



REPUBLIC OF KENYA



**KENYA LAW**  
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**Namae v Kipkorir & another (Civil Appeal 30 of 2019)  
[2024] KEHC 4115 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4115 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL 30 OF 2019**

**DK KEMEL, J**

**APRIL 26, 2024**

**BETWEEN**

**LILIAN NAMAЕ ..... APPELLANT**

**AND**

**GILBERT KIPKORIR ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH LELEI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the ruling of Hon. S. Mogute, Senior Principal Magistrate in Bungoma Chief Magistrate's Court Civil Case No. 447 of 2013, delivered on 6th March 2019)*

**JUDGMENT**

1. The Appellant herein lodged her record of Appeal on 13<sup>th</sup> November 2019 vide a Memorandum of Appeal dated 8<sup>th</sup> April 2019. She relied on three (3) Grounds of Appeal namely:
  - a. The learned trial magistrate erred in law and fact vide his ruling wherein he failed to find that the Appellant had a merited application for review notwithstanding the material that was placed before him and the circumstances of the matter.
  - b. The learned trial magistrate erred in law and fact when he considered matters that were not considerable in a forum on an application for review which was to the prejudice of the Appellant.
  - c. The learned trial magistrate erred in law and fact when he exhibited a default in appreciating the law relating to application for review thereby prejudicing the Appellant's application.
2. The Appellant herein had filed a notice of motion application dated 9<sup>th</sup> January 2017 seeking orders of review of the lower court decree issued and urged the lower Court to make an award of special damages



in the sum of Kshs.146, 600/= and costs of the application. The application was duly opposed by the Respondents herein vide grounds of opposition dated 7<sup>th</sup> February 2017.

3. In his ruling, the learned trial magistrate arrived at a finding dismissing the application for review as it lacked merit. He held that the law explicitly states that special damages must be specifically pleaded and proved by way of evidence and that in his Judgement, he had held that that the claim for medical expenses was not proved to the required standards as no evidence was availed in support of the same. Further, he held that if the Appellant was aggrieved by the said decision of the court she ought to have appealed but not file a review.
4. Aggrieved by the decision of the trial Court, the Appellant appealed against ruling for review.
5. Vide Court directions, the appeal was canvassed by way of written submissions. Only the Appellant filed written submissions in respect of this Appeal and therefore this Judgment is based on the said submissions which they relied upon in their entirety.
6. The background of this appeal is that the Appellant herein on 8<sup>th</sup> February 2013 while travelling as a fare paying passenger in Motor Vehicle Reg. No. KAX 1027J Toyota Townace along Webuye-Eldoret road when the same was negligently or recklessly driven by the 1<sup>st</sup> Respondent causing it to plunge into river Nzoia and occasioning her to sustain serious bodily injuries which she particularized as miscarriage, injury to the head, injury to the spinal cord, injuries to the left shoulders. The Appellant sought special damages, general damages, costs of the suit and interest.
7. The Respondents entered appearance and filed their defence denying all the Appellant's allegations and blaming her for the accident, if any occurred.
8. The matter proceeded to hearing and on conclusion, parties were directed to file and exchange their respective written submissions.
9. As the Respondents did not avail any evidence challenging the version of events as described by the Appellant, the trial Magistrate proceeded to hold that the Appellant had proved her case against the Respondents on a balance of probability and found the Respondents liable for the accident in question. On quantum, relying on the availed Dr. Kubasu's medical report and taking into consideration the injuries sustained by the Appellant, relevant authorities and inflation he made an award of Kshs. 150,000/= as general damages for pain, suffering and loss of amenities. Under special damages, the trial Magistrate made an award of Kshs. 2,000/= which was what the Appellant was able to prove to the required standards. He further dismisses the other claims under special damages as they were not duly proved.
10. Aggrieved by the judgement, the Appellant filed the application for review of the judgement seeking to factor in the other special damages that had been erroneously omitted by the trial court. The same was however dismissed necessitating the appeal.
11. I have considered the material placed before me in this matter as well as the submissions filed.
12. The Appellant's application that had been dismissed by the trial court had been brought under the provisions of Order 45 of the Civil Procedure Rules. Order 45 rule 1(b) of the Civil Procedure Rules, provides as follows:

“(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.”

