REPUBLIC OF KENYA

Farrah v Kenya Ports Authority

Court of Appeal, at Mombasa ` March 16, 1992

Hancox CJ, Gachuhi, Cockar JJ A

Civil Appeal No. 138 of 1991

March 16, 1992, **Hancox CJ**, delivered the following Judgment.

The facts giving rise to this appeal are that the Appellant, in the course of his employment by the Respondent Port Authority was driving a tractor for the purpose of moving scrap metal, which was being stacked on the tractor by the operator of a fork lift who was another employee of the Ports Authority, but who has since retired.

The plaint contained the usual provision in these master and servant cases, namely that the Authority was obliged to provide a safe system of work, plant and appliances, so as to enable him to carry out his duties without undue risk of damage or injury to himself. The next following paragraph avers that at about 11 am on the 28th October, 1986 the Appellant was seriously injured when he slipped and fell whilst alighting from his tractor.

> "as per the instructions of the defendants. And/or its servants and/or agents".

These follow the usual, stereotyped, particulars of negligence which can be obtained from any book on pleadings and civil procedure. Although a defence was filed denying liability no defence witnesses were available on the date of hearing and the learned Judge embarked on proceedings in which the only oral testimony was that of the plaintiff/Appellant, supported by medical documentary evidence from Mr. Hemant Patel. This stated that the Appellant had suffered a fracture of the fifth metacarpal of the right hand. That he was off work for six weeks and suffered no permanent or residual incapacity.

The Judge was not impressed with the Appellant's case on liability, and dismissed the suit. Had the plaintiff succeeded he would have awarded Shs.30,000/- general, and Shs.1,000/- special, damages. The principal reason which affected the Judge in his decision was that his testimony was at variance with the plaint. The Judge continued.

> "He was not injured by the scrap metal nor was he injured by the tractor. The cause of his injury is his alighting in a hurry in fear that the scrap metal would fall on him."

Both Mr. Jiwaji, appearing for the Appellant, and Ms. Adego for the Respondent referred us to passages in the brief record of the Appellant's testimony. Mr. Jiwaji, in support of his submission that the Appellant jumped from the tractor to avoid being hurt by the falling metal, in the course of which he slipped and his right leg was trapped inside the tractor cited this passage:

> "I noticed that the heap was unstable and I decided to come out of the tractor to avoid the heaping (falling) on me. I then fell down……. My right arm was broken".

Ms. Adogo, on the other hand, submitted that it was clear from the judgment that the Judge regarded the primary cause of the accident as being the manner in which the Appellant alighted from the tractor, which showed that there was no negligence on the part of the Respondent. She said that the burden of displacing that finding lay on the Appellant in this appeal.

An analysis of the evidence shows that the Appellant believed that the heap of scrap metal loaded on to his tractor by the forklift driver had become unstable. He said:-

> "I slipped because I was alighting in a hurry because of fear that the crap metal would fall on me".

So that paragraph contains the key as to why he jumped: because he was in fear. Fear that the scrap metal would fall on him, which it would have done had he not jumped, because the Appellant continued:

> "The scrap metal fell into the tractor after I fell down".

Was that a reasonable apprehension? In my opinion it was. A man is not bound to wait until disaster befalls him and then attempt to extricate himself from it. He is entitled, and indeed bound, if he is not to be guilty of any contributory negligence, to take reasonable precautions to avoid injury to himself.

In Jones v Boyce [1816] 171 ER VOL. P 540 the situation was not dissimilar from the instant one. The plaintiff was a passenger in a horse drawn coach and saw that the coupling reen had broken, and that he horses were careering down the slop. Fearing the coach would overturn and he would be injured he jumped off with the consequences that his leg was broken. In leaving the case to the jury LORD ELLENBORUGH said:-

> "To enable the plaintiff, to sustain the action, it is not necessary that he should have been thrown off the coach; it is sufficient if he was placed by the conduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at certain peril; if that position was occasioned by the default of the defendant, the action may be supported. On the other hand if the plaintiff's act resulted from a rash apprehension of danger, which did not exist, and the injury which he sustained is to be attributed to rashness and imprudence, he is not entitled to recover. The question is, whether he was placed in such a situation as to render what he did a prudent precaution, for the purpose of selfpreservation".
>
> "Therefore it is for your consideration, whether the plaintiff's act was the measure of an unreasonably alarmed mind, or such as a reasonable and prudent mind would have adopted. If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences; if, therefore, you should be of opinion, that the reins were defective, did this circumstance create security for what h did, and did he use proper caution [496] and prudence in extricating himself from the apparently impending peril".

After the address the jury found for the plaintiff and awarded him **pounds** 300 damages. So in this case the test is did the plaintiff, (here the Appellant) act as a reasonable and prudent man would have done? In my judgment the belief that the Appellant entertained was reasonable. Its reasonableness is demonstrated by the fact that the scrap metal did fall into the tractor. In tortious liability it is enough for a plaintiff to establish that he act or omissions of the defendant, and in the case of vicarious liability of his servants or agents, created the situation which obliged him to take avoiding action. In the application of this principle the existence or otherwise of instruction to alight from the tractor is immaterial. Equally the fact that the plaintiff was in this case a driver and not a passenger, as in Jones v Boyce matters not for it was someone else's negligence which put him in the position of having to jump.

