

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL APPEAL NO. E137 OF 2024

HENRY KITEKI NYARANGA -----
APPELLANT

- **VERSUS** -

NICHOLAS MWITI -----
RESPONDENT

***(Being an appeal from the Ruling and Decree at the
Principal Magistrates' Court in Webuye delivered by Hon.
P.Y. Kulecho PM on the 6/09/2024 PMCC No. 80 of 2023)***

JUDGMENT

1. At the outset, I must observe that there appears to be confusion on the part of the Appellant in preparing his appeal regarding the ruling or judgment he is contesting.
2. The cover of the Record of Appeal states that the Appellant is appealing the trial court's decision of 2/07/2024. However, the Memorandum of Appeal, filed on 17/09/2024 and part of the Record of Appeal, indicates that the Appellant is appealing against the trial court's ruling delivered on 6/09/2024.
3. This Court's understanding, based on a thorough review of the record, is that the Appellant was dissatisfied with the trial court's ruling issued on 6/09/2024, which led to his appeal

lodged via the Memorandum of Appeal dated 17/09/2024. I will now proceed to consider it.

4. The Appellant filed a plaint on 31st March 2023, suing the Respondent in the primary suit for damages amounting to Kshs. 199,000/= and costs, arising from a road traffic collision on 27th February 2023 at Malaha junction along the Webuye-Kitale road.
5. The Respondent entered an appearance and filed a defence dated 21 June 2023, in which he denied the Appellant's averments and demanded strict proof of the same, while also alleging contributory negligence on the part of the Appellant.
6. In a judgment issued on 2nd July 2024, the trial court found that the Appellant did not prove the Respondent's liability for causing the accident and dismissed his suit.
7. Aggrieved by the decision of the trial court, the Appellant, through a motion dated 11th July 2024, sought a review of the judgment on the ground that there was an apparent error on the record, as the Respondent had been held 100% liable in a related matter - Webuye PMCC No. 88 of 2023.
8. The Respondent opposed the Application by a Replying Affidavit sworn on 19th July 2024, in which he acknowledged that there was a series of files arising from the same cause of action. However, he noted that the Appellant's suit stood out

because it was for material loss or damage, whereas the others were for personal injury claims. He further stated that no file was designated as a test suit on liability, and therefore, liability had to be proven on each individual file in the circumstances described.

9. In a ruling delivered on 6th September 2024, the trial court held that there were no directions for one of the cases to serve as a test suit on liability, and that the Appellant had to prove each and every allegation of fact in his case. Accordingly, the trial court dismissed the Appellant's application.
10. Dissatisfied with the trial court's ruling, the Appellant filed the present Appeal through the Memorandum of Appeal dated 17th September 2024, in which he outlined seven grounds of appeal as follows:

(1). That the learned trial magistrate erred in law and in fact and misdirected herself in finding the Appellant failed to establish that the Respondent was liable for the suit accident when in the body of the judgement she found the Respondent culpable, hence an error on the face of the record.

(2). That the learned trial magistrate misdirected herself in finding that the absence of evidence

of the investigating officer and in particular, the police abstract other than that which was pleaded when the exhibits were produced in evidence and adopted evidence of the police officer as PW1 in Webuye CMCC No. 88 of 2023 a related matter involving the Appellant and Respondent for personal injury and where the Respondent was held 100% liable amounted to a sufficient reason for review.

(3). That the learned trial magistrate erred in law and in fact in finding that the Appellant failed to establish the grounds of review when it was plain from the judgment that there was a mistake or error apparent on the face of the record.

(4). That the learned trial magistrate failed to apply judicially (sic) and to adequately evaluate the pleadings; evidence and exhibits tendered before it and particularly those of the Appellant and thereby arrived at a decision unsustainable in law.

(5). That the learned trial magistrate erred in holding that the plaintiff failed to link the defendant driver to the said accident when in

her analysis of evidence, she acknowledged that the defendant confirmed having occasioned the accident and having been charged in a traffic cases hence an error on the face of the record warranting review.

(6). That the learned trial magistrate misdirected herself on the principles based on/applicable in a review application and relied on technicalities to arrive at her decision.

(7). That the learned trial magistrate erred in law and facts by failing to consider and take into account the materials presented before it holistically.

