



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CIVIL APPEAL NO 18 OF 2015

PASTOR MARGARET MWAWURI.....APPELLANT

AND

EFGENIA TABU MWANGOMBE.....RESPONDENT

(Being an appeal from the entire Judgment (sic) of the Honourable K. I. Orange, Resident Magistrate at Wundanyi Law Courts, delivered on 1st March 2011 in SPMCC No 16 of 2010)

BETWEEN

EFGENIA TABU MWANGOMBE.....PLAINTIFF

AND

PASTOR MARGARET MWAWURI.....DEFENDANT

JUDGMENT

INTRODUCTION

1. According to the Plaint dated 30th August 2010 filed on even date, the Appellant herein was the Respondent's Pastor in Pentecostal Church. On 11th April, the Appellant uttered certain words, which words when put into consideration by right thinking persons, meant that the Respondent was a witch, was practicing witchcraft and was an undesirable to worship or stay with other members of the public.

2. The Respondent therefore sought judgment against the Appellant for:-

- a. General damages**
- b. Costs of the suit**
- c. Interest at Courts rate (sic)**
- d. Any relief this courts (sic) deem fir (sic) to grant**

3. The Appellant filed her Defence dated 13th September 2010 on even date. She denied the Respondent's assertions and averred she did not know which year of 11th April it was and consequently, the Plaint was bad in law. On 5th October 2010, the Respondent filed an Amended Plaint dated 28th September 2010 in

which she indicated that the date of the utterances by the Appellant was on 11th April 2010.

4. On 21st October 2010, both the Appellant and the Respondent fixed the hearing of the case by consent for 14th December 2010. The hearing proceeded on 14th December 2010 when the Respondent herein closed her case. The Appellant indicated that she had three (3) witnesses. Her defence case was then fixed for 18th January 2011.

5. However, the Appellant did not attend court on 18th January 2011 as a result of which the Learned Trial Magistrate closed the defence case and directed that both parties file their respective Written Submissions. The matter was mentioned before him on 1st February 2011 when both parties confirmed they had filed their Written Submissions whereupon he reserved the Judgment for 1st March 2011.

6. On the said date of 1st March 2011, the Learned Trial Magistrate delivered his Judgment in which he found that the Respondent had proved her case as the Appellant did not offer any defence. He thus awarded the Respondent Kshs 80,000/= for general damages plus costs of the suit.

7. Subsequently, the Appellant filed a Notice of Motion application dated 3rd March 2011 on 4th March 2011 in which she prayed for the setting aside of the judgment on record and all consequential orders and that she be allowed to adduce her evidence. She averred that she was never given an opportunity to advance her case and that failure to attend court was not deliberate as she arrived in court after the matter had already been called out.

8. In his Ruling of 30th March 2011, the Learned Trial Magistrate found the said Notice of Motion application not to have been merited and dismissed the same. He observed that the Appellant had not acted in good time to move the Trial Court to give her a hearing date and that she had actually moved the court after about two (2) months. It was his contention that the Appellant failed to attend court for her defence case but filed Written Submissions whereupon a Judgment date was given. He added that the said application was intended to deny the Respondent from enjoying the fruits of her judgment.

9. Being dissatisfied with the said Ruling of 30th March 2011, M/S Gunga Mwinga & Co Advocates for the Appellant filed the Memorandum of Appeal dated 18th April 2011 on 21st April 2011. The grounds of appeal were as follows:-

a. THAT the learned magistrate erred in law and in fact in failing to appreciate that it was necessary for the Defendant to be allowed to adduce her evidence. In failing to give an opportunity to the Defendant to give evidence in defence the same was in contravention of the breach of the Rules of Natural Justice and particular the rule that a party is not to be condemned unheard.

b. THAT the learned magistrate failed to favourable appreciate(sic) the reasons advanced by the Applicant for non-attendance on defence date. The learned Magistrate thus misdirected himself and wrongfully denied the Applicant an opportunity to tender her defence.

c. THAT the Learned Magistrate erred in law and failed to embrace the principles enunciated in the overriding objective to the civil procedure Act (sic) and as a result failed to make a just determination of the proceedings. It was in the interests of Justice (sic) that the Appellant be heard.

10. In addition, on 5th May 2011, the Appellant then filed another Notice of Motion application dated 3rd May 2011 seeking for a stay of execution pending the hearing and determination of **HCCA No 66 of 2011 Pastor Margaret Mwawuri vs Efgenia Tabu Mwangombe at Mombasa**. As the application was not opposed, the Learned Trial Magistrate allowed it on condition that the Appellant deposited into court the decretal sum within thirty (30) days of the said Ruling that was delivered on 4th July 2011.

11. This court did not see any documentation relating to the transfer of the Appeal to High Court of Kenya Voi. All the same, the Appeal file found its way to this court and was assigned **HCCA No 18 of 2015 Pastor Margaret Mwawuri vs Efgenia Tabu Mwangombe, Voi.**

12. On 15th September 2016, M/S Nyakoni Ratemo & Co Advocates filed a Notice of Change of Advocates that was dated 14th September 2016 to come on record on behalf of the Appellant herein in place of M/S Gunga Mwinga & Co Advocates. They also filed the Record of Appeal dated 28th October 2016 on 3rd November 2016. The Respondent was not represented by counsel and appeared in person.

