



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 101 OF 2008

(Being an Appeal against the judgment/Decree in RMCC NO. 1828 OF 2007 of the Hon. Resident Magistrate Mr. H. Adika at Mombasa Court)

JUMA KEYAAPPLICANT
VERSUS
AFRICAN SAFARI CLUBRESPONDENT

J U D G M E N T

This is an appeal from the judgment of the Honourable Resident Magistrate, Mr. H. Adika delivered on 15th May, 2008 in Mombasa RMCC No. 1828 of 2007 **JUMA KEYA –VERSUS- AFRICAN SAFARI CLUB**

In the said suit, the plaintiff sued the Defendant for special and general damages for alleged loss and damages arising from serious injuries sustained in a road accident on 18th November, 2002 involving the Defendant's motor vehicle registration No. KAD 688 F Mitsubishi Canter. In the plaint, the plaintiff who is the Appellant pleaded, inter alia that:-

- *At all material times, he was employed by the Defendant as a Panel Beater.*
- *It was a term of the contract of employment between the plaintiff and the Defendant and/or it was the duty of the Defendant to take all reasonable precautions for the safety of its employee which engaged upon his work, not to expose the plaintiff to a risk or harm or injury which it knew or ought to have known and to provide a safe system of work to enable the plaintiff work in safety.*
- *That on or about 18th November 2002 at about 2.30 p.m. the plaintiff was travelling in the ordinary course of his employment in the Defendant's motor vehicle from Crocodile Camp, Malindi to several Hotels Mombasa when the Defendant's driver servant and/or Agent drove the said motor vehicle in a negligent and reckless manner thereby causing it to overturn as a result of which the plaintiff sustained serious injuries and has suffered loss and damage.*

The plaintiff/Appellant pleaded that he sustained injuries in the said accident, namely, contusion of the neck and both knees.

The Respondent who was then the Defendant filed a Defence dated 27th July 2007 in which it denied in a general manner the plaintiff was employed in the company as a panel beater. The Defendant denied that the accident took place and all the particulars of the negligence. The Defendant in the alternative pleaded contributory negligence on the part of the plaintiff.

At the trial the plaintiff testified on oath and called Dr. Hemant R. Patel as a witness in respect of the injuries allegedly sustained by him.

The plaintiff testified that he was a Welder and Panel Beater with the Defendant. That on 18.11.2002 together with two other employees went to the Crocodile Camp in Tsavo travelling in the Defendant's motor vehicle, a Canter. The other two were the driver and a mechanic. He was seated between the two when the vehicle was involved in an accident. The motor vehicle hit the pavement and rolled over, overturning once. The plaintiff was injured in the accident. After the plaintiff closed his case when the Doctor to produce the medical report, the defendant was called to open the defence case.

The Defendant did not call any witness and closed its case. In his three line judgment the trial Magistrate Hon. H. M. Adika, Resident Magistrate decided as follows:-

“

J U D G M E N T

The cause of action arose in 18.11.2002. the suit is based on the negligence of the Defendant. It was filed on 2/6/07. No order was granted to file the suit out of time. The suit is a non-starter and was since dismissed with costs.”

The appeal raises four grounds of appeal:-

1. That the Learned Magistrate erred in law in his finding that the claim was based on the tort of Negligence when the claim was based on contract.
2. That the Learned Magistrate erred in law in his finding that the claim had lapsed after 3 years yet the limitation time for a claim was based on contract is 6 years.
3. That the Learned Magistrate erred in law in failing to consider all the evidence and issues and in failing to give reasons for his decision.
4. That the judgment on the whole cannot be supported by both facts and law.

I have considered the Memorandum of Appeal, the Record of Appeal in which is contained the proceedings, proceedings and judgment. I have also considered the submissions by counsel.

I am of the view that the court should deal with Ground No. 3 of the Memorandum of appeal as it raises a serious and fundamental issue with regard to the conduct of the case by the trial court.

