



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Appeal 118 of 2002

DWA ESTATE LTD.....APPELLANT

VERSUS

STANLEY KASINA MUNYAO.....RESPONDENT

JUDGMENT

1. The judgment herein is limited to the issue whether liability was properly proved in the case before the lower court i.e RMCC No. 174/2007 (Makindu). In that case, the present Respondent, Stanley Kasina Munyao had filed suit against the present Appellant, DWA Sisal Estate, claiming general damages and special damages of Kshs. 11,500/= together with interest and costs thereon. The basis for the claim was well set out at paragraph 4 and 5 of the said Plaintiff dated 15.10.2001 wherein the Plaintiff averred as follows:-

“4. It was an express or implied term of the contract

between the defendant and the Plaintiff that the defendant would take all reasonable care and duty to safeguard the plaintiff and that it would not unnecessarily imperil, endanger or otherwise expose the plaintiff to harm or risk to his health while he was engaged upon the said work or which they knew or ought to have known.

5. The Plaintiff will further aver that it was the defendant’s duty to provide and maintain a safe system of work to enable the Plaintiff to carry out his work without being injured.”

2. A casual reading of the above averments would show that the cause of action was one in contract but surprisingly at paragraph 8 of the plaintiff the Plaintiff averred as follows:-

“The said injuries and loss and damages were occasioned to the Plaintiff by reason of the negligence and or implied breach of duty of employment terms thereof on the part of the defendant, his servants and/or agents.”

3. I need not go into the injuries suffered by the Plaintiff but in evidence before O.J. Ochako Esq, R.M he stated that on 15.1.2000 he was on board motor vehicle registration number KAG 203 P belonging to the present Appellant when the same lost control and overturned because the driver was driving it at high speed. He added that he was being driven from his home to his place of work when the accident occurred.

4. The Defendant’s case as set out in the evidence of DW1, Geoffrey Nzuki, an Administrative Manager

for the Defendant, was that indeed the accident occurred but that the driver, Joseph Shoyi, a Mechanical Supervisor had no authority to drive motor vehicle KAG 203 P. That the said person was not an authorized driver and he was not entitled to carry any passenger and the principle of vicarious liability could not be invoked. He produced a statement dated 29.1.2000 (D.exhibit 1) in which the Plaintiff stated as follows:-

- i) he was with his wife and son on 15.1.2000 at 5pm and he was cycling home after work when motor vehicle KAG 203P stopped and he was offered a lift by Joseph Shoyi. He obliged and put his bicycles in the car. He also boarded it together with his family.
- ii) The said vehicle sped off and rolled after 2 Kms. DW1 also produced a notice D. Exhibit 3 indicating that the motor vehicle driver was not authorized to carry passengers and specifically not authorized to offer lifts to passengers and that if he did so, he was liable to be dismissed. D. exhibit 2 was a letter dated 1.3.2000 indicating that Joseph Shoyi was actually dismissed from service for the said reason.”

5. Mr. Mulwa urged me to find that in this case liability was not proved and I should allow the Appeal. I agree.

6. The Respondent pleaded a contract between him and his employer but it is patently clear from the evidence above that in fact he was not in his employment at the time the accident occurred. That in fact he was going home, after work, when he accepted a lift in a motor vehicle driven by a person whom he knew or ought to have known, was unqualified to drive the subject motor-vehicle. No contract was proved and none was breached by the Appellant.

7. On the other claim of tort, it is unclear to me whether the claim was wholly based on a contract or wholly on a duty of care in tort. I have said that there was no basis to make a claim in contract and even if I accept that the cause of action in tort was properly framed, and it is not, then there is no evidence that the Appellant was liable under the principle of vicarious liability. In Muwonge vs A.G. of Uganda [1967] E.A. 17 at 18 , it was held in relation to that principle that;

“ All that one can say , as understand the law, is that even if the servant is acting deliberately, wantonly, negligently or criminally, even if he is acting for his own benefit, nevertheless if what he did was merely a manner of carrying out that he was employed to carry out then his act are acts for which his master is liable.”

8. In this case, the person driving motor vehicle KAG 203P was not employed to drive motor vehicles but to supervise mechanical works. The Respondent knew or ought to have known that the said Joseph Shoyi had no such authority and when he packed his bicycle and family into the motor – vehicle, he was inviting danger upon himself and the principle of Volenti non fit injuria properly applies.

9. The Appeal was not opposed and I can only but find that since no liability was properly proved, the judgment in the lower court was in error.

10. The Appeal is allowed and the suit before the lower court is instead dismissed in its entirety. The Appeal is allowed in those terms and the Appellant shall have the costs of the Appeal and the suit in the lower court.

11. Orders accordingly.

Dated and delivered at Machakos this 26th day of November 2008.

Isaac Lenaola

Judge

In the presence of: Mr. Kamanda h/b for Mr. P.M. Mulwa for
Appellant.

Isaac Lenaola

Judge