



REPUBLIC OF KENYA

Dola v Attorney General

High Court, at Mombasa

August 27, 1992

Omolo J

Civil Case No. 327 of 1989

August 27, 1992, Omolo J delivered the following Judgment.

I heard and completed evidence of the witnesses in this case on the 14th July, 1992. I then ordered that counsel were to make written submissions; Mr. Pandya for the Plaintiff was to supply the Court with his submissions within seven days from the date of the hearing. Mrs. Momanyi, Senior State Counsel, and counsel for the Defendant was to thereafter supply the Court with hers within a further seven days. Mr. Pandya's submissions were received on the 21st July, 1992. By the time I started on this judgment (6th August, 1992) I had not seen any submissions from counsel for the Defendant. I take it that she has none to make.

The Plaintiff, Asha Salim Dola, is the mother of one Mfaki Salim and it is alleged that Salim died on the 9th June 1988. It is alleged that Salim (hereinafter "The Deceased") died when a dhow called "USINISEHE," the Dhow", in which he and other were sailing was hit by the ferry "LAMU", "the Ferry", and the Dhow capsized. There were four persons in the Dhow, the Deceased, Bakari Juma (PW.2) and two others who did not give evidence in the case. It is further alleged that at the time of the said accident, the Ferry was being piloted, or to use Mr. Pandya's word, "ferried" by one Isaak Muthoka (D.W.1). D.W.1 is employed as a coxswain by the Ministry of Transport and Communications and at the time of the alleged accident, he was based in Kilifi and was one of the coxswains operating the Ferry. The Plaintiff's contention is that when the Ferry hit the Dhow, and the latter capsized, the Deceased was thrown into the sea and drowned. He was buried in Kilifi but as he was a Muslim, no post-mortem examination was conducted on his remains. The Plaintiff thought D.W.1 is an employee of the Government of Kenya, the Plaintiff instituted this suit against the Defendant, the Attorney-General, under and in accordance with the provisions of section 12 of the Government Proceedings Act. The Plaintiff claims damages, both general and special for herself under the Fatal Accidents Act and the Law Reform Act, though this is not stated anywhere in the plaint. The particulars of negligence alleged against D.W.1 in the plaint filed on 2nd June, 1989 are that he (D.W.1)-

- (a) "ferried" the said Ferry "LAMU" at an excessive speed in the circumstances;
- (b) "ferried" the said ferry without proper look out'
- (c) "ferried" the said ferry without due care and attention; (d) failed to stop or steer clear of the Dhow;
- (e) failed to exercise reasonable care and skill in "feerying" and management of the Boat.

On being served with the Plaintiff's claim, the Defendant entered appearance on the 3rd August, 1989 and

followed this up with a defence on the 19th October, 1989. In the three paragraph defence, the Defendant denied any negligence as alleged in the plaint and put the Plaintiff to the strict proof of her allegations. An agreed "STATEMENT OF ISSUES" containing five items were then filed and the trial proceeded on those issues. The first issue was framed thus:-

1. Was the accident referred to in paragraph 3 of the plaint caused by the negligence of the servant/agent of the defendant as alleged in paragraph 4 of the plaint?"

That issue does not really reflect the true position of the parties. The issue as framed assumes that there was in fact an accident on the 9th June, 1988 as pleaded in paragraph 3 of the plaint and that the only thing denied was liability for that accident. That assumption, on the evidence adduced before me, is not correct because D.W.1 who was in charge of the Ferry at the time of the alleged accident strenuously denied in his evidence that the Ferry was involved in any accident or that he was made aware of any such accident. D.W.1's position was that he only came to hear of the alleged accident at about 5.00 p.m. when he went to Kilifi Police Station. Even on the pleadings themselves, the assumption that an accident did take place is wholly wrong because it is pleaded in paragraph 2 of the defence:-

"The defendant denies the contents of paragraph 3 and 4 of the plaint and put the plaintiff to strict proof of the same."

