REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 168 of 2003

AKAMBA PUBLIC ROAD SERVICES ....APPELLANT

VERSUS

NICHOLAS ORINA OMBUI ……........…………………. RESPONDENT

(Appeal from the Judgment of Hon. J.S. Kaburu – Senior Principal Magistrate,

in Naivasha SRMCC No.388 of 2001 delivered on 11th July, 2003)

JUDGMENT

This appeal lies from a judgment delivered on 11th July, 2003 in SRMCC No.383 of 2001 in which the Respondent was awarded general and special damages against the appellant in the sum of kshs.131,500/- together with interest and costs. The claim arose out of an accident involving the appellant's bus, registration No.KUY 730, whilst being driven by the Respondent on 15th July, 1996 along the Nairobi-Nakuru highway. The Respondent was at the time employed by the Appellant as the driver of the subject bus.

The facts of the case were that on the fateful day, at about 3.30 a.m., the Respondent was ferrying passengers in the Appellant's bus from Kisii to Nairobi. On reaching Kinungi within Naivasha area, the said bus was confronted by another bus, driving from the Nairobi direction and trying to overtake a lorry. To avoid a head-on collision with the oncoming bus, the Respondent swerved his bus, KUY 730 to his extreme left where unfortunately there was a stationary lorry loaded with charcoal. Bus No.KUY 730 rammed into the stationary lorry causing charcoal dust to engulf the inside of the bus. Passengers made to escape the charcoal dust and streamed towards the driver's door in a bid to get out. In the process, they trampled on the Respondent, causing him severe injuries. The injuries were proved by medical evidence tendered at the trial.

The appellants did not call any evidence at the trial but filed written submissions, in which they raised, ***inter alia*** the defence of limitation of action under section 4(2) of the Limitation of Actions Act (Chapter 22 of the Laws of Kenya). They stated in their submissions that, the suit, being one based on tort, ought to have been filed within three years of the date on which the cause of action arose, which clearly was the 15th July, 1996 (the date of the accident). That the suit having been filed on 3rd March, 2001 (sic) without leave of the court should have been struck out.

The issue of limitation is central to the appeal which raises other grounds as follows:

1. That the plaintiff/Respondent having been the driver of the subject motor vehicle, his claim ought to have been brought under the workmen's compensation Act.

2. That the award of general and special damages was excessive in comparison to other awards in similar cases.

3. That the assessment of damages was against the weight of evidence placed before court.

4. That the learned trial magistrate misdirected himself in his consideration of the evidence and failed to note contradictions in the plaintiff's evidence.

5. That the learned trial magistrate acted on wrong principles of law as a result of which he arrived at an erroneous finding that the plaintiff/Respondent had proved his claim against the Appellant on a balance of probabilities.

Based on the above grounds, the appellant has therefore urged this court to adjudicate the whole claim on both liability and quantum, to find in favour of the appellant and to set aside the judgment and decree of the lower court with costs to the appellant in both the primary suit and the appeal. The Respondent did not attend at the hearing of the appeal despite having being notified of the hearing date.

In addition to submitting on limitation as stated in the grounds of appeal, Mr. Korongo for the appellant told this court that the Respondent, not being a person covered under section 4 of the Insurance (Motor Vehicles Third Party Risks) Act (Chapter 405 Laws of Kenya), but instead, being an employee of the appellant, he could not maintain a claim in negligence as against the Appellant, since no negligence could be attributed to the appellant as an employer. Also that no evidence was adduced as would prove the existence of duty of care on the part of the appellant towards the Respondent or a breach thereof. On this ground, counsel submitted that the finding in negligence was erroneously reached and the award wrongly made.

It is common ground that the Respondent was the employee of the appellant. Evidence that he was injured while in the employ of the Appellant as he was lawfully driving the appellant's bus for the appellant's benefit was not rebutted at all and is not, based on the facts, in dispute.

The particulars of negligence attributed by the plaintiff/Respondent to the Defendant/Appellant were set out in the plaint as follows:

(a) Exposing the plaintiff to the risk of injury which they knew or ought to have known.

(b) Failing to provide emergency exits on the said bus to enable the passengers use (the same) in the event of accidents.

(c) Failing to securely guard the driver's cabin by steel rails or otherwise to ensure that passengers do not use the driver's door for exit.

(d) Failing to ensure that the plaintiff was safe while engaged at his lawful duties.

(e) Failing to control passengers on the said bus so as not to endanger the plaintiff.

Faced with the above, the appellants' imputed contributory negligence on the Respondent *inter alia* as follows:

(i) Overloading the bus with extra passengers for own profit.

(ii) Failing to avoid colliding with the stationary lorry by applying brakes, swerving or slowing down.

