



- 1) Civil Practice and Procedure
- 2) Preliminary Objection
- a) Plaintiff sued the owner of vehicle but not driver. This amounts to suit being a nullity.
  - b) The dependant filed suit within 20 days of cause of action.
  - 3) Held:-
    - I: Driver
      - a) There appears to be a contradiction to the decision of the court of appeal in 1981 and in 2000
      - b) Where the employer disputes the authority given to the employee driver, the driver must be joined as a co defendant.
    - II: Fatal Accidents Act
      - a) The suit duly filed by the plaintiff is a nullity having been filed contrary to section 7.
    - b) The dependants must wait six months before filing suit to allow an administrator to take up letter of representation.
      - III: Plaint struck out
        - 4) Case law
          - Driver
            - a) Anyanzwa v Gasperis 1981 KLR 10
            - b) Ndungu v Coast Bus Co. Ltd 2000 2 EA 462 CAK
            - c) Selle v Another v Associated Motor Branch Co. Ltd. Statute Charlesworth & Percy on Negligence 8th Edition 15 – 17 Fatal Accident
            - a) Touristick Union International v Jane Mbeyu CA 145/90
            - b) R. v .Immigration Appeal Tribunal
            - c) Hintz vs Mwakimo 1984 KLR pg 294,Kneller JA 304
            - d) Charlesworth & Percy on negligence 15-16 8th Edition
          - 5) Advocates
            - F.M. Kalwa Advocate for the plaintiff
            - P.N. Ngugi advocate for the defendant

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NARIOBI

CIVIL CASE NO.118 OF 2004

VERONICAH NDISO ..... PLAINTIFF

VERSUS

GIDEON NGUTA ..... DEFENDANT

RULING

## ON A PRELIMINARY OBJECTION

Hccc 118/04 and Hccc 119/04

I was impressed when I noted in this suit that the cause of action arose on the 20.1.04 and the suit filed on 12.2.04 barely a month later. Parties completed their pre-trial and by the 21.06.04 dates were taken for hearing on the 7th and 8th of July 2004 which dates were duly confirmed for hearing.

The advocate for the plaintiff disclose that the case arose from the death of one Stanley Kithome Kugoki who being a passenger in a public served vehicle is alleged to have alighted and was crushed by the defendants vehicle (Hccc118/04).

The owner of the vehicle was sued but not the driver.

The plaintiff who filed suit is said to be the widow. She did not have letters of grant to bring this suit to court. The plaintiff through her advocate notified the court they will only prove the claim under the Fatal Accidents Act.

The claim under the Law Reform Act was being abandoned.

A preliminary Objection was taken up by the advocate for the defendant. A similar suit to this one of Hccc118/04 was also filed by the same advocate on behalf of his client being Hccc 119/04. It was agreed that the Preliminary Objection may be consolidated only for purpose of answering the following objections questions:-

- “1. Whether the failure by the plaintiff to disclose the alleged Tort feassor to the suit renders the suit against the master of the tort feassor a nullity
2. Whether seciton 7 of the Fatal Accidents Act envisages that there should be a lapses of at least 6 months from the date of death before a dependant can be vested with a capacity to bring suit under the said act.

and

- 1) Whether the suit brought before the lapse of six months by the plaintiff (who holds no letters of administration) is a nullity.

### **1) Non Joinder of a tort feassor**

The defendants advocate argued that in any suit against an employer who is to be held vicariously liable for an act in tort, he said employee, tortfeassor must be party to a suit. He relied on the authority of:-

### **Anyanza v Gaspenis**

(1981) KLR 10 (Law, Miller, Potter JA).

The facts of the case being a tour and travel Company owned a motor vehicle from its owners to carry tourist. The company employed its own drivers to drive the hired vehicles. The vehicle overturned causing an accident. The tourists sued the hirers of the vehicle, the owners of the hired vehicle but not the personal representative of the driver (now deceased).

It held that where a 3rd party who has been injured by a negligent act of a driver of an insured motor vehicle of another person may have his damages satisfied by the user of the motor vehicle only if the driver or his legal representative is proved as a defendant.