Paragraph 3 of the plaint alleges the occurrence of the accident between the dhow and the Ferry on the 8th June, 1988, and the consequent death of the Deceased. Paragraph 4 alleges negligence on the part of the Defendant's servant/agent and sets out the particulars of the alleged negligence. These are the matter denied in paragraph 2 of the defence and the strict proof of which is demanded by the Defendant. So that Issue No.1 ought to have been framed differently, namely-

"was there an accident between the ferry and the Dhow as alleged in paragraph 3 of the plaint, and if there was such an accident was it caused by the negligence of the Defendant's servant/agent as alleged in paragraph 4 of the plaint?"

I shall proceed to answer that issue as framed by me rather than in the manner in which it was agreed by counsel. This must be so due to the nature of the evidence I received, particularly that of D.W.1. Mrs. Momanyi even suggested to the Plaintiff and PW.2 that the Deceased did not in fact perish as alleged or else there would have been a postmortem examination of his remains. The Plaintiff was not in the Dhow and so she could not tell if there was in fact such an accident. She did not even see the body of her son as she did not participate in the final rites of burial. She, however, produced a Photostat copy of a burial permit (Exh. 1) and that document shows that the Department of the Registrar-General permitted the interment of the body of one Mfaki Salim who died on the 9th June, 1988 at Mnarani, Kilifi. The burial permit was issued to one Juma Salim on the 12th June, 1988, some three days from the 9th June. The plaintiff said she knew her son had died and it was not suggested by anyone that the burial permit was fake.

Then there is the evidence of PW.2. He says he was in the Dhow and that the Deceased was with him. His evidence was that they intended to cross the Kilifi Creek from the east to the west, i.e. from Kilifi side to Mnarani. While they were doing so, they saw the Ferry crossing from the north to the south. When they saw the Ferry they stopped to let it pass. It passed and went and docked to off-load its passengers. As PW.2 and his group thought the Ferry would take time as it had to take on fresh passengers, they (PW.2 and his group) started to cross the creek again. But the Ferry did not take on any passengers; it hurriedly left and approached PW.2 and his group at a high speed. They saw it coming and raised and waived their arms to warn the coxswain of their presence, and the danger they faced. The time was about 6.30 a.m. The coxswain did not either see them or if he did he ignored their presence and the danger facing them. The Ferry came and ran the Dhow down and PW.2 and two of his colleagues were lucky to dive into the sea and swim away. The Deceased was not so lucky and he drowned. The ferry did not even stop but proceeded on its course until it reached its destination. It then returned to the opposite side and according to PW.2, when it landed, he went and told DW.1 what had happened. D.W.1 simply denied any such accident. PW.2 and his group then went and reported the matter to the police but they were given no

assistance. They then started to search for the body of the Deceased and they recovered it after three days. They obtained a burial permit and interred the body on the 12th June, 1988. Those are the Plaintiff's allegations in support of the claim that the Deceased was killed when the Dhow was hit by the Ferry and that the accident was due to the negligence of D.W.1.

