



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Civil Suit 1090 of 2004

WILLIAM RICHARD KUTAI.....PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION.....DEFENDANT

J U D G M E N T

1. The Plaintiff herein **William Richard Kutai** was at all times material to this suit working for the Defendant as a Train Guard. His duties were to ensure that wagons were properly served, properly labeled, properly sealed and in a fit condition before departure of the goods train on which he was deployed at any one time. The Plaintiff alleges that on 18/02/2001, he was lawfully traveling in such capacity on duty in a goods train B-38 belonging to the Defendant along the Kikuyu-Kibera railway line when the said goods train was so negligently driven, controlled and/or managed by the Defendant's driver, agent and/or servant that it collided head on with another goods train. The Plaintiff says that as a result of the said collision, he suffered loss and damage. The Plaintiff holds the Defendant solely responsible in negligence for the accident. The Plaintiff alleges that the Defendant was negligent in:

- (a) *Failing to exercise or maintain any sufficient or adequate control of the said goods trains.*
- (b) *Failing to have any sufficient regard for the life and safety of the plaintiff as a Guard on duty in the goods train B-38.*
- (c) *Causing or allowing the said goods train to collide and thereby risking the life of the plaintiff*
- (d) *Failure to adhere to the laid down rules and regulations governing trains working using paper line clear.*

2. As a result of the said accident, the Plaintiff says he suffered the following injuries:-

- Serious injuries on the head, chest, back, legs and psychological trauma*
- Persistent headaches, generalized body pains insomnia (lack of sleep) depressed mood, back pain and jerking involuntary movements.*

3. As a result of the above injuries, the Plaintiff prays for judgment against the Defendant for:-

- (a) *Special Damages* - *Kshs.23,140.00*

- (b) *General Damages*
- (c) *Future Medical Costs*
- (d) *Loss of future earnings*
- (e) *Costs of this suit*
- (f) *Interest on (a), (b), (c) and (d) above at court rates*
- (g) *Any other order and/or relied (sic) that this Honourable Court deems fit and just to grant.*

4. The Defendant entered appearance but failed to file defence within the stipulated time. Interlocutory judgment was subsequently entered on 31/01/2005. On 27/04/2006 the Defendant filed a Chamber Summons application dated 25/04/2006 seeking to set aside the interlocutory judgment. For reasons that are set out in the ruling dated 31/07/2008 the Defendant's application dated 25/04/2006 was dismissed with costs to the Plaintiff/Respondent.

5. On the 5/03/2009 and 9/03/2009, the Plaintiff's case proceeded to formal proof. The Defendant was represented at the hearing by Mr. Makori of Oraro & Co. Advocates, while the Plaintiff was represented by Mr. Ashiruma of Ashiruma & Company Advocates.

6. The Plaintiff testified and also called one witness. PW1 was **Dr. Margaret Makanyengo**, Head of Psychiatric Services at the Kenyatta National Hospital. She said she saw and examined the Plaintiff on 29/03/2004 and noted that the Plaintiff had suffered injuries on the head, back and also suffered pains on the legs. She also testified that at the time of examination, the Plaintiff presented with headaches, general body pains, lack of sleep, depressed mood back pains and involuntary jerking movements of the body. Dr. Makanyengo also told the court that the Plaintiff was retrenched from employment following the accident. She also said that from the examination she carried out on the Plaintiff, she could say with certainty that the injuries suffered by the Plaintiff were not due to past physical or family history. She confirmed that the Plaintiff was neither alcoholic nor was he a drug abuser.

7. In her further testimony, Dr. Makanyengo said that the Plaintiff was restless and exhibited a depressed mood; that his speech was not flowing due to the involuntary jerkings of the body and that his mental functioning was only fair. She said she formed the impression that the body jerks were due to the injuries sustained during the accident and that the Plaintiff's permanent incapacity was at 60%, namely that in the condition in which she saw the Plaintiff, the Plaintiff could not do any normal work like farming or the like and that his neurological damage to the brain and to the spinal code was permanent.

8. Dr. Makanyengo confirmed during cross-examination that the examination she carried out on the Plaintiff was of a psychological and psychiatric nature, and that the current body pains experienced by the Plaintiff are of the same psychological/psychiatric nature. She stated however that these pains could be as a consequence of the injuries sustained by the Plaintiff during the accident.

