IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 525 of 2003

GEORGE KARIUKI WAITHAKA....………….. APPELLANT

VERSUS

ATTORNEY GENERAL…....…………………..RESPONDENT

J U D G M E N T

George Kariuki Waithaka (hereinafter referred to as the appellant), filed a suit in the High Court at Nairobi against the Hon. Attorney General (hereinafter referred to as the respondent), and 9 others (i.e. 2nd to 10th defendants), seeking general and special damages. The appellant claimed that he was brutally attacked and assaulted by a group of military officers. His motor vehicle was also damaged. The Attorney General entered appearance on behalf of the 2nd defendant and on his own behalf. Subsequently, the Attorney General filed a statement of defence on his own behalf, denying the appellant's claim and contending that if any injuries were occasioned to the appellant the same was occasioned by the military officers outside the scope of their employment and the Hon. Attorney General was not vicariously liable.

On the 16th November, 2000, the appellant withdrew the suit against the 3rd – 10th defendants. Interlocutory judgment was thereafter entered in favour of the appellant against the 2nd defendant in default of defence. On the 15th January, 2003, Hon. Angawa J. set aside the interlocutory judgment entered against the 2nd defendant as the appellant's advocate was not properly on record at the time the judgment was obtained. On the 8th August, 2003, a consent order was recorded transferring the suit to the Chief Magistrate's Court at Milimani for hearing and final disposal. On the 7th April, 2004 the suit came up for hearing before the Senior Principal Magistrate Milimani whereupon an application was made on behalf of the Attorney General to withdraw from acting for the 2nd defendant. The trial magistrate however refused to grant an adjournment and ordered the hearing to proceed.

During the hearing the appellant testified and explained that on the 26th October, 1991, he was at Nairobi West where he used to do a part-time taxi business. At about 1.00 p.m. a client approached him and requested to be taken to Mogoya Estate. He refused to go to Mogoya Estate because the previous night he was attacked when he went to drop some clients at that estate. The person explained that he was Major Cherogony of the Army, whereupon the appellant agreed to take him to Mogoya Estate. When they arrived at the estate Cherogony directed the appellant to his house. Before the appellant could turn into the gate, Cherogony slapped the appellant on the face, as a result of which the appellant's vehicle hit a pavement and stopped. Cherogony came out of the vehicle and called out saying he had brought the man. A number of people came out with crude weapons and pangas and attacked the appellant. The appellant tried to run away but he was overpowered, hit with metal bars and mallets and tied with a nylon rope and dragged into Cherogony's house. The appellant was later rescued by police officers from

Langata Police Station, Sergeant Mukuria and one Lokonoye. He was taken to Kenyatta National Hospital by the police officers. The appellant lost consciousness and only regained it 4 days later. He was moved to the Aga Khan Hospital where he was treated. A metal implant had to be put in his legs at a cost of Kshs.100,000/=. An attempt by the appellant to produce a medical report prepared by a Dr. Gakuo was successfully resisted by the respondent. The trial magistrate directed that the report be marked for identification to be produced by the maker. An attempt to produce invoices and receipts from the hospital was also rejected by the trial magistrate as no special damages for medical expenses were pleaded.

The appellant explained that he later went to Langata Police Station to pursue the matter but the police chased him away. He reported the matter to his area MP who raised the matter in parliament.

Counsel for the appellant applied for adjournment after the evidence of the appellant to enable him get Prof. Gakuo who was to produce the Medical report. Counsel explained that Prof. Gakuo was not in court as he was on an urgent training abroad. Counsel explained that they were not aware of Prof. Gakuo's absence until that morning when they received the information from his office. The trial magistrate rejected the application for the adjournment contending that there was no evidence that Prof. Gakuo had traveled out of the country. She directed the appellant to close their case if they did not have any other witness whereupon, the appellant closed his case. No evidence having been offered by the Attorney General parties were given a date for submissions on the 6th May, 2004.

On the 4th May, 2004 the appellant brought an application under certificate of urgency seeking to have the court review and set aside its orders closing the appellant's case and requesting that the case be opened for further hearing and the appellant be allowed to adduce further evidence including the doctor's evidence. The application came up for hearing on 12th May, 2004 on which date the appellant's advocate was served with grounds of opposition. The appellant's advocate applied for adjournment to enable them respond to the grounds of opposition. The trial magistrate allowed the adjournment and marked the application as stood over generally, but directed that submissions be made on the 14th May, 2004. On 14th May, 2004, the matter was not listed but the trial magistrate mentioned the matter and fixed judgment for 18th June, 2004.

