



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mulatya v Musunza & another (Civil Appeal E074 of 2024)  
[2026] KEHC 4394 (KLR) (11 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 4394 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CIVIL APPEAL E074 OF 2024  
LW GITARI, J  
MARCH 11, 2026**

**BETWEEN**

**JACKSON WANZIA MULATYA ..... APPELLANT**

**AND**

**ARESTUS MUNEENI MUSUNZA ..... 1<sup>ST</sup> RESPONDENT**

**TRIDENT INSURANCE CO. LTD ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The appeal arises from the Ruling in the Chief Magistrate's Court at Kitui Civil Case No. 19/2020. It is based on the following grounds in the Memorandum of Appeal.
  - 1) That the learned trial magistrate erred in law in applying section 5 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya where both Respondents were held jointly liable.
  - 2) That the learned trial magistrate erred in law and in fact by failing to properly apply the legal principles regarding joint and several liability thereby arriving an erroneous decision.
  - 3) That the learned trial magistrate erred in law and in fact by relieving the 2<sup>nd</sup> Respondent from liability without adequate justification thus occasioning a miscarriage of justice.
  4. That the Learned Trial Magistrate erred in law and in fact by allowing a review of the judgement delivered on 05/07/2022 in the absence of a formal application for review or appeal.
2. The appellant prays that the appeal be allowed. The Ruling delivered on 08/07/2024 be set aside entirely. That the appellant be awarded costs.
3. The background in this matter is that the appellant filed the suit in the lower court arising from a road traffic accident involving motor vehicle registration number KCU 066N in which he was travelling in



as a passenger and motor vehicle KAV 920B which was being driven along Kibwezi-Mutomo road. The appellant sustained serious injuries and filed the suit against the owner of motor vehicle KAV 920B who was also the insurance policy holder of the said motor vehicle.

4. The claim was founded on negligence against the 1<sup>st</sup> respondent and/or his driver. The claim by the appellant was that he sustained severe injuries involving compound (open) fracture on the right tibia, compound (open) fracture right tibular leading to amputation of the right leg. He claimed general and special damages against the respondents jointly and severally.
5. The respondents filed a statement of defence and denied the claim. The record shows that the learned magistrate entered interlocutory judgement and the matter proceeded by way of formal proof. The learned magistrate found the defendant's 100% liable for the accident. He then awarded general damages as follows:
  - a. Damages for diminished earning capacity – Kshs. 900,000/=
  - b. Future medical expenses – Kshs. 1,050,000/=
  - c. General Damages for pain & Suffering – Kshs. 2,300,000/=
  - d. Special damages – Kshs. 6,000/=Total – Kshs. 4,256,000/=
6. Thereafter, the appellant initiated the process of execution of the decree. This prompted the 2<sup>nd</sup> respondent to file a notice of motion seeking a declaration that he was only liable to pay Kshs. 3,000,000/= out of the decretal sum which he had paid in full or he be allowed to pay Kshs. 3,000,000/= in terms of some annexed cheques it had issued.
7. The appellant had opposed the application and filed grounds of opposition dated 25/10/2023 contending that the 2<sup>nd</sup> respondent never filed a statement of defence and therefore the issue relating to its statutory liability of Kshs. 3,000,000/= was not before the court for consideration.
8. That the judgement was entered against the respondents and no appeal or application for review had been filed against the said judgement. The appellant had urged the court to dismiss the application.
9. The learned magistrate held that the 2<sup>nd</sup> respondent had fulfilled his obligation in satisfaction of the decretal sum and the amount in excess should be paid by the insured.
10. The appellant was dissatisfied with the said ruling and filed this appeal. The appeal was canvassed by way of written submissions. The respondents did not file submissions.

