



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: VISRAM, NAMBUYE & MUSINGA, J.J.A)

CIVIL APPEAL NO. 321 OF 2013

BETWEEN

MARGARET MUGURE NJUNGUNA

(Suing as the Personal Representative of the

Estate of DENNIS MOIMBO ONGAYO (deceased) ..... APPELLANT

AND

JOHN NDUNGU GATHEBA ..... RESPONDENT

*(An appeal from the Ruling of the High Court of Kenya at Kericho (Mutende, J.) dated 4<sup>th</sup> December, 2012 in H.C.C.C No. 13 of 2010.)*

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JUDGMENT OF THE COURT

1. Following a fatal road accident involving the appellant's husband, Dennis Moimbo Ongayo (the deceased), the appellant filed a suit against the respondent in the High Court seeking damages under the *Fatal Accidents Act*. The accident was as a result of a collision between two vehicles, one of which was under the care and control of the deceased and the other belonged to the respondent.

2. By consent, liability was apportioned between the parties at the rate of 20:80 in favour of the appellant and the matter went on for hearing for ascertaining the quantum of damages. At the end of the said trial, the learned Judge **G. B. M. Kariuki, J.**, (as he then was) delivered judgment on 25<sup>th</sup> January, 2012 in favour of the respondent in the sum of Kshs.346,300/=. Thereafter, the appellant filed an application on 17<sup>th</sup> February, 2012 seeking *inter alia*:

*a) Review of the judgment of 25<sup>th</sup> January, 2012 and subsequent decree to read that the deceased's earnings was Kshs.700 per day instead of per month.*

*b) Re-assessment of damages under the Fatal Accidents Act.*

3. The application was premised on the grounds that there is an error apparent on the face of the judgment. The error being that the court inadvertently indicated the deceased's wages as Kshs.700 per month as opposed to Kshs.700 per day contrary to the pleadings and proceedings on record. It is on the basis of that error that the court proceeded to assess the damages payable.

4. In opposition, the respondent claimed that the application did not fall within the ambit of **Order 45** of the *Civil Procedure Rules* and was otherwise an abuse of the court process.

5. After taking into consideration the submissions made on behalf of each party, the learned Judge (**Mutende, J.**) in a ruling dated 4<sup>th</sup> December, 2012 stated in her own words:

*“To ascertain if indeed the error alluded to was an accidental slip or omission, I have to revert to pleadings, the evidence adduced and the judgment thereof. Paragraph 7 of the Plaint stipulate as follows:*

*‘His daily income was Kenya shillings seven hundred (Kshs. 700/=) making a monthly income of Kenya shillings twenty one thousand (Kshs.21,000/= or thereabout or in the alternative the plaintiff shall claim an income of Kshs.500,80/= per day as per the minimum earning wage of a driver as per Legal Notice No. 70, The regulation of wages and Conditions of Employment Act (Cap 229) The Regulation of Wage (General)(Amendment) Order 2009.’ (sic)*

*In her evidence at page 5 of the proceedings, the plaintiff stated as follows:*

*‘He used to earn on daily between Kshs.700/= and 1,000/=’*

*When cross examined at page 6 she stated as follows:*

*‘I do not have any document to show my husband earned between 700/= and 1,000/= per month.’*

*In reaching his decision at page 3 the Hon, Justice G.B.M Kariuki stated as follows:*

*‘The plaintiff testified that her husband used to earn between Shs. (sic) 700/= and 1,000 per month.’*

*At page 5 he stated as follows:*

*‘In cross examination, the plaintiff stated that she had no documentation to show that the husband earned between Shs. (sic) 700/= and 1,000/= per month.’*

...

*The court in awarding Kshs.700/= per month took into consideration what the plaintiff stated in cross examination. The evidence was analyzed at length prior to the Hon. Judge settling on the sum awarded. It cannot be concluded that he had an intention of writing 700/= per day but erroneously wrote 700/= per month.*

*Acting under section 99 of the Civil Procedure Act would be tantamount to sitting as an appellate court. The jurisdiction to amend the judgment herein and the decree thereof vests in the court of appeal.*

*In the result I find the application lacking merit. The same is dismissed with costs to the respondent.”*

6. It is that ruling that is the subject of the appeal herein which is based on a total of 12 grounds all of which fault the learned Judge for declining to review the judgment in issue.