(iii) Allowing passengers to stand in the driver's enclosure

(iv) Driving a defective motor vehicle and failing to report the defects to his superiors.

(v) Suddenly applying emergency brakes and causing passengers to fall on him.

Although the above contentions were pleaded as an alternative to the Appellant's total denial of the employment contract, none of the said allegations were proved since no evidence was tendered to support the defence. Rather than provide a defence in favour of the appellant, the same appear, quite clearly, to support the Respondent's claim of a breach of duty by the Appellants to ensure a safe environment within which the Respondent would carry out his lawful duties. That there were no emergency doors on the bus was not disproved, neither was the claim that the driver's cabin was not secured and/or separated from the main cabin.

The common law imposes a legal duty on an employer to provide an employee with a safe working environment in order that unnecessary risks are avoided in the performance of the employee's duties. As held in the English case of SMITH –VS- BAKER 1891 A.C. 325, the duty was defined as a duty

". . to take reasonable care . . . as not to subject persons employed to unnecessary risks."

The test as to what unnecessary risks means was, in my view, most appropriately explained by Slade, J. in HARRIS –VS- BRIGHTS ASPHALT CONTRACTORS LTD [1953] 1 Q.B 617 when he said:

"In case there is any doubt about the meaning of "unnecessary" I would take the duty as being a duty not to subject the employee to any risk which the employer can reasonably foresee, to put it slightly lower, or not to subject the employee to any risk which the employer can reasonably foresee *and which he can guard against by any measure*, the convenience and expense of which are not entirely disproportionate to the risk involved."

It is common sense and, I believe, a legal requirement that passenger transport vehicles be fitted with emergency exits for use by the passengers in situations such as faced the Respondent and his passengers in the incident herein. In failing to provide the same I am of the view that the Appellant failed in both his contractual and legal duty of care to the Respondent. I am of the considered view that the Defendant/Appellants having not disproved negligence, the learned trial magistrate was right in finding them wholly liable to compensate the Respondent for the injuries sustained. I also find the award reasonable and not excessive at all.

Coming to the main ground of appeal, that of statutory limitation, I am unable to discern from the lower court's judgment the reason advanced in rejecting that line of defence. Although the learned trial

magistrate did note the issue of limitation, the court appears not to have considered the arguments put forth or make any findings in that regard. All the learned trial magistrate said in his judgment in this regard was the following:

"Counsel for the defence also submits that the suit is time barred owing to the effect (sic) that it is premised on a tort and having been filed after the expiry of three years without leave of the court. My reading of the plaint shows that damages are claimed as a result of injuries sustained while the plaintiff was in the employment of the defendant as a driver."

The plaint on record shows that the suit was filed on 3rd March, 2000. This was clearly seven months put of time. I have noted also that the appellants did raise the issue of limitation by way of cross-examination by counsel for the appellant. Although the Respondent stated in his answer that the suit was filed in 1998, the pleadings and facts disclose otherwise.

Section 4(2) of the Limitation of Actions Act is very clear as to the time frame within which an action such as was brought by the Respondent herein ought to have been filed. The said provisions provides as follows:

"An action founded on tort may not be brought after the end of three years from the date on which the cause of action arose . . ."

The section also limits the filing of actions for libel or slander to 12 months from the date the action arose. There is ample authority, including the decisions in NYAMBURA KAMUYU –VS- DOUGLAS JOHN FRANCIS & ANOTHER C.C. NO.3485 OF 1992 (NBI) and JAMES MBUGUA –VS- PAUL KIBET BIWOTT & ANOTHER, NKR Civil Appeal No.66/03 cited herein by the Respondent to support the position that the only way round the limitation imposed under section 4(2) of Cap 22 is by obtaining leave of the court to file action outside the limitation period. No such leave was ever sought or obtained.

Notwithstanding my findings as to liability as set out earlier in this judgment, I am persuaded, considering the submissions by counsel for appellant and the authorities cited in support thereof, that the suit before the lower court lacked the legal substratum upon which it would stand, having been filed out of time and without the leave of court. It ought to have been dismissed. For this reason, the appeal succeeds and is hereby allowed with costs.

In the premises, the judgment and decree of the lower court are hereby set aside. The appellant shall have the costs of the appeal but each party shall bear its own costs in the primary suit.

Orders accordingly.

Dated and signed at Nakuru this 13th day of November, 2008.

M.G. MUGO

JUDGE

While the design, structure and metadata of the Case Search database are licensed by Kenya Law under a Creative Commons Attribution-ShareAlike 4.0 International, the texts of the judicial opinions contained in it are in the public domain and are free from any copyright restrictions.
Read our Privacy Policy | Disclaimer