



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CIVIL APPEAL NO 331 OF 2016**

**[FORMERLY MOMBASA HIGH COURT CIVIL APPEAL NO 120 OF 2012]**

**PETER MULAA MUTUNGA.....APPELLANT**

**VS**

**RUBI PLASTIC INDUSTRIES.....RESPONDENT**

*(Appeal from the Ruling and Order of Hon Odenyo, PM delivered on 11<sup>th</sup> July 2012 in Mombasa CMCC No 2070 of 2007)*

**JUDGMENT**

**Introduction**

1. This appeal was initially filed in the High Court at Mombasa as **Civil Appeal No 120 of 2012**. Pursuant to an order issued by **P.J Otieno J** on 14<sup>th</sup> April 2016, the matter was transferred to this Court for hearing and determination.

2. When the file was received in this Court, the matter was erroneously registered as a cause instead of an appeal under reference **Cause No 331 of 2016**. Subsequent pleadings filed by the parties adopted the reference **Civil Appeal No 331 of 2016**, which is the reference cited in this judgment. I have found it necessary to record this anomaly as it impacts the record of statistics relating to this Court.

**The Appeal**

3. By a Plaint dated 12<sup>th</sup> July 2007, the Appellant (Plaintiff in the lower court) sued the Respondent (Defendant in the lower court) for damages on account of a work injury. The Respondent filed a Defence dated 24<sup>th</sup> August 2007.

4. The matter proceeded to full trial, culminating with a judgment delivered by **Hon R. Kirui, PM** on 11th November 2010, dismissing the claim with costs to the Respondent.

5. The Appellant subsequently filed an application dated 24<sup>th</sup> January 2011, seeking review of the judgment delivered on 11<sup>th</sup> November 2010.

6. In a ruling delivered by **Hon Odenyo, PM** on 11<sup>th</sup> July 2012 the Appellant's application was dismissed with costs to the Respondent.

7. The present appeal arises from the ruling rendered by **Hon Odenyo, PM** on 11<sup>th</sup> July 2012.

8. In his Memorandum of Appeal dated 17<sup>th</sup> July 2012, the Appellant raises the following grounds of appeal:

- a) That the learned Magistrate erred in law and in fact in that he misapprehended the issues before him and thereby arrived at the wrong decision;
- b) That the learned Magistrate erred in law and in fact in that he failed to consider the issues before him;
- c) That the learned Magistrate erred in fact and in law in failing to find that there was an error on the face of the record which error had consequently led the court to err in the judgment under review;
- d) That the learned Magistrate erred in fact and in law in holding that the best avenue available to the Appellant was to appeal when clearly there was an error on the face of the record;

- e) That the learned Magistrate erred in fact and in law in punishing the Appellant for a mistake he did not commit;
- f) That the learned Magistrate erred in law and in fact in that he failed to consider the submissions made by the Appellant;
- g) That the learned Magistrate erred in law and in fact in dismissing the Appellant's application and awarding costs to the Respondent.

9. From the record, the matter before the lower court passed through the hands of several Magistrates. The Appellant complains that in the course of typing of proceedings, his evidence was not correctly recorded. He therefore takes the position that the Magistrate who eventually wrote the judgment relied on a wrong record. This is what he terms as an error apparent on the face of the record, on which basis he filed the application for review before the trial court.

10. In the judgment dated 11<sup>th</sup> November 2010, of which the Appellant sought review, the trial court stated the following:

***“The Defendant tendered no evidence but the Plaintiff’s evidence is at variance with his own pleadings. Whereas he claimed in his pleadings that he was cut on his 3<sup>rd</sup> and 5<sup>th</sup> right fingers his evidence is that he was cut in his thigh. That evidence also contradicts that of PW 2 who said he was cut on the 3<sup>rd</sup> and 5<sup>th</sup> right fingers.***

***In his evidence he also said he was replacing a blade but his pleadings are that he was bolting a knife when one of the nuts slid.”***

11. In the ruling on the application for review of judgment, the learned trial Magistrate stated:

***“In the present application, I do concur with the Respondent’s Counsel that what the Applicant seeks to portray as mistake or error on the face of the record are matters that with the application of due diligence, would have been discovered and corrected during the course of the proceedings especially when typing and certification was done.....***

***I am also persuaded that it is in the wider interest of justice to disallow the application. As often said, litigation must come to an end. The particular judgment sought to be reopened was reached after the evidence of the Plaintiff and his witness, with the Defendant calling no witness. Thus the Plaintiff was accorded all the opportunity to insulate his case. If he lost subsequently, like happened herein, it is not because he was stopped from calling any witness or presenting any evidence.”***

12. My understanding of the Appellant's complaint is that the findings by the trial court as contained in the judgment delivered on 11<sup>th</sup> November 2010, were based on an incorrect record of the Appellant's testimony. In his application for review, the Appellant termed this as an error apparent on the face of the record.

13. The Appellant's application before the trial court, which led to the ruling delivered on 11<sup>th</sup> July 2012, was premised on Order 45 Rule 1 of the Civil Procedure Rules. This provision is similar to Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules which reads as follows:

***(1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling-***

***(a) if there is discovery of new and important matter or evidence, which after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; or***

***(b) on account of some mistake or error apparent on the face of the record; or***

***(c) if the judgment or ruling requires clarification; or***

***(d) for any other sufficient reason.***

14. The Court was referred to the decision in *Nyamogo & Nyamogo v Kogo (2001) EA 170* where an error apparent on the face of the record was defined in the following terms:

***“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.”***

15. The line between an appeal and a review may not always be bold. Courts must therefore be on guard not to sit on appeal over their own decisions under the pretext of review. As held in *Republic v Advocates Disciplinary Tribunal Ex Parte Apollo Mboya [2019] eKLR* an erroneous decision cannot be corrected within the margins of review.

16. Having looked at the reasoning by the trial court both in its judgment and the ruling on review, I find and hold that any mistake that may have been made fell within the borders of misapprehension of evidence which may have been a good ground of appeal but certainly not a ground for review.

17. The decision by the trial court to decline to exercise the power of review in the Appellant's favour cannot therefore be faulted.

18. In the result, this appeal fails and is dismissed.

19. Each party will bear their own costs.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 22<sup>ND</sup> DAY OCTOBER 2020**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Maundu for the Appellant

Mrs.

Machuka

for

the

Respondent