



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal No. 525 of 2001

HAMMERHEADS LIMITED.....APPELLANT

VERSUS

JAMES GITHINJI & ANOTHER..... RESPONDENTS

J U D G M E N T

On 27/3/2002, the appellant appealed to this court, against the Judgment of the Senior Principal Magistrate's Court, Milimani, Nairobi delivered on 6/9/01 in Civil Case No. EJ. 172 of 1998, on eight grounds:

1. The Learned Magistrate erred in law and fact, in refusing to allow the appellant's counsel's application for an adjournment despite his knowledge and information that the appellants key witness – Kuria Wa Gathoni – was held in Kamiti Maximum Prison and would not be in a position to attend court without a production order being issued.
2. The Lower Court erred in law and in fact in refusing to grant an adjournment to the appellant despite the fact that the appellant's advocates had taken the necessary steps to have the appellant's key witness produced in court; the appellant having applied for a production order.
3. The Lower Court erred in law and in fact in failing to find that the appellant's case could not proceed without the said Kuria Wa Gathoni's evidence as the Chief witness.
4. The Lower court erred in law and in fact in dismissing the appellant's suit when the appellant was represented by an Advocate.
5. The Learned Magistrate erred in law and in fact in dismissing the suit when the circumstances of the case favoured granting an adjournment to the appellant.
6. The Learned Magistrate erred in law and in fact in dismissing the suit when the same was meritorious and the Respondent's defence was a sham and the case was good to go for full trial.
7. The Learned Magistrate erred in law and in fact in failing to find that previous adjournments prior to the date of judgment had been occasioned by the fact that there had been negotiations out of court between the parties to the suit.
8. The Learned Magistrate erred in law and in fact in condemning the appellant unheard which is against

the rules of natural justice.

Wherefore the appellant prays that: the appeal be allowed with costs; the dismissal orders of the lower court be set aside; and the case be tried **de novo**.

Reading through the pleadings and the proceedings at the lower court, and the ruling of the Learned magistrate dated 6/9/2001, the grounds of appeal can be, and I reduce the same into one ground of appeal whose substance is, in my view, ably captured by the contents in Ground of Appeal No. 8, which is simply the justice in condemning a party unheard. In my humble view, the rest of the grounds of appeal do no more than illustrate how the appellant herein was denied his right to be heard.

From the brief facts in the plaint, the appellants key witness, and as a matter of fact, the witness without whom the Appellant could not proceed to establish or fail to establish negligence on which liability for the accident could be pinned down on the Respondent could not be produced to give evidence as he was held in custody at the Kamiti Maximum Prison for a capital offence. This key witness was Kuria Wa Gathoni whose criminal trial was in the public domain at the time.

From the record from the lower court's file, I am satisfied that the Appellant's counsel did his best to procure the attendance of the key witness to attend court and give evidence, including witness summons through the Commandant of Kamiti Maximum Prison.

That the appellant's counsel was granted a last adjournment to facilitate procurement of Kuria Wa Gathoni to give evidence is not in dispute. Nor is it disputed that given the security surrounding such an inmate, at such a prison, the witness was not in court on the day scheduled by the court.

As a consequence, the appellant was unable to prosecute his case in the absence of the key witness who was the driver of the appellant's vehicle on the material day and time when the accident occurred. Without the driver – Kuria Wa Gathoni – there was no way the appellant could prove the particulars of negligence alleged in the plaint against the Respondent.

In all fairness there was injustice in dismissing the appellant's suit under the circumstances.

The appellant was denied his right to be heard on merit. No matter how long it took or it would have taken, to produce the key witness in support of the appellant's case, the Appellant should have been granted the requisite adjournment.

Accordingly, this appeal succeeds and I order as under:

- 1. Allow the appeal herein with costs to the appellant and against the Respondents.**
- 2. Set aside the Subordinate Court's dismissal orders.**
- 3. Order that the case be tried de novo, before a different Magistrate.**

DATED and delivered in Nairobi, this 21st day of March, 2006.

O.K. MUTUNGI

JUDGE