



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 117 OF 2011

GEORGE KAHURA.....APPELLANT

VERSUS

TITUS KIOKO MICHAEL.....RESPONDENT

R U L I N G

1. The Appellant herein was sued by the Respondent in the Lower Court for special and general damages following a road traffic accident. The trial magistrate, **C. Obulutsa P M** considered the case and entered judgment in favour of the Respondent. He awarded a sum of **Kshs. 70,000/=** in general damages and **Kshs. 3,200/=** in special damages. No appeal was lodged against the decision of the court.
2. The judgment was delivered on the **23rd March, 2011**. On the **20th June, 2011**, the Appellant filed an application for review and/or vacation of the judgment/decreed entered against the Appellant. The application for review was declined by **J. K. Ngeno S P M**. It was against that ruling that the Appellant appealed on grounds that:
 - The application of **Order 45** of the **Civil Procedure Rules 2010** was narrowly construed.
 - Interest of justice by affording the Appellant an opportunity to be heard was not taken into account.
 - Supporting evidence of the Appellant was not considered.
 - There was no appreciation of the fact that the Plaintiff's name did not appear in police records and hospital records.
 - The Police Abstract, P3 form and treatment notes adduced in evidence were fraudulent documents.
 - A finding that the Appellant's application had failed the test of review outlined in **Order 45 Rule 3** was erroneous.
3. According to directions given, the application was to be disposed of by way of written submissions. However, only the Respondent's submissions were on record.
4. The Respondent submitted that the Appellant failed to meet the criteria for review. The judgment of the Lower Court was elaborate. The Appellant never called any witnesses, therefore the Respondent's case was uncontroverted. The Respondent was a genuine claimant and victim of the accident in question, a fact that was not proved otherwise.
5. This being the first Appellate Court, I am enjoined to follow the case of **Selle v. Associated Motor Boat Co. LTD (1968) EA 123** where it was stated as follows:

“An appeal to this court from a trial is by way a retrial and the principles upon which such an appeal are well settled the court must reconsider the evidence, evaluate it itself and draw its own conclusions.....”

6. Order 45 Rules 1, 2 and 5 of the Civil Procedure Rules 2010 stipulates thus:

“(1) (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.

5. When an application for review is granted, a note thereof shall be made in the register, and the court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.”

Instead of appealing, the Appellant herein chose to seek review of the Lower Court Judgment and application that was dismissed. The court that considered the application for review dismissed it for not meeting the criteria for review as set out in **Order 45** of the **Civil Procedure Rules 2010**.

7. The Court of Appeal in the case **Pancras T. Swai v. Kenya Breweries Limited (2014) eKLR** quoted the case of **National Bank of Kenya Ltd v. Ndungu Njau (Civil Appeal No. 211 of 1996 (Unreported))** stating thus:

“This court, with respect, correctly held:

“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 the law. Misconstruing a statute or other provision of law cannot be a ground for review.”

“.....the learned Judge, he made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review.”

8. The Lower Court gave reasons for dismissal of the application. The Appellant having not canvassed the appeal as required, I find the Learned Magistrate having exercised his discretion

as required by the law. Instead of seeking review the Appellant should have appealed.

9. In the premises the appeal lacks merit. Accordingly, it is dismissed with costs to the Respondent.

10. It is so ordered.

Dated at Kitui this 30TH day of NOVEMBER, 2015.

L. N. MUTENDE

JUDGE

Dated, Signed and Delivered at Machakos this 17th day of December, 2015.

P. NYAMWEYA

JUDGE



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