**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Civil Appeal 16 of 2000**

**AKAMBA PUBLIC ROAD SERVICES LTD.....APPELLANT**

**VERSUS**

**PATRICK OKILLE .....RESPONDENT**

***(Being an appeal from the judgment of the Chief Magistrate's Court***

***at Meru of R.N. Oundu SRM delivered on 10th December 1998)***

**JUDGMENT**

The respondent in the lower court filed a claim against the appellant seeking compensation for damages suffered as a consequence of a road traffic accident. His claim was denied by the appellant. When the case came up for hearing on 16/11/1998 Mr. G. Miriti advocate on instructions from the advocate for the appellant applied for an adjournment. The basis of that application was that the appellant had filed an application in Nairobi High Court seeking the transfer of the lower court case to Nairobi for disposal. The basis of seeking the said transfers stated in court was that the accident had occurred at Nakuru/Gilgil Road and that the defendant (appellant) resided in Nairobi. As it can be seen, the appellant is a limited liability company. The court in its ruling in respect of that application for adjournment rejected the adjournment by finding that what the appellant should have sought was stay of proceedings if indeed there was an application for transfer. The plaintiff (respondent) proceeded to tender evidence before court and in so doing produced as an exhibit the report of Doctor Kwena who had examined him and had prepared the medical report. The respondent was cross examined by Mr. Miriti Advocate. At the end of the plaintiff's case after the evidence of the respondent was tendered, Mr. Miriti advocate again applied for an adjournment on the basis that he had no witnesses for the defence. The court rejected that application and stated that it had already ruled on the adjournment application. The court by its judgment dated 10th December 1998 entered judgment for the respondent for Kshs. 200,000 as general damages and Kshs. 800 as special damages. The appellant has filed this appeal against that judgment. The appellant has brought 10 grounds of appeal which are as follows:-

1. The learned magistrate erred in fact and in law in admitting into evidence statements in documents whose makers had not been called as witnesses in the proceedings.

2. The learned magistrate erred in fact and in law in admitting into evidence statements in documents whose makers had not been called as witnesses in the proceedings notwithstanding that no or no proper basis had been laid for the exercise of the discretion.

3. The learned magistrate erred in law and in fact in failing to afford the appellant a full opportunity

to be heard at the hearing in breach of the fundamental principles of natural justice.

4. The learned magistrate erred in fact and in law in awarding the respondent general damages of Kshs. 200,000/= notwithstanding that the respondent had not proved injury in law.

5. The learned magistrate erred in law and in fact in holding the appellant liable to the respondent for the costs of this suit.

6. The learned magistrate erred in law and in fact hearing and determining the suit notwithstanding that there was a real likelihood of bias.

7. The learned magistrate erred in law in failing to give notice and/or afford an opportunity to the appellant in to render submissions in the suit which is the subject of this appeal.

8. The learned magistrate erred in fact and in law in hearing and determining the suit notwithstanding that the court had no jurisdiction to do so under the Civil Procedure Act.

9. The learned magistrate erred in fact and in law in failing to give the appellant notice of the date of judgment.

10. The learned magistrate erred in fact and in law by admitting in evidence receipts in respect of which Stamp Duty had not been paid in contravention of the Stamp Duty Act (Cap 480 of the Laws of Kenya).

I will begin by considering ground 3 and 4 together. These grounds relate to the court's rejection for an adjournment. The appellant quite rightly accepted in its submissions that the decision of granting an adjournment is one that falls within the realm of discretionary powers of a magistrate. The appellant however argues that such discretion must be exercised judiciously. I do accept that a party ought not to be condemned unheard. That is accepted principle of law. The appellant relied on the case of Manubhai BhailalBhai Patel Vs. Richard Gottfried Civil Appeal No. 10 of 1952 where the Court of Appeal quoted with approval the case of Maxwell Vs. Keun [1928] 1KB 645. It stated as follows:-

*"I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned Judge on such a question as an adjournment of a trial, and it seldom does so, but on the other hand, if it appears that the result of the order made below is to defeat the right of the parties all together, and do that which the Court of Appeal is satisfied would be an injustice, to one or other of the parties, then the Court has the power to review such an order and it is to my mind, its duty to do so."*

I ask myself a rhetorical question whether indeed the appellant can be said to have been condemned unheard. The answer to that is *No*. The appellant was represented by counsel who participated in the trial after an adjournment was denied. In my view, the appellant did not place before court sufficient material to enable the court grant the adjournment that was sought. After the respondent closed its case and the appellant was once again denied an adjournment, he proceeded to close the defendant case stating: - "*We have no evidence to offer.*" Again in respect of the 2nd application for adjournment there was no explanation given why the appellant failed to produce his witnesses before court. I am therefore of the view that the learned magistrate judiciously made a decision not to allow an adjournment. Those grounds therefore fail. On the first ground of appeal, the complaint by the appellant is that the lower court allowed an exhibit to be produced by a person who was not a maker of it. This indeed was the medical report produced by the respondent which had been prepared by the doctor who examined him. Section 35 of the Evidence Act provides for the admissibility of documents in evidence. Section 35 (1) (a) is pertinent to this matter. It is in the following terms:-