As a first appellate Court we are entitled to re-evaluate the evidence given in the High Court. In doing so it seems to me that when the heap started to sway and became unstable, the Appellant was perfectly justified in taking the avoiding action, that he did, namely by jumping off. Ms. Adogo said that if the overloading of the scrap metal on the tractor was the cause of the Appellant jumping off, then this was not

pleaded and was another instance of the variation between the pleadings and the evidence which so influenced the learned Judge.

There was a minor variation as to the time of the occurrence. The plaint says it was 11 am, whereas the Appellant says it was 5.30 pm. The difference may be due to the Swahili concept of time which could, on one version, indicate 11 a.m. At all events the Workmens Compensation Act report says it was 5 pm. In my view the balance of probabilities are tht the latter was the correct time. That point was not, however noticed by either counsel.

As regards the other variation what does this amount to? The material part of paragraph 6 states:-

> "…….. he was seriously injured when he slipped and fell whilst alighting from a tractor No. 42……".

The evidence is that as he was alighting from the tractor in a hurry he slopped and fell. I do not see any difference in substance therein. The account of the event is materially the same, namely that due to this, as I think reasonable, apprehension that this pile of scrap metal would fall on him, the Appellant alighted from the tractor as quickly as he could. The only difference is that in the next portion of paragraph 6 it is stated that he did this

> "as per the instructions of the Defendant its servant and/or agent'.

There the Appellant did not say he had been so instructed, but whether he was or not makes no difference in view of that which I have already stated on this aspect of tortious liability. Independently of any misdirection it was in my view reasonable for the Appellant to jump in the emergency which he reasonably apprehended. On the authority of Jones v Boyce (Supra) it matters not that the injury which he in fact suffered was different from or more severe than, that which he would have sustained had h e waited for the scrap metal to fall on him. The variance between the pleading and evidence is in this case circumstantial and immaterial. In the case of Kenya Meat Commission v Raden Civil Appeal No. 40 of 1989, this Court held that the real test in such matters was whether there was any unfairness as regards the defendants in knowing what case they had to meet. Thus tested the plaint in this case did not in any way seem to mislead or cause injustice or unfairness to the Respondent. We also held that it would be unfortunate in a case of personal injury if a plaintiff, who has otherwise proved his case, is deprived of his remedy due to the niceties of pleading. In Raden's case Kwach JA cited an earlier paragraph from the judgment of Forbes V – P in Plotti v Acacia Co. 1959 EA 248 at p 251 where he cited this passage:

> "…….. The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded'.

And continued

> " I am in complete agreement with what Forbes, V-P said in this passage. All I need to add is that the defendant in this case had more than fair, indeed abundant, notice of what the plaintiff's case was".

I entirely agree with those sentiments. In my view the Appellant proved his case more substantially in accordance with his pleading. I would allow the appeal on the issue of liability. I would substitute for the learned trial Judge's finding that the Defendant (then respondent) was liable in negligence to the plaintiff (the Appellant) and should be condemned in damages.

As regards quantum, I have considered the authorities put forward by Mr. Jiwaji and the reasoning of the learned Judge on this aspect. While I might myself have made a higher award I do not consider in his assessment that the judge committed any error of principle, tested by the criteria set out in Butt v Khan 1977 1 KAR 1. I would therefore dismiss the second ground of appeal and I would award the appellant

Shs.30,000/- general, and Shs.1,000/- special, damages. I would order the Respondent to pay the costs of this appeal and of the proceedings in the High Court on the High Court scale. As the other members of this Court agree it is so ordered.

Gachuhi JA. I have had the advantage of reading the judgment of Hancox CJ in draft form and entirely agree with it.

On the liability the employer will be liable for the carelessness of his employee in executing his duty which will place anybody in imminent danger. In this particular case, the appellant was not the one who loaded the tractor with scrap metal, his duty being tht of driving away the tractor after it had been loaded. It is the fork lift operator who stacked scrap metal negligently or carelessly without considering that the heap of scrap metal unless properly secured would place the plaintiff in an imminent danger. As he drove away, he noticed that the load would fall on him. He had no other course open to him but to take such a measure to avert the danger to himself. He cannot be expected to ignore the impending danger or be expected to wait for the metal to fall on him which may cause him untold injuries. To state that the plaintiff was negligent in the way he a lighted from the tractor was to demand too much of him by overlooking the fact that in a moment of passion one has to take quick decision of what to do to avoid the danger and there is no time to think or to look for where to step in alighting but rather to jump and avoid the danger though in doing so he may hurt himself. In so doing he was taking steps to avoid more danger. What about if he had remained in the tractor and the metal, which eventually fell in the tractor fell on him and caused more injuries? In my view the steps the plaintiff took to avoid danger cannot be correctly said that he was negligent or contributed to his injuries.

The plaintiff's evidence went unchallenged and did prove his case. On my part I would allow the appeal and award the damages assessed by the trial Judge. I agree with the order proposed by my Lord the Chief Justice.

Cockar JA. I have had the advantage of reading in draft the separate Judgments of my Lord The Chief Justice and of Gachuhi, JA with both of which I concur. I agree that this appeal be allowed. I also agree with the quantum of damages and costs as proposed by my Lord The Chief Justice.