REPUBLIC OF KENYA

<u>IN THE HIGH COURT OF KENYA AT NAKURU</u>

<u>Civil Appeal 19 of 2002</u>

DOUGLAS OJWANG ………………………….. 1st APPELLANT

CHARLES OGETO …………………...…...….. 2ND APPELLANT

VERSUS

LEAKEY GITAU MWAURA …….……........………RESPONDENT

RULING

The respondent in this appeal, Leakey Gitau Mwaura, has brought this application under the provisions of **Order XLI Rule 22(1), (2), 23 and 24 of the Civil Procedure Rules and Sections 3A and 78(1) (2) of the Civil Procedure Act** seeking the orders of this court to grant him leave to adduce additional evidence during the hearing of the appeal to enable this court make an appropriate assessment of damages to be paid by the appellants, Douglas Ojwang and Charles Ogeto. The application is based on the grounds that the respondent was at the time of the filing of the application suffering from secondary generalised tonic clonic epilepsy which developed as a result of the injuries the respondent sustained in a road traffic accident on the 4th of May 1997.

The respondent states that the said evidence was not available at the time the case was heard by the lower court and therefore he could not have adduced the same. The respondent further stated that were the said evidence adduced before the trial Magistrate's court, the said court would probably have awarded the respondent more damages than it actually did. The respondent therefore pleaded with the court to allow him to adduce additional evidence so that the said new development as regard the injuries sustained by the respondent could be placed before this court for the proper determination of the issues in controversy. The application is supported by the annexed affidavit of the respondent, Leakey Gitau Mwaura. In his said affidavit he has annexed the medical treatment records and the three medical reports prepared by various doctors. The latest medical report prepared by Dr Charles Gachenia Woiye is dated the 17th of May 2005. It is the said report that the respondent would wish to have produced during the hearing of the appeal.

The application is opposed. The appellants filed grounds in opposition to the respondents' application. They stated that the said application was misconceived, incompetent, bad in law and did not disclose any cause of action. They further stated that the injury claimed i.e. epilepsy was not an injury which was pleaded in the plaint filed by the respondent in the lower court and therefore the respondent could not claim damages on the said alleged injury on this appeal. The appellants further stated that the respondent had not filed a cross-appeal to entitle him to seek the leave of this court to adduce additional evidence or introduce new issues on this appeal. The appellants further stated that the medical documents which the respondent is seeking to produce before this court as additional evidence are not genuine documents as they contained contradictory dates thus negating their evidential value.

I heard the submission made by Mr Mutonyi, learned Counsel for the respondent and Mr Mahida, learned Counsel for the appellant. I have carefully considered the said submissions made including the decided cases that were relied on by the Counsel for the respondent. I have also read and considered the application filed, the supporting affidavit and the annextures filed thereto. I have considered the grounds of opposition filed by the appellants. The issue for determination by this court is whether the respondent has established sufficient cause to enable this court to allow to him adduce additional evidence in this appeal. The law as regards the admission of additional evidence by an appellate court is clear.

Section 78 of the Civil Procedure Act provides that: -

> *"(1) Subject to such condition and limitations as may be prescribed, an appellate court shall have power –*
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> *(a) to determine a case finally;*
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> *(b) to remand a case;*
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> *(c) to frame issues and refer them for trial;*
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> *(d) to take additional evidence or to require the evidence to be taken;*
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> *(e) to order a new trial.*
>
> *(2) Subject as aforesaid the appellate court shall have the same powers and shall perform as nearly as may be the same duties as ate conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein."*

Order XLI Rule 22 of the Civil Procedure Rules provides that:-

> *"(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if –*
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> *(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or*
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> *(b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced or witness to be examined.*
>
> *(2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reasons for its admission."*

In **Wanje –Vs- Saikwa [1984] KLR 275**, the Court of Appeal held that the principles upon which an appellate court in a civil case, will exercise its discretion in deciding whether or not to receive further evidence are that it must be shown that the evidence could not be obtained with reasonable diligence for use at the trial; The evidence must be such that if given, it would probably have an important influence on the result of the case and finally the evidence sought to be adduced must be on the face of it credible. This decision was quoted with approval by a subsequent bench of the Court of Appeal in **Joginder Auto Services Ltd -Vs- Mohammed Shaffique & Ano C.A. Civil Appl. No. NAI 210 of 2000 (Nairobi) (unreported).**

The Respondent in this appeal has invoked the said law in his bid to persuade this court to grant him leave to adduce additional evidence on appeal. It is the respondent's case that he suffered epilepsy after the case in the lower court had been heard and concluded and judgment entered accordingly. The three medical officers who examined the respondent at the time of the hearing of the case did not make a

finding that the injuries which the respondent had sustained during the accident could result in epilepsy. The respondent developed epilepsy after the said judgment had been delivered by the lower court and before this appeal *(which had been filed by the defendants in the lower court)* could be heard. The respondent has submitted that this is additional evidence which the court should consider during the hearing of the appeal. The appellants are naturally opposed to the respondent's application. Their main ground in opposition to the said application is that the appeal now pending before this court was filed by the appellants. The respondent had not filed a cross-appeal. In the absence of a cross-appeal, the respondent cannot adduce additional evidence on this appeal.

Having carefully considered the respondent's application in the light of the applicable law, I do hold that this court can only allow a party to an appeal to adduce additional evidence under two circumstances; the first instance is where the lower court refused to admit evidence which ought to have admitted and in the second instance where an appellant wishes to adduce additional evidence in support of his appeal. The respondent is not saying that the lower court refused him to adduce certain evidence in the lower court during the trial of the case. If he made this applications under the said head then this court could have entertained his application. What the respondent is however saying is that the said evidence was not available at the time the lower court heard the case and gave its judgment. The respondent wishes the said new evidence to be produced on this appeal. The respondent did not plead in his Plaint that he was going to adduce such evidence. This court cannot however allow the respondent to adduce such evidence in the absence of the cross-appeal. The respondent was satisfiedwith the judgment of the lower court. If there was a cross-appeal, then this court would have found it easier to allow the respondent's application. As it were, the respondent wants to ride piggy back on the appeal filed by the appellants in this case. Even if this court were inclined to allow the respondent to adduce additional evidence on this appeal, it would be an exercise in futility as the only mandate this court has on this appeal is to consider the grounds of appeal put forward by the appellant. This court cannot fault the decision of the lower court when the respondent did not seek to impeach it by filing an appropriate appeal. The authorities supplied to this court by the respondent all establish that additional evidence can only be adduced at the appellate stage when there is a competent appeal filed by the party seeking to adduce such new additional evidence. (**See Dick -Vs- Koinange [1973] E.A. 165, Edgar Ogechi & 12 others -Vs- University of East Africa Baraton C.A Civil Appl. No. 130 of 1997 (Nairobi)** *(unreported).* The court does not wish to make a ridiculous ruling which would be rendered useless were the appellants to decide to withdraw their appeal.

In the circumstances of this case therefore, the application filed by the respondent to adduce additional evidence lacks merit and the same is dismissed with costs to the appellants.

DATED at NAKURU this 5th day of August 2005.

L. KIMARU

JUDGE