



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 45 (B) OF 2018

SHARON MUNEE WAENI.....APPELLANT

VERSUS

PANIJ AUTOMOBILES LTD.....1ST RESPONDENT

PETER WAMBUA MULI.....2ND RESPONDENT

(Being an appeal from the ruling of the Senior Principal Magistrate's Court at Makueni (Hon. J. Mwaniki) dated 27th June 2018 in PMCC No. 26 of 2015)

JUDGEMENT

1. On 19/10/2014 the plaintiff was involved in a road traffic accident along Machakos – Wote road while being a passenger – a motor vehicle KBV 533L. She sustained injuries which she rated to be soft tissue injuries inter alia.
2. As a result of the aforesaid accident on 25/2/2018 she lodged a claim against the owner and driver of the said motor vehicle seeking to be compensated for injuries sustained. The Defendants filed defence and denied the claim.
3. After a number of adjournments, the matter commenced hearing on 27/6/2018. Plaintiff/appellant testified and produced various documents save for police abstract and the medical reports which were marked for production by police and the doctor respectively.
4. After the appellant testimony the appellant's advocate sought adjournment to enable him bring the doctor and the police officer. The defence seems not to have opposed the adjournment expressly but stated that the case was old.
5. The court on that note said that it noted the history of the case and especially the fact that it had not taken off since 2015. Also the fact that twice it had not proceeded due to absence of the appellant. Thus the court found no reason to vary the orders of 13/6/2018 which marked adjournment as final on the side of the plaintiff.
6. The record shows that on 13/6/2018 the matter was adjourned on the account of the sickness of the appellant. The refusal of adjournment triggered the filing of the instant appeal and the staying of the lower court proceedings to await hearing and determination of the appeal.
7. The appellant thus set out 6 grounds of appeal which can be compressed to one ground namely;
 - i. Whether the refusal to grant appellant an adjournment was justified?***
8. The parties agreed to canvas appeal via written submissions but only appellant filed same by 21/6/2019 when judgement was drafted.
9. **“The duty of the first appellate court is to approach the whole of the evidence on record a fresh perspective and with an open mind. Then evaluate and re-exam the evidence on record in order to reach a finding taking into account the fact that appellate court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.....” See *Selle & Another vs Associated Motor Boat Co. Ltd & Another [1968] EA 123.***
10. The appellant submitted that:

(1) The learned magistrate on 27/6/2018 held that the mater had not taken off since February, 2015. The court did not check the proper history of the matter as pointed out by the appellant's advocate that there had been a pending application by the respondents' advocate which application had never been prosecuted by the respondents' advocate.

(2) The application forms part of the supplementary record of appeal filed on 8/2/2019. The application by the respondents is dated 23/10/2017 and it was an application by the respondents' advocate to cease acting in the matter on behalf of the respondents.

(3) A perusal of the court file shows that once the respondents' advocate on record filed the application dated 23/10/2017 the respondents' advocate on record then went to slumber and never prosecuted the application meaning the suit could never be heard and determined without the said application being disposed of first.

(4) The application was ultimately dismissed on 17/1/2018 by the appellant's advocate due to the warrant of prosecution by the respondents' advocate on record for the application dated 23/10/2018.

(5) In assigning blame entirely on the appellant for lack of prosecution of the matter since 2015, the court failed to appreciate that on 25/10/2017 when the matter came up for hearing and the plaintiff was in court, the court did not sit on that date as the trial court had gone on transfer. When the appellant's advocate went to fix the matter for hearing at the registry, he was informed that there were no dates available for the rest of 2017 and was given a date for hearing on 17/1/2018 which was fixed not as a date for hearing of the main suit but rather for the hearing of the respondents' advocate application dated 23/10/2017.

(6) The matter was also delayed by the fact that the court handling the matter had been transferred in the year 2017 and the replacement only arrived in 2018 when the applicant fixed the matter down for hearing.

11. After going through the record and the submissions tendered, I find the issue is;

ii. Whether the trial court was justified in refusing an adjournment?

12. On 13/6/2018 the trial court had recorded on account of absence of the appellant on the ground of sickness thus last adjournment for plaintiff. On 27/6/2018 the doctor was absent. The court seems not to have noted the history of the matter and who really was the culprit for delaying the hearing of the matter.

13. The plaintiff had appeared and testified and only the police and the doctor who had not appeared to testify. However the appellant side did not explain why the 2 crucial witnesses were not availed to testify to justify an adjournment taking to account that court had given appellant last adjournment on 13/6/2018.

14. Perhaps court would have asked itself whether the costs would have sufficed to compensate defence in event an adjournment was granted. The interest of justice dictates that court to take into consideration of all the circumstances of the matter and decide on who would suffer harm in making of the decision on the adjournment.

15. **Article 159 (2) (d) the constitution of Kenya**, dictates that justice be administered without undue regard to procedural technicalities. The National values and principles of governance stipulate that; **The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them- applies or interprets this Constitution; - enacts, applies or interprets any law; or - makes or .. Decisions.**

16. **The national values and principles of governance include—....., equity, .. justice,, equality, human rights,See art 10 of the constitution supra.**

17. The fact that a last adjournment for plaintiff had been decreed did not mean that it was an absolute and an immutable order which could not be changed if circumstances changed and warranted the same.

18. **“The overriding objective in civil litigation is a policy issue which the court involves to obviate hardship, expense and focus on substantive justice”.** See **Abdi vs Safi Petroleum Products Ltd & 6 Others Civil Appeal No. 173 of 2010.**

19. Thus in sum the court find that the appeal has merit, and makes the following orders:

(1) The appeal is allowed.

(2) The appellant to pay respondent Ksh.5,000/= for occasioning the adjournment of lower court matter payable in any event.

(3) Matter to continue from where it had reached before another magistrate in Makueni safe Mwaniki J. (SPM).

(4) No orders as to costs in the appeal.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT MAKUENI THIS 12TH DAY OF JULY, 2019.

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C. KARIUKI

JUDGE