



**Muthumbi v Muriuki (Civil Appeal E092 of 2024)
[2025] KEHC 14158 (KLR) (7 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14158 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E092 OF 2024
EM MURIITHI, J
OCTOBER 7, 2025**

BETWEEN

JOHNSON MUKUNYA MUTHUMBI APPELLANT

AND

DANSON MUTHII MURIUKI RESPONDENT

*(Being an appeal from the Ruling of Hon. S.M Nyaga
delivered on 2/8/2024 in Baricho SPMCC No. 109 of 2020)*

JUDGMENT

1. By an application dated 6/3/2024, the Appellant sought inter alia review and/or the setting aside of the judgment delivered on 1/2/2024 and an order that the Respondent was 100% liable for the accident that occurred on 2/7/2018 due to his careless overtaking as indicated in the police abstract Occurrence Book.
2. The Respondent swore a Replying Affidavit on 11/3/2024 in opposition to the application. He averred that his injuries were confirmed by PW1 Dr. Kane Maina, and the Appellant's insurance company had expressed their readiness to pay the decretal sum.
3. In its Ruling dismissing the application, the trial court rendered thus;

“To begin with the defendants have admitted there was full hearing but none of the parties produced the police file and the O.B. which would have aided this court know the accurate circumstances of the accident and reach a just determination...In addition parties were given sufficient time to canvass each his/her own case when now the defendant tell us that he needs time to avail police evidence through a review is a little confusing this court. Note we do not even know what this police evidence is all about. The second limb of the application, that the relevant insurance conducted post judgment investigations again leave this court



at a more confusion, it cannot be imagined that litigants have a right to go out fishing out evident after losing court battles. It is easy to say the insurance did not exercise due diligence while defending this matter. This should I supposed a big insurance company and why they rushed to confirm matter as being ripe for hearing before the needed investigations is in fair words a sign of lack of diligence. Trials may never therefore come to an end. This court is not willing to set a bad precedent. Furthermore, this is very old matter 2020. Every party had an opportunity to be heard. We heard everyone and a judgment was passed on merit. In simple conclusion, there is no new evidence found necessary for review, parties had a chance to be heard and were heard trials must come to an end and there is no sufficient cause to allow review of this court judgments. There is not even a ground for allowing stay and interim stay herein is now dispensed. As a result the entire application of 09/03/2024 is hereby dismissed with costs to the plaintiff. ”

The Appeal

4. On appeal, the Appellant filed his Memorandum of Appeal dated 15/8/2024 raising 7 grounds:
 1. The learned honourable magistrate erred in law and fact by dismissing the Appellant’s application dated 6th March 2024 seeking to review orders the judgment delivered on 1st February 2024.
 2. The learned honourable magistrate erred in law by failing to have due regard and take into account the documentary evidence attached to the Appellant’s application dated 6th March 2024.
 3. The learned honourable magistrate erred in law by finding that there was no sufficient reasons and/or new evidence to warrant a review of the Judgment delivered on 1st February 2024.
 4. The honourable magistrate erred in law in failing to appreciate sufficiently or at all that there was no basis in law and fact upon which he could properly review the judgment he made on 1st February 2024.
 5. The honourable magistrate erred in law and fact by failing to take into account important considerations and thereby arriving at the wrong decision.
 6. The honourable magistrate erred in law and fact by completely ignoring the Appellant’s written submissions and all authorities cited whose copies were availed.
 7. The ruling and order of the honourable magistrate dated 2nd August 2024 is wrong in principle and unfair in effect.

Duty of the Court

5. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123).
6. The application was canvassed by way of written submissions, which were duly filed by both parties.

Submissions

7. The Appellant cites *Mwangi v Wambugu* (1984) KLR 453, on the duty of the first appellate court. He urges that the new evidence sought to be introduced to wit the Occurrence Book could not be traced



and/or availed during trial, and beseeches the court to allow the appeal to ensure that no injustice is occasioned to a party who is not at fault. He urges the court to consider the contents of the occurrence book to establish the correct circumstances of the alleged accident in order to ensure that justice is not only seen to be delivered but is actually delivered. He cites *Karmali Tarmohamed & Anor v Lakhani & Company* (1958) EA 567 and *Farah Awad Gollet v CMC Motor Group Limited* (2018) eKLR to fortify his submissions.