In her judgment, the trial magistrate found that although the appellant's case appeared to be that the 2nd defendant was an army officer, and that the respondents was vicarious liable for the 2nd defendant's action, no vicarious liability was pleaded on the part of the respondent in the plaint and therefore no cause of action is disclosed in the plaint against the respondent. The trial magistrate further found that there was no evidence to prove the appellant's assertions that the 2nd defendant was an army officer, nor was there any evidence to corroborate the appellant's assertions that he was brutally attacked by the 2nd defendant and rescued by police officers. She noted that no police abstract report or P3 form or records of initial treatment were produced, nor was the medical report prepared by Dr. Gakuo produced. She concluded that the appellant had dismally failed to prove his case, and therefore dismissed the appellant's suit with costs to the respondents.

Being dissatisfied with that judgment and the ruling of 7th April, 2004 refusing the application for adjournment, the appellant has filed a memorandum of appeal raising 8 grounds as follows:

(1) The leaned magistrate erred in failing to exercise her discretion judiciously to allow the appellant's application for adjournment on 7th April, 2004.

(2) The learned magistrate erred in failing to consider the evidence of the appellant on record.

(3) The learned magistrate's judgment is at variance with the evidence and submissions before the court.

(4) The learned magistrate erred in closing the appellant's suit without allowing the doctor's evidence on 7th April, 2004.

(5) The learned magistrate erred in failing to find that the appellant was entitled to general damages.

(6) The learned magistrate erred in holding that the appellant had failed to prove his case on a balance of probabilities as required by law.

(7) The learned magistrate erred in refusing to hear and determine the appellant's application dated 4th May, 2004 seeking to adduce further evidence.

(8) The learned magistrate erred in failing to allow the appellant time to have the relevant documents certified for production in court.

Counsel for the appellant has submitted that the trial magistrare did not exercise her discretion judiciously in refusing the application for adjournment. It was contended that the failure by the magistrate to allow the adjournment, occasioned prejudice and injustice to the appellant, as the appellant was denied the opportunity to produce vital documents in support of his case. The appellant was further locked out from having the order of the trial magistrate reviewed when his application brought under certificate of urgency was stood over generally. Counsel for the appellant referred to the following cases: -

· ***Mbogo and Another vs Shah, (1968) EA 93***, wherein it was stated that the discretion of a Judge can be interfered with if the Judge has misdirected himself and misjustice has resulted.

· ***Mrima vs Atlantic Buildings & General Contractors and Another, (1991) KLR 609***, where it was held that although a trial Judge has unfettered discretion to grant or not to grant an adjournment, that discretion should be exercised judiciously.

· ***Samson Auma vs Jared Shikuku & Another., Civil Appeal No.191 of 2002, (2007) eKLR***, that the court has power to interfere with the discretion of a Judge on adjournment where the order results in injustice.

It was submitted that although the case was an old one the record showed that the adjournments were largely occasioned by the respondent and the court. Relying on ***Hammerheads Limited vs James Githinji & Another (2006) eKLR***, it was submitted that the appellant was denied an opportunity to prosecute his case effectively. It was further contended that the trial magistrate failed to note that there was no evidence adduced by the respondent to controvert the appellant's evidence.

For the respondent it was contended that the respondent's appeal against the ruling dated 7th April, 2004, was statute barred as was the ruling against the judgment dated 18th June, 2004, the appeal having been filed outside the period of 30 days. It was further contended that no decree or order having been extracted in respect of the ruling of 7th April, 2004 and the judgment of 18th June, 2004 the appeal was incompetent. It was contended that the trial magistrate exercised her discretion judiciously in rejecting the application for adjournment as the suit was an old one. It was further submitted that the trial magistrate properly dismissed the appellant's suit having given a detailed analysis of the appellant's case.

In response, to the submissions made on behalf of the respondent, the appellant's counsel submitted, that the appeal was filed within 30 days, as under Order XLIX Rule 7 of the Civil Procedure Rules, the first and last days are not included in the computation of the period. It was contended that there was no need for two separate memorandum of appeal over the same issues.

The memorandum of appeal filed by the appellant indicating that the appeal is against the ruling of 7th April, 2004 and the judgment of 18th June, 2004 was filed on 19th June, 2004. As regards the appeal against the judgment of 18th June, 2004, the memorandum of appeal was apparently filed on the 31st day. However, Order XLIX Rule 7 of the Civil Procedure Rules states as follows: -

"***In any case in which any particular number of days not expressed to be clear days is prescribed under these Rules or by an order or direction of the court, the same shall be reckoned exclusively of the first***

day and inclusively of the last day."