11. The parties agreed to dispose off the Appeal through written submissions. I note that only the Respondent's submissions were on record.
12. The Respondent submitted that the trial court was correct in finding that the Appellant had failed to prove his case, as the absence of the police abstract weakened it, and that he failed to provide credible and independent corroboration of the accident. It was further argued that the Appellant's evidence was not only unsubstantiated but also contested by the Respondent, thereby increasing the necessity for objective corroboration such as the police abstract. Counsel relied on

the cases of Timsales Ltd vs. Wilson Libuywa [2008] eKLR and Ndungu Dennis vs. Ann Wangari Ndirangu & Another [2018] eKLR.

13. Counsel further argued that the Appellant's claim that the court applied a higher standard of proof was mistaken, as the standard in civil cases is based on the balance of probabilities. In this case, the evidence presented by the Appellant, when considered together, was insufficient to establish liability on the part of the Respondent. The Appellant's application for review, which was based on an error apparent on the record, involved extensive argument and interpretation, which disqualified it from being an error evident on the face of the record. Therefore, the trial court correctly dismissed the application.
14. It was further argued that the Appellant's review application sought a re-evaluation of evidence, which is a matter for appeal rather than review, as held in the case of National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR.

ANALYSIS AND DETERMINATION

15. As this is a first appeal, the Court is obliged to reassess the evidence from the trial court independently and arrive at its own findings and conclusions. (See Selle & Anor vs. Associated Motor Boat Co Ltd & Others [1968] EA 123.)

16. Having reviewed the trial record, grounds of appeal, and submissions, the main issue for my determination is whether the appeal is justified and should be allowed, that is, whether the trial court erred in its ruling dated 6th July 2024 dismissing the appellant's application for review.
17. As previously stated, the current Appeal challenges the Ruling of 6th July 2024, in which the trial court dismissed the Appellant's Application for review of its judgment dated 2nd July 2024. The Appellant's motion dated 11th July 2024 aimed to have the trial court reconsider its judgment of 2nd July 2024 on the grounds that there was an obvious error on the record, specifically that the Respondent was held 100% liable in a related case, Webuye PMCC NO. 88 of 2023.
18. Review under Kenyan law is governed by Section 80 of the Civil Procedure Act, which empowers the courts to review their decrees or orders as follows: -

80. 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 judgement to the Court, which passed the

decree or made the order, and the Court may make such order thereon as it thinks fit.

19. Order 45 Rule 1 of the Civil Procedure Rules sets down the criteria for review applications as follows: -

Rule 1:

Application for review of decree or order:

(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.

(2). A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

20. The Superior courts have interpreted the above-mentioned provisions through several decisions. In Civil Appeal No. 2111 of 1996, National Bank of Kenya v. Ndungu Njau, the Court of Appeal stated on review applications 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 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 proceeds on an incorrect expansion of the law.”

21. In **Republic vs. Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] KEHC 6379 (KLR)**, the Court considered the import of some mistake or error apparent on the face of the record as captured in Order 45 of the Civil Procedure Rules. It rendered itself thus: -

“Review is impermissible without a glaring omission, evident mistake or similar ominous error. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review. The power of review is available only when there is an error apparent on the face of the record. I emphasize that review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted

the law would amount to exercise of Appellate Jurisdiction, which is not permissible.”

22. Returning to the facts of this case, the Appellant’s Application for review was based on the claim that there was an error apparent on the record, as the Respondent had been held 100% liable in a related matter, Webuye PMCC NO. 88 of 2023. In my view, this does not constitute an error apparent on the record. The Appellant was essentially requesting the trial Court to re-evaluate the evidence, which is a function of an appellate Court. In *Nyamogo & Nyamogo vs. Kogo* (2001) EA 170, the Court discussed what would constitute a long-drawn process. It observed as follows:

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a 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 a long drawn process of reasoning 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 apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”

23. Following the decision in Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya (supra), an erroneous decision on a claimed evidentiary issue, which was central to the Appellant’s case before the trial court, cannot serve as a ground for a review. The Appellant’s attempt to overturn the judgment of 2nd July 2024, therefore, was rightly unsuccessful.
24. I further note that the Appellant’s grounds of appeal here sought to persuade this Court to consider the judgment of 2nd July 2024, which was not the subject of this Appeal, as previously outlined.
25. In conclusion, I find this appeal lacks merit. The appeal is dismissed with costs awarded to the Respondent. Orders accordingly.

**Dated, signed and delivered at Bungoma on the 3rd Day of
March 2026.**

**R. E. OUGO
JUDGE**

In presence:

Appellant - Absent

Miss Wambani -For the Respondent

Wilkister - C/A

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