D.W.1 in turn denied before me that an accident ever took place or that he was ever made aware of it that morning. In support of this contention, he produced proceedings in the Court of the Resident Magistrate at Kilifi (Exh.D.1) wherein he was charged with two offences, one of failing to report an accident contrary to Section 31(b) of the Kenya Ports Authority Act, and a second one of endangering the safety of persons contrary to Section 54(d) of the same Act. Those charges arose out of the same alleged accident and D.W.1 was tried on them. He was acquitted on both charges. The Defendant called three other witnesses, Karani Dzeka (D.W.2), Hamisi Abdalla Daraji (D.W.3) and Nicholas Masha (D.W.4). D.W.2 and D.W.3, like D.W.1, at 10.00 p.m. on the 8th June, 1992. D.W.2 worked the Ferry up to 2.00 a.m. when he was relieved by D.W.1 who worked it from then to about 6.00 a.m. D.W.2, however remained in the office from which the Ferry is run until the time D.W.1 reported off. D.W.3 relieved D.W.1 at the time of reporting off while D.W.4 is a crew-man in the Ferry and reported on duty at about 6 a.m. D.W.4 was rather confused as to the time when E.W.3 reported on duty and took over from D.W.1. I have no doubt having seen him, that D.W.4's confusion as to the time when D.W.1 was reported off. D.W.3 relieved D.W.1 at the time of reporting off while D.W.4 is a crewman in the Ferry and reported on duty at about 6.00 a.m. D.W.4 was rather confused as to the time when D.W.3 reported on duty and took over from D.W.1. I have no doubt having seen him, that D.W. 4's confusion as to the time when D.W.1 was relieved by D.W.3 was a genuine mistake and was not designed to achieve any advantage for either side to the detriment of the other. D.W.4 basically agreed that it was D.W.4 who took over the Ferry from D.W.1. His confusion over the times is really not material. These three witnesses basically agree with D.W.1 that they saw no accident. They all, however, stated that they heard people talking about the accident that morning and D.W.4 went so far as to say that he saw P.W.2 that morning. P.W.2, as I have said, stated that he reported the matter to D.W.1 that morning when D.W.1 simply denied any knowledge for the accident. What should I make of these allegations? Of course, the burden is on the Plaintiff, to be discharged upon a balance of probabilities to prove that there was in fact an accident and that a servant or agent of the Defendant caused that accident by negligence. P.W.2 was adamant that there was in fact an accident that morning and that he reported it to the police at Kilifi. P.W.1 produced "An Abstract from Police on a Road Accident" (Exh. 2) and it shows that such an accident was in fact reported there and registered as OB.22 of 9th June, 1988. The vehicles reported to have been involved in the accident were the Ferry and the Dhow and among the people listed as witnesses was P.W.2. The Deceased was reported to have perished in the said accident. Exhibit 2 supports the evidence of P.W.2 that there was in fact an accident and that he did in fact report it to the police. Again the Burial Permit (Exh. 1) supports P.W.2'S evidence that the Deceased did perish during that accident.

Then of course, there is the evidence of D.W.2, D.W.2, D.W.3, and D.W.4 which I have already set out. While they say they saw no accident, yet all of them agree that they did hear about that morning and as I pointed out earlier, D.W.4 did admit that he saw P.W.2 talking to D.W.1 that morning. D.W.1 was with these witnesses that morning and it is only him who denies ever hearing about the accident that morning; it is very unlikely that this was so and that D.W.1 only heard of the accident at about 5 p.m. the same day. D.W.3 even admitted having seen a dhow within the vicinity, though he did not say it was the Dhow. Taking all these circumstances into account, I have no doubt that there was in fact an accident between the Ferry and the Dnow that morning as narrated by P.W.2 and that must be the reason why D.W.2, D.W.3 and D.W.4 heard people talk about the accident that morning. It is to be remembered that these three witnesses, in the main, gave evidence favourable to D.W.1 and if they had not heard about the accident, there would have been no reason for them to say they heard about it. It is indeed, very unlikely that P.W.2 could have made up the story about that accident, reported its occurrence to the police that morning and subsequently obtained the burial permit for the Deceased all on a false basis. Having seen P.W.2, I do not think he is capable of that sort of machination.

It is true that D.W.1 was acquitted of the two offences arising from the said accident but I do not think those acquittals can in any way be relevant or fatal to the Plaintiff's case. The acquittals were based on two grounds, first that D.W.1 was charged under the provisions of the Kenya Ports Authority Act which