9. The Plaintiff also testified and told the court that he was on duty in the ill fated goods train on the material day and at the material time. He said that the accident occurred as a result of the negligence of the Defendant's officers who gave line clear instructions when it was not safe to do so, and thus caused the head-on collision between the two trains. The Plaintiff produced a number of Exhibits to confirm the occurrence of the accident which is not denied by the Defendant. He also produced payment receipts for services rendered to him at the various clinics where he was taken for medical attention. In total, the Plaintiff produced receipts amounting to Kshs.20,294/=. The Plaintiff also produced Hospital treatment cards and Discharge Summary from Kenyatta National Hospital. There is no dispute by the Defendant that the Plaintiff was treated at these various institutions. Finally, the Plaintiff produced a letter dated 29/03/2003 by which he was notified of his early retirement from the employ of the Defendant. According to that letter the Plaintiff's early retirement had been necessitated by the accident as a result of which the Plaintiff could not work. The Plaintiff also produced PExhibits 19 and 20 to confirm that the

accident occurred as a result of the negligence of the Defendant's officers. The Plaintiff stated that as at the time of his retrenchment, he had not yet reached the mandatory retirement age of 55 years. According to his evidence, the Plaintiff still had another 7 years to go before the mandatory retirement age.

10. At the close of the Plaintiff's case, the parties put in written submissions. It was contended on behalf of the Plaintiff that since the Defendant had neither filed defence nor called witnesses, this honourable court should find the Defendant 100% liable in negligence. On special damages, the court was urged to award Kshs.23,394/= being the amount incurred by the Plaintiff on treatment. As for General Damages learned counsel for the Plaintiff contended that the Plaintiff suffered serious injuries during the accident, including fracture of the left pedicle at L2 with a deformity of the spinal canal outline. Plaintiff's counsel also contended that the Plaintiff suffered a lot of excruciating pain, lost much blood and that he has not fully recovered to date. Counsel proposed a figure of Kshs.3,500,000/= to be reasonable compensation for pain suffering and loss of amenities. A number of authorities were cited in support of this proposal.

11. Counsel for the Plaintiff also submitted that the Plaintiff is entitled to future medical costs; the rationale being that the Plaintiff is still in need of medicines. It was proposed that a sum of Kshs.1,000,000/= would be an adequate compensation under this head.

12. As for loss of future earnings, it was submitted that taking the Plaintiff's last net salary of Kshs.20,060/= and the fact that the Plaintiff would have worked for a further 7 years, counsel for the Plaintiff proposed a figure of Kshs.1,685,056/20 under this head worked out as follows:

$Kshs.20,060.55 \times 12 \times 7 = Kshs.1,685,086/20$. Plaintiff's counsel cited a number of authorities to assist the court on this issue.

13. The Defendant's submitted that the Plaintiff is not entitled to the reliefs sought for reasons that this suit is not properly before this honourable court. Counsel for the Defendant submitted that the Plaintiff's suit was instituted twelve months after the act complained of, which was contrary to section 87(b) of the Kenya Railways Corporation Act. The quoted section exempts actions founded on continuing injury or damage which should be commenced within six months after the cessation of such injury or damage.

14. It is both necessary and helpful at this point to define what amounts to a continuing damage/injury. In **Volume 12 of Halsbury's Laws of England, 4th Edition** at paragraph 1135, continuing damage is defined in the following terms:-

"A cause of action in respect of which a Plaintiff is entitled and is required to have the prospective damages assessed must be distinguished from a continuing cause of action, namely, a cause of action which arises from the repetition or continuance of acts or omissions of the same kind as that for which the action has been brought. Thus, where a trespass continues, a fresh cause of action arises everyday during which the trespass continues. Similarly, where the damage consequent on an act or omission, rather than the act or omission itself provides the cause of action, as for example in nuisance, then, as the action is only maintainable in respect of the damage, or is not maintainable until the damage is sustained, a fresh action will lie every time damage accrues from the act. In this case, prospective damages are not recoverable, for the cause of action is not the act but the damage arising from it. A continuing cause of action is not constituted by repeated breaches of a continuing obligation."

15. According to **Black's Law Dictionary**, a continuing injury is one that is still being committed. Counsel for the Defendant says that the Plaintiff has not proved an ongoing tortious act on the part of the Defendant. Counsel for the Defendant relied on the persuasive authority in **National Coal Board v Gallery [1958] I All ER 91** in which the Court of Appeal in England said the following on the issue of continuing injury:-

"The general proposition that persists in tortious conduct of particular kinds such as trespass or nuisance constitutes a continuing cause of action must be regarded as established ---- a continuing cause of action is not constituted by repeated breaches of recurring obligations nor by intermittent breaches of a continuing obligation. There must be a quality of continuance both in the breach and in the

obligation.”

16. The argument put forward by counsel for the Defendant is that the circumstances of the present case do not constitute a continuing cause of action that falls within the exemption of section 87(b) of the Kenya Railways Corporation Act as alleged by the Plaintiff. Counsel for the Defendant further contends that even after the Plaintiff was duly warned about the flaw in his suit no attempt was made to put the situation right. The Defendant therefore urges this honourable court to strike out the suit with costs to itself.

