**Makau and others v Attorney-General and another**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 11 July 1974

**Case Number:** 237/1972 (21/75)

**Before:** Simpson J

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*[1] Limitation of Actions – Proceedings against Government – Under Fatal Accidents Act – Must be*

*filed within* 12 *months – Public Authorities Limitation Act* 1974*, s.*3 (1) (*K.*)*.*

*[2] Master and Servant – Vicarious liability – Government servant entitled to mileage allowance –*

*Government not liable for servant’s negligence.*

223.

**JUDGMENT**

**Simpson J:** In this suit for damages under the Fatal accidents Act (Cap. 32), the first defendant who is the Attorney-General seeks by way of a preliminary objection to have his name struck out of the plaint. The second defendant at the time of the accident which resulted in the death of the deceased was employed in the Water Development Department of the Ministry of Agriculture and the Attorney-General is sued under the provisions of the Government Proceedings Act (Cap. 40). The plaint alleges that the deceased was a passenger in the second defendant’s motor vehicle at 7.30 p.m. on 27 November 1969, when he so negligently drove it that it overturned resulting in serious injuries to the deceased from which he died “soon thereafter”. The second defendant, it is averred, was “at all times material to this suit acting in the course of his employment or within the scope of his authority as such a Government employee or servant or agent whatever the case may be”. That is the only allegation against the first defendant. The nature of the second defendant’s employment is not stated, nor his particular duty at the time of the accident. It is not alleged that the deceased was a government servant. The time of the accident was outside the normal hours of duty of a government servant and the vehicle the second defendant was driving was his own. *Prima facie* the first defendant would not be liable for the negligence of the second defendant in these circumstances. The plaint fails to allege facts which would render the first defendant liable. No cause of action is disclosed against the first defendant. I should have given sympathetic consideration to an application for leave to amend the plaint had it been made and had any effective amendment been possible. I am informed however that the plaintiff does not claim that the second defendant was employed by the Government as a driver his own vehicle in circumstances which would have entitled him to make a claim for mileage allowance. The first defendant has in addition to the foregoing pleaded the Public Officer’s Protection Act (Cap. 186) now replaced by the Public Authorities Limitation Act 1974. The accident occurred on 27 November 1969. The plaint was not filed until 16 February 1972. Under the provisions of the Public Officer’s Protection Act proceedings should have been instituted within six months of the act, neglect or default complained of or in the case of a continuance of injury or damage within three months of the ceasing thereof. Mr. Mutinda submitted that the Public Officer’s Protection Act cannot be pleaded where an action is brought by the personal representative of a deceased person under the provisions of the Fatal Accidents Act (Cap. 32). He cited a number of English authorities. No East African authority was brought to my notice by either counsel and it would appear that there is no reported case. It is a point of law of some importance on which I should have welcomed fuller argument and the assistance of senior counsel. Mr. Mutinda relied mainly on *Venn v. Tedesco*, [1926] 2 K.B. 227 where McCardie, J. in an action under Lord Campbell’s Act, the Fatal Accidents Act 1846, against defendants to whom the Public Authorities Protection Act 1893 was otherwise applicable held that the time within which the action could be brought was that limited by the former and not that limited by the latter Act. For the purposes of this case the material provisions of the Fatal Accidents Act (Cap. 32) are identical with those of the Fatal Accidents Act 1846, and the material provisions of the Public Officers Protection Act (Cap. 186) to those of the Public Officers Authorities Protection Act 1893, prior to its amendment in 1939. McCardie, J. said he felt bound to follow the decision of the Privy Council in *British Columbia Electric Ry. v. Gentile*, [1914] A.C. 1034, it being highly undesirable that there should be conflict between decisions of the Privy Council and the High Court. His decision appears to have been based almost wholly on the weight of Privy Council authority which, with obvious reluctance, he felt bound to follow because the Court of Appeal in *Nunan v. Southern Ry*., [1924] 1 K.B. 223 in dealing with a question which he considered not wholly dissimilar had apparently treated *Gentile’s* case as an authority to be acted on by them. At p. 233 he said: “A great deal of the case law with respect to the inter-relationship of Lord Campbell’s Act and the Public Authorities Protection Act is in a state of some doubt. No tabula rasa exists on which a clear and logical decision can be written. I must now refer to the leading decision relied on by counsel for the plaintiff – namely, *British Columbia Electric Ry. v. Gentile*. That case was before the Privy Council. It was an appeal from the Court of Appeal of British Columbia. In that Province two Acts were in force – namely, the Families Compensation Act, 1911 (2 Geo. 5, c. 82, Revised Statutes), which in substance was the same as Lord Campbell’s Act, and gave the same limit of time for bringing an action, and the Consolidated Railway Companies Act, 1896, of British Columbia (59 Vict. c. 55), which, for the purpose of the case, can be regarded as in substance the same as the English Public Authorities Protection Act, 1893. The action was by the widow. Her husband had been knocked down and instantaneously killed by one of the defendant’s cars, and negligence was alleged and proved. The action was begun by the widow more than six months, but less than twelve months, after the accident and death. It was held by the Privy Council that the action was not barred, inasmuch as the time was fixed by the Families Compensation Act, 1911, and not by the Consolidated Railway Companies Act 1896.” While the British Columbia Consolidated Railway Companies Act 1896 might no doubt for the purpose of that case be regarded as in substance the same as the English Public Authorities Protection Act 1893, there are significant differences in the drafting of the material provisions. The relevant provisions of the latter Act read as follows: “1. Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect– ( *a*) t he action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in the case of a continuance of injury or damage, within six months next after the ceasing thereof.” (In Kenya the latter period is three months.) S. 60 of the British Columbia Act provided: “all actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the company, shall be commenced within six months next after the time when such supposed damage is sustained, or, if there is continuance of damage, within