

REPUBLIC OF KENYA

Hassan v Jaswinder Singh Enterprises & Another

High Court, at Mombasa

February 5, 1992

Wambilyanga J

Civil Appeal No 384 of 1989

February 5, 1992, **Wambilyangah** J delivered the following Judgment.

Mr Khanna applies to be allowed to produce in these proceedings a witness's evidence recorded in R.M.C.C. 2250 of 1989. He has argued that the issue for which the evidence in the subordinate court's case was adduced was substantially similar to the one in the present case; namely whether the plaintiff or the 2nd defendant herein or both are to be held guilty for negligence that resulted in the collision of the 2 vehicles.

Mr Khanna cites section 34 of the Evidence Act as the one which entitles him to make this application.

In the Indian Evidence Act the similar section is section 33. According to Sarchar on Evidence 10th Edn at p 365, the previous evidence of a witness who can not be called is admissible in subsequent judicial proceeding in proof of the facts stated therein when the following conditions are fulfilled.

"1. that the evidence was given in a judicial proceeding or before any person authorised by law to take it.

"2. that the first proceeding was between the same parties as the second proceeding or between representative in interest of the parties to the second proceeding; in other words, the party to the first proceeding should have been a representative in interest of the party to the second proceeding and not vice versa. The identity of the parties in the proceedings must be substantial and not nominal.

"3. that the party against whom the deposition is tendered had a right and full opportunity of cross-examining the deponent when the deposition was taken.

"4. that the issue involved are the same or substantially the same in both proceedings.

"5. that the witness is incapable of being called at the subsequent proceeding (on account of death, incapability of giving evidence or being kept out of the way by the other side or on unreasonable delay or expense"

I have had to examine the deposition in the previous court and it is obvious to me that the witness was only cross-examined by Mr Khanna who sought to establish that it was the plaintiff herein who was to be blamed for the accident. Mr Khanna appeared for the same defendants as in the present. The record also reveals that Mr Okuthe who had been holding the brief of the Nairobi Bus Union, the present plaintiff's employer, withdrew from the case before that witness testified and so he never cross-examined her. In other words, the plaintiff's version of the case as presented in this case was never put to that witness. So that condition 3 in Section 34 remains or becomes unfulfilled. This aspect becomes compounded by the absence of any evidence to establish condition 5 of section 34 of the Evidence Act. I accept Mr Pandya's submission that at no stage during the several adjournment of this case was it intimated to court by Mr Khanna that he was looking for this particular witness. On the contrary, it is on this record that on 17/12/91 Mr Khanna applied for an adjournment so that he could call the driver of Coast Bus. He did not indicate that there was this other witness whom he also wished to call. As matter of fact he appeared to have already decided that the production of subordinate court's file was going to

adequately meet his needs. In doing so, he had not, in my considered view, addressed himself to the provision of Section 34 of the Evidence Act. And so, it is not open for him to say now why the witness herself cannot be called to testify because he has attempted to call her.

For these reasons I uphold Mr Pandya's objection to the application. I refuse to allow the production of the file of Resident Magistrate's court in these proceedings.