17. In his reply to the Defendant's submissions dated 6/04/2009, the Plaintiff contends that his suit is competent and thus properly before this court. He refers to PExhibit 21 which is the Defendant's letter dated 16/07/2004 and says that in the circumstances, the Plaintiff's damage in this case was a continuing action. PExhibit 21 is the Defendant's letter dated 16/07/2004 in response to the Plaintiff's advocate's letter dated 10/03/2004. In the letter, the Defendant informs the Plaintiff that the Plaintiff's claim against the Defendant was time barred in accordance with Section 87(b) of the Kenya Railways Corporation Act, Cap 397. In the same letter, the Defendant raises the issue of notice to the Defendant from the Plaintiff about the accident, thus inferring that the Plaintiff did not give requisite notice to the Defendant before commencing suit.

18. In reply, counsel for the Plaintiff argues that the Plaintiff is exempt from the requirements of section 87(b) of the Kenya Railways Corporation Act on the basis that Part III of the Limitation of Actions Act, Chapter 22 Laws of Kenya applies to him. In other words the Plaintiff claims that he was under a disability by reason of the illness that resulted from the injuries sustained during the accident. Counsel relies on **Gatune vs The Headmaster, Nairobi Technical High School & Another Civil Appeal No. 79 of 1982 – [1988] KLR 561-573** in which the court made the following observation at page 569:-

“--- although the Appellant was aware of the injury to his eyes from the 21st May 1973 that knowledge alone did not in the circumstances of this case constitute material facts relating to the cause of action. On the evidence, he had been under a disability up to the time when he knew of the contents of the medical report.”

It is the Plaintiffs case that he had been under a disability until he knew of the contents of the medical report dated 29/03/2004 (Pexhibit 1(a)) and that for this reason, the court ought not to strike out his suit.

19. The question that the court will decide is whether there is evidence to the effect that the Plaintiff was under a disability.. In his evidence in chief the Plaintiff says that after the accident, he was admitted to PCEA Thogoto Mission Hospital Kikuyu where he stayed for one month as per the Kikuyu Hospital card produced and marked as PExhibit 6. He also said that he was immediately referred to Kenyatta National Hospital (KNH) upon discharge from Kikuyu Hospital on 8/05/2001, though he remained an outpatient. He said that he used to go for Orthopaedic clinics at KNH once a week from May to September 2001. According to the Plaintiff's further evidence he attended the last clinic at KNH on 9/02/2004. The Plaintiff also testified that he received the Neurological Medical Report from KNH – Pexhibit 12 – on 24/08/2001. He also produced as PExhibit 11 a Discharge Summary from Kikuyu Hospital dated 21/02/2001.

20. Part III of Chapter 22 deals with extension of Periods of Limitation provided for under Section 4 of the Act. In case of disability, as claimed by the Plaintiff in this case, *“the action may be brought at any time before the end of six years from the date when the person ceases to be under a disability or dies, whichever event first occurs notwithstanding that the prescribed period of limitation has expired”*. Would the court act *suo moto* in granting extension of the limitation period and does the law require a party under a disability to seek leave of the court before instituting suit? In his submissions, counsel for the Plaintiff seems to suggest that the court should act *suo moto* and that a party in such a case need not obtain leave of the court. Section 31 of Chapter 22 is part of PART III of the Act which covers sections 22 to 31 (both sections inclusive). Under the same PART III is Section 27 of the Act which provides as follows:-

“27. (1) Section 4 (2) does not afford a defence to an action founded on tort where —

(a) The action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written Law); and

(b) The damages claimed by the Plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries or any person; and

(c) The court has, whether before or after commencement of the action granted leave for the purpose of this section; and

(d) The requirements of subsection (2) are fulfilled in relation to the cause of action.

(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included

facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the Plaintiff until a date which —

(a) Either was after the three year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

(b) In either case, was a date not earlier than one year

before the date on which the action was brought.

(3) This section does not exclude or otherwise affect —

(a) any defence, which, in an action to which this section applies, may be available by virtue of any written law other than section 4 (2) (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of the three years from the date on which the cause of action accrued.

21. Sub-sections (1) (2) and (3) of section 30 of the Act provide:-

30(1) In sections 27, 28 and 29 of this Act, any reference to the material facts relating to a cause of action is a reference to one or more of the following:-

(a) the fact that personal injuries resulting from the negligence, nuisance or breach of duty;

(b) the nature or extent of the personal injuries resulting from that negligence, nuisance or breach of duty constituting that cause of action;

c) the fact that the personal injuries so resulting were attributable to the negligence, nuisance or breach of duty or the extent to which any of those personal injuries were so attributable.

