



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 152 OF 2015**

**DAVID KIHU KARANJA ..... APPELLANT**

**- V E R S U S -**

**PETER MAINA MURIGI .....RESPONDENT**

*(Being an appeal from the judgement and orders of Hon. Arika (Mrs.) delivered on 30<sup>th</sup> April, 2014 in CMCC No. 2647 of 2014, Nairobi )*

**JUDGEMENT**

1. Peter Maina Murigi, the respondent herein, filed a compensatory suit in the Chief Magistrate's Court, Nairobi against David Kihui Karanja, the appellant herein, for the injuries he allegedly sustained on 28.12.1995 when he was knocked down by the appellant's motor vehicle registration no. KVB 459 along Enterprise Road.

2. The appellant filed a defence and denied the respondent's claim.

Both sides adduced oral and documentary evidence.

3. On 26<sup>th</sup> June 2003, judgment was delivered in favour of the respondent and against the appellant in the sum of ksh.284,895/=. Being dissatisfied with the aforesaid judgment, the appellant filed an application seeking to have the decision reviewed and set aside. The application was heard and dismissed by Hon. L. Arika, learned Ag. Senior Principal Magistrate.

4. The appellant was dissatisfied by the dismissal order hence he preferred this appeal and put forward the following grounds:

*i. That the learned magistrate erred in fact and in law in holding that there was no 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 ruling was delivered in February 2012.*

*ii. That the learned magistrate erred in law and fact in finding that there was no mistake or error apparent on the face of the record when in fact the appellant produced evidence to show that he has never entered appearance on the record.*

*iii. That the learned magistrate erred in law and fact in finding that there was no mistake or error apparent on the face of the record when it is clear that the summons were served on and signed by a person different from the appellant.*

*iv. That the learned magistrate erred in law and fact in finding that the applicant did not meet the conditions set for review.*

*v. That the learned magistrate erred in law and fact by finding that the application dated 9<sup>th</sup> May 2012 was res judicata.*

*vi. That the learned magistrate erred in law and fact by exercising her discretion not to review the order emanating from the ruling delivered on 29<sup>th</sup> February 2012 in the face of massive irregularities that are on record.*

*vii. That the learned magistrate erred in law and fact in finding that the appellant's application had no merit which finding went contrary to the weight of evidence produced in court.*

*viii. That the learned magistrate erred in law and fact in basing her decision on technicalities contrary to the Oxygen Principles and the new Constitutional dispensation which requires that substantive justice be done without undue regards to technicalities.*

*ix. That the learned magistrate erred in law and fact in failing to attach the necessary weight to the evidence produced in the subordinate court by the appellant in support of his application for review.*

*x. That the learned judge erred in law and fact in failing to critically analyze substantive issues raised by the appellant in his application for setting aside the ex parte judgment.*

*xi. That the learned magistrate's ruling is so full of errors of law that it amounts to a miscarriage of justice against the appellant.*

*xii. That the ruling of the Subordinate Court as written and delivered cannot therefore be supported in law and fact.*

5. When the appeal came up for hearing, this court issued orders directing the appeal to be disposed by written submissions.

6. I have re-evaluated the arguments presented before the trial court and the rival written submissions. In the first four grounds of appeal, the appellant accused the learned Senior Principal Magistrate for failing to appreciate the principles applicable in an application for review.

7. The appellant further faulted the learned Senior Principal Magistrate for finding that the application for review was resjudicata. The appellant also accused the learned Senior Principal Magistrate for dismissing his application on technicalities.

8. The respondent on the other hand was of the contrary opinion. It is the submission of the respondent that the issues raised vide the application for review were issues which had been raised and argued in an application for setting aside judgement and therefore the learned Senior Principal Magistrate was right in holding that the motion resjudicata.

9. The respondent further argued that the learned Senior Principal Magistrate rightly found that there was no discovery of new and important matter or evidence.

10. The respondent also stated that an error can be said to be apparent on the face of record only if such an error is patent and can be located without any elaborate arguments therefore the appellant's application did not come within the ambit of an application for review.

11. The record shows that the learned Senior Principal Magistrate delivered a detailed ruling on review. The trial magistrate found that there was no discovery of a new and important matter or evidence which after exercise of due diligence was not within the knowledge of the appellant.

12. It was also pointed out that no account of some mistake or error apparent on the face of record or any other sufficient reason was shown to the trial court and for the above reasons, the application for review was dismissed.

13. I have carefully re-evaluated the arguments made in support of the motion for review and it is apparent that the appellant filed the draft defence and the affidavit in response to the application to set aside judgment.

14. The facts stated therein were facts which were within the knowledge of the appellant, therefore the application did not meet the requirements for an application for review.

15. The appellant appears to have relied on the ground that there is an error apparent on the face of record. It is clear from the record that the appellant did not deem it fit to specify that appeared as an error. Therefore, the learned Senior Principal Magistrate was right to hold that there was no error apparent on the face of record.

16. The other issue which was ably addressed by the parties to this appeal relates to the question of resjudicata. It is clear from the record that the learned Senior Principal Magistrate stated that the application was resjudicata to the application dated 9.5.2012. Though the respondent denied that the learned Senior Principal Magistrate made such a finding, it is on record that it is one of the grounds which was used to dismiss the motion for review. However had this been the only ground relied upon by the learned Senior Principal Magistrate to dismiss the motion, I would have allowed the appeal but since other grounds were relied upon, then the appeal must fail.

17. In the end, this appeal is found to be without merit. It is dismissed in its entirety with costs to the respondent.

**Dated, Signed and Delivered in open court this 2<sup>nd</sup> day of November, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Appellant

.....for the Respondents