



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: KWACH, AKIWUMI & O'KUBASU, J.J.A.)
CIVIL APPEAL NO. 189 OF 1999
BETWEEN**

1. CHARLES MARANGA BAGWASI

2. GEORGE BAGWASI MARANGA

(MINOR SUING THROUGH HIS NEXT FRIEND

AND FATHER CHARLES MARANGA

BAGWASIAPPELLANTS

AND

1. SAMUEL KAMONJO MUCHIRI

2. DAVID NJUGUNA

KIHARARESPONDENTS

**(Appeal from the Judgment of the High Court of Kenya at
Nairobi (Lady Justice Ang'awa) dated 2nd June, 1999**

in

H.C.C.C. NO. 1698 OF 1994)

JUDGMENT OF THE COURT

The present appeal from the judgment of Ang'awa J raises certain issues which we very much regret to observe, tarnish the judicial reputation of the learned Judge.

We ought to now set out the background to this appeal. The Appellants were injured in a motor accident which was undeniably caused by the negligence of the Respondent. The matter was set down for hearing for two days namely, 18th and 19th May, 1999. On 18th May, 1999, when the matter came before the learned Judge, counsel for the Appellants said that since the parties had not agreed on the documents, including medical reports, to be produced in evidence, the evidence of the Appellants be first heard that day, and the matter adjourned to the next day to enable the authors of the documents to be called to give evidence. Whilst counsel for the Respondent conceded that there had been disagreement as to the documents to be produced in evidence, she, however, objected to the application for adjournment on the grounds that the Appellants if they were serious, should had ensured that their witnesses were in court that day. The learned Judge, without giving any reason for doing so, and inspite of the fact that she must have been aware, that there was still another day that had been set down for the hearing of the matter, summarily dismissed the application in the following four words:

"Application for adjournment refused."

The first Appellant then gave evidence describing his injuries and that of his son, the second Appellant, and how the accident had occurred. He also produced without objection, various documents, including medical reports on the injuries suffered by himself, and his son, and also regarding the hospital expenses incurred by him. These documents the learned Judge ironically accepted and marked them for identification, by those who had made them and whom she well knew, would not be given the chance to do so, because of her refusal to grant the necessary adjournment applied for. The second Appellant, a boy, then thirteen years old, gave unchallenged evidence that the accident had been caused by the negligence of the Respondent's driver. He also described the injuries that he had suffered as a result of the accident. Counsel for the Respondent did not even cross-examine him. But, before giving his evidence, the young boy, obviously, in answer to questions put to him by the learned Judge said: "... I go to church - I know who God is. I am aged 13 years old. I know what it is to tell a lie. It is to say something that is not true. I know why I am here in court to give evidence."

After this, and without complying with the relevant parts of section 19(1) of the Oaths and Statutory Declarations Act, which is as follows:

"Where, in any proceedings before any court ... any child of tender years called as a witness does not in the opinion of the court ... understand the nature of an oath, his evidence may be received though not given on oath, if, in the opinion of the court ..., he is possessed of sufficient intelligence to justify the reception of evidence, and understands the duty of speaking the truth; ...",

the learned Judge allowed the young boy to give evidence, merely noting that:

"This court warns itself in admitting the evidence of a minor."

But no matter.

In her judgment, the learned Judge found that the Respondent was wholly liable for the accident but that even though the Appellants had suffered injuries, she would not award any damages because:

"the plaintiff failed to call the doctors to give evidence."

This of course, is, we fear, rather untruthful, since it was the learned Judge herself, who had as already shown, refused for no reason, to give the Appellants the chance to call the doctors to give evidence the next day which was still a day set down for the hearing of the suit. And in any case, if the Appellants as in this case, gave credible and unchallenged evidence, they should have been awarded some general damages for pain and suffering. There was proof of injuries suffered by the Appellants upon which the learned Judge could quantify general damages. We think that her finding that there was no such evidence because the doctors were not called to give evidence, and for that reason, that the suit filed by the Appellants must be dismissed, was wrong.

But the main issue that was argued before us, was whether the learned Judge erred in refusing to grant the application made on behalf of the Appellants on 18th May, 1999, when the suit came up for hearing, that after the Appellants had given evidence, the hearing should be adjourned to the next day which was included in the dates set for the hearing of the suit, so as to enable those who had made medical and other reports, to present them to the Court. As already shown, the learned Judge in the exercise of her discretion, peremptorily and imperiously rejected this application.

We are aware of the celebrated case of *Mbogo and Another V. Shah* (1968) E. A. 93 where it was held that a Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge 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 injustice. In the case *Openda v Ahn* [1982-88] 1 KAR 294, Kneller JA had this to say about the refusal to grant an adjournment:

"The refusal of an adjournment is what Buckley J in *Rose v Humbles* (1970) 2 All ER 519, 523 f Ch D) called an extreme course for a judge to take but it is a matter for his discretion (Ord, r1) and it should not be interfered with by an appellate court unless it has been exercised in such a way that it caused an injustice when the appellate court must make sure it is further heard."

It is clear from the record of appeal, that the learned Judge as shown, quite unreasonably refused the Appellant's application for adjournment. Furthermore, when it is considered that the learned Judge did find that the Respondent was 100% liable for the injuries sustained by the Appellants, but had craftily put the blame for the Appellant's failure to call the authors of the supporting reports that the Appellants wished to produce in evidence, on the Appellants, it becomes manifest from all this, that the learned Judge was clearly wrong in the exercise of her discretion which in our view, resulted in a gross miscarriage of justice.

Before we conclude, we would like to comment on statements made from the bar, by counsel appearing in the appeal before us, that the learned Judge heard the suit after 5 p.m. on 18th May, 1999. This, she should not have done, unless there were special reasons for doing so, which do not appear in the record of appeal. According to the Circular Ref. No. C.J. 69 dated 27th April, 2000, from the Chief Justice to all Judges of the High Court, the official working hours of the High Court in the afternoon are 2.00 p.m. to 5.00 p.m. He put this clearly in his Circular in this way:

"2. Needless to say, official working hours are known to all of us. I may only recapitulate that they are as follows:

8.30 a.m. - 1.00 p.m.

2.00 p.m. - 5.00 p.m.

It must now be apparent that the present appeal must succeed. It is hereby allowed and the judgment of the learned Judge delivered on 2nd June, 1999, and the proceedings of 18th May, 1999, are all set aside and the suit filed by the Appellants in the High Court be heard and determined afresh by a Judge of the High Court other than Ang'awa J. The Appellants shall have their costs of this appeal. It is so ordered. It is also further ordered that a copy of this judgment be served on Ang'awa J.

Dated and delivered at Nairobi this 19th day of May,

2000.

R. O. KWACH

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JUDGE OF APPEAL

A. M. AKIWUMI

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JUDGE OF APPEAL

E. O'KUBASU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR