REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO. 13 Of 2018

AINU SHAMSI HAULIERS LTD.....APPELLANT

-VERSUS-

ANASTACIA NDINDA MWANZIA (Suing as the administrators of the estate of)

HARRISON MWENDWA KAVILI.....RESPONDENT

(Being an Appeal from the Ruling of Hon. P.M. Wambugu (SRM) in the Senior Resident Magistrate's Court at Kilungu Civil Case No.254 of 2016, delivered on 23rd January 2018)

JUDGMENT

Background

1. The Respondent filed Kilungu SRMCC No. 254 of 2016 *(Kilungu case)* against the Appellant, seeking compensation on behalf of the deceased's estate, following a fatal road accident at Ngokomi area along the Nairobi-Mombasa highway on 23/11/2013. Judgment was eventually delivered and liability was apportioned in the ratio of 80:20 in favour of the Respondent.

2. Through an application dated 28/09/2017 *(the application)*, the Appellant sought to have the judgment on liability reviewed to 70: 30 to align it with the finding in Makindu PMCC No. 117 of 2014 *(Makindu case)*. The Appellant deposed that the Makindu case was a test suit in a series of other cases which had arisen from the same accident and in which there was another party *to wit* Ladha Coach Ltd. He also deposed that liability therein had been apportioned in the ratio of 20:50:30 with the Plaintiffs shouldering 50% liability.

3. In a ruling delivered on 23/01/2018, the learned trial magistrate dismissed the application and opined that it was an appeal disguised as an application for review. According to him, the mere fact that another court decided differently in the same issue cannot be a ground for review.

4. Aggrieved by the ruling, the Appellant filed this appeal and raised 3 grounds stating that the learned trial magistrate erred in law and fact by;

a. Failing to consider the review application, Notice of Motion dated 28/09/2017.

b. Failing to consider all the evidence on record when making it's order on the said Notice of Motion.

c. Failing to consider the evidence of a key witness, the police officer who was a witness for the plaintiff.

5. Before this appeal was canvassed, the Appellant applied to have additional evidence taken and the same was granted *via* a ruling dated 17/10/2018. By consent of the parties recorded on 03/04/2019, the certified copy of police file from Sultan Hamud police station was produced as exhibit 1.

6. The appeal was disposed of by way of written submissions.

The Appellant's case

7. The Appellant submits that the trial court's discretionary powers are not absolute and the appellate court has the power to reverse the decision where it is evident that the lower court acted arbitrarily and whimsically. It relies on **Mbogo –vs- Shah & Anor (1968) EA** where

the Court of Appeal stated as follows;

> "I think it is well established that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or taken or because it failed to take into consideration matters which it should have taken into account and consideration and in so doing, arrived at a wrong decision."

8. Further, he submits that it's application for review was premised on *'error apparent on the face of the record'* and invites this court to peruse the entire record and establish whether the trial court exercised it's discretion judiciously. He relies on **Muyodi –vs- Industrial and Commercial Development Corporation & Anor (2006) 1EA 243 as quoted in Barclays Bank of Kenya Ltd –vs- Abdi Abshir Warsame & Anor (2006) eKLR** where the Court held that;

> "…an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in it's very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between the mere erroneous decision and an error apparent on the face of the 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 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 or wrong view and is certainly no ground for a review although it may be for an appeal"

9. The Appellant contends that the trial magistrate ignored relevant considerations when he overlooked the testimony of the police officer who blamed the driver of motor vehicle registration No. KAY 060X *(the bus)*. He submits that from the said testimony, it is indisputable that the unfortunate accident occurred on the right hand side of the road *(heading towards Mombasa)* which was the lawful lane of his motor vehicle registration No. KBQ 869V/ZD 7699 *(the trailer)*. Further, he submits that the evidence of the police officer was crucial in determining liability.

10. The Appellant also submits that the issue of liability was conclusively determined in **Makindu SPMCC No. 412 of 2014: Paulina Mwende –vs- Jacqueline Kambua Musyimi & Ainu Shamsi Hauliers** where the trial magistrate apportioned 80% blame to the bus driver and 20% blame to the trailer driver. He contends that the case emanated from the same accident and as such, the matter under consideration by this court should be decided in the same way for consistency and uniformity.

11. With regard to the additional evidence, the appellant submits that from the findings of the police investigations, the point of impact was on the right side of the road, heading to Mombasa, and the bus driver was therefore to blame for causing the unfortunate accident.

The Respondent's case

12. In opposing the appeal, the Respondent briefly submits that the Appellant did not satisfy the conditions set out in Order 45 of the Civil Procedure Rules to warrant a review. She relies *inter alia* on **Pancrast Swan –vs- Kenya Breweries Ltd (2014) eKLR** and also cites the Code of Civil Procedure, Volume III pages 3652-3653 where it is stated as follows;

> "The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power.
>
> The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of the Civil procedure. Thus re-assessing evidence and pointing out defects in the order of Court is not proper"

13. Having considered the grounds of appeal, the rival submissions as well as the entire record, I find two issues falling for determination namely;

> a. Whether the trial magistrate erred by dismissing the application dated 28/09/2017?
>
> b. What is the effect, if any, of the additional evidence admitted by consent?

a. Whether the trial magistrate erred by dismissing the application dated 28/09/2017?

