REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OMOLO, O'KUBASU & DEVERELL, JJ.A.

CIVIL APPEAL 40 OF 2002

BETWEEN

ELECTORAL COMMISSION OF KENYA ……………...……..……. APPELLANT

AND

NUNOW ABDI ABDULLAHI ………..…………………………….RESPONDENT

(Appeal from the judgment/decree of the High Court of Kenya at Nyeri (Mr. Justice Juma) dated 25 th January, 2001 in H.C.C.C. NO. 331 OF 1998)

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JUDGMENT OF THE COURT

The respondent herein **Nunow Abdi Abdullahi**; suing as the administrator and personal representative of the estate of **Shafe Nunow Abd**i (deceased), filed a suit against the appellant, Electoral Commission of Kenya seeking judgment, by way of special damages in the sum of Shs. 20,050/=, general damages, costs of the suit plus interest. The pertinent paragraphs of the plaint which was filed in the superior court on 10th November, 1998 state as follows:-

"1. The plaintiff is an adult male of sound mind residing and working for gain in Habaswen in Garissa District of the Republic of Kenya. He brings this suit on his own behalf and on behalf of the dependants of the deceased under the Law Reform and Fatal Accidents Acts Caps 26 & 32 of the Laws of Kenya respectively. His address of service for purposes of this suit shall be Care of Sichangi & Company Advocates, Konahauthi Suite H.2, Kimathi Way/Kanisa Road P.O. Box 983, NYERI.

2. The defendant is a body established under the provisions of the constitution of the Republic of Kenya to organise and oversee the conduct of Presidential, Parliamentary and Civic Elections in the foregoing Republic. Service of Summons shall be effected through the Plaintiff Advocate's office.

3. At all material times during the general elections held in the month of December 1997 the

deceased was an employee of the Defendant as a Deputy Presiding Officer for Hara Polling Station in Ijara Constituency of Garissa District where his duties included assisting the presiding officer to oversee the General elections for that area and upon completion of the same to ferry and/or accompany the ballot boxes to the counting hall at Hola Town.

4. At all material times the roads leading to the aforesaid polling station were impassable owing to heavy rains and the defendant was therefore under a duty and resolved to provide aerial transport to the deceased to and from his station of work aforesaid.

5. The defendant through its servants and or agents only provided air transport to the deceased to his station of work but failed and/or neglected to provide return, air transport to him notwithstanding that the polling station and the counting hall were inaccessible otherwise than by air with the result that the deceased was stranded at the polling station aforesaid.

6. By reason of the foregoing the deceased in an attempt to access the counting hall to further perform his duties as required by the defendant and as he understood them to be, he was on 2nd January, 1998 forced to hire a boat in which to cross the River Tana and travel to the counting hall but he drowned in the course of his employment.

7. The plaintiff avers that the defendant was negligent and/or that it was in breach of its common law and/or statutory duties of care to the deceased as its employee which resulted in his demise."

The plaintiff then set out what was described as ***"particulars of the negligence of the defendant and/or breach of its statutory and/or common law duties to the said deceased" as follows:-***

"(a) Failing to provide the deceased with air or alternative means of transport from the polling station.

(b) Failing to have any or adequate regard for the safety of the deceased as its employee.

(c) Failing to have any regard for the well being of the deceased with safe means of transport from his place of work in the circumstances."

It was pleaded in the plaint that the deceased was survived by his parents, five sisters and six brothers all of whom dependent on the deceased

A defence was filed on behalf of the appellant in which it was stated inter alia:-

"4. The defendant maintains that the Plaint does not disclose any or any reasonable cause of action and should be struck off with costs to the defendant.

5. Further, and without prejudice to the foregoing pleadings, the defendant maintains that the plaintiff's suit is frivolous and/or is an abuse of the process of court and hence it should be struck off or dismissed with costs to the defendant.

6. Further, and without prejudice to the foregoing pleadings, the defendant maintains that the deceased brought to himself his own misfortune through his own misadventure in circumstances in which the defendant had not the remotest relation or connection and hence the plaintiff is not entitled to maintain his claim herein against the defendant and in particulars the contents of paragraphs 7, 8 and 9 of the plaint are denied and the same should be struck off.

7. Further, and in the alternative, with free knowledge of the risk of injury or damage to himself by the act or conduct of the defendant referred to in the paragraphs 4, 5 and 6 of the plaint, the deceased voluntarily consented to accept such risk and to waive any claim in respect of any injury or damage that may be occasioned to him by reason of such acts or conduct of the

defendant, and in the premises the plaintiff is not entitled to maintain his claim herein against the defendant.

