



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 100 OF 2010

JOSEPHINE WAIRIMU WANJOHI.....APPELLANT

VERSUS

INTERNATIONAL COMMITTEE OF THE RED CROSS.....RESPONDENT

RULING

1. The Appellant has filed this appeal on the following grounds:-

- i. *The learned magistrate erred in law and in fact in holding that the Respondent enjoys privilege and immunity and is exempted from suit and legal process under section 9 and the fourth schedule of the Privileges and Immunities Act Chapter 179 Laws of Kenya.*
- ii. *The learned magistrate erred in law and in fact in holding that the court had no jurisdiction to try the suit by nature of the provisions of section 5 of the Civil Procedure Act.*
- iii. *The learned magistrate erred in law and in fact in holding that the Appellant's suit was an abuse of the court process as the Appellant did not seek a waiver of the privilege and immunity enjoyed by the Respondent.*
- iv. *The learned magistrate erred in law and in fact in failing to consider the Appellant's authorities and submissions in arriving at his decision.*
- v. *The learned magistrate erred in law and in striking out the Appellant's suit in the lower court.*

2. The Appellant filed a suit in the lower court seeking recovery of damages from a road traffic accident which was alleged to have been occasioned by the Respondent's driver driving motor vehicle registration number KX27A326 which was claimed to be owned by the Respondent. Subsequent to the filing of the suit an application was filed on behalf of the Respondent contending that the Respondent was exempted from legal process by virtue of Section 9 and fourth schedule of the Privileges and Immunities Act Chapter 179 of Laws of Kenya (*the Act*) and that the suit ought to be struck out. The Respondent also relied on section 5 of the Civil Procedure Act. It was argued that the proper procedure the Appellant should have followed was to apply for waiver of immunity under the Act.

3. It was argued on behalf of the Appellant that absolute immunity was against public policy since legal actions covers contractual and tortious acts. That the Minister has no power under section 9 of the Act to waive the jurisdiction of court. It was submitted that immunity does not cover acts of a private nature. In response thereto it was submitted that there was no contractual relationship in the instant case.

4. The basis upon which the trial court allowed the application was that the court could not issue its process against the Respondent unless the immunity was waived.

5. The Appellant cited Article 43 (2) (b) of the Vienna Convention on Diplomatic Relations and argued that immunity from jurisdiction does not apply in respect of a civil action either by a third party for damage arising from an accident in the receiving state caused by a vehicle, vessel or

aircraft. It was argued that a Minister has no power under section 9 of the Act to by a mere gazette notice waive the jurisdiction of the court. To illustrate the said argument the Appellant cited **Tononoka Steels Limited and the Eastern and Southern Africa & Another., COA Appeal No. 255 of 1998.**

6. The Respondent on the other hand submitted that Article 43 of the Vienna Convention on Diplomatic Relations' application is limited to Career Consular Officers and Other Members of a Consular Post not an international organisation. The Respondent distinguished the Tononoka case from the instant appeal and stated that in the Tononoka case there existed agreements between the parties unlike in this case.
7. This being a first appeal, I am called upon to re-evaluate the facts afresh, re-assess this case and make my own independent conclusions as was held in **Peters v. Sunday Post (1958) E.A. 424 at 429 where Sir Kenneth O'Conner said:-**

"It is a strong thing for an appellate court to differ from the finding on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

8. The issue for determination here is whether or not the trial court had the jurisdiction to entertain the suit in light of the immunity claimed by the Respondent. Lord Denning had this to say in **Ministry of Defence of the Government of the United Kingdom v. Ndegwa Civil Appeal No. 31 of 1982 at page 965** and **Thai-Europe v. Government of Pakistan (1975) 3 ALL ER 961:-**

"...the general principle is undoubtedly that, except by consent, the courts of this country will not issue their process so as to entertain a claim against a foreign sovereign for debt or damages...The reason is that, if the courts here once entertain the claim, and in consequence gave judgment against the foreign sovereign, they could be called on to enforce it by execution against its property here. Such execution might imperil our relations with that country and lead to repercussions impossible to foresee."

9. Kenya's jurisprudence courtesy of the application of the Vienna Convention on Diplomatic Relations and other Privileges and Immunities has over the years embraced absolute foreign immunity such that no suit can be entertained against a foreign sovereign without waiver by the foreign sovereign. This position has been affirmed by the Privileges and Immunities Act, Chapter 179 of the Laws of Kenya.
10. In the Tononoka case, there was a departure from the absolute immunity approach. In that case it was stated as follows:-

"...I know of no country which would allow a bank to provide banking and financial services with absolute immunity from suits and legal process and with absolutely no protection for its hapless customers...The decision by the Minister to grant PTA Bank absolute immunity from suits and legal process even in purely commercial transactions seems to me to be contrary to international law."

11. Similarly in **Trandex Trading Corporation Ltd v. Central Bank of Nigeria (1977) 1 All ER 881** Shaw L.J at page 908 observed as follows:-

"...there has been put before the court a wealth of material comprising decisions of foreign courts and the writings of international jurists which tend to show that over the last half century there has been a shift from the concept of absolute immunity to a narrower principle which excludes ordinary mercantile transactions from the ambit of sovereign immunity notwithstanding the sovereign states of a party to those transactions... so long as sovereign institutions confine themselves to what may in general terms be described as the basic functions of government a total personal or

individual immunity from suit was unobjectionable...” (Emphasis mine)

12. It follows therefore that the applicable test that ought to be employed when dealing with diplomatic immunity is whether or not the foreign sovereign was acting in a governmental or private capacity. Protection will then not be afforded in private transactions. In this case, the driver is said to have been driving the Respondent's motor vehicle. Presumably, he was acting in the course of his employment thereby the Respondent may be afforded immunity.
13. I must mention that the Constitution of Kenya, 2010 Provides for the place of international law in Kenya as follows:-

“Article 2(5) the general rules of international law shall form part of the law of Kenya....

(b) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”.

It follows therefore that a treaty or convention once ratified by Kenya is adopted or automatically incorporated into our laws without the necessity of a domesticating statute. This position has however been cured by the Treaty Making and Ratification Act, No. 45 of 2012 which gives effect to Article 2 (6) and provides for the making and ratification of treaties. The said Act addresses issues of the initiation of treaties and ensures their consideration and approval by Cabinet and Parliament before ratification. It however applies to treaties concluded by Kenya after its commencement i.e. on 14th December 2012, by virtue of Section 3(1) thereof.

14. The cases cited here do not apply to international organisations as in the instant case. The applicable law with regard to international organizations is Section 9 of the Privileges and Immunities Act which provide that Minister may by order declare an organization to be an organization which Kenya, or the government or any foreign sovereign power(s) are members and in such an order provide that the immunities and privileges set out in part I of the Fourth Schedule to the Act shall apply to such organization. Section 17 of that Act provides that the order made under Section 9 of the Act must be laid in Parliament for approval by a resolution. In this respect, the order was made by Legal Notice 115 of 1996. The order must have been laid in Parliament and duly approved and for that reason the Respondent enjoys the Privileges and Immunities set out in part I of the Fourth Schedule when carrying its operations in Kenya.
15. Since it was not disputed that the Respondent was a part of an international organisation and that its driver must have been in the course of work, it must follow that the case against the Respondent was correctly struck out by the learned trial magistrate. In the end I uphold the trial court's ruling and order. This appeal is thereby dismissed with costs.

Dated, Signed and Delivered in open court this 30th day of July, 2015.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant.

..... for the Respondent.