



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller, Hancox JJA & Nyarangi Ag JA)

CIVIL APPEAL NO. 64 OF 1984

Between

KENYA CARGO HANDLING SERVICES LIMITED.....APPELLANT

AND

DAVID UGWWANG.....RESPONDENT

(Appeal from the High Court at Mombasa, Bhandari J)

JUDGMENT

David Ugwwang (the respondent) was a loading and booking clerk employed by the Kenya Cargo Handling Services Limited (the appellant) on February 23, 1978.

While he was checking the loading of some bags of fertilizer and coils of wire into railway wagons at the terminal for containers at Kilindini Port that day, the respondent was nearly run down by a forklift carrying bags of fertilizers. He skipped out of its way and he tripped on a nylon rope on the ground. He shattered his right knee cap and bruised both legs. He was taken to the Pandya Memorial Clinic in Mombasa where a surgeon removed his knee cap.

He went to an advocate, Mr Kassim, who filed a plaint on his behalf in the High Court in Mombasa on September 7, 1982 claiming damages, special and general, from the appellant for his “severe injuries and suffering and loss and damage.” So this litigation began in the High Court with the respondent as the plaintiff and the appellant as the defendant.

The bases of the claim are put this way in the plaint:-

- “3. At all material times the plaintiff was employed by the defendant as a loading booking clerk.
- 4) It was a term of the said contract of employment between the plaintiff and the defendant and/or it was the duty of the defendant to take all reasonable precautions for the safety of the plaintiff while he was engaged upon the said employment, not to expose the plaintiff to a risk to damage or injury of which they knew and ought to have known and to provide a safe and proper system of working and effective supervision of the same.”

Particulars of the respondent’s injuries and special damages are then given.

Next comes this paragraph:

“6. The said accident was caused by breach of the aforesaid implied term of the contract by the defendant, its servant or agents.”

and five sets of particulars are given of that breach of the implied term of the contract.

None is given for any breach of duty or failure to provide a safe and proper system of working or effective supervision of it.

The appellant’s written statement of defence filed on October 9, 1982 included, among other matters, an admission that the accident took place on February 23, 1978 but by waiting until September 7, 1982 (a period of over 4 1/2 years) to file his action, the respondent was out of time under section 4(2) of the Limitation of Actions Act (cap 22).

This sub-section provides that:-

“(2). An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”

Libel and slander are not relevant in this appeal.

This was taken as a preliminary objection by the appellant’s advocate, Mr Aboo, on September 22, 1983 before the High Court in Mombasa (Mr Justice Bhandari) to which Mr Kassim duly replied.

Reference was made to section 27(1) of the same Act and its terms are:-

“27(1) Section 4(2) does not afford a defence to an action founded on tort where:-

- (a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exist by virtue of a contract or of a written law or independently of a contract or written law) and**
- (b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and**
- (c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and**
- (d) the requirements of subsection(2) are fulfilled in relation to the cause of action.**

(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which:

- (a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and**
- (b) in either case, was a date not earlier than one year before the date on which the action was brought.**

(3) This section does not exclude or otherwise affect-

- (a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or**
- (b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.”**

Mr Aboo's further submission was that the respondent's cause of action was for damages for negligence or breach of duty (the duty existing by virtue of a contract) and the damages he claimed for the negligence and or breach of duty included damages in respect of his personal injuries but the [High] court had not, before or after the commencement of the action, granted leave for the purposes of section 27(1) of the Act and the respondent knew all the material facts relating to his cause of action before the three year-period of the cause of action was exhausted and so section 4(2) did not afford the appellant a defence to the respondent's action whether it was founded on tort or on contract.

Mr Kassim's reply was that section 27(1) was limited to actions founded on tort. An action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. Section 4(1)(a) of the Act. A plaintiff could elect to claim damages either in contract or in tort and he had pleaded both, and on behalf of the (plaintiff) respondent elected to pursue the claim in contract which was not brought out of time. He conceded that the action in tort was statute barred.