8. Further, and in further alternative the said accident and matters complained of arose from inevitable accident, and not withstanding the exercise of all reasonable care and skill or the post of defendant and/or the boat's rower, the accident could not be avoided."

The hearing of the suit commenced in the superior court before Juma J. on 17th July, 2000 when the respondent Nunow Abdi Abdullahi (PW1) (as the plaintiff) gave evidence. It was his evidence that he was the father of the deceased Shafe Nunow Abdi and that he had obtained the Grant of Letters of Administration, which enabled him to file the suit as a result of the deceased's death. Abdullahi produced several documents and went on to testify that the deceased was 25 years old when he died and that he (deceased) used to educate his younger brothers and sisters.

Hassan Amey Ali (PW2) testified that he and the deceased were Deputy Presiding Officers for Ijara Constituency but in different polling stations. He stated that they were supposed to be airlifted from Musalane town to Garissa as the roads were impassable due to El Nino rains. As they were not airlifted, they decided to walk from Musalane to Hola a distance of 40 kilometres. They reached the banks of River Tana at around 5.00 pm on 2nd January, 1998 where they found canoes to take them across the river. The canoe, which the deceased used, capsized and the deceased died as a result. Ahmed Abdi Salat (PW3) was Deputy Returning Officer in Ijara Constituency and he too travelled with the deceased and witnessed the tragedy in which the deceased lost his life. The plaintiff closed his case after the evidence of Salat. The appellant decided to call no witness.

The advocates for both sides filed written submissions and the learned Judge reserved his judgment to a future date, which was eventually delivered on 25th January, 2001.

The learned Judge considered the evidence and the submission made by learned counsel and came to the conclusion that the appellant as the employer of the deceasedAbdi was liable. It was the learned Judge's finding that the appellant was responsible for the death of the deceased. In the course of his judgment the learned Judge stated:-

"Whereas the Agreement of Service was silent on the issue of transport, the circumstances of the case were uch that the same could be safely implied. At the time the defendant hired the deceased at Garissa town to be a Deputy Presiding Officer in Ijara Constituency, Musalane had been cut off from Garissa by floods. The defendant, therefore, knew that he had to either airlift the deceased and his colleagues toMusalane or provide boats for them. He airlifted them in helicoptersfree of charge. After the election the defendant failed to provide the necessary transport. I hold that the defendant was in breach of his implied contractual obligation. Counsel for the defendanthas argued that the deceased should have waited for transport.

The plaintiff's evidence was that transport had been refused.It was not a case of waiting for transport. The deceased and others had been abandoned. They had served their purpose."

Having so found the learned Judge proceeded to calculate general damages by taking into account the gross salary of the deceased, his age at death and applied the multiplier of 18 years. He accordingly entered judgment for the respondent by concluding his judgment thus:-

"I therefore enter judgment for the plaintiff against the defendant in the sum of Kshs. 667,438/=. The plaintiff shall also have the costs of this suit and interest."

Being aggrieved by that judgment of the superior court the appellant filed this appeal citing seventeen (17) grounds of appeal which were however reduced to five when the matter came up for hearing on 3rd November, 2005.

This being a first appeal we are alive to our duty on a first appeal as stated by Sir Clement De Lestang VP

in ***Selle v Associated Motor Boat Company*** [1968] EA 123 at page 126;

"….An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such appeal are well settled. Briefly put,they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always ear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

The above has been cited with approval by this Court in its later decisions like in ***Jivanji v. Sanyo Electrical Company Ltd*** [2003] KLR 425 at page 430 – 31.

Luckily, in the present appeal the facts are not in any serious dispute. The deceased was engaged by the appellant as an Election Official during the General Elections, of 1997. The deceased was engaged as a Deputy Presiding Officer according to a letter dated 21st December, 1997 and produced as Exhibit 3 which showed that the deceased was appointed as a Deputy Presiding Officer on casual terms of service for a period of 10 days with effect from 21st December to 30th December, 1997. The deceased signed this agreement of service, and was assigned the duties of a Deputy Presiding Officer within Ijara Constituency. After the election exercise the deceased and other officials found themselves in some transport problems. While the deceased and his colleagues tried to cross the river the canoe they had hired capsized and as result the deceased met his death.

Mr. Adere the learned counsel for the appellant submitted that when the deceased and his other colleagues reached the bank of the river they decided, on their own, to hire a canoe and in that case the appellant had no relationship with the canoe or that mode of transport. It was Mr. Adere's submission that the authorities cited to the learned Judge did not apply to the situation in this case. He pointed out that the deceased had engaged an independent contractor for which the appellant was not responsible. In Mr. Adere's view, there was no connection between the independent contractor and the appellant. It was further submitted that the appellant was no longer the employer of the deceased when the incident took place and that the appellant had not placed the deceased in a situation where it could be said there was no alternative.

