



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Case 4 of 1991

NELSON KIMATUI & OTHERSPLAINTIFF

VERSUS

SHIMBA TOURIST SERVICES LTDDEFENDANT

JUDGMENT

I: BACKGROUND

1. It was on the night of 20 November 1986, just before midnight that Joel Musitikho Kimatui was driving motor vehicle registration KWG 938, a Nissan “matatu” van for Tourist in the course of his employment with M/s Simba Tourist Services when a self accident occurred. This was along the Mombasa – Nairobi Highway as one passed the Mutito Andei Shopping Centre about ½ a mile or so, Joel was rushed to a near by hospital then later to Kenyatta National Hospital where he died two days later. 2. Nelson Kimatui and Ruth Khasaha Kimatui (the 1st and 2nd plaintiff herein) sued the said employer M/s Shimba Tourist Services (herein referred to as the defendant) for the wrongful death occasioned to the deceased in their negligence in providing to the deceased an unserviceable vehicle. The suit was filed on 3 January 1991.

The defendants entered appearance and filed defence on the 15 May 1991 denied liability and blamed the deceased of being the author of his misfortune. They also blamed the deceased stating that the doctrine of non fit injura would apply and further that the suit was bad in law.

II: DELAY

From 1991 to the year 2005 this suit had never been heard. The cause of delay are various but I wish to just document them down in this judgment to reflect how justice delayed is justice denied.

4.(i) Summons for directions was completed on 23.9.92 (Njai Principal Deputy Registrar) 4(ii) Dates of hearing had been taken but the suit was never heard by the High Court.

a) 15.12.93

b) 18 and 19 December 1993

c) 12 and 13 March 1997

d) 21 and 22 October 1997

e) 14 and 15 December 1998

f) 14.12.98 (Osiemo J) suit taken out of the list by consent of parties

g) 10 and 11 March 1999 h) 8. and 9 June 1999

i) 8.6.99 Githinji J.

Plaintiff adjourns due to the absence of police officer - the key witness to the accident

j) 27.11.00 – an application dated 13.9.00 requesting the court to dismiss suit for lack of prosecution. Application refused (Aganyanya, J)

8 and 9 May 2001 before Gacheche, CA (as she was then). Plaintiff applies for adjournment and was refused. Defendants raises Preliminary Objection on grounds that letters of grants had not been taken out prior to trial nor had order 36 r (1) and (2) Civil Procedure Rules been complied as the minor suing through the 2nd plaintiff had attained the age of majority.

The Preliminary Objection dismissed 9.5.01 Gacheche CA (as she then was).

l. 22.5.01 Kasanga Mulwa J application under order 36 r(1) & (2) b Civil Procedure Rules allowing the minors to proceed with suit instead of the next of friend – granted.

m. 22.10.01 Rawal J. Advocate for plaintiff seeks to file formal application to cease from acting for the plaintiff n. 2.10.02 Mbito J Stood over generally a notice of motion dated 8.7.02 (for dismissal of suit for lack of prosecution).

o. Chamber Summons 26.10.01 to cease from acting adjourned before deputy registrar (Matheka deputy registrar) p. Chamber Summons 26.6.03 Hayanga J. Application chamber summons 26.10.01 stood over generally (SOG as both parties absent) q. 5.11.03 G.B.M. Kariuki J Notice of Motion 8.7.02 seeking for dismissal of suit could not be reached. Matters stood over generally.

r. 27.11.03 Deputy Registrar (Muya, Senior Principal Deputy Registrar) Chamber summons 26.10.01 granted for leave to cease from acting for plaintiff by their advocates.

s. 28.1.04 Muya (Senior Principal Deputy Registrar). By consent of parties application on dated 8.7.02 for dismissal of suit withdrawn.

t. 5 and 6 July 2004 Ojwang J. Plaintiff seeks adjournment due to unavailability of the police. Adjournment granted.

u. Chamber summons 9. September 2004 Matheka (Principal Deputy Registrar). Leave to amend defence granted to include a claim that the suit is TIME barred and be dismissed.

v. 13 and 14 June 2005 Ang'awa J. The lawyer sort to conduct the plaintiffs trial held no practicing certificate. The issue of representation arose as the advocate for defendant M/s Mereka & Co. Advocate who took over from M/s Rustam Hira were never on record. All their pleading up to 14.6.05 were duly struck out as having been irregularly filed. w) 11 and 12.10.2005 Ang'awa J.

Advocate for defendant now properly on record. Raises a Preliminary Objection that the suit was time barred. The Preliminary Objection dismissed on grounds that the relationship between employer/employee is both contractual and TORT.

x) Hearing 17.10.05, 26.10.05 and 2.11.05 Ang'awa, J

5. I may only conclude that the major reasons for the delay of this suit is the court system not availing a hearing date for trial, especially before and prior to 1998. The second reasons is that the key witness – the police had always been reluctant to come forward to give evidence in this case.