8. The Respondent cites *Hosea Nyandika Mosagwe & 2 Others v County Government of Nyamira* (2022) eKLR, for the proposition that, “a review cannot be claimed or asked merely for a fresh hearing or arguments or corrections of an erroneous view taken earlier.” He further cites *Menginya Salim Murgani v KRA* (2014) eKLR, *Telekom Kenya Limited v John Ochanda* [2014] KECA 600 (KLR), *Raila Odinga v IEBC* (2013) eKLR and *R v Advocates Disiplinary Tribunal Ex parte Apollo Mboya* [2019] KEHC 6379 to buttress his submissions.

Analysis and Determination

9. From the grounds of appeal, the issue for determination is whether the trial court erred in dismissing the Appellant’s application for review.
10. A court can only review its decision upon proof of any of the conditions as listed under Order 45 Rule 1 of the Civil Procedure Rules as follows:
 - i. That there is discovery of new and important evidence which was not available to the applicant when the judgment or order was passed despite having exercised due diligence; or
 - ii. That there was a mistake or error apparent on the face of the record; or
 - iii. That sufficient reasons exist to warrant the review sought.

In addition to proving the existence of the above grounds, the applicant must also demonstrate that the application was filed without unreasonable delay.”

11. The alleged new evidence sought to be introduced by the Appellant is the Occurrence Book extract which read in part that, “Was being driven by Johnson Mukunya Muthumbi a businessman in Nairobi tel No. 0702439549 rammed the motorcycle which was lying on the left lane as one faces Makutano. Another motor vehicle reg. No. KCP 400 M driven by David Nyaga...rammed the same motor cycle and stopped. The driver of the probox stopped but later fled from the scene leaving the motor vehicle.”
12. Was that discovery of new evidence which was not available to the Appellant, when the impugned judgment was passed despite having exercised due diligence? The answer was highlighted by the Court of Appeal in *Mwihiko Housing Company Ltd v Equity Building Society* [2007] eKLR as follows;

“It is trite law, and we reiterate, that 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 of review that another Judge could have taken a different view of the matter. Nor can it be a ground of review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review. See *Nairobi City Council Vs. Thabiti Enterprises Ltd* [1995-98] 2EA 251 (CAK).”

13. The extract of the Occurrence Book was marked as an exhibit, but it was never produced until after the judgment had been delivered. This has obvious evidentiary implications in terms of authenticity,



veracity and admissibility and leads to the question whether the makers of the documents and the deponents to the affidavits could be amenable to cross-examination on the same at that post-judgment stage. See the Court of Appeal in (Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) [2014] KECA 600 (KLR).

14. To admit such evidence, which would potentially alter the judgment of the trial court, would be akin to permitting the Appellant to patch up the loopholes in his case.
15. Suffice to state, the Respondent recorded in his statement dated 7/5/2020, which was adopted as his evidence in chief that, “At around Mevdi areas the said Vehicle abruptly swerved towards me without any indication directly hitting my motorcycle head on and I was hurled and dragged to my side of the road suffering multiple cut bruises and wounds...that the impact of being hit by the defendant caused me to suffer multiple fractures on both right and left leg.” Those injuries were corroborated by PW1 Dr. Kane Maina and the police officer, PW2.
16. The Appellant acknowledged on cross examination that, “I swerved and exposed me to an object. I realized later on that it was a bodaboda. I was at 8 Kph. I ran over the bodaboda (Motorcycle). I slowed down but I was very near the “Object”. It was ahead of me.”
17. This court finds that, the evidence on record, taken cumulatively, coupled with the Appellant’s own admission of running over the motor cycle, is proof on a balance of probabilities that an accident indeed occurred in which the Respondent was severely injured. The inference this court draws from the belated introduction of the purported new evidence post judgment by the Appellant is that it is a back door and belated attempt to reopen the case and have a second bite at the cherry, as it were, which is undesirable affront to the principle of finality of the judicial process.
18. This court does not find any misdirection by the trial court in its application of the principles of review under Order 45 of the Civil Procedure Rules, to warrant its interference.

Orders

19. Accordingly, for the reasons set out above, the appeal is without merit and it is hereby dismissed.
20. Costs of the appeal to the Respondent.

Orders accordingly.

DATED AND DELIVERED THIS 7TH DAY OF OCTOBER 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Kahiti for the Appellant.

Mr. Muriuki for the Respondent.