Mr Justice Bhandari delivered his ruling on October 13, 1983. He set out a portion of section 27 of the Act and continues thus:

“Mr Aboo argued that what the above provisions of section 27 mean is that a plaintiff basing his claim on contract and claiming damages in respect of personal injuries must file his suit within the period of limitation as laid down under section 4(2) of the Act, that is three years. With respect this is a completely wrong reading of the provisions of section 27(1) quoted above. What these provisions, in my opinion, mean is that although a defendant is entitled to invoke the provisions of section 4(2) for actions founded on tort his said defence can be defeated if the plaintiff brings himself within the provisions of section 27 and obtains the court's leave as laid down therein. This section in no way affects or limits the period of limitation provided for actions founded on contract – that is six years.

.....

The court agrees as already stated earlier in this ruling this suit is based both on contract and on tort. The plaintiff can pursue his remedies on contract of employment. The period of limitation in respect of cause of action founded on contract had not expired when this suit was filed. The plea of limitation fails. The suit should be set down for hearing.”

Mr Aboo's client was aggrieved by this so Mr Aboo filed its memorandum of appeal on May 23, 1984 with these four grounds:

- (a) That the learned judge erred in law in holding that the plaintiff's right of action had not expired before the filing of the suit by the plaintiff.**
- (b) That the learned judge erred in law and in fact in holding that the plaintiff could elect to base his claim on contract.**
- (c) The learned judge erred in law in holding that section 27(1)(a) and (b) of the Limitation of Actions Act (cap 22) Laws of Kenya, in no way affected the period of limitation provided for actions founded on contract.**
- (d) That the learned judge erred in law in holding that the suit was not time barred by section 4(2) of the Limitation of Actions Act (cap 22) Laws of Kenya.**

The arguments of Mr Aboo and Mr Kassim for the appellant and for the respondent in this court were a little more elaborate, I believe, than they were before Mr Justice Bhandari but by and large traversed the same terrain.

Mr Kassim revealed that the precedent for part of the plaintiff was culled from the report of *Mathews v Kuwait Bechtel Corporation* [1959] 2 All ER 345 (CA). It is as well that he did so because Sellers LJ

covered the ground so fully in the issue of whether a workman may sue his employer in such circumstances in contract or tort that Willmer LJ found it unnecessary to say anything more than that he wholly agreed with him.

Sellers LJ said there were passages in *Salmond on Torts* (12th edition), p 31, *Munkman on Damages* (pp 60 and 61) which declared that the relationship of master and servant to is based on contract but the duty to take care not to expose the servant to danger and risk in the course of his employment is imposed by the law of torts and is not to be thought of as an implied term in the contract. There was also a passage in *Bullen & Leake's Precedents of Pleadings* (3rd edition) pp 362, 363 and the authority of *Riley v Baxendale* (1861), 6 H & N 445 in which the Court (Pollock CB and Martin and Wilde BB) was of the same opinion and so held. Sellers LJ sweepingly consigned all that to the limbo of lost causes because Lord Cairns LC in *Wilson v Merry* [1868] LR 1 SC & Div 326 and Lord Wright in *Wilson & Clyde Coal Co Ltd v English* [1937] 3 All ER 628, 642 were of the opposite view in their speeches in the House of Lords' cases. The obligations or duties arise from the common law, they said, and the workman may elect to sue his employer on contract or in tort.

Viscount Simonds had two years earlier said that a single act of negligence may give rise to a claim either in tort or for breach of a term express or implied in a contract and (in England) it was trite law. *Lister v Romford Ice & Cold Storage Co Ltd*, [1957] 1 All ER 125, 131 (HL).

We were told there was no reported authority on this in this part of Africa and I cannot find one. It is, in my respectful view, good law and should be part of the law in Kenya. Mr Aboo agreed that the respondent could elect, and may be that is why he did not address the court on the second ground of the memorandum. Anyway, in my judgment, it fails.

The others, in one way or another, come to this: does section 27 of the Limitation of Actions Act affect actions in contract for damages for personal injuries?

Again, this conundrum would appear not to have been canvassed here before.

Mr Aboo steered his way through section 2(1) and section 22 of the English Limitation Act 1939 and then section 2A of the English Limitation Act 1975 all of which Mr Kassim criticized as being unnecessary because the Kenya Act is different.

The limitation period for actions founded on simple contract or on tort in England is six years. Section 2(1) Limitation Act 1939. It was reduced to three years for both actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person. Section 2 Law Reform (Limitation of Actions etc) Act, 1954.

