**Bwagwasi v Muchiri**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 19 May 2000

**Case Number:** 189/99

**Before:** Kwach, Akiwumi and O’kubasu JJA

**Sourced by:** LawAfrica

**Summarised by:** H K Mutai

*[1] Evidence – Unchallenged evidence of Plaintiffs regarding injuries – Production of documentary*

*evidence – Whether Plaintiffs’ unchallenged evidence could be relied upon.*

*[2] Practice – Courts – Working hours – Court hearing extending beyond normal working hours –*

*Courts ought not to work outside normal working hours without good cause.*

*[3] Practice – Trial – Conduct of hearing – Two days set down for hearing – Application for*

*adjournment to second day – Application refused – Appeal against refusal – Grounds for interfering with*

*trial court’s discretion – Whether the trial court had properly exercised its discretion.*

**Editor’s Summary**

The Appellants filed suit against the Respondent seeking damages for injuries sustained in an accident allegedly caused by the Respondent’s negligence. The suit was set down for hearing on 18 and 19 May

1999. When the suit came up for hearing on 18 May, counsel for the Appellants requested the court to adjourn the matter, following the Appellants’ testimony, to the following day. This was to enable the authors of the medical documents being relied on by the Appellants to come and give their testimony since the parties had not been able to agree on the documents to be produced in evidence. The

Respondent opposed the application which was duly denied by the judge. The First Appellant then gave evidence describing how the accident occurred and produced, without objection, various documents including medical reports on the injuries suffered by himself and his son, the Second Appellant. The

Second Appellant also gave unchallenged evidence describing, *inter alia*, the injuries he suffered in the accident. The trial Judge found the Respondent wholly liable for the accident but failed to award any damages on the ground that the Appellants had failed to call the doctors to give evidence. The Appellants appealed primarily on the ground that the trial Judge erred in failing to grant them the adjournment sought.

**Held** – A Court of Appeal should not interfere with a trial Judge’s exercise of discretion unless it is satisfied that the judge misdirected himself and as a result arrived at a wrong decision or unless it is clear that the judge was clearly wrong in the exercise of his discretion and as a result there had been an injustice; *Mbogo v Shah* [1968] EA 93 and *Openda v Ahn* [1982–88] 1 KAR 294 applied. In this instance, it was clear that the trial Judge unreasonably refused the request for an adjournment and as a result was clearly wrong in the exercise of her discretion. Even in the absence of the doctors’ evidence, there was credible and unchallenged evidence of injuries suffered by the Appellants upon which the judge could have awarded damages for pain and suffering.

The official afternoon working hours of the court were from 2 to 5 pm and unless there were special reasons for doing so, the trial Judge erred in hearing the suit past 5 pm on 18 May. The appeal would therefore be allowed and the suit remanded to the High Court for a fresh hearing before a different judge.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Mbogo and another v Shah* [1968] EA 93 – **AP**

*Openda v Ahn* [1982–88] 1 KAR 294 – AP

***United Kingdom***

*Rose v*