JOHN MUGALA AND KENNETH KABENGA v THE ATTORNEY-GENERAL
(1988 - 1989) Z.R. 171 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND CHIRWA, J.J.S.
13TH SEPTEMBER AND 10TH NOVEMBER ,1989
(S.C.Z. JUDGMENT NO. 9 OF 1989)

Flynote

Civil procedure - Prima facie case - Right of Judge to rule on own motion.

Headnote

The plaintiff's truck broke down in the vicinity of a bridge that was being guarded by armed police officers in uniform. The plaintiffs went with some of the officers to a nearby village to drink beer. Later another armed police officer joined the party and engaged in drinking beer. Some time later the plaintiffs left the group and the officer who had joined the group later followed them. For no apparent reason the officer shot the plaintiffs, injuring them, and then shot himself dead.

The plaintiffs took out a writ alleging assault and battery or negligence by the State. At the end of the plaintiffs case the judge invited submissions from both parties. Counsel indicated that at that stage they would make no submissions. The judge then made a ruling whereby he found that the plaintiffs had failed to establish a prima facie case against the state. The plaintiff appealed.

Held:
It is most undesirable for a trial judge to volunteer a ruling especially without affording the parties advance notice of what the judge has in mind and giving them the opportunity to address him. The better practice is to make a ruling only when the defence make a submission and even then the judge should be slow to take a decision on the evidence before he has heard it all.

Cases referred to:
(1) Young v Rank and others [1950] 2 K.B. 510
(2) Laurie v Raglan Building Company [1942] 1 K.B. 152
(3) Acropolis Bakery v ZCCM Ltd (1985) Z.R. 232
(4) Attorney-General v Landless (1970) Z.R. 1

Legislation referred to:
1. High Court Rules, Cap. 50
2. Supreme Court Practice of England (White Book)

For the appellants: I.C.T. Chali, of Mwanawasa and Co
For the respondent: R. Okafor, Senior State Advocate.

Judgment

NGULUBE, D.C.J.: delivered the judgment of the court.

The problem posed by this appeal is whether or not the learned trial judge was right, of his own motion, to stop the case and to rule that the plaintiffs had not made out their case so as to require the defendant to enter upon his defence. We have been asked to find that the learned trial judge made a mistake and that we should order the trial to proceed, or a new trial.

The plaintiffs took out a writ claiming damages for assault and battery,

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alternatively, for negligence. They had come across a party of armed police officers in uniform guarding a bridge. The plaintiffs' truck broke down and in the course of the events they went with some of the police officers to some village in the neighbourhood for beer drinking. The offender joined them later and they all drank the beer which the plaintiffs were buying. The offender was also armed and in uniform. After a while the plaintiffs left and sat somewhere to contemplate what they would do next. Out of the blue, the officer who joined in the beer drinking later, followed the plaintiffs and for no apparent reason shot at them injuring them and then shot himself dead. The State was sued on the basis of vicarious liability and the defence was that the officer was then on a frolic of his own. After the plaintiffs had given their evidence and closed their case, the learned trial judge invited submissions but both counsel, including the defendant's advocate, indicated they would not make any at that stage. The learned trial judge nevertheless proceeded to make a ruling in which he found that the plaintiffs had failed to establish a *prima facie* case; that the offender was on a drinking spree with the plaintiffs and not on duty; that he acted outside the scope of his duties and the defendant could not be vicariously liable; and that the plaintiffs could only maintain an action against the estate of the offender.

With regard to the no case ruling, we respectfully concur with the observation in order 35/7/2 R.S.C. (1988 White Book) that, in a case such as this, it is generally highly inconvenient to the trial judge for defending counsel to make a submission of no case to answer and the judge should generally refuse to rule on such a submission unless the defendant had made it clear that he needs to call no evidence or is put to his election. Although it is inconvenient, it is obviously competent for a trial judge to make such a ruling and the matter is solely within his judicial discretion: see *Young v Rank and Others* (1). One consideration which a trial judge could have in mind would be the expense and inconvenience to the parties should his ruling be found to have been wrong on an appeal. We agree with Devlin J, when he made an observation to this effect in the *Young case*, and it goes without saying also that the appellate court is free to examine whether there was in truth no *prima facie* case and to come to a different conclusion: see *Laurie v Raglan Building Company* (2). We have not, of course, lost sight of the fact that the ruling here was volunteered by the court and did not follow upon any submission by the defence; but the point is whether it was competent for the learned trial judge, even of his own motion, to make such a ruling. We do not doubt that it was competent but hasten to point out that it is most undesirable for a trial judge to volunteer such a ruling, especially without even affording the parties advance notice of what the judge has in mind and giving them the opportunity to address him. We suggest that it is better to adhere to the practice of making a ruling only when the defence makes a submission and even then the judge should be slow to make a decision on the evidence before he has heard it all. There may, of course, be cases where it is very clear from any point of view that the plaintiff's case must fail of its own inanition, as for example, in defamation cases failure to prove express malice or special damage when the

defamation is actionable only on such proof.

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The plaintiffs in this case were non-suited by the finding of the learned trial judge. We use the word "non-suit" not in its correct old sense now replaced by the procedure of discontinuance but in its loose sense to denote the act of the learned trial judge in stopping the case and entering judgment for the defendant without calling upon him to prove his defence. One aspect which was apparently not taken into consideration is that the judge at the trial has full power to allow the plaintiff to alter or amend his writ or any party to amend his pleading on such terms as may be just; and to add, or strike out, or substitute a party under Order 14 of our High Court Rules. Even assuming, therefore, that the learned trial judge was correct to rule that the wrong party had been made the defendant, Order 14, especially at Rule 5(3), did not permit that the action should be summarily defeated by reason of non-joinder or misjoinder of parties. To sum up under the first question raised; although it is competent for a judge to rule that there is no case to answer, it is undesirable to volunteer the ruling and in any case, the High Court Rules do not permit that the whole of the action should be defeated on account of non-joinder or misjoinder. We consider that this last factor alone would entitle the plaintiffs to succeed in this appeal.

The second question concerned the finding that no *prima facie* case was made out, presumably thereby saying 'against the defendant now sued'. There are countless authorities on vicarious liability, especially where an employer seeks to avoid his own liability on the basis that the employee was then on a frolic of his own: for example, we cite only *Acropolis Bakery v ZCCM* (3) where the employer was held not liable, contrasting this with *Attorney-General v Landless* (4) where the employer was held to be liable. It all depends on the facts and circumstances of each case and the time to make that decision is after all the evidence has been heard. There was no indication from the defence that they would not be calling any evidence and we do not know if after the drinking spree the offending officer had resumed the course of employment or not. In view of the fact that the appeal is liable to succeed on the point concerning the erroneous ruling of non-joinder or misjoinder we do not wish to prejudice the course of the new hearing, which we propose to order before another judge of the High Court, by commenting any further on the ground relating to a *prima facie* case.

In sum, the appeal is allowed and the ruling below reversed. In all fairness, there should be a rehearing before another judge. Since the appeal stemmed out of a ruling volunteered by the court, and in all the circumstances, the costs of this appeal will abide the outcome of the retrial.

Appeal allowed.