13. This court directed both parties to file their respective Written Submissions. The Appellant filed her Written Submissions dated 16th December 2016 on 18th December 2016 while the Respondent filed her Written Submissions dated 6th February 2017 on even date.

14. When matter came up on 14th February 2017, both parties requested this court to deliver its Judgment based on their respective Written Submissions which they did not highlight but relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

15. Notably, the first appeal court, such as this one, is under a duty to re-evaluate and assess the evidence that was adduced in the Trial Court 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 demeanour of the witnesses and hearing their evidence first hand.

16. 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...”

17. Having said so, this court wished to make some observations before delving into the substantive appeal. The first was that although M/S Nyakoni Ratemo & Co Advocates indicated in their Record of Appeal that they were appealing against the entire Judgment of the Trial Court, it was evident from the Memorandum of Appeal they annexed in their Record of Appeal that the appeal herein was only in respect of the Ruling that was delivered by the Learned Trial Magistrate on 30th March 2011.

18. There was no evidence on the court record that seemed to suggest that the said Memorandum of Appeal was ever amended. Indeed, this court could not make an assumption that the Appellant was appealing against the entire Judgment of the Learned Trial Magistrate as she did not even address herself to the award that he made in the submissions herein.

19. However, in the Appellant’s Written Submissions, her advocates seemed to have restricted themselves to the said Ruling. For all intents and purposes, this court therefore restricted itself to considering the merits or otherwise of the Appeal in respect of the Ruling that was delivered on 30th March 2011.

20. The second observation was that it was not clear to this court whether any leave was granted to the Respondent to amend her Complaint. She appears to have been prompted to amend her Complaint after the Defendant filed her Defence. Be that as it may, this court did not find the same to have been a material issue because the Defendant acquiesced in the Amended Complaint being filed by proceeding with the trial. In addition, it was never in dispute from the proceedings that the Appellant and the Respondent were clear that the words in contention were said to have been uttered on 11th April 2010.

21. The third issue was that it was not clear to this court whether or not the Appellant deposited the decretal sum into court as had been ordered by the Learned Trial Magistrate on 4th July 2011. As the Respondent made no mention of the same, this court could not make a determination as to whether the Appellant was in contempt of the court's orders which ordinarily she ought to have purged before being given audience by this court. This court therefore proceeded to hear and determine the Appeal as was filed.

22. All the Grounds of Appeal were dealt with together as they were related. As was correctly pointed out by the Appellant, the right to a fair hearing is a cardinal principle of the rules of natural justice that mandate that no party should be condemned unheard.

23. This court therefore fully associated itself to the holding of Weldon Korir J in **Republic vs Chairperson Business Premises Rent Tribunal & 2 Others [2013] eKLR** and this very court's holding in **Auron Odipo t/a Baraka Bookshop vs Boitallin Supply & Trading Company Limited & Another [2016] eKLR** cases that the Appellant relied upon to support its argument that her rights to fair trial would be infringed if the Judgment that was delivered on 1st March 2011 and all consequential orders are not set aside.

24. However, this court was more persuaded by the Respondent's submissions that the Appellant voluntarily participated in the proceedings after her case was closed in her absence when she filed her Written Submissions and failed to object to the Learned Trial Magistrate reserving his Judgment. She ought to have moved the Trial Court in an appropriate manner for the re-opening of the case to enable her adduce her evidence.

25. The moment she filed her Written Submissions after the order of the Learned Trial Magistrate of 18th January 2011 in which he closed the case for the defence in her absence, she waived her right to object and was estopped from complaining that she was denied an opportunity to be heard or that she was condemned unheard.

26. The application to set aside the Judgment and all consequential orders came a tad too late because it was made after the Learned Trial Magistrate delivered his Judgment. He correctly observed that the Appellant had about two (2) months within which she ought to have moved him appropriately to give her an opportunity to re-open her defence case.

27. Nothing stopped her from making her application immediately she established what transpired on 18th January 2011. She did not do so and must therefore bear the consequences of her inaction and failure to act diligently. This court thus wholly concurred with the conclusion that was arrived at by the Learned Trial Magistrate that the said application was aimed at denying the Respondent from enjoying the fruits of her judgment.

28. Accordingly, having considered the Record of Appeal and the Written Submissions by both the Appellant and the Respondent, this court came to the firm conclusion that the Appellant had not provided any sufficient ground for it to interfere with the Learned Trial Magistrate's Ruling of 30th March 2011. It is now almost seven (7) years since the Ruling was delivered by the Learned Trial Magistrate. It is time the Respondent enjoyed what is due to her.

29. In the premises foregoing, Grounds of Appeal Nos (1), (2) and (3) were not merited and are hereby dismissed.

DISPOSITION

30. The upshot of this court's judgment was that the Appellant's Appeal that was dated 18th April 2011 and filed on 21st April 2011 was not merited and the same is hereby dismissed with costs to the Respondent.

31. It is so ordered.

DATED and **DELIVERED** at **VOI** this 11th day of April 2017

J. KAMAU

JUDGE