In this case it reflects that it is imperative to join the driver to a suit in order to prove that the driver was negligent. Once that has been established then the employer would be vicariously liable.

A counter authority was put in by the plaintiff's advocate being:- **Ndungu v Coast Bus Co. Ltd.** (Omollo, Lakha, Bosire (JJA) 2000(2) EA 262

Where by inter alia the trial judge held the failure to join a driver in a suit was not fatal.

The act of appeal held that:-

“Failure to join a driver in damages claim against his employer was not fatal as the employer's liability largely depends on the pleading and evidence in support of the claim.”

These two authorities are most certainly at variance decided 20 years apart.

I would take the position that in order for an employer to be liable the negligence of a driver must be proved. Such proof may be by way of evidence or a traffic court proceedings.

The non joinder of the driver is in fact essential to a case which relied on the vicarious liability of the employer/master.

As both authorities are from the court of appeal and as this High court is bound by the decision of the court, parties are bound to the first authority. This being the earlier decision and the court of appeal perhaps may not over rule itself.

I would leave the matter as it is and refer the question to the presiding judge of the court of appeal to deal with.

## **II) The issue of locus**

The plaintiff is said to be the widow of the deceased. She brought this suit under both the Law Reform Act and the Fatal Accident Act.

**The Touristic Union International v Jane Mbeyu & Another** CA 145/90 Apaloo CJ, Kwach, Cockar, Omolo and Tunoi JJA) Is a case which clearly established that before a claim under the Law Reform Act is filed there must be a legal representative holding the requisite letters. This position was indeed conceded to when the plaintiff's advocate withdrew his claim under the Law Reform Act. The plaintiff had no letters of grant issued to her by the courts on application.

The Fatal accidents act allows dependents to file suit without taking out the letters of representative. The plaintiff wished to proceed with this claim when the defendant (Hccc 118/4) brought it to the courts attention that section 7 of the Fatal Accidents Act had not been complied with. This section requires there to be a lapse of six months before a dependent may bring in a suit namely where no action is brought by an executor or administrator of the deceased, then an action may be brought by the dependants within 6 months.

The question is whether the widow/dependents requires to bring an action within 6 months or to await the lapse of six months.

In the cases of:-

## **Hintz v Mwakimo**

1984 KLR 294 (Kneller, Chesoni, Nyarangi JJA) In the judgment Kneller J (dissenting) he stated that:- “The action (under Fatal Accidents Act) is for the benefit of the wife,

husband parent and child of the deceased and not for his estate. The claim is for injuriously affecting the family of the deceased.

It has to be brought by and in the name of the executor or administrator of the deceased within 6 months from his death. If no action is brought within 6 months by the executor or administrator, then it can be brought by and in the name or names of all or any of those persons for whose benefit the action may be brought, namely the wife husband parent and child of the deceased, but it must be begun within 3 years of the date of death of the deceased”

Any money recoverable will go to the benefit of the dependents and not to the creditors.

I indeed find that the term within 6 months refers to the executors or administrator. That is where they fail to bring suit within 6 months after death by taking out letters of representation then, after a lapse of 6 months can the dependents now sue.

I find that his point is very clear and would rule accordingly. I now turn to the third objection.

**3) Is the suit a nullity having been brought within 6 months?**

I find that suit is indeed a nullity. The said suit was filed in court 20 days after the deceased died and when the cause of action arose. It therefore means that the executors or administrators had not been given an opportunity to bring the suit to court within 6 months.

I accordingly struck out this suit as being a nullity

**In Summary:-**

- 1) Non-joinder of a driver as a tortfeasor Contradictory judgments of the court of appeal
- 2) Locus of the plaintiff Plaintiff has no locus to bring suit as a dependent within 6 months.
- 3) Suit struck out as a nullity.

I award costs to the defendants.

Dated this 30th day of July 2004 at Nairobi.

M.A. ANG'AWA

JUDGE

Kalwa & Co. Advocates for the plaintiff

Kipkenda, Lilan & Co. Advocates for the defendant