did not apply to D.W.1, he being an employee of the Ministry of Public Works Department. The magistrate held that the Kenya Ports Authority Act only applies to employees of the Authority. Secondly, the magistrate basically held that the time of the alleged accident was not certain, and as there were three coxswains involved in the matter, it was possible that the accident, if it occurred, might have occurred at a time when D.W.1 was not piloting the Ferry. That would perfectly be a valid defence to a criminal charge, for the prosecution would be duty-bound to prove beyond any reasonable doubt that it was D.W.1 who was in charge of the Ferry at the time of the accident. I do not think that defence can be of any avail to the Defendant against the Plaintiff's claim. Whether it was D.W.1, or D.W.2 or D.W.3 who was in charge of the Ferry at the time of the accident cannot be of any interest to the Plaintiff once it is shown that whoever was in charge at the time of the accident was negligent. The Defendant has not alleged anywhere that the person piloting the Ferry at the time of the accident was not doing so in the course of his employment. But as it is, I am more inclined to the view that it must be D.W.1 who was piloting the Ferry when the accident occurred, and that he must have been negligent by either not seeing the Dhow at all or if he saw it, he did so when there was no sufficient time to avoid running it to the ground. That must be why it is only D.W.1 who denied ever hearing about the accident before he left the Ferry that morning. Accordingly I now answer the first issue which I earlier framed as follows:-

“Yes there was an accident between the Ferry and the Dhow as alleged in paragraph 3 of the plaint and that accident was caused by a the negligence of the Defendant's servant/agent as alleged in paragraph 4 of the Plaint.”

To this I would add that as a result of that accident the Dhow capsized and the Deceased was drowned. The Defendant is accordingly liable to the Plaintiff in damages for that negligence. PW.1 was not very certain about the age of the Deceased but in the end she remembered that the Deceased was sixteen years old at the time of his death. He was a fisherman and PW.2 who owned the Dhow said in his evidence that in a month, each of them would earn an average of Shs.3,000/-. PW.1, for her part stated that the Deceased would give her anything from Shs.200/- to Shs.300/- to Shs.1,00/- in a month. Mr. Pandya submits that since the Deceased was earning Shs.3,000/- in a month, I should take it that he would spend Shs.2,000/- on himself and give his mother Shs.1,000/-. I think that assumption can only be made where there is no evidence as to what amount a deceased person was giving to a dependant. Where the actual amount is known and proved then that is the loss suffered by the dependant or the estate of that deceased. In the circumstances of this case I do not think it would be right to pick on the lowest figure of Shs.200/- or the highest figure of Shs.1,000/- mentioned by the Plaintiff as the amount she used to get. She mentioned three figures and I think the correct thing to do is to use the average of those figure which in the circumstances come to $\text{Shs.200/-} + \text{300/-} + \text{1,000} \div 3 = \text{Shs.500/-}$ per month. Mr. Pandya asks me to use a multiplier of 20 years, taking into account the age of the Deceased. There is no contrary suggestion by counsel for the Defendant and I think that the 20 years suggested by Mr. Pandya is reasonable. Accordingly, for loss of dependency I award to the Plaintiff $\text{Shs.500/-} \times 12 \times 20 = \text{Shs.120,000/-}$.

On the head of loss of expectation of life, Mr. Pandya asks me to award Shs.75,000/- to the estate of the Deceased and once again, the Defendant has made no countersuggestion. The figure suggested by Mr. Pandya is reasonable, taking into account the age of the Deceased. I award to the estate of the Deceased the sum of Shs.75,000/- as damages for loss of expectation of life. Shs.5,100/- was claimed in the plaint as special damages representing fee for the accident abstract (Shs.100/-) and funeral expenses, (Shs.5,000/-). The Shs.100/- has been proved but as respects funeral expenses only Shs.3,700/- was proved. Accordingly I award to the Plaintiff Shs.3,800/- as special damages.

In the event, I now enter judgment for the Plaintiff against the Defendant as hereunder:-

1. General Damages for loss of dependency Shs.120,000.00
 2. General Damages for loss of expectation Of life Shs. 75,000.00
 3. Special damages Shs. 3,800.00
- TOTAL Shs.198,800.00

I award interest at court rates on the total sum from the date hereof. I also award to the Plaintiff the costs of the suit. These, then shall be my order in the matter.