



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Appeal 1053 of 2007**

**Editorial Summary**

1. *Civil Appeal*
2. *Subject of Subordinate Court Case*

**TORT**

- 2.1 *Running down*
- 2.2 *Female adult/pedestrian aged 54 years in 2003.*
- 2.3 *Run down by vehicle*
- 2.4 *Injuries*
  - a) *Bimalleolar fracture right ankle*  
*(on P3 form)*
  - b) *Blunt trauma to right wrist*  
*(not on P3 form)*
- 2.5 *Application by plaintiff/appellant to amend*  
*pleadings orally.*
- 2.6 *Application refused by trial magistrate*
- 2.7 *Suit dismissed on grounds of contradictory evidence*  
*based on possible amendments that would have*  
*rectified anomaly if made early enough.*
- 2.8 *Applicant appeals.*

3. *Appeal filed 21<sup>st</sup> December 2007*

*Inter alia, learned magistrate erred in:*

*failing to consider the original plaintiff application  
to amend proceedings.*

4. *In reply:*

- i) *Application for amendments of pleading  
made after plaintiff closed its case.*
- ii) *Amendment sought 2 ½ years after the  
suit was filed.*

5. *Held:*

6. *Case Law:*

7. *Advocates :*

- i) *A.J. Ambahi holding brief for D.M. Mwangi instructed by M/s Mwangi Wahome & Co  
Advocates for appellant*
- ii) *S.N. Makila instructed by L.M. Kambuni & Co Advocates for respondent*

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**CIVIL APPEAL NO. 1053 OF 2007**

MARGARET WANJIRU ..... APPELLANTS/ORIGINAL PLAINTIFF

VERSUS

SUSAN SHITIKHA CHIVUSA ..... RESPONDENT/ORIGINAL DEFENDANT

*(Being an appeal from the judgment of Hon. E.C. Cherono- Senior Resident Magistrate delivered on 4<sup>th</sup>  
December 2007 at Milimani Commercial Courts)*

**J U D G M E N T**

I. **INTRODUCTION**

1. In this appeal before, Margaret Wanjiru (the original plaintiff/appellant herein) had sued Suzanne Shitikha Chivuwa (the original defendant/respondent herein) in TORT. Margaret was a pedestrian along Mbagathi Way when she alleged that she was run down by a vehicle driven by the respondent so negligently that she sustained injury. She prayed that she be awarded damages both general and special,

in the subordinate court.

2. When her evidence was being recorded in a trial before the subordinate courts, a discrepancy arose as to the date in which the incident occurred. The plaintiff's case had been closed but the defence having had not been taken, the advocate applied to amend the plaint to read the correct date in which the incident occurred.

3. This application was disallowed by the Hon. Magistrate. The trial proceeded to the hearing of the defence case.

4. Judgment was delivered on 4<sup>th</sup> December 2007 in which the

Hon. Trial Magistrate dismissed the suit against the defendant. The grounds relied on and arrived at the decision was on the issue of the amendment of the pleadings, namely and I quote:

***“During the date of defense hearing counsel for the plaintiff made a peculiar application for oral amendment of the plaint under Order VIA rule 5 Civil Procedure and Section 100 Civil Procedure Act. The effect of the amendment was to change the date of the alleged accident as pleaded in the plaint from 10<sup>th</sup> November 2003 to 9<sup>th</sup> November 2003.***

***Having heard the vital submissions by the counsel of the plaintiff and the defendant and having considered the rules of amendment, I found that the application was prejudicial to the adverse party since the plaintiff had testified and closed its case. Amendment sought was made too late in the day.***

***I found that such an application for amendment as sought by the counsel for the plaintiff is one that was tailored to steal a march on the defendant.”***

5. The trial magistrate was of the view that the appellant was not permitted to amend the pleadings after close of the plaintiff's case. That by doing so, it amounted to prejudice against the defendant. The arguments on the amendments, be stated was well documented in the proceedings.

6. Going to the proceedings, upon the application for amendment being made, the advocate for the respondent stated:

***“...I confirm that I have talked to my colleague and I have no objection to oral application for amendment.”***

7. The basis of the dismissal of the subordinate court's case is due to the discrepancy of the dates and to the fact that the amendments sought came too late in the day.

8. The original plaintiff filed appeal to this court and asked that the orders dismissing her suit be set aside and for the High Court to award the damages done to her.

9. The respondent stated in reply that the subordinate court had the discretion to allow or disallow an application for amendments. The plaintiff had already closed its case. The suit had been filed in February 2005. The amendments sought came two and a half years later on the 17<sup>th</sup> October 2007. This delay was inordinate.

10. The appeal, he implied should be dismissed.

## II OPINION

11. The rules of amendments considered by the trial magistrate fall under Order VIA r 7 of the former rules of the Civil Procedure Rules.

12. Basically, under Order VIA r 3, apart from dealing with issues of misjoinder and non-joinder of parties and apart from amendments made before close of pleadings, the court has discretion

***“at any stage of the proceedings on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.”***

13. Amendments of pleadings may therefore be done at any stage of the proceedings to meet the just hands of justice.

14. In the subordinate court the amendments sought was as to an error. It is therefore permitted by law for purpose of ***“determining the real question in controversy between the parties or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”***

15. The powers of amendments in civil suit is wide. It is not the same as in a criminal court case.

16. An amendment application can be made orally. Where it may be opposed a formal application is advised to be made and arguments between the parties be made.

17. The rules of amendments does not apply to judgment and or orders of the court.

18. My findings herein are that the Hon. Trial magistrate erred in refused to permit the application of amendments. The issue before court was TORT, a running down matter as to liability and quantum. These issues were not considered in the reasoning of the judgment nor did the Hon. Magistrate gave a possible award in the event that he would have found for the original plaintiff.

19. I hereby allow this appeal and set aside the orders of the magistrate dismissing this appeal.

20. I order that the file be remitted to the trial magistrate for a retrial on issue of liability and quantum according to law.

21. There will be costs to the appellant.

DATED THIS 26<sup>TH</sup> DAY OF OCTOBER 2011 AT NAIROBI

M.A. ANG'AWA  
JUDGE

Advocates :

i) *A.J. Ambahi holding brief for D.M. Mwangi instructed by M/s Mwangi Wahome & Co Advocates for appellant*

ii) *S.N. Makila instructed by L.M. Kambuni & Co Advocates for respondent*