This has a familiar ring to it because it is also part of section 27 of the Kenya Limitation of Actions Act but with an important difference to which I shall return later.

A reduction to two years for the period of limitation in all actions for damages for personal injuries was recommended in England by Lord Tucker's Committee in 1949 but the English Parliament made it three.

And Diplock LJ, in *Letang v Cooper* [1964] 2 All ER 929 (CA) explained its effect in these words (at p 936 F to I):

“... The Act is a Limitation Act; it relates only to procedure. It does not divest any person of rights recognized by law; it limits the period within which a person can obtain a remedy from the courts for infringement of them. The mischief against which all limitation Acts are directed is delay in commencing legal proceedings; for delay may lead to injustice, particularly where the ascertainment of the relevant facts depend on oral testimony. This mischief, the only mischief against which the section is directed, is the same in all actions in which damages are claimed in

respect of personal injuries.

It is independent of any category into which the cause of action which gives rise to such a claim falls. I see no reason for approaching the construction of an enactment of this character with any other presumption than that Parliament used the words which it selected in their ordinary meaning and meant what it chose to say.”

Remaining still in England, for the moment, section 2(2) of the Law Reform (Limitation of Actions, etc) Act, 1954 substituted a period of three years for six years for someone to whom a right of action for damages for personal injuries accrued was under a disability.

The present English law of limitation for actions for damages for personal injuries founded on contract or on tort is specially set out in section 2A-D of the Limitation Act, 1939, and was inserted by the Limitation Act, 1975. It is three years from the date on which the cause of action accrued, or the date (if later) of the plaintiff’s “knowledge” and “knowledge” is defined in detail. The court has a discretionary power to override the time limit. Section 2D.

All this has to almost the same extent been repeated in the Limitation of Actions Act here in Kenya but with these differences.

First, an action founded on any contract may still be brought in Kenya before the end of six years from the date on which the cause of action accrued. Section 4(1)(*ibid*). Secondly, the limitation period for an action founded on tort here is not the same, as it is in England, but different and only three years. Thirdly, section 27(1) of the Kenya Act is not in the same terms as any in the English one.

The Kenya one begins:

“27(1) Section 4(2) does not afford a defence to an action founded on tort where ..”

I have underlined five vital words in that. Now it may be odd or inconvenient that the period of limitation in Kenya for actions for damages for personal injuries founded on contract is different from that for actions founded on tort. It might be better (for the employer, at any rate) if it were the same. These actions revolve round oral testimony and a shorter period may make it easier to discover the true facts.

But it is the words of Parliament, as they stand, which I must interpret. Respectfully echoing Diplock LJ in *Letang v Cooper (ibid)* I presume ‘that parliament used the words which it selected in their ordinary meaning and meant what it chose to say’. Mr Kassim, in my view, was right when he said the Kenya section 27 did not intend to or pretend to affect actions for damages for personal injuries founded on contract.

Fourthly, and finally, there are the pertinent provisions of section 27(3)(b) to which Hancox JA draws attention in his judgment and which persuade me the draftsman was not trying to rescue *Riley v Baxendale (ibid)* from limbo.

The submissions of Mr Aboo and of Mr Kassim were ably put but in the end those of Mr Aboo do not prevail in the circumstances of this appeal and, in my judgment, the ruling of Mr Justice Bhandari was correct. So I would propose that this appeal now be dismissed with costs. Hancox JA and Nyarangi Ag JA agree so those are now the orders of the court.

Hancox JA. I have had the advantage of reading the judgment prepared by Kneller JA in draft and I agree with it.

Mr Aboo, on behalf of the appellant, who unsuccessfully took the point as to limitation before Bhandari J, in the High Court, has presented his case before us with great skill. He demonstrated how the statutory law has developed as to limitation in England, in an attempt to show that section 27(1) of the Kenya Limitation of Actions Act, cap 22, operates so as to cut down the period within which a suit claiming

damages for personal injuries must be filed to three years, even though the action is pleaded by way of breach of a contractual duty to provide precautions for the plaintiff's safety, rather than as a breach of a general duty of care which exists independently of contract or statute.