14. The right to apply for review is provided for in Section 80 of the Civil Procedure Act and elaborated by Order 45 of the Civil Procedure Rules as follows;

Order 45, rule 1: Application for Review of decree or order.

> 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.

15. There are three limbs which are discernible from part (b) above i.e.;

a. Discovery of new and important matter or evidence.

b. Mistake or error apparent on the face of the record.

c. Any other sufficient reason.

16. I have read through the application and supporting affidavit and note that the issue of the police officer's testimony was not captured anywhere. That testimony is supposed to be the *'error apparent on the face of the record'* which the Appellant referred to in his submissions. However, since that issue was not canvassed in the application, I find that it cannot form a ground of appeal now. Be that as it may, the learned trial magistrate made his decision on liability based on his analysis of the evidence on record.

If the Appellant felt that the trial court had misconstrued the evidence, then it should have appealed and filed for review. What he did is tantamount to asking the trial court to sit on appeal on its own decision.

17. The application was solely based on the outcome of the Makindu case whose judgment was attached to the supporting affidavit. I have perused the judgment and noted that there were three defendants i.e. Ladha Coach Ltd *(1st Defendant),* Musyimi Jaqueline *(2nd Defendant)* and Ainu Hamshi Hauliers Ltd *(3rd Defendant).* The correct position on liability is that by a consent of the parties, the Plaintiff was apportioned 20% blame, the 1st and 2nd Defendants carried 50% blame and the 3rd Defendant carried 30% blame.

18. Further, the judgment in the Makindu case was delivered on 04/11/2015 and the one in the Kilungu case was delivered on 19/09/2017, approximately two years later.

Since the Appellant was a party in the Makindu case and even participated in the consent on liability, it was clearly aware of the outcome in that matter. I find that the grounds advanced in the application did not qualify as *'new matters which the Appellant could not have obtained with the exercise of due diligence'*. More so the trial magistrate could not be bound by the judgment in the Makindu case. My conclusion is that the application did not meet the threshold for review and the learned trial magistrate did not err by dismissing it.

b. What is the effect, if any, of the additional evidence admitted by consent?

19. It is clear that several suits arising from the accident between the bus and trailer were filed in various courts within the Makueni region. It is also clear that there are different outcomes on liability.

20. In the Makindu case, parties consented that the Appellant should shoulder 30% blame. In the Kilungu case, the trial magistrate assigned it 80% blame while in the Paulina Mwende case *(supra)* the trial magistrate assigned it 20% blame. Evidently, there is lack of uniformity and consistency. Each court acted on the material before it, and none could be bound by the other.

21. I have considered the additional evidence and I believe it is imperative to highlight the following extract from the covering report;

> "The brief circumstances of this accident are that on the material day, date and time the actual driver of motor vehicle registration No. KAY 060X Nissan UD diesel was driving the said vehicle from Kitui to Mombasa with 60 passengers on board and on reaching at the location of the accident (Ngokomi area) along Nairobi-Mombasa highway, the driver of motor vehicle KAY 060X Nissan UD bus was trying to overtake another motor vehicle, going to the same direction, from Nairobi towards Mombasa and in the process he noticed another motor vehicle coming from the opposite direction and it was very near. The motor vehicle from the opposite direction splashed the full light as an indication of warning but unfortunately, the motor vehicle reg. No KAY 060X Nissan UD bus couldn't avoid the head on collision with the oncoming trailer reg. No. KBQ 869V/ZD 7699 M/Benz Axior…"

22. Having considered both the extract and proceedings in the Kilungu case I am convinced that indeed the bus driver should carry the bigger portion of blame. The difficulty is this; if this court agrees with the apportionment in the Paulina Mwende case *(supra)* and applies it across board, the effect will be to vary the consent in the Makindu case irregularly. On the flipside, if the court agrees with the Makindu case, the effect will be to overturn the finding in the Paulina Mwende case irregularly. The other difficulty is that in some cases, the registered owners of the bus were not included as Defendants.

23. My finding is that any interference with the findings on liability in any of the cases can only be done through an appeal and not review as the Appellant attempted to do. Infact if it is true that the Makindu case was a test case then all those related cases should have been filed before the same court and not have them scattered as was the case here.

24. I therefore find nothing to warrant this court's interference with the ruling by the learned trial magistrate. I uphold his decision. As a result, the appeal is dismissed with costs to the Respondent.

DELIVERED, SIGNED AND DATED THIS 16TH DAY OF MAY, 2019 IN OPEN COURT AT MAKUENI.

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H. I ONG'UDI

JUDGE