Under Order XX, rule 4 of the Civil Procedure Rules then in force and now carried forward in Order 21, rule 4 of the new Civil Procedure Rules, a judgment must have certain contents in its format:-

“4. Judgments in defendant suits shall contain a concise statement of the case, the points for determination, the decision thereon, and all the reasons for such a decision.”

I have already set out the entire judgment in this case which is in three (3) short sentences.

- It contains no concise statement in the case.
- It does not contain the points for determination.
- It does not give sufficient reasons for the decision.

The trial magistrate goes straight to one single point of law which was not pleaded whatsoever i.e. question of Limitation of Actions in that the suit is based on a tortious claim and was time-barred having been filed outside the period of 3 years. This was never pleaded in the first place and this court is unable to state how it became the only issue in contention in the suit. It will be recalled that it was the plaintiff's

case that he was an employee of the Defendant company and the Defendant owed him a duty to take all reasonable precautions for the safety of his employees while engaged upon his work. The plaintiff pleaded that the Defendant had breached this duty through the manner its driver drove and controlled the motor vehicle.

The Defendant denies the employment contract and the allegations of negligence. I do hold therefore that the question of the employment contract was an issue in dispute and for determination by the court. The trial court was obliged to determine this question and to give reasons for its findings. The same applied to all the issues before the court which are numerous from the pleading.

I do hold that the judgment is not in compliance with order 20 (4) of the Civil Procedure Rules in force then and the same is defective.

As a result the Appellant does not have the reasons for the decision, and the legal and factual basis it was reached. This has deprived the Appellant of his rights and entitlement to a fair hearing. If it is a party cannot understand or know the reasons for a judgment which dismisses his case; the same amounts to a miscarriage of Justice. On this ground alone the appeal should succeed.

I do hold that the Honourable Magistrate failed to consider all the evidence and issues in the case and to give his reasons and justification for the decision.

I will now go back to the first ground of appeal namely, that:-

- **The learned Magistrate erred in law in his finding that the claim was based on tort of negligence when the claim was based on contract.**

First and foremost, the Defendant at no time raised the question of limitation of action in his defence. He did not plead that the cause of action was time-barred and that it was a claim in tort. The plaintiff duly filed a Reply to the Defence as the Defendant had pleaded contributory negligence.

The plaintiff did base his claim on negligence arising from performance of his duties as an employee of the Defendant. I have already referred to the pleadings of the plaintiff hereinabove in this regard.

The plaintiff as a Welder and Panel Beater was travelling in the motor vehicle in the course of his duties as an employee. He was being ferried to and from Crocodile Camp in Tsavo where he had been taken to do some work.

In the Court of Appeal case of **KENYA CARGO HANDLING SERVICES LIMITED –V- UGWANG (1985) KLR** 593, it was held inter alia as follows:-

- 1. A claim for personal injuries arising in the course of employment may be the subject of an action either for a breach of an implied term in the contract of employment or in tort simpliciter, and a claimant may make an election as which of those actions he intends to pursue**
- 2. Section 27 of the Limitation of Actions Acts, (Cap 22) does not lay down any limitation. All it does is to state certain circumstances under which the period of limitation provided for actions in tort does not apply. That section does not affect actions for personal injuries founded on contract as it relates exclusively to action founded on tort.**

In this case, while the plaintiff was injured as a result of an accident while travelling as a passenger in a motor vehicle which belonged to the Defendant, and while this cause of action could have been in tort simpliciter, yet the plaintiff/Appellant did not stop there in his pleading. He pleaded that:-

- He was an employee of the Defendant as a Panel Beater.
- He was injured while in the course of his duties.

- It was a term of the contract of employment between the plaintiff and the Defendant and/or it was the duty of the Defendant to take all reasonable precaution for the safety of the employee while engaged upon his work, not to expose the plaintiff to a risk or harm or injury which it knew or ought to have known and to provide a safe system of work to enable the plaintiff work in safety.

As a result, it was an issue for determination as to whether the Defendant was in breach of any of its duties as an employer under the contract of employment, if at all the employment was proved. The plaintiff testified on oath about his employment. He said that the accident took place when the steering wheel became loose and the driver could not control the motor vehicle. He said that the Defendant serviced its vehicles through its own mechanics. They suggested an allegation that the vehicle was defective at the time of the accident. The Defendant did not call a single witness to disprove the question of employment of the plaintiff and the alleged defect in the motor vehicle's steering wheel and the circumstances of the accident.