7. Ms. Obaga, learned counsel for the appellant, reiterated that there was an error apparent on the judgment with regard to the reference of the deceased’s wages as being Kshs.700 per month instead of Kshs.700 per day. The record is clear that not only had the appellant pleaded but had also testified that the deceased used to earn Kshs.700 per day. Further, submissions filed by the parties at the High Court indicated as much.

8. He faulted the learned Judge for ignoring the foregoing and relying on the appellant’s response in cross examination to the effect that she did not have documents to show that the deceased was earning 700-1000 per month as the basis of declining to review the judgment. He suggested that it was more than likely a direct response to a question by the respondent’s counsel.

9. In Ms. Obaga’s view, the error was a result of an accidental slip of the pen by the trial Judge thus capable of being corrected under the slip rule set out in **section 99** of the **Civil Procedure Act**. In that regard, the case of **Vallabhdas Karsandas Raniga vs Mansukhlal Jiurat & Others [1965] E. A. 700** was cited.

10. On his part, learned counsel for the respondent, Mr. Ombui submitted that the learned Judge’s decision which was discretionary in nature was sound. Citing the case of **Shah vs Mbogo [1967] E. A. 116** he argued that the appellant had not demonstrated any ground to warrant this Court to interfere with the learned Judge’s discretion. According to him, there was no error apparent on the face of the record.

11. Be that as it may, Mr. Ombui contended that since the issue of whether the deceased earned Kshs.700 daily or monthly arose directly from the appellant’s evidence, only the trial Judge (G. B. M. Kariuki, J.) would be in a position of revising the judgment under the slip rule.

12. We have considered the record, rival submissions by counsel and the law. We also take cognizance of the principles which would entitle us to interfere with the exercise of the learned Judge’s discretion in declining to review the judgment. Simply put, we can only interfere where the learned Judge misdirected herself in some matter and as a result arrived at a wrong decision or, that she misapprehended the law or failed to take into account a relevant matter. See this Court’s decision in **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**.

13. Ideally, an application for review of a judgment or ruling should be placed before the court that rendered the decision in issue. However, where it is not possible, as in this case, the trial Judge (G. B. M. Kariuki, J.) had by then become a Judge of Appeal, such an application can be placed before another Judge of concurrent jurisdiction.

14. It is common ground that the appellant's application was based on the ground that there was an error apparent on the face of the record. Time and again this Court has stated that what amounts to an error apparent on the face of the record is dependent on the circumstances of each case. In particular, the exposition given by this Court in *National Bank of Kenya Limited vs Ndungu Njau [1997] eKLR* is worth mentioning:

***“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 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 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 ground for review.”***

15. Applying the foregoing principles to this case, we, unlike the learned Judge, do find that there was an error apparent on the face of the record. Having perused the record we note that the pleadings, submissions and proceedings before the High Court indicate that the deceased's salary was Kshs.700 per day. The error first arose during cross examination which we believe was an accidental slip on the part of the learned Judge when he recorded the appellant's response. The error was then carried forward to the judgment.

16. In our view, this error is self-evident and tenable for correction under *section 99* of the *Civil Procedure Act* (slip rule) which stipulates:

***“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”***

Consequently, we find that the learned Judge erred in declining to allow review of the judgment.

17. Having expressed ourselves as herein above, we deem it suitable for the High Court to re-assess the damages in light of the review.

18. In the end, we find that the appeal has merit and is allowed with costs to the appellant. The ruling dated 4<sup>th</sup> December, 2012 is hereby set aside in its entirety and substituted with an order allowing the appellant's application for review with no orders as to costs. We direct that the matter be placed before the High Court for re-assessment of damages.

**Dated and delivered at Nairobi this 12<sup>th</sup> day of October, 2018.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**R. NAMBUYE**

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**JUDGE OF APPEAL**

**D. MUSINGA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**