



IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Madan, Law & Miller JJA)

CIVIL APPEAL NO 38 OF 1981

Between

KYALO.....APPELLANT

AND

BAYUSUF BROTHERS LTDRESPONDENT

JUDGMENT

These proceedings began with a plaint filed by the respondent in the High Court at Mombasa on December 10, 1976, containing an averment in paragraph three thereof which stated that on July 26, 1975, the appellants' vehicle registration Number KPR 481 was being driven so negligently and carelessly on the Mombasa Causeway by Kipruto arap Solian, the servant or agent of the appellant firm, in the course of his employment or within the scope of his agency, that it was allowed to collide with the respondent's motor vehicle causing it damage amounting to Kshs 53,697. The particulars of negligence on the part of Kipruto and the details of the damage suffered by the respondent's motor vehicle were set out in the plaint. The respondent claimed as damages amounting to Kshs 53,697 from the two appellants and their driver Kipruto as the third defendant.

On February 23, 1977, the above-named appellant, Mr Panchmatia, describing himself as a partner in the firm of Buret Hauliers and employer of Kipruto, filed a defence on behalf of his firm and also on behalf of Kipruto containing, *inter alia*, the following averments, ie although knowing that the appellants had an established office and a manager in Mombasa, the respondent did not report the accident verbally or in writing to Mr Panchmatia or his manager and none of them had any knowledge of the accident about which they came to know only on receipt of the respondent's claim; that it was not necessary to get the appellant's authority and consent before the repairs of the nature of the claim were carried out to the respondent's vehicle; that if such a "heavy accident was involved", some sort of damage would also have been caused to the appellants' lorry but no damage whatsoever was visible on their lorry; that if the accident had been reported to them, the appellants would have asked their insurance company to deal with the matter as they carried a fully comprehensive insurance policy on the date of the accident; that they had already contacted their insurance company and also applied for a copy of the police report; that Kipruto was no longer working for them, and they had asked the police to look for him; that the appellants be allowed six to eight weeks to file a supplementary defence after completing their inquiry and investigations.

The respondent company filed an amended plaint on March 24, 1977, which increased the claim for damages to Kshs 88,297. Thereafter, summons for directions were ordered on June 3, 1977, in the absence of the appellants though served. Then, at an appearance before the judge in chambers on February 8, 1978, the hearing of the suit was adjourned at the request of the appellants' advocate at the time, the respondent's advocate consenting, because Mr Panchmatia had gone abroad. The two advocates, also by consent, recorded the evidence of a police officer to introduce the police file relating to the accident, a sketch plan of the scene made by him, and also the statements recorded by him from both drivers and two other witnesses named Ahmed Salim and Arab Chro/police officer further testified that Kipruto was charged but failed to attend court and according to a note in the learned judge's ruling, a warrant had gone out for him.

On August 18, 1980, the appellants filed an amended defence through a new or different advocate, Mr Sharma, but without leave of the court. In this amended defence, the averments are that Kipruto was not in the employment, nor the servant or agent of the appellants, on July 26, 1975 or at any material time, he having been first employed by the appellants in connection with vehicle registration number KPR 481 when it became their property on or about December, 1975, before which date it was owned by another firm named Buret Road Transporters in whose name it was insured. Other averments denied the negligence alleged, damages, vicarious liability, the place of the alleged collision, if it happened at all, with an addendum relating to Kipruto that at no material time was he the appellants' servant or agent, or acting within the course of any alleged employment or within the scope of his alleged agency, with the appellants. The respondent applied for an order by summons that the amended defence filed by the plaintiff (sic) be disallowed on the grounds that it had been filed out of time, and being an abuse of the process of the court, it would delay the fair trial of the action to the prejudice of the respondent as it made an allegation of fact inconsistent with a previous pleading of the appellants in the same suit. The appellants came in with summons asking for extension of time for filing and service of their amended defence notwithstanding that the time limited therefor had expired. The appellants have appealed against Kneller J's dismissal of their application, who held that the amended defence which had been taken on the file should be disallowed.

The file produced by the police officer was received in evidence by consent of the parties. It contained statements of drivers of each vehicle which then became evidence in the case. I have perused Kipruto's statement in the High Court file. He stated he was employed by the appellant since 1974 and drove this very vehicle KPR 481 on the day of the accident. This is exactly what Mr Panchmatia said in the defence filed by him, the only difference between him and Kipruto being that Kipruto said that the body of the lorry being driven by him was damaged on the off-side. The ownership of lorry KPR 481 made an important issue in the amended defence. I expected the log book of the lorry to be produced for inspection by the judge. It was not produced. I expected it to be produced for our inspection this morning. It has not been produced. It is not available for we inquired. The application to amend was very late. To grant leave to amend the defence which proposes to take a complete somersault from the original one would be both unfair and cause heavy prejudice to the respondent who is entitled, nearly six years after the accident, to hold the appellants to the admissions made by them originally. I would not open the door to possible pleas of limitation against the respondent. I would dismiss the appeal with costs. As Law and Miller JJA agree, it is so ordered.

Law JA. In this case, an amended plaint was filed on December 7, 1977, claiming damages for the result of a collision between the plaintiffs' motor vehicle and one allegedly owned by the defendants, No KPR 481. The defendants (now appellants), who had filed a defence to the original plaint admitting ownership of the vehicle No KPR 481 and that the driver was their employee, could have filed an amended defence within fourteen days under order VIA rule 1(2) (b). They did not do so, and it was for the first time on November 7, 1980, that the appellants, through their advocate, Mr Sharma, applied by

chamber summons for leave to file an amended defence out of time so as to plead that they were not the owners of KPR 481 or the employers of the driver at the material time, in the original defence. The learned judge was not impressed by this application which was not supported by an affidavit sworn by the appellant who had signed the original defence on behalf of all three defendants, but solely by an affidavit made by Mr Sharma and by statements by him from the bar. The learned judge exercised his discretion against the appellants and dismissed their application, noting that the proposed amended defence was in contradiction of the original defence and that the reasons for taking such a different stand had not been persuasive. In my respectful opinion, the learned judge exercised his discretion rightly and judicially, and I see no reason to interfere with that exercise of discretion. I would dismiss this appeal, and I concur in the order proposed by Madan.

Miller JA. I have had the benefit of reading the draft judgment of Madan JA in this appeal. I agree with it and the order he has proposed.

Dated and delivered at Mombasa this 28th day of January, 1982.

C.B MADAN

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JUDGE OF APPEAL

E.J.E LAW

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JUDGE OF APPEAL

C.H.E MILLER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

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