It is not disputed, and it was conceded by Mr Aboo, that a claim for damages for personal injuries arising in the course of employment may be the subject of an action either for a breach of an implied term in the contract, or in tort simpliciter, at the election of the claimant – per Sellers LJ in *Matthews v Kuwait Betchtel Corporation* [1959] 2 All ER 345 at p 349. See also *Esso Petroleum Co Ltd v Mardon* [1976] 2 All ER 5, at p 15.

Mr Aboo has put his argument in this way. He pointed out that initially in England, under the Limitation of Actions Act, 1939, the period of limitation in respect of actions founded on simple contract or on tort was the same, namely six years. Then in 1954, by the Law Reform (Limitation of Actions) Act, the legislature cut down the period to three years where the damages were claimed for personal injury, *inter alia*, for breach of duty, whether the duty allegedly breached existed by virtue of a contract, or under a statutory provision, or independently of any contract or statutory provision, that is to say the general duty of care owed by persons generally to others, the breach of which gives rise to a cause of action in tort. This provision was in effect repeated in the Limitation Act, 1975, though the scheme of that Act is different from the 1954 Act.

The position in England, therefore, Mr Aboo submitted, is that the period of limitation is the same for personal injuries action whether the claim sounded in contract or tort, as is shown by the extract from the text of *Halsbury's Laws of England*, 4th edition Volume 28 at paragraph 691, headed "The Limits in Personal Injury Actions." Thus all personal injury actions in England are, for the purposes of limitation, classified together.

In the same way, Mr Aboo argued, whenever the two ingredients of a breach of duty and of personal injuries are present, as they are in paragraphs (a) and (b) of sub-section (1) of section 27 of the Kenya Act, then the period of limitation is reduced to three years, whether, as is stated in parenthesis in paragraph (a), the duty breached exists by virtue of a contract, or of a written law, or independently of those two, that is to say, to put it shortly in tort. Thus we should import these two ingredients into and relate them back to sub-section (1) of section 4 of the Act, so that the limitation period is the same whether the action is founded in contract or in tort. To do otherwise, Mr Aboo said, would render section 27 obsolete, because if the interpretation given to it by Bhandari J, in the instant case, is upheld, it would mean that everybody would sue in contract rather than in tort so that the point of enacting section 27 would be lost. It would encourage delays, such as has occurred in this case, of some four and half years since the cause of action arose, before an action is filed.

Moreover, he continued, section 27, assuming it does apply to contracts, would not apply to every breach of a contractual duty, for example it would not apply to a breach of contract for the sale of goods or of land. The court should therefore lean toward giving the section a purposive effect, because to do so would still permit the six years' period of limitation under section 4(1) to operate in actions for breach of contract which do not involve personal injuries.

Letang v Cooper [1964] 2 All ER 929, was a case where two causes of action were said to have arisen from the same act giving rise to a conflict in the periods of limitation. There the wrongful act consisted in driving a motor car over the legs of the plaintiff who was sunbathing on the grass where cars were parked. The two causes of action were both in tort, namely for negligence and trespass to the person. The periods of limitation were in the former, three, and in the latter six, years. Mr Aboo relied on various dicta by Lord Denning, MR pointing to the absurdity of having two periods of limitation existing side by side in respect of the same factual situation. But since all the members of the Court of Appeal were unanimous that as the injury was unintentional and that the only cause of action that existed was therefore in negligence, I do not find this case of great assistance in deciding a matter where two forms of action can co-exist, and I agree with Mr Kassim, who argued this case on behalf of the respondent, that *Letang v Cooper* is distinguishable on its facts from the present situation.

Mr Kassim took up a little time in citing authorities to the effect that two alternative causes of action may arise out of the same wrongful act. For instance in *Lister v Romford Ice & Cold Storage Co Ltd* [1957] 1 All ER 12 where the appellant negligently backed his lorry so as to run over his father, a co-employee, and the employer sued him for the damages they had had to pay to the father, Lord Simonds said, at p 131:-

“It is trite law that a single act of negligence may give rise to a claim either in tort or for breach of a term express or implied in a contract.”

Since, however, this aspect of the case was conceded by Mr Aboo the reference to these decisions did not take us very much further.

