



**IN THE COURT OF APPEAL AT NAIROBI**

**(Coram: Trevelyan Ag CJ, Wambuzi & Law JJA)**

**CIVIL APPEAL NO 36 OF 1977**

**Between**

**ABDULREHMAN .....PLAINTIFF**

**AND**

**ALMAERY.....DEFENDANT**

*(Appeal from the High Court at Nairobi, Madan J)*

**RULING**

The plaintiff claimed damages from the two defendants in respect of the death of his wife who died from injuries received in a traffic accident which occurred on the Mombasa to Malindi road on August 24, 1974.

The proceedings were filed in Nairobi on May 5, 1975 and the case was set for hearing on June 23 and 24, 1977. Apparently, at the request of counsel for the defendants, the hearing did not begin until June 24th, and inevitably it could not be completed that day, time permitting the plaintiff to call only two of his witnesses. The further hearing was set for the July 1, but on that day, counsel for the defendants, who practices in Mombasa, did not come to court, but counsel for the plaintiff did. He said that he had received a telephone call from defence counsel to the effect that he was beset with a personal problem and would appreciate a further adjournment until the July 15, to which he, counsel for the plaintiff had no objection.

The hearing was again adjourned.

When the court re-assembled on the July 15, the plaintiff called his third and last witness, a doctor, and closed his case. Counsel for the defendant then applied for the case to be adjourned once more saying that the second defendant was employed on a project 15 miles from Malindi – we are told from the Bar that it is an offshore installation – that both defendants had been present when the hearing began and that the second defendant was, as he put it, “a more material witness.” He said that he had been unable to get in touch with him and so had sought to notify him of the adjourned hearing date through the first defendant. He said, and he quite frankly said, that he did not know whether his message had been conveyed, adding that he was appearing so that the plaintiff might close his case being aware that a doctor had come from Mombasa, “only for the purpose of giving his evidence.” Counsel for the plaintiff was not called upon, and the court made the order “Adjournment refused.” Thereafter, judgment was delivered and was entered in favour of the plaintiff.

The question for decision in this appeal is whether or not a case has arisen requiring this court to interfere with the decision of the trial court in respect of the refusal of the adjournment. It is, of course, beyond

legal contest that whether or not an adjournment should be granted is within the discretion of the trial court and that the manner of its discretion is not for interference if it appears that the discretion has not incorrectly been exercised: *Balderkumar Mohindra v Mathuraderi Mohindra*, (1953) 20 EACA 56 and *Manubhai Bhailalbai Patel v Richard Gottfried*, (1953) 20 EACA 81. What is the situation in this appeal? In so far as the plaintiff is concerned no apparent miscarriage of justice was likely to arise for he had closed his case and his extra expense occasioned by the granting of the adjournment could be taken care of by an award of costs. On the other hand, in so far as the defendants were concerned, the refusal of the adjournment deprived them of all opportunity of making their defence and we do not have the benefit of the court's reasons for that refusal. Did the defendants deserve such order? With respect, we think not. The plaintiff, as he was entitled to do, brought his action in Nairobi rather than in Mombasa and both defendants and their witness came to court on the first day of the hearing. Defence counsel might well have brought his available witnesses with him on the second occasion, and it would certainly have been better had he done so, but he did not have his "more material witness" so that from his point of view, the defence case could not, in any case, have been completed. Whether the second defendant had, or had not, been notified of the new date to enable him to attend court was not known. Defence counsel had, however, come to Nairobi to facilitate the taking of the plaintiff's doctor's evidence and the defendants' resolve to defend the case set against them was clearly manifested. The seeking of the further adjournment, upon which the views of counsel for the plaintiff were not sought, was as we believe, not unreasonable, and we are impelled to say that the possibility of an injustice to the defence case cannot be ruled out by the order which was made.

The appeal must succeed. The judgment and decree appealed from are set aside. In the particular circumstances of the case there will have to be a re-trial, and we so order. The costs of the first trial will be in the discretion of the judge who presides over the re-trial. The defendants will have the costs of this appeal to be taxed, but in the event of the plaintiff succeeding in the re-trial, they will be set off against the costs awarded to him therein.

**Dated and delivered at Nairobi this 25th day of may, 1978.**

**E. TREVELYAN**

**AG. CJ**

**S.W.W WAMBUZI**

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**JUDGE OF APPEAL**

**E.J.E LAW**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**