Even before this court, two adjournments were necessitated because of the unavailability of the police.

6. I now wish to deal with the issue of this court's jurisdiction.

III: JURISDICTION

7. There are two issues on this which I require to mention. The first is that this suit was time barred. I heard the Preliminary Objection on 11 October 2005. In my ruling, I understood the defendant/applicant as saying that this case arises from a TORT, as such under the Limitation of Actions Act a suit filed under TORT must be filed within 3 years. It is quite clear that this suit was filed 3 to 4 years after the cause of action arose in 1991. I did state in my ruling that the cause of action having arisen in 1991, the Limitation of action is six years and not three. The reasons for this is that the relationship between an employer and employee is unique. It is contractual and any breach is 6 years before one sues. It thus means that though the action is in TORT the limitation time to sue is 6 years. I relied on the case of:-

Kenya Cargo Handling Services Ltd

v

David Ugwang (1982- 88) I KAR 672.

The Preliminary Objection was duly dismissed

8. I then wish to bring a point I see reflected in the original defence. This is, that the plaintiff had been paid Workman's Compensation and actually agreed, I believe, as this is what the defence impresses me to believe, that it was full and final and there would be an "absolute discharge from liability upon settlement of the entire Workman's Compensation Claim." Under the Workman's Compensation Act Cap.236 Laws of Kenya a claim by a worker does not preclude that worker or his estate from suing in a court of law for damages. Section 25(1) of the act states inter alia:-

"Nothing in this act shall prevent proceedings to recover damages being instituted against the employer in a civil court independent of this act."

9. It is also seen, that, an employee is not permitted to write and or sign a statement that he is receiving the Workman's Compensation from full and final settlement of a claim against an employer. Such agreement is not enforceable. The claimant has a right to come to court and sue in TORT. The court would in giving award take into account the Workman's Compensation paid. The proviso under section 25(1) (i) reads Provided that:-

(i) If damages are awarded after compensation has been paid the amount of damage awarded in such proceeding shall take into account the compensation paid in respect of the same injury under this act.

IV: LIABILITY

10. The negligence attributed to the employer is "that the vehicle that the deceased was driving on 21 November 1986 (mid night) in the course of his employment along the Nairobi-Mombasa road was when the vehicle suddenly left the road and overturned killing [the deceased] instantly."

The only particulars of negligence pleaded being:-

"Causing or permitting the motor vehicle to be driven along the said road when they knew or ought to have known that the brakes and other vital parts thereof were defective and unsafe condition"

11. The accident was not disputed. It occurred and the deceased died. What was disputed is whether the defendants were negligent in providing a defective motor vehicle and thus causing the deceased's demise?

12. The plaintiff called PW3 who stated he used to work formerly with the defendants as a "grease man" and later became a mechanic. In the year 1984 he had been employed. In 1988 he had left the employment. In November 1986 he recalls having been requested to service the motor vehicle Registration KWG 938. This vehicle was unserviceable and could only be driven within Nairobi area. He was therefore surprised to find that the vehicle had gone on safari out of Nairobi. The back breaks had excessive leakage and this had been due to the oil leakage. The vehicle had knocked a pot hole causing the driver to lose control. The steering had moved and the thyroid ends cuts. He actually inspected the vehicle after the accident. The plaintiff also produced the file and reports from the police through PW3 within the police file was a statement from the investigating officer and a sketch plan. This file was closed on grounds that the accident was a self accident. The police recommended to a magistrate at Machakos (Kanyi Senior Resident Magistrate, 1997) that the file be closed there not being any evidence. It would have been of great assistance if the said file was indeed forwarded for an inquest to be held. That inquest would have been the basis for proceeding under section 34 of the Evidence Act Cap.80 Laws of Kenya for the same to be used as evidence in this trial. The court has the file before it. There is a sketch map indicating the vehicle veering of the road with signs of broken glass or overturning of the rear side of the road.

The theory given by the investigating officer is that there may have been approaching a vehicle with bright headlights. The deceased moved to his extreme rear side. One of the wheel (left back) hit a hole and the driver lost control going off the road and thereby overturning. There was also an indication of there being rain from another police office.

13. The advocate for the defendant tried to state that the deceased was over speeding. In fact the statement in question referred to actually said that the "skid mark" of the vehicle before it overturned and after it overturned show longer distance showing little evidence that the driver was probably driving at a high speed. What this actually means there was little evidence that the driver was over speeding and the skid marks was over a longer distance this could only conclude that the vehicle may probably have had some problems.

14. The motor vehicle examiner's certificate of examination and Test of vehicle – indicates that there was no pre accident defects noted and the damages caused was by the impact. The gear box and steering mechanism was not reported on being referred to as N/A (Non applicable). The vehicle was dented as a result of the accident. 15. The defendants denied liability. They called no witnesses to court and further denied that the vehicle was not defective. I have therefore only the version before court that evidence of the plaintiff's witness. The court is required to weigh the evidence before it. Namely, is the evidence of PW3 credible?