#### **The Appellant's Submissions:**

11. The appellant submits that the issues for determination are:
  1. Whether the learned magistrate erred in reviewing its own judgement.
  2. Whether the learned magistrate erred in exonerating the 2<sup>nd</sup> respondent from liability where both respondents had been held jointly and severally liable.
12. It is submitted that the Law allows a judge to alter judgement to correct apparent errors or obvious mistakes on the face of the record. He relies on the Supreme Court decisions in Mbugua & Another (suing as the administrators of the estate of Joseph Kiarie Mbugua & Another) –vs- Timber Manufacturers & Dealers Limited (2023) eKLR where the Supreme Court clarified that changes are the ones that ought not to change the substance of the judgement or alter the intention of the court.



13. The appellant submits that the learned magistrate in the impugned ruling purported to review the judgement delivered on 05/07/2022 by limiting the 2<sup>nd</sup> respondent's liability to 3,000,000/=. That by doing so, he sat on appeal over his own judgement a fact which is an error both in law and facts. That he learned magistrate lacked jurisdiction to re-evaluate and limit the liability in the absence of an appeal.
14. The appellant relies on Order 45 Rule 1 Civil Procedure Rules which gives the requirements for a party seeking review of a judgement or ruling and that a party must file a formal application.

**Analysis & Determination:**

15. The issue for determination is whether the learned trial magistrate erred by altering his judgment. This being the first appellate court, it has a duty to re-appraise and re-evaluate the proceedings and findings of the trial court and come up with its own independent finding. This is provided under Section 78 of the [Civil Procedure Act](#) which provides:

- “(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
  - (a) to determine a case finally;
  - (b) to remand a case;
  - (c) to frame issues and refer them for trial;
  - (d) to take additional evidence or to require the evidence to be taken;
  - (e) to order a new trial.
- (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

16. The Court of Appeal in the case of *Selle –vs- Associated Motor Boat Company Limited (1968) E.A. 123* held that:

“An appeal to this court from a trial by the High Court is by way of retrial and the principle upon which acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect ...”

17. The ruling from which this appeal stems from is in respect of a Notice of Motion which was brought under Order 22 Rule 22, Order 50 and Sections 1A, 1B, 3, 3A and 63 (e) [Civil Procedure Act](#). The prayer for review was listed under prayer 5 asking the court to declare that the 2<sup>nd</sup> defendant was only liable to pay Kshs. 3,000,000/=

18. Order 45 Rule 1 Civil Procedure Rules provides that:

- (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.”

19. Section 80 of the *Civil Procedure Act* provides that:

“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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

20. A court’s power to review a judgement as set out under Order 45 of the Civil Procedure Rules arises from the following grounds:

- i. There must be discovery of new and important matter of evidence which after the exercise of due diligence was not within the knowledge of the applicant at the time the decree was passed or the order was made or –
- ii. That was a mistake or error apparent on the face of the record.
- iii. There were other sufficient reasons and,
- iv. The application must have been made without undue delay.

21. The application was based on the ground that the applicant was only supposed to pay Kshs. 3,000,000/ = out of the decretal sum and that he had already paid that amount to the appellant, a fact that was not in dispute. It is obvious that the applicant wanted the court to use review process to offer an alternative judgement by altering the judgement.

22. The Court of Appeal in the case of Mahinda –vs- Kenya Power & Lighting Company Ltd (2005) 2KLR 418 had this to say with regard to a court’s discretion to review its judgement –

“The court has however, always refused invitations to review, vary or rescind its own decisions except so far as to give effect to its intention at the time the decisions was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the court on the basis of arguments thought long after the judgement or decisions was delivered or made.”

23. The emphasis is that review should not be used as a means to alter judgements which have already been passed by the courts on the application by litigants in the disguise of review.

An application for review must meet the threshold under Order 45 Rule 1 (supra), to correct errors apparent on the face of the record or upon discovery of new and important evidence, or for any other sufficient reason. This was the holding by the Court of Appeal in the case of Singh t/a Trilok Construction -vs- Sucham Investment Ltd (2024) KECA 568 (KLR) where the Court of Appeal



referred to the writings in the Code of Civil Procedure Volume III pages 3652 – 3653 by Sir Disnshaw Fardunji Mulla which it found relevant to the parameters under which a review can be done in that:

“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 ground for review. The review proceedings are not by way of an appeal and have to be strictly confirmed to the scope and ambit of Order 47 Rule 1 Code of Civil Procedure...