(2) For the purpose of sections 27, 28 and 29 of this Act, any of the material facts relating to a cause of action shall be taken at any particular time, to have been facts of a decisive character if they were facts which a reasonable person, knowing those facts and having obtained appropriate advice with respect to them would have regarded at that time as determining, in relation to that cause of action, that (apart from section 4(2) of this Act) an action would have a reasonable prospect of succeeding and resulting in the award of damages sufficient to justify the bringing of the action.

(3) Subject to subsection 4 of this section, for the purpose of sections 27, 28 and 29 of the Act a fact shall be taken at any particular time, to have been outside the knowledge (actual or constructive) of a person if, but only, if

(a) he did not know that fact; and

(b) in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of ascertaining it; and

(c) in so far as there existed and were known to him, circumstances from which, with appropriate advice, the fact that might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect of those circumstances.”

22. Section 4 (2) provides that an action founded on tort may be brought after the end of three years from the date on which the cause of action accrued. In the instant case, the Plaintiff should have filed suit on or before 18/02/2004. Instead he filed his case on 14/10/2004, which was some eight (8) months outside the limitation period. Since the suit is against the Defendant who operates under the Kenya Railways Corporation Act, the suit should have been filed within a year of the occurrence of the cause of action. Can it be said that the Plaintiff is covered by the provisions of section 27(11) of the Limitations of Actions Act or should the Plaintiff's claim be thrown out of the window as submitted by the Defendant?

23. I think that after carefully considering all the circumstances of this case, including the evidence and all the facts pertaining to the case I do find and hold that there is nothing in the circumstances of this case that would bring the Plaintiff's claim herein within the ambit of section 27 of the Limitation of Actions Act, or constitute a continuing cause of action as submitted by Plaintiff's counsel. Section 27 of the Limitation of Actions Act requires a party seeking to take cover under its provisions to show that:-

(a) the action is for damages for negligence, nuisance or breach of duty; and

(b) the damages claimed by the Plaintiff consist of or include damages in respect of personal injuries of any person; and

(c) the court has granted leave, whether before or after commencement of the suit, for purposes of this section; and

(d) the requirements of subsection (2) are fulfilled in relation to the cause of action.

24. The section uses the conjunction “and” after each of the requirements which means that all the requirements must be fulfilled. Whereas the Plaintiff in this case has fulfilled the conditions under section 27 (1) (a) and (b), he has fallen short of the requirements under section 27 (1) (c) and (d). The Plaintiff did not apply for any leave to file this suit out of time. The section does not require him to have obtained the leave before commencement of the suit. He could still have done so after commencement of the suit and particularly after he was put on notice by the Defendant's letter dated 16/07/2004. The letter came in good time before the suit was filed, and this was the opportune time for the Plaintiff to move the court for the leave to file the suit out of time. Having failed to do so, this claim must regrettably be refused.

25. Secondly, I do not think that the plaintiff's case is one of coming out of continuous cause of action or that there were decisive facts unknown to the Plaintiff. There are no circumstances to suggest that there was any material that was not within the knowledge of the Plaintiff until after expiry of the statutory period. Nor is there evidence to show that the tort against the Plaintiff was one of a continuous nature. The accident happened on 18/02/2001 and that was it. Thereafter, the Plaintiff simply battled with his injuries which persist up to today. One cannot say that fresh damage was sustained by the Plaintiff each day or year before the action was finally brought to court. Further, the Plaintiff got all the material reports long before he filed suit. On the basis of this finding, I do not accept Plaintiff's counsel's

argument that the Plaintiff's claim arises from a continuing cause of action. This case must therefore fail.

26. Having made the above findings, I have no option but to strike out the Plaintiff's case. As for costs, I do not think that the Defendant is entitled to any costs. The Defendant did not file any defence and was generally lethargic even when it came to moving the court to set aside the interlocutory judgment. The Defendant took a whole 1½ years to bring a mere application to set aside. What this implies is that the Defendant is not a serious litigant.

27. Having said the above, it is however necessary to assess damages should an appeal to the Court of Appeal succeed. Judgment on liability was entered at 100%. Based on the authorities cited to me by Plaintiff's counsel, all of which authorities I have carefully considered, I would enter judgment on damages as follows:—

(a) *Special damages* - Kshs.20,000/=

(b) *General damages for pain*

Suffering and loss of amenities - Kshs.3,000,000.00 (c) *Loss of future earnings*

Would be - Kshs.1,685,086.20

(d) *Future medical costs* - Kshs.1,000,000.00

28. I would also award costs of the suit and interest at court rates.

It is so ordered.

Dated and delivered at Nairobi this 1st day of September 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. Ashiruma (Present) For the Plaintiff

Mr. Charagu for Makori For the Defendant

Weche

Court clerk