I therefore hold that the plaintiff's claim was not a claim in tort simpliciter but a claim for personal injuries arising in the course of employment. Was the Defendant obliged to provide reasonably safe mode of transportation of its employees when it transported its workers to specific locations to its premises to carry out any work or duties?

I do hold that on a balance of probability the plaintiff proved his claim namely that:-

1. *At all material times he was an employee of the Defendant as a welder and panel beater.*
2. *At the material time he was travelling on a motor vehicle which belonged to his employer upon instructions and to carry out duties at Crocodile Camp Tsavo and return to Mombasa.*
3. *The Defendant was in breach of his duties to provide a safe transport system or mechanism as the vehicle's steering wheel was defective leading to the accident when the driver could not control the vehicle.*
4. *In any case, the Defendant did not rebut the allegations and evidence as to negligence in the manner the vehicle was driven by the Defendant's driver, agent and/or employee. The Defendant missed the opportunity to rebut the allegations when it elected not to call any witness.*

In the course of this appeal, it is the duty of the court to re-evaluate the evidences on the record and to make its own analysis and findings on the merit. I do find that the plaintiff did prove his case on a balance of probability. I find in favour of the plaintiff/Appellant as far as liability is concerned. I see no basis to find any contribution of negligence on his part as he was a lawful passenger in the course of his duties and had no control over the vehicle in terms of control when driven or maintenance of its condition.

It was the duty of the Defendant to call evidence as to whether the plaintiff had safety belts on and if not in what circumstances, as it was their vehicle and the plaintiff their employee.

Ground 2 of the Appeal is tied with ground No. 1 I do find that claim herein was a claim for injuries arising in the course of the employment of contract. Any action founded on any contract may be brought in Kenya before the end of six years from the date on which the cause of action accrued. In this case the accident took place on 18th November 2002 while the suit was instituted/filed on 2nd June 2007. This was within 6 years since the date of the accident (4 years and 6 months). It was therefore well within the limitation period for claims based on contract.

Having found that the Defendant/Respondent was wholly liable for the injuries and loss and damage, what is the level of general damages payable to him? The medical report by Dr. Hemant R. Patel is consistent with the pleadings. The plaintiff sustained injuries to the neck and both knees. It is referred to as "contusion to the neck and both knees". "contusion" is defined in Concise Oxford Dictionary 8th Edition (Clarendon Press-Oxford) as:-

“injury without breaking of the skin.”

As a result, I find that the injuries were soft tissue injuries to the neck and both knees. There were no scars and he suffered no permanent incapacity. He was off work for one week only. He was not admitted in hospital. I find that there were minor injuries of the soft tissues as stated by the doctor. In his testimony, the plaintiff said he was paid by the Insurance company. This must be in connection with Workmen’s Compensation which is his right.

I have perused the authorities on record in the record of appeal. The Appellant has asked to be awarded Shs.150,000/- in general damages and doing the best I can considering all circumstances. I do hereby award a sum of Kshs.100,000/- as general damages for pain, suffering and loss of amenities. I hereby award a sum of Kshs.6,000/- being a special damages make up as follows:-

Medical Report	- Kshs.2,000.00
Doctors’ Court Attendances	- Kshs.4,000.00
	<u> Kshs.6,000.00</u>

I award a total sum of Kshs.106,000/- which shall attract interest at court rates from the 15.5.2008 which is the date of judgment until payment in full.

The Defendant shall pay the costs in the suit in the trial court and the cost of this Appeal to be agreed or taxed.

Orders accordingly.

Dated and delivered at Mombasa on this 28th day of January 2011.

**M. K. IBRAHIM
J U D G E**

Coram

Ibrahim, J
Court clerk – Mutisya
Mr. Khatib for the appellant
Mr. Otieno for the Respondent
Judgment delivered in their presence

Ibrahim,