13. The foregoing provisions are based on section 80 of the *Civil Procedure Act* Cap 21 Laws of Kenya which states as follows:

“ 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.”

14. It is clear from the foregoing that the review remedy is only available to a party who, though having a right to challenge the decision in question by an appeal, is not appealing or to whom there is no right of appeal. In other words, a person cannot exercise both the right of appeal and review at the same time. See *Orero vs. Seko* [1984] KLR 238.

15. Under Order 45 Rule 1, a person aggrieved by a decision whether an appeal is allowed or not but who is not appealing, is at liberty to apply for review of the decision.

16. Order 45 provides for three circumstances under which an order for review can be made. To be successful, the Applicant must demonstrate to the court that there has been 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. A party may successfully apply for review, secondly, if he can demonstrate to the court that there has been some mistake or error apparent on the face of the record. The third ground for review is worded broadly: an application for review can be made for any other sufficient reason.

17. The Appellant herein grounded her review application on existence of an error and sufficient reason.



18. In *Muyodi vs. Industrial and Commercial Development Corporation & Another* (2006) 1 EA 243, the Court of Appeal considered what constitutes a mistake or error apparent on the face of the record, and stated as follows:

“In *Nyamogo & Nyamogo vs Kogo* (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is 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 long drawn process of reasoning or 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 or wrong view is certainly no ground for a review although it may be for an appeal.”

19. In *Paul Mwaniki vs. National Hospital Insurance Fund Board of Management* [2020] eKLR, it was said:

“... 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 a ground for review.”

20. From the above, it is clear that the error the subject of the application ought to be so glaring that there can possibly be no debate about it. An error which has to be established by a long-drawn out 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. The issue of special damages, in my view, is a substantial issue that can only be established by way of evidence, and cannot, therefore, be regarded as an error apparent on the face of the record or sufficient reason.
21. A perusal of the lower Court record, it is clear that the Appellant prayed for special damages but only proceeded to avail a medical report receipt of Kshs. 2,000/=. The other claims under the similar head e.g. medical expenses were thereby dismissed as they were not proved as required under law. The Appellant proceeded to file a review application vide notice of motion application dated 9<sup>th</sup> January 2017.
22. In his ruling dated 6<sup>th</sup> March 2019, the trial magistrate held that the Appellant failed to avail original copies of receipts and invoices with regard to the medical expenses and that the photocopies availed did not meet the standard of proof required by law and that the same lacked revenue stamps as provided for under the *Stamp Duty Act*. The court further held that the Appellant did not avail an explanation to persuade the court to grant the same.
23. From the above, it is elaborate that the same application did not meet the threshold as set under Order 45 for it to qualify for a review. The Appellant was simply arguing out reasons why she was entitled to the pleaded special damages, which would have been suited under the appeal umbrella. The Appellant was trying to point out to the court that it had omitted to include the special damages probably pleaded



but without the proper receipts and if this was the position, then she ought to have preferred an appeal since the trial court had erred on a point of law or fact. I concur with the trial court that the Appellant was simply aggrieved with its finding and that the same was a good ground for an appeal and not review as to do so then the trial magistrate would have sat on appeal in a matter that he had made a judgement. The proper court to do that was the High Court which acts as the appellate court.

24. Accordingly, i uphold the ruling of the trial Court and proceed to dismiss the Appellant's appeal dated 8<sup>th</sup> April 2019 with no orders as to costs.

It is hereby ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 26<sup>TH</sup> DAY OF APRIL 2024.**

**D. KEMEI**

**JUDGE**

In the presence of:

Angima for Appellant

No appearance Lunani for 1<sup>st</sup> Respondent

No appearance Lunani for 2<sup>nd</sup> Respondent

Kizito Court Assistant