In this case, the appellant had 30 days within which to file his appeal. If the 1st day is excluded, then appeal was filed on the 30th day which was within time. The appeal against the judgment of 18th June, 2004 is therefore properly before the court.

The appeal in respect of the ruling dated 7th April, 2004 was obviously filed out of time having been filed more than two months after that ruling. No leave having been granted to file the appeal out of time, the appeal against the order of 7th April, 2004 is incompetent. Nevertheless, it is evident that during the trial the magistrate exercised her discretion in refusing an adjournment to the appellant. The exercise of this discretion had serious repercussions on the prosecution of the appellant's case. Although the specific appeal against the order of 7th April, 2004 is incompetent, the court cannot look at the order refusing the adjournment in isolation from the actual hearing of the suit. That order was part of the process of hearing the suit which eventually resulted in the judgment of the trial magistrate. The court is therefore under an obligation to examine that order and the process by which it was arrived at. If the exercise of the discretion to refuse an adjournment was not exercised judiciously, then the proceedings were vitiated. The court must therefore examine the proceedings with the view to determining whether the process of hearing the suit was carried out properly and whether the judgment of the court was arrived at fairly.

The record of the lower court indicates that on 19th January, 2000, a list of documents was filed under Order X Rule 11A of the Civil Procedure Rules, indicating the documents which the appellant had in his possession and which the appellant intended to produce during the hearing of the suit. That list included invoices, receipts from the doctor, medical treatment receipts, receipts in respect of purchase of replacement of motor vehicle parts, medical report by Dr. L.N. Gakuo etc. The appellant had therefore given adequate notice that it intended to rely on those documents. During the hearing, some of the documents were even marked for identification. These included; the report from Dr. Gakuo, statement of account and receipts from Aga Khan Hospital. The trial magistrate refused to allow the appellant to produce invoices and receipts from the Aga Khan hospital on the grounds that no special damages were pleaded. That was not proper. Although the special damages may not have been specifically pleaded, the receipts and invoices to a certain extent corroborated the appellant's contention that he was treated at the Aga Khan Hospital.

The failure by the trial magistrate to allow an adjournment to the appellant to call the doctor to produce the medical report completely prejudiced the appellant in the prosecution of his case. The explanation given by the appellant's advocate, that the doctor had to urgently travel out of the country, was a reasonable explanation and ought to have been accepted.

I take note of the fact that the trial magistrate in refusing the application for adjournment was exercising her discretion and that the general principle is that a Court of **Appeal should be very slow to interfere with the exercise of discretion by a Judge. However, as was stated in the case of *Mbogo & another vs Shah* (Supra): -**

"***A Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice."***

In this case, in exercising her discretion, the trial magistrate was apparently concerned that no evidence had been given to confirm that Prof. Gakuo had traveled. The trial magistrate did not apparently consider the appellant's counsel explanation that they had only received that information by phone that morning. At best the trial magistrate could have given time for such evidence to be availed. This was a case in respect of which hearing was starting for the first more than 10 years after the suit was first filed. The court file indicates that on all occasions when the matter came in court, the appellant was always ready to proceed. There was therefore no reason to assume that in applying for adjournment the appellant was merely procrastinating the matter. I

would borrow the statement of Chesoni Ag.J.A (as he then was) in *Mugachia vs Mwakibundu (1984) KLR 572* (at page 579) that:

“***The court should indeed discouraged unnecessary adjournments for cases set down for hearing. But that must not be done at the expense of proper and judicious administration of justice with fairness to the parties.”***

In this case, the exercise of the trial magistrate’s discretion crippled the appellant in prosecuting his suit as the appellant was unable to call crucial evidence. Indeed, the trial magistrate dismissed the appellant’s suit due to lack of evidence including treatment notes and the doctor’s report which evidence was blocked by the refusal to grant an adjournment to the appellant. This is a clear case where the trial magistrate did not exercise her discretion judiciously but exercised it in a manner which was unfair and prejudicial to the appellant thereby resulting in an injustice.

I come to the conclusion that the consequent judgment cannot be allowed to stand. Accordingly, I allow the appeal, set aside the judgment of 18th June, 2004 and order that the lower court file be remitted back to the lower court for the hearing of the suit to proceed *de novo*. Each party shall bear his own costs in this appeal.

Orders accordingly.

Dated and delivered this 30th day of July, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Gacheru for the appellant

No appearance for the respondent