*"35. (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say-*

*(a) if the maker of the statement either-*

*(i) had personal knowledge of the matters dealt with by the statement; or*

*(ii) Where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have personal knowledge of those matters."*

The document which was produced by the respondent, that is, the medical report was made by a person who had personal knowledge of the matters. I have had the opportunity to look at that report and it is clear that Doctor Kwena examined the respondent before making the report. He therefore had first hand knowledge and the report is admissible under the above section. I do not accept the submissions of the appellant in respect of section 48(1). That section purely defines who an expert witness is. It does not make it obligatory that a document such as the report which was submitted here to be of necessary produced by the maker. The court was correct in relying on Dr. Kwena's report. In respect of ground number 5 the appellant faulted the learned magistrate for finding that it is liable to pay the costs of the suit. Section 27 (1) of the Civil Procedure Act provides that costs in any action are to follow the event unless the judge or magistrate for good reason shall otherwise order. In this case, the respondent was successful in his claim. There was no reason before court why the court should have deviated from the provisions of section 27(1). On ground 6, I find myself hard pressed to understand it. The appellant did not at the lower court allege bias on the part of the learned magistrate. It cannot therefore be that it would allege for the first time at this appeal that there was bias. The court rejects that ground because it has no basis. On ground 7, I find that the proceedings show that after the hearing, the court ordered the parties to make submissions before it on 26th November 1998. There is no record in the proceedings to show what happened on that day. Submissions were made by the respondent's counsel only on 4th December 1998. I then ask myself what prejudice did the appellant suffer. Obviously it suffered the prejudice of not being able to submit the authorities that supported its case. This court is the first appellate court and the court is mandated to reconsider the evidence tendered in the lower court to reevaluate it and reach its own conclusion bearing in mind that it did not have the benefit of hearing and seeing the witnesses. That being so, the appellant should have submitted in support of its appeal in respect of the authorities that could have supported its case on quantum. That did not happen and I have re-considered the authorities the learned magistrate relied upon and bearing in mind the injuries that are suffered by the respondent, I can find no fault in the finding of the learned magistrate that the respondent was entitled Kshs. 200,000 in general damages. On ground number 8, the advocate for the appellant raised informally before the lower court the issue on whether the court had jurisdiction to entertain the suit. Mr. Miriti, counsel holding brief for the appellant merely informed the lower court that there was pending before high court an application for the transfer of the suit to Nairobi for trial. He did not invite the court to consider whether it had jurisdiction to entertain the application. Section 16 of the Civil Procedure Act forbids an objection being raised in respect of the place of suing at an appeal. That section is in the following terms:-

*"No objection as to the place of suing shall be allowed an appeal unless such objection was taken in the court of first instance and there has been a consequent failure of justice."*

The appellant did not ask the court of first instance to consider whether it had jurisdiction and it therefore cannot now bring it in this court. On ground number 6, the appellant complaint is that it was not informed of the date that judgment was to be delivered. The appellant failed to state in this appeal what prejudice it suffered because of that failure. The only prejudice that it would have suffered in my view is to fail to file an appeal in time. The appellant did move this court and was granted an order to file this appeal out of time. There is therefore no obvious prejudice to the court's failure to inform the appellant of the date of its judgment. On ground 10, the appellant has relied on the Stamp Duty Act Cap 480 to state that the lower court should not have accepted the receipt representing the claim for special damages because it lacked Stamp Duty. Section 19 (1) of that Act is in the following terms:-

*"19 (1) Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings*

*whatsoever, except-*

*(a) in criminal proceedings; and*

(b) *In civil proceedings by a collector to recover stamp duty, unless it is duly stamped.*

*(2) No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped."*

That section prohibits the court from receiving documents from which stamp duty is payable in civil matters. The appellant is correct in its submissions in this regard and accordingly, the award of special damages to the respondent being Kshs. 800 will be deducted. In the end, this is the judgment of the court:-

*1. The appellant's appeal fails save for the award by the lower court to the respondent of Kshs. 800 which is hereby reversed and deducted from the lower court's judgment.*

*2. This court does uphold the lower court's judgment for the respondent in respect of the award of general damages being Kshs. 200,000/=.*

*3. Because the appellant's appeal substantially failed, the costs of this appeal are awarded to the respondent.*

Dated and delivered at Meru this 6th day of November 2009

**MARY KASANGO**

**JUDGE**