Mr Kassim also submitted that whereas in England the limitation period is six years both in contract and in tort, in Kenya that is not so. The period is six years for contract and three for tort. However, section 27 permits an extension of the period in tortious personal injury cases, provided certain conditions are met, one of which is that the leave of the Court has been obtained (a matter not canvassed in either of the submissions before us), but nowhere does that section lay down the period of limitation. The difficulty I have had with Mr Aboo’s argument is that the opening words of section 27(1) say expressly:-

“Section 4(2) “(which itself only relates to actions founded on tort)” does not afford a defence to an action founded on tort where...”

and the respective paragraphs are then set out. Mr Aboo eventually conceded that for his argument to succeed, the words “founded on contract or on tort” would have to be supplied into the subsection, plus, of course, a reference to section 4(1). However, he reiterated that unless the section was read in that way there would be no purpose to it. This does not, in my opinion, justify the introduction of words into the statutory language to give meaning and effect to it. In *King Emperor v Benoari Lal Sarma and Others* [1945] 1 All ER 210, Lord Simon LC said:

“Again and again, this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used.”

Another difficulty is that the form of language in the two amending statutes of limitation passed in England in 1954 and 1975 is different from the Kenya Act. In the Law Reform (Limitation of Actions) Act, 1954, the words indicating that the proviso applies whether the duty (the breach of which causes personal injury) exists by virtue of a contract, or of a statutory provision, or independently thereof, appear parenthetically in the proviso, and therefore embrace all actions for personal injuries, however they arise. Although the scheme of the Limitation Act, 1975, is different, the effect is similar to the 1954 Act, for section 2A is made to supplant section 2 in the 1939 Act in actions for personal injuries, again however they arise.

In the Kenya Act, however, the duty referred to in paragraph (a) can only be tied to an action founded on tort. The words there in parenthesis cannot be related back, as it were, and imported into the opening, and I would say controlling, part of the sub-section without doing violence to the existing language. It may be that that was what the Legislature meant, namely that in all personal injury cases the period should be the same, but that is not what was enacted. If this were not enough there is also the third subsection of section 27 to contend with. That provision expressly says that the section does not exclude or otherwise affect any defence which, in an action to which it applies, may be available by virtue of any written law other than section 4(2) of the Limitation of Actions Act. In my judgment there is a clear saving there for the defence available under section 4(1), that is to say the subsection relating to actions founded on contract.

I therefore agree with Mr Kassim that nowhere does section 27 itself, in contrast to the two English amending statutes, lay down any period of limitation. All it does is to say that in certain circumstances the period of limitation provided for in actions in tort shall not apply. If it were to be extended to actions founded on contract the strange result would follow that the six years period also could be extended as set

out in section 27. That cannot be right, and cannot in my opinion have been intended.

For these reasons I would hold, with respect, that Bhandari J, reached the correct conclusion as regards the effect to section 27(1) of the Limitation of Actions Act, cap 22. I would therefore dismiss the appeal from his decision and I would award the costs of this appeal to the respondent.

Nyarangi JA. The sole consideration here as it emerges from the judgment of Kneller JA and the judgment of Hancox JA both of which I have had the advantage of reading in draft is whether section 27(1)(a) and (b) of the Limitation of Actions Act (cap 22) (the Act) affects the period of limitation for actions founded on contract. Under section 4(1) of the Act, actions founded on contract may not be brought after the end of 6 years from the date on which the action accrued and under section 4(2) an action founded on tort may not be brought after the end of 3 years from the date when the cause of action accrued. Section 27(1)(a) and (b) provides specifically for actions founded on tort. My reading of the section does not permit for doubt let alone elaborate arguments supported by court decisions on a statute whose provision is different in a material particular. Parliament “used the words which it selected in their ordinary meaning and meant what it chose to say” *Letang v Cooper* [1964] 2 All ER 929 at page 936.

It must have been meant that section 27(1)(a) and (b) would be concerned with actions founded on tort to the exclusion of actions founded on contract. The trial judge was, with respect, right in describing the contrary view urged before him as “a completely wrong reading” of section 27(1). I agree that this appeal be dismissed with costs.

Dated and delivered at Mombasa this 6th day of March, 1985.

A.A KNELLER

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JUDGE OF APPEAL

A.R.W HANCOX

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JUDGE OF APPEAL

J.O NYARANGI

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR