

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 145 OF 2017

ZAMZAM INTERGRATED ACADEMY.....APPELLANT

VERSUS

MOHAMED HUSSEIN.....RESPONDENT

R U L I N G

1. The Judgment in this appeal was delivered by this court on the

30/5/2019 when the court rendered its determination as follows:-

“Accordingly I do allow the appeal on the limb of liability only but dismiss the limb on quantum of damages. Thus the judgment of the lower court holding the Appellant wholly liable is set aside and in its place substituted with a judgment apportioning liability at 50:50%.

The effect is that the sum assessed as general and special damage stand to be discounted at 50% in favour of the appellant. That sum shall attract interest at court rates from the date of judgment of the lower court till payment in full.

On costs, the plaintiff having succeeded only halfway, I award to him half of the costs of the appeal but the respondent gets costs of the suit at trial”.

2. All the court said is that the appeal on liability was allowed to the extent that the liability was apportioned between the parties equally. That finding is not itself under challenge. The only challenge is on the order on costs.

3. Having read that portion of the judgment, it is clear for me that it is the use of the word **“plaintiff”** that makes the order on costs depart from the outcome of the appeal and the law that costs follow the event. The outcome of the judgment was that the Appellant had succeed halfway and was granted ½ costs of the appeal while the Respondent, as the plaintiff at trial, would get the costs at trial.

4. Consequently, in so far as the last paragraph gives the impression that the Respondent as plaintiff at trial, and who had lost on appeal was to get the costs of the appeal, there is an error apparent on the face of the record which error stares at the face and the court. I do find that it would be inimical to the general flow of the reasoning in the appeal to award the costs of the appeal to the respondent. I find that there is an error apparent on the face of the record, a slip that calls for correction and rectification by an order for review.

5. In *Nyamogo & Nyamogo vs Kogo (2001) EA 174* cited with approval in *Muyobi vs Industrial and Commercial Development Corporation [2006] 1 EA 243* the Court of Appeal defined the expression error on the face of the record as follows:-

***“...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.”(emphasis mine)*(emphasis added)**

6. Here an error stares at me on the face for which reasons, I do allow the application dated 4/7/2017 and I do review the judgment dated 30/5/2019 at **paragraph 28** by deleting the word **“plaintiff”** and substituting therefore the word **“Appellant”**.

7. Since the mistake was on the court and the respondent having conceded that the entire problem was the use of the single word plaintiff, I make orders as to costs.

Dated and delivered at Mombasa this 1st day of November 2019.

P.J.O. OTIENO

JUDGE