Mr. Mondi, the learned counsel for the respondent, submitted that there was implied duty on the appellant to provide transport to the deceased and other Election officials. He argued that although the agreement was silent on the issue of transport the only inference was that the Election officials would be provided with transport back to their homes. It was Mr. Mondi's further submission that the deceased's death was a natural consequence of the appellant's failure to provide transport. He argued that the deceased felt abandoned and that is why he took alternative way of reaching home. He relied on ***Ogol v Muriithi*** [1985] KLR 359.

As already stated elsewhere in this judgment the facts of this case are not in dispute. The deceased had been engaged by the appellant for a period of ten days with effect from 21st December, 1997 to 30th December, 1997. The deceased was appointed as a Deputy Presiding Officer within Ijara Constituency. The deceased performed his duties as a Deputy Presiding Officer until the exercise of election was completed. The election materials were then airlifted for counting but the deceased and his colleagues were left behind. They felt abandoned by the appellant and decided to walk 40 kilometres to Hola when they got into canoes in order to cross Tana River. It was in the process of crossing the river that the canoe in which the deceased travelled capsized resulting into his death. The issue is whether the appellant was responsible for what happened to the deceased. In

our view the relevant authority in a situation of this nature is this Court's decision in ***Mohammed Farrah v Kenya P***orts ***Authority*** [1988-92] 2 KAR 283 in which the Court adopted the decision in ***Jones v Boyce*** [1816] 171 ER 54 in which Lord Ellenborough had this to say:-

"To enable the plaintiff to sustain the action, it is 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 in 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 self-preservation………..If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."

The above was cited to the learned Judge and relying on the said authority the learned Judge made a finding that the appellant was responsible for what happened to the deceased. The issue before us now is whether the deceased (or respondent) was entitled to recover damages from the appellant. The respondent's claim was based on the ground that the appellant had abandoned the deceased who was forced to take a perilous alternative way of going back home. But can it be said that the deceased was abandoned? It would appear that after the election exercise the election officials were to remain behind while the election materials and other officials were airlifted to Hola. At that moment in time we cannot say that the deceased was placed in such a situation as to oblige him to adopt the alternative of a dangerous route. We must not forget the fact that the deceased was unlucky in the sense that he was the only one who died when the election officials used the canoes in crossing the river. It must also be remembered that crossing the river in a canoe was the general mode of crossing the river. It was not an inherently perilous way of crossing the river. This was indeed unfortunate accident in which the deceased lost his life.

As regards the appellant's liability we must consider the relationship between the deceased and the appellant. The deceased had been engaged for 10 days by the appellant. The contract was to run form 21st to 30th December, 1997. Hence, strictly speaking, by the time the accident occurred on 2nd January, 1998 the deceased was no longer an employee of the appellant. But even if we are to hold that the deceased was still pursuing his duties to the counting hall his act of hiring a canoe was entirely his own decision for which the appellant could not be held responsible. In Weld-Blundell vs Stephens [1920] AC 96 it was held that: -

"No duty can be imposed on one person in respect of loss or injury occasioned to another by a third party,even if that loss or injury is already foreseeable and preventable."

In the instant case it cannot be said that loss or injury was foreseeable when the deceased decided to cross the river by using a canoe. But even if it had been foreseeable the boat-owner was an independent contractor for whose acts the appellant could not be held vicariously liable. This was an isolated incident in which one boat capsized while the other boats crossed the river safely. We may perhaps add that according to the Agreement of Service there was no mention of transport so that it cannot be said that the appellant was responsible for the transport of the deceased. When the deceased negotiated transport with the owners of the canoes/boats that was a matter that the appellant could not be held responsible. It was the submission of Mr. Mondi that although the agreement was silent on the issue of transport we should draw an inference that the deceased was to be provided with transport. With due respect we do not agree. What is not in the contract cannot be implied. Even the plaint made no reference to the existence of any implied term so that it was not open to the plaintiff to assert such a term. Even if such an implied term had been pleaded we do not think the implied term would have been held to exist.

We think, we have said enough in this matter. In view of what we have already stated we have come to the conclusion that the appellant could not be held responsible for what befell the deceased in the unfortunate accident of 2nd January, 1998. Accordingly, we allow this appeal set aside the judgment of the superior court and order that the respondent's suit in the High Court be dismissed with costs. We also award to the appellant the costs of the appeal. It is so ordered.

Dated and delivered at Nairobi this 16th day of December, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

E. O. O'KUBASU

..…………………….

JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR