



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 508 OF 2018

ELIZABETH MUSYOKA.....APPELLANT

VERSUS

EXPRESS CONNECTIONS LIMITED.....1ST RESPONDENT

JERAD MURIITHI WAIGANJO.....2ND RESPONDENT

(Being an appeal from the Judgment of Hon L.W. Kabaria (Ms),

Senior Resident Magistrate (SRM) at the Chief Magistrate's

Court at Milimani in Civil Case No 7610 of 2013 delivered 22nd December 2016)

JUDGMENT

INTRODUCTION

1. In her decision of 22nd December 2016, the Learned Trial Magistrate, Hon L.W. Kabaria (Ms) Senior Resident Magistrate (SRM), dismissed the Appellant's suit against the Respondents herein.
2. Being aggrieved with the said judgment, the Appellant filed her Memorandum of Appeal dated 24th October 2016 on even date. She relied on three (3) Grounds of Appeal.

LEGAL ANALYSIS

3. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.
4. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

5. Having looked at the Appellant's Grounds of Appeal, her Written Submissions and those of the Respondents, it appeared to this court that the only issue that was before it for determination was whether or not the Learned Trial Magistrate erred in law and fact in having dismissed the Appellant's suit on account of a legal technicality. The court therefore dealt with all the three (3) grounds of appeal together as they were interrelated. The issue of quantum would only be pertinent in the event this court were to find that indeed the Learned Trial Magistrate had erred as aforesaid.
6. The Appellant submitted that Article 159(2)(d) of the Constitution of Kenya , 2010 provides that **“ Justice shall be administered without undue regard to procedural technicalities.”** She pointed out that whereas the Respondents could have filed an application for dismissal of the suit under Order 32 Rule 2(1) and (2) of the Civil Procedure Rules, 2010 for want of compliance with the provisions of Order 32 Rule 1

(1) of the Civil Procedure Rules, the court could have exercised discretion and provided opportunity to the minor to correct the error and/or withdraw the suit. In this regard, she placed reliance on the case of **Peris Onduso Omondi vs Tectura International Limited & Another [2012] eKLR**.

7. She further relied on the cases of **Re S (a minor) independent representation) [1993] 3 All ER 36** where the court therein set out the conditions of a minor to represent himself or herself under r. 9. 2A(6) of the Family Proceedings Rules 1991 and **Re T (a minor) (child: representation) [1993] 4 All ER 518** where the court therein found that the minor's right under r. 9.2A (1)(b) of the said Family Proceedings Rules to bring the proceedings without a next friend or guardian *ad litem* had been satisfied.

8. It was therefore her submission that the Learned Trial Magistrate ought not to have dismissed her suit and urged this court to award damages in the sum of Kshs 560,300/= computed as shown hereinbelow:-

General damages Kshs 550,000/=

Special damages Kshs 10,300/=

Kshs 560,300/=

Plus interest on general damages from the date of judgment and interest on special damages from the date of filing suit and costs.

9. On the other hand, the Respondents argued that the issue of lack of capacity of the Appellant was raised at trial and no application was filed before the judgment was delivered to correct the error. They referred this court to **HCCC No 109 of 2001 Busia Solomon Mwathe Mitau & 787 Others vs Nguni Group Ranch, ELC No 305 of 2014 Kisumu Phares Omondi Okech & 2 Others vs Victory Construction Limited & Another** and **HCCA No 29 of 2014 The Anglican Church of Kenya St Peters Church Gatunduini vs The Secretary, Muranga County Government & Another** in support of their case.

10. Notably, neither were the eKLR citations and copies of the decisions furnished to this court. Suffice it to state that in the said decisions, suits were dismissed for having been filed by persons who had no legal capacity to institute the same.

11. Order 32 Rule 1 of the Civil Procedure Rules stipulates that:-

1. Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.

2. Before the name of any person shall be used in any action as next friend of any infant where the suit is instituted by an advocate, such person shall sign a written authority to the advocate for that purpose, and the authority shall be filed.

12. Order 31 Rule 2 of the Civil Procedure Rules further states that:-

1. Where a suit is instituted by or on behalf of a minor without a next friend the defendant may apply to have the suit dismissed with costs to be paid by the advocate or other person by whom it was presented.

2. Notice of such application shall be given to such person, and the court, after hearing his objections (if any), may make such order in the matter as it thinks fit.

13. Although the Respondents herein did not seek to have the Appellant's suit against them struck out prior to the commencement of the hearing, in the absence of the authority of the person who was to institute the suit in her name, this court found itself in difficulty as far as her case was concerned.

14. On being cross-examined, she admitted that as at the time of the accident and filing of suit, she was aged seventeen (17) years having been born in April 1996. When she was re-examined, she confirmed that on 3rd December 2016, which was the date the suit was filed, she was seventeen (17) years of age. The pleadings therefore ought to have appeared as "**xxx suing as the next friend of Elizabeth Musyoka**" as the Plaintiff in the proceedings in the lower court.

15. This was not a procedural technicality that could be excused and/or cured by Article 159 (2)(d) of the Constitution of Kenya, 2010. It was a substantive flaw that could not save her suit herein against the Respondents herein. As they pointed out, the issue of her age arose during trial. The dismissal of the Appellant's suit was not brought in an interlocutory application before trial commenced when the court could have exercised its discretion as was observed by Odunga J in the case of **Peris Onduso Omondi vs Tectura International Limited & Another** (Supra).

16. The Respondents were under no obligation to file the application under Order 31 Rule 2 of the Civil Procedure Rules to give the Appellant an opportunity to correct the error. The key word in the provision is that the "**defendant may apply**"(emphasis court). The issue having been raised during cross-examination had sealed the fate of her case as allowing any applications to respond to the Respondents' line of cross-examination would have been tantamount to pulling the rug under their feet so as to defeat their case.

17. The cases of **Re S (a minor) independent representation)** (Supra) and **Re T (a minor) (child: representation)** (Supra) that the Appellant had relied upon could not assist her case and were distinguishable from the facts of her case as in those two (2) cases, the English law had specific provisions allowing for certain instances when minors could represent themselves without a guardian. This was not so for

the Kenyan law. Notably, Order 32 Rule 1 of the Civil Procedure Rules which provides that no suit by a minor can be instituted without a next friend is couched in mandatory terms.

18. Consequently, the absence of the legal capacity of the Appellant to represent herself in the lower court matter meant that although she may have had a valid cause of action for determination by the court, that cause of action could not be sustained and had to fail.

19. In that regard, this court wholly concurred with the holding of the Learned Trial Magistrate that although she had found the Respondents to have been culpable for the accident in which the Appellant was said to have sustained injuries, the claim as brought was not sustainable. This is a similar conclusion that this court arrived at in the case of **Gladwell Otieno & 2 Others vs The Standard Group Limited & Another [2020] eKLR**.

20. In view of the aforesaid conclusion, this court did not deem it necessary to address itself to what quantum the Appellant could have been awarded as the issue was now moot.

DISPOSITION

21. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 24th October 2016 was not merited and the same is hereby dismissed. In view of the fact that the Appellant was a minor at the time of institution of the suit in the lower court, this court will not condemn her to pay costs of this Appeal. Each party will therefore bear its own costs of this Appeal.

22. It is so ordered.

DATED and DELIVERED at NAIROBI this 29th day of September 2020

J. KAMAU

JUDGE