it was held that an error stated to be apparent on the face of the record:

> " ...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may conceivably be two opinions."

14. Having set out what amounts to an error apparent on the face of the record, I must now determine if there is such an error apparent in the judgment. Given the nature of the application, I will look at the plaint filed by the Appellant/Applicant in the court below and ascertain if the claim for loss of earning capacity was indeed pleaded.

15. I note that paragraph 7 of the plaint was couched in the following terms: -

> " 7. The plaintiff further contends that the date of the accident he was 50 years old, was very healthy and strong and was working as a driver and as a result of the accident he is not able to work as a driver and he has lost his earning capacity at the rate of Kes. 48,991/- per month and the plaintiff claims for lost capacity for 10 years."

16. Although the claim above wasn't set out in the prayers part of the Plaint, it was nevertheless in the said Plaint.

17. The judgment, on the other hand, stated as follows, in paragraph *12*: -

> " On whether the trial court ought to have made an award for loss of earning capacity, it is the opinion of this court that the same was not pleaded in the trial court, and the same cannot be determined by this court..."

18. It is evident that, contrary to what this Court found, the claim for loss of earning capacity was pleaded in the Plaint. There is, therefore, an error on the part of this Court. The error is clear and does not need elaborate reasoning or elucidation.

19. Based on the foregoing, I find and hold that there was an error apparent on the face of the record and that the court ought to have awarded the Appellant/Applicant compensation for loss of earning capacity.

20. In Butler vs Butler [1984] KLR 225, the Court of Appeal held as follows: -

> " A plaintiff's loss of earning capacity occurs where, as a result of his injury, his chances in the future of any work in the labour market or work, as well paid as before the accident, are lessened by his injury. ... It is a different head of damages from an actual loss of future earnings which can readily be proved at the time of the trial. The difference was explained in this way: compensation for loss of future earnings is awarded for real accessible loss proved by evidence. Compensation for demotion of earning capacity is awarded as part of the general damages. ..."

21. What then would be the appropriate award? In my view, and as was submitted, I shall use the multiplicand to arrive at an award that is just and fair, and per the circumstances of this case. I will take

into account the Appellant/Appellant's age, occupation, and earnings at the time of the accident, as provided by documents.

22. I am guided by the decision of the Court in Alpharama Limited vs Joseph Kariuki Cebron [2017] eKLR stated as follows: -

> " To assess loss of earning capacity in the future, the court must consider to what extent the claimant's ability to earn income will be affected in the future and for how long this restriction will continue. The traditional approach adopted by the courts when calculating a claim for future loss is to assess what lump sum is needed to compensate the claimant for the future loss. The starting point in this calculation will be to determine what annual net loss the claimant will incur in the future (the "multiplicand"), which is the annual loss of earnings. The multiplicand will then be multiplied by a "multiplier". The multiplier is assessed having regard to the number of years between the date of the settlement and the date when the loss stops. In a claim for future loss of earnings, this may be the date when the claimant would, but for the injury, have retired."

23. The evidence before the court showed that he was earning Kes.48,991/- monthly. Dr Udayan assessed that the Appellant/Applicant suffered an incapacity of 50%. Given that he was 50 years old, and with, probably, less than ten years of employment left and taking into account the uncertainties of life, I am inclined to agree that the Appellant /Applicant would have worked for six more years. In the circumstances, I award him Kes.1,763,676/-, as compensation for the loss of earning capacity. I have arrived at the said figure in the following manner; Kes.48,991 (per month) * 12 (months in a year) * 6 years * 50/100 (incapacity in percentage terms). This is in addition to the amount awarded in the impugned judgment.

24. As costs follow the event, I award the Appellant/Applicant the costs of the application.

25. It is so ordered.

DATED AND SIGNED IN MOMBASA THIS 7TH DAY OF MAY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr Kazungu, for the Appellant/Applicant;

Ms Ireri, holding brief for Mr Bosire, for the Respondent; and

Arthur - Court Assistant.