

KENYA / JUDGMENT

Kanji Naran Patel v Devshi Dhanji

[1976-80] 1 KLR 545 [1977] KECA 24 (KLR)

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COURT

Court of Appeal

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Kanji Naran Patel v Devshi Dhanji

Court of Appeal for East Africa, Nairobi 9th June 1977

TTM Aswani, taxing officer

Costs -taxation -certificate for two counsel- brieffee for senior counsel - instructions fee for junior counsel - respective roles of senior and junior counsel- Rules of Taxation of Costs, rule 15.

Case referred to in judgment:

Kanji Naran Patel v Devshi Dhanji (unreported) Civil Appeal No 57

of 1974, Court of Appeal for East Africa, taxing officer.

Taxation

This was an application by the plaintiff, Kanji Naran Patel, for the taxation of the costs of the defendants, Devshi Dhanji, Dhanji Ramji, Shivji Naran, Mulji Devji, Premji Devji and Shivji Ramji, in Civil Appeal No 35 of 1976. The facts are set out in the ruling by the taxing officer.

PM Khanna for the Plaintiff.

BJ Sarvaiya for the Defendants.

9th June. Aswani, the taxing officer, gave the following Ruling.

At the outset on this taxation I dealt with the smaller items which had been objected to by Mr Khanna, counsel for the unsuccessful plaintiff. He objected to items 2,4,5,7,8,9,10,13,16,17,18,19,20,21 and 23.

[The taxing officer having referred briefly to those items (other than items 4 and 23) continued:] Mr Khanna then objected to items 4 and 23, the items dealing with instructions and brief fees. It was his contention that the case was simple, involving two points set out as two short grounds in the memorandum of appeal. It was his submission that, as Mr Salter QC was involved in the case

from the High Court from the very beginning, he could not see the role played by Mr Sarvaiya. He submitted that Mr Sarvaiya only sat in Court as what he termed a "dummy" and he, ie Mr Sarvaiya, cannot justify his claim for Shs 10,000 as instructions fees. It was his submission therefore that as Mr Salter handled the case all along, there were no fresh instructions given to Mr Sarvaiya, the junior counsel, to oppose the appeal; and he referred me to the proviso to rule 15(1) of the Rules of Taxation of Costs, which he invited me to apply to this taxation.

On Mr Salter's claim, it was the submission of counsel that the senior counsel had the conduct of the case all along. He knew what the case was all about and this could be evidenced in the cases he cited; that is, he cited the same authorities in this Court as he had done in the court below. He further submitted that the fee note from Mr Salter indicated that he was paid both for consultancy and conducting the appeal and that the brief fee should only be for conducting the appeal.

Mr Sarvaiya on the other hand submitted that he was not merely what Mr Khanna termed as a "dummy", but that he was the advocate on record who had to prepare the brief for the senior counsel who was only a mouth-piece of the junior in Court. He also produced a receipt from Mr Salter acknowledging fees paid by his firm, clearly indicating that he was fully in charge of the case. He attributed Mr Khanna's remarks to the fact that he came into the appeal too late to understand the nature and complexity of the case and the interest of the parties in it. He further submitted that the nature and complexity of the appeal is seen in the order of the court on costs. Were it a simple appeal, be submitted, the Court would not have awarded a certificate for two counsel.

He also referred me to my ruling on a taxation in an earlier appeal between the same parties in *Kanji Naran Patel v Devshi Dhanji*, in which the plaintiff in this case was the successful party and where I awarded him Shs 6000 as instructions fees. He submitted that the case was similar and he could have claimed higher fees as, in this appeal, he was awarded a certificate for two counsel.

In order to reach the final decision on this matter, I would like to clear a few preliminary matters. It is quite clear from the record of the High Court and of this Court that both Mr Salter and Mr Sarvaiya appeared for the defendants in both Courts and it is common practice in this country that a Queen's Counsel does not appear without a junior counsel. The duties of a junior counsel are to brief the senior counsel in every case in which they appear together; and where a certificate for two counsel is granted, both the senior's and the junior's fees are charged, in the former case, as brief fee which is a disbursement and, in the second case, as an instructions fee. There is therefore no occasion for the existence of a "dummy" in such a case.

There are other instances where a senior is employed and appears with a

junior, but the Court does not grant a certificate for two counsel. In such cases it means that the party who engages two advocates would be given the costs of one counsel and the second counsel's fee would be considered as a luxury not to burden the other party with.

In this appeal the Court in its wisdom granted a certificate of two counsel and, consequently, the fees claimed by the defendants will be charged not under the proviso to rule 15(1) of the Rules of Taxation of Costs but under rule 15(2)(a) and (3). I will therefore overrule Mr Khanna's submission that Mr Sarvaiya was only a "dummy" who should be entitled to the minimum charge under rule 9, that is, Shs 100; and that the fees of the senior counsel should be taxed in accordance with the proviso to rule 15(1) of the Rules of Taxation of Costs.

Having disposed of that argument I would now like to turn to the merits of the claim for Shs 4000 as brief fee for senior counsel under item 23, and consequently to Shs 10,000 claimed as instructions fees for the junior counsel under item 4.

It is my considered view, having regard to the conduct of this case and the complexity of the issues involved, that the fee claimed by and paid to the senior counsel was reasonable and fair. It is common knowledge that the fee charged by the senior counsel includes consultancy fees, as he has to be consulted before he conducts a case. I would therefore overrule Mr Khanna's objection to the inclusion of some element of consultancy charges in the fee note by the senior counsel and award the sum of Shs 4000 claimed under item 23 as claimed.

The next point to be decided is whether the junior counsel is entitled to claim Shs 10,000 under item 4 when the senior counsel claimed only Shs 4000. Mr Sarvaiya justified the claim by referring me to my ruling in a taxation between the same parties in *Kanji Naran Patel v Devshi Dhanji* in which the unsuccessful plaintiff here was the successful party. I awarded the plaintiff Shs 6000 out of a claim for Shs 12,500.

In that taxation, Mr Sarvaiya submitted that the appeal was a simple one, involving no amount of money and had suggested a fee of Shs 2000 as appropriate. Mr Bhandari, who appeared for the plaintiff, argued that the appeal was a difficult one, involving matters of procedure in defamation cases where the judge is both the judge and jury. In that case I ruled that the issues involved were more complicated than the case I had been referred to then and drew a lot of interest from both parties and probably, if Mr

Bhandari had a junior or senior, he would have been awarded a certificate for two counsel.

I have read the notes and the judgment of this Court in this matter and I am mindful of the fact that the plaintiff was successful on the main issue of defamation and failed to convince the Court on the proof of damage to himself. I would in those circumstances rule that this appeal was somewhat less difficult than the earlier one in *Kanji Naran Patel v Devshi Dhanji* and would look at the overall fees to be allowed in this appeal and rule that there is nothing in this case and nothing has been urged to convince me or to indicate that the junior counsel should be awarded a higher figure than the senior counsel. I would accordingly award the junior counsel Shs 3500 on

item 4 and tax off Shs 6500 from the item.

The sum disallowed calls for the automatic disallowance of items 16,17,18,19,24 and 25. The total taxed off is Shs 6697/50. This leaves a figure of Shs 795/50, to which is added a taxing fee of Shs 80 to make a total of Shs 8075/50. The bill is allowed at Shs 8075/50.

Taxation accordingly.

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