



**Smart Auto Limited & another v Jefwa & another (Suing as the Administrators of the Estate of Kazungu Kadenge Tsuma) (Civil Appeal 357 of 2024) [2025] KEHC 12347 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 12347 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 357 OF 2024  
F WANGARI, J  
JULY 17, 2025**

**BETWEEN**

**SMART AUTO LIMITED ..... 1<sup>ST</sup> APPELLANT**

**WYCLIFF OKWANDA MASIA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JACKSON YAA JEFWA ..... 1<sup>ST</sup> RESPONDENT**

**KAMONE KITI YAA ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF KAZUNGU  
KADENGE TSUMA**

*(Being an appeal against the ruling and order of Hon. Noelyne Reuben Akee (SRM) delivered on 26th September 2024 in Mombasa Chief Magistrate's Court Civil Suit No. E0297 of 2022)*

**JUDGMENT**

1. The Respondent who was the Plaintiff in the lower court matter filed a suit against Appellant/ Defendant for Special and General Damages under the *Fatal Accident Act* and The *Law Reform Act* for the benefit of the deceased estate, who died in an accident caused by the negligence of the Appellants' negligence.
2. On 12/04/2024, Judgment was entered in favour of the Plaintiff/ Respondent with a cumulative award of Kshs. 2,242,000/=. Dissatisfied with the Judgement, the Respondent filed a Notice of Motion application dated 23/05/2024 seeking for orders of stay of execution pending the hearing and determination of the application, review of the judgment made on 12/04/2024 doing away with the award of General Damages, and that costs of the application be in the cause.



3. The application was premised on grounds that the award of general damages was erroneous as it was just listed in paragraph 13 without any basis or explanation. The Plaintiffs did not plead for the award of General Damages in their Plaint neither was there a provision for an award of General Damages in a fatal claim under the *Law Reform Act* and the *Fatal Accidents Act*. That failure to grant the orders sought would render the appeal nugatory, the Applicants would suffer irreparable damage, and that substantial loss would result.
4. The Plaintiffs/Respondents filed Grounds of Opposition dated 10/06/2024 that the application was fatally defective and should be dismissed with costs, that there was no valid reason for review provided for under Order 45 of the *Civil Procedure Rules*, that the substantive ground raised in the application were for an appeal not review.
5. Further, there were no justifiable reasons to grant the orders sought, that the Plaintiffs/Respondents would be prejudiced if the application was allowed, and that the application had been brought in bad faith and meant to delay the cause of justice. The Plaintiffs/Respondents therefore prayed that the application be dismissed with costs.
6. The trial court dismissed the application vide the Ruling dated 26/09/2024 which is the subject of this appeal. The trial court relied on Article 159 (2)(b) of the *Constitution* of Kenya, stating that Judgment having been delivered, justice should therefore not be delayed.
7. The Appellants filed a Memorandum of Appeal dated 18/10/2024 on grounds that the trial magistrate erred in law and facts in dismissing the Appellants' application for review of her judgment delivered on 12/04/2024, in failing to consider all the prayers sought for in the Appellants' application for review and in considering and determining prayers not sought for in the Appellants' application for review dated 23<sup>rd</sup> May 2024.
8. The Appellants prayed that the appeal be allowed, that the lower court's Ruling be set aside, that this court be pleased to review Judgment of the trial court. That the failure by the trial court to give reasons for the award under the head General Damages offends the provisions of the *Civil Procedure Rules*, that this court be pleased to review the trial court's judgment and set aside the award entered under the heading of General Damages, that the Appellants be awarded costs of this appeal, and such other relief that this honourable court deems fit.
9. Though parties indicated to court on 02/04/2025 that they had filed their submissions, copies of the same were not on the CTS or in the file. This court will therefore proceed and make its determination on merit.

### **Analysis**

10. I have considered the Record of Appeal dated 23<sup>rd</sup> October 2023 and submissions by the parties. The issues for determination are: -
  - a. Whether the Appellant's application for review of judgment had met the legal threshold for an order of review.
  - b. Who should bear costs



11. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in *Selle v Associated Motor Boat Co.* (1968) E.A 123 as follows: -

“... Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ...”
12. The jurisdiction of the court to grant review is set out in Section 80 of the [Civil Procedure Act](#) which states as follows;

“ 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 a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit”.
13. Under Order 45 Rule 1. Under the rule, a party may seek for review orders if;
  - a. there is discovery of new and important evidence that despite due diligence, was not within the knowledge of the party when the orders were issued.
  - b. when there is an error apparent on the face of the record.
  - c. any other sufficient reason.
14. From the provisions of Order 45 (1) above, it must be shown that there was discovery of new evidence, or there was an error or omission on the part of the court that needs correction or any other sufficient reason. The Applicants sought for review orders based on grounds that an award of damages was granted yet it was not pleaded. It was further stated that the award of damages was erroneous hence an oversight of the court and the court ought to correct the apparent error on record.
15. This application seeks to rehear the application dated 1/3/2022 which is not one of the purpose under Order 45, Rule 1. (See *Lakesteel Supplies v Dr. Bandia & Another* Kisumu HCC No. 191 of 1994). I find that the application dated 1/3/2024 fails to meet the threshold under Order 45. It therefore lacks merit and is dismissed with costs to the Plaintiffs/Respondents.
16. In [Paul Mwaniki vs National Hospital Insurance Fund Board of Management](#) [2020] eKLR the court stated as follows;

“A review may be granted whenever 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 a 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. Misconstruing a statute or other provisions of law cannot be a ground for review.”



17. Further, the court stated that;

“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 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 purposes of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put it differently an order, 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. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it.”

18. The Applicants sought for review to have the award of General Damages done away with as it was not pleaded. This is not a simple error that can be rectified by way of an appeal. This is a matter of law and fact, and the Applicants ought to have appealed against the Judgment of the court instead of filing an application for review. I find that the Notice of Motion application dated 23/05/2024 did not meet the threshold for review orders and ought to have been dismissed on that basis.

19. On costs, the same follows the event. This is the import of section 27 of the Civil Procedure Act. However, the court retains discretion whether to award the same or not. I hereby direct that each party do bear its own costs.

### **Determination**

20. Following the foregone discourse, the upshot is that the following orders do hereby issue: -

- a. The Notice of Motion Application dated 23/05/2024 had no merits, and subsequently, this appeal has no merits and is hereby dismissed.
- b. Each party to bear its own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> DAY OF JULY, 2025.**

.....

**HON. F. WANGARI**

**JUDGE**

In the presence of;

N/A by the Appellants

N/A by the Respondent

Ms. Norah, Court Assistant

NB: Judgment released to the registry. Parties be notified