The review court cannot sit as an appellate court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper.”

24. I have considered the above decisions which provide a good guide and re-affirms the place of review in our laws.
25. The ruling by the learned magistrate stated that the issue that he had to determine is the liability of the 2<sup>nd</sup> defendant applicant. The judgement of the court had held that he 1<sup>st</sup> and 2<sup>nd</sup> defendants were liable for the accident. So when the leaned magistrate sought to determine liability after the judgement had been entered and no appeal filed within the stipulated time, he made an error by varying a judgement on an application for review.
26. The court had no jurisdiction to entertain the application to vary the judgement at that stage when the execution process was on going. The court should not entertain applications to challenge the correctness of its decisions as that would be setting a bad precedent that would see litigants using review instead of filing appeals.
27. The appellant had sued the respondents jointly and severally. The term “joint” is defined in the Black’s Law Dictionary, Tenth Edition as – “common to or shared by two or more persons or entities” and further as, combined, united or sharing with another. On the other hand, joint and several as it refers to liability is defined as, “of liability, responsibility, means apportioned at an adversary’s discretion either among two or more parties or to only one or a few selected members of the group, together and in separation.
28. The doctrine of joint and several liability is the principle that when two or more persons cause an injury each is liable for the full amount of damages. Joint and several liability is liability that may be apportioned either among two or more parties or to only one or a few select members of the group at the adversary’s discretion. It means that each liable party is individually responsible for the entire obligation but a paying party may have a right of contribution or indemnity from non-paying party or parties. So where there is joint liability, each part is responsible for eh entire debt or damages not just a position and if one party pays, the debt is discharged as between the parties to the suit while that party who pays may seek reimbursement from the others in proportion to their specific share.
29. In Kenya Airways Limited –vs- Mwaniki Gichohi Milimani Commercial H.C.C.C. 423/2002 the court stated that-

“The concept of joint and several liability comprehends one judgement and decree against two or more persons who are liable collectively and individually to the full extent of such decree.”
30. In Dubai Electronics –vs- Total (K) Ltd & 2 Others H.C.C.C. 810/98 the judge stated that –

“Clearly therefore where you have joint liability all the foot passers and each one of them is liable to settle the full liability. However, in a purely several liability is only liable to the time



of his liability. Where however, the liability is joint and or several the plaintiff has the option of either directing his claim against any of the foot passers or making his claim against each one of the foot passers according to their individual liability. Either way he cannot recover more than the amount decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them. That is my understanding of joint and several liability.”

31. The learned magistrate entered judgement against the defendants jointly and severally on liability.
32. From the foregoing definition of jointly and severally and the above cited authority, the respondents bore the responsibility of settling the appellant’s claim. There was no error apparent on the face of the record to warrant a review of the judgement. There was no other discovery of new and important reason to warrant review of the judgement nor was there any other sufficient reason.
33. The 2<sup>nd</sup> respondent was sued jointly and severally with the 1<sup>st</sup> respondent. Each one of them had a duty to settle the claim and seek refund from the co-defendant.
34. The application before the learned magistrate did not meet the threshold for review. Furthermore, the application before the learned magistrate had no provision seeking review of the judgement.
35. The learned magistrate erred by sitting on appeal of her own judgement. For these reasons, I find that the leaned magistrate erred by varying her own judgement on liability a matter she did without jurisdiction. In the circumstances, I find that the appeal has merits. I order as follows:
  1. The appeal is allowed.
  2. The Ruling dated 8/8/2024 is set aside.
  3. Costs of the appeal to the appellant.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 11<sup>TH</sup> DAY OF MARCH, 2026.**

**HON. LADY JUSTICE L. GITARI**

**JUDGE**