16. I find that a motor vehicle assessor should have been able to provide a report as to the status of the vehicle and its mechanical fitness. All I have is a examination and Test of vehicle report of 27 November 1986 that state the vehicle had no pre accident defects and the brakes were effective. This report had not been subjected to examination of the marker.

17. I would in the instance find that liability against the defendants has not been established and would accordingly dismiss this suit.

18. I am required in law to state what my award would have been if the plaintiffs had been successful.

V: QUANTUM

19. Possible Award

a) Law Reform Act Cap.26 Laws of Kenya.

The suit was filed on the 31 January 1991. The plaintiffs took out letters of grant intestate (Juma J) (as he then was) on 5.9.1996 five years after the suit had already been filed. In the case law of:-

Touristic Union International & Another v Jane Mbiyu 1982 – 1988 I KAR.

It outlines the requirements that a legal representative must take out letters of administration or letters of the grant as the case may be in order to file suit to claim under the Law Reform Act. It is common knowledge that prior to this suit being heard by the court of appeal advocates were filing cases without taking out letters of administration. What a party therefore required to do is therefore withdraw the suit, take out letters then seek leave to file suit out of time before proceeding to trial. Instead, the letters of representation was taken out in 1996. The effect of this is that the plaintiff are not entitled to make claim because when the suit was filed they were not the legal representative of the deceased estate. If I was to nonetheless make an award I would have awarded under the head for pain and suffering Ksh.100,000/- as the deceased died 2 to 3 days later. For loss of expectation of life a conventional figure of Ksh.70,000/- would suffice. See the case of:-

Jeremiah Wambui Njoroge v Philip Mwangi Hccc 242/99 Ang'awa, J.

20. I accordingly would dismiss the claim under the Law Reform Act Cap 26 Laws of Kenya.

b) The Fatal Accidents Act Cap.32 laws of Kenya

21. One need not have letters of administration in order to claim under the Fatal Accidents Act. This though is not a license to forego filing for letters of grant of representation. There must first be a lapse of 6 months before suit is filed from the date the deceased died in order to allow the estate to first file suit. Notice as to the particulars of the dependants must be served on the dependants together with their full details.

22. The plaintiff must show that the dependants who are either the parents, spouse or children of the deceased, their age and relationship to the deceased. Plaintiff has in this suit done so by particularizing the plaintiff deceased dependants in the plaint. There are six minors who after 14 years awaiting this trial to begin are now all adults. The plaintiff sort for an award of Ksh.146,064/- a multiplier of 17 years was recommended an income of Ksh.1074/- was suggested and not Ksh.12,880/- as pleaded in the plaint with a 2/3 dependancy ratio.

The dependants asked the multiplier be 7 years and multiplicand Ksh.1,074/- as earlier stated.

The deceased was aged 43 years old. The normal retirement age is 55 years. The plaintiff state the deceased would have easily have worked for 17 years to the age of 60 years being in the private sector. The defence puts this at 50 years. I believe a fair award is the multiplier be 12 years (55 years old retirement). Thus $12 \times 12 \times \text{Ksh.1,074/- wages} \times \frac{2}{3} = \text{Ksh.103,104/-}$. Say 103,000/-.

Workman's Compensation would have been taken into account of which I was informed was Ksh.29,000/-.

VI. SPECIAL DAMAGES

24. None was pleaded and as such no award is made. 25. In Summary:-

25.(a) Driver male adult aged 43 in 1986

25.(b) Self Accident

25.(c) Injuries

Fatal

25.(d) Quantum Possible award I: Law Reform Act Cap 26 Laws of Kenya - Nil

(i) Letter of grant issued (Juma J) 5.9.96) five years after suit had already been filed.

(iii) Touristic Union International & Another v Jane Mbiyu (supra case) To claim under the Law Reform Act Cap.26 Letters of grant must first be issued before filing suit

(ii) Claim dismissed

Possible award

i) Pain and suffering Ksh.100,000/-

ii) Loss of expectation of life Ksh. 70,000/- Jane Wambui Njoroge v Philip Mwangi Hccc242/99 (unreported)

II: Fatal accidents Act Cap 32 Laws of Kenya.

a) Loss of dependency Ksh.1,704/- x 12 x 12 x 2/3 Ksh.103,104/- Say Ksh.103,000/- Total Ksh.273,00/-
Workman Compensation taken into account Ksh.244,000/- III: Special Damages Not pleaded and no award is made.

26. This suit is dismissed.

I award the costs of this suit to the defendant.

Dated this 3rd day of November 2005 at Nairobi.

M.A. ANGA'WA

JUDGE

J.A. Guserwa & Co. Advocates for the plaintiff

Mereka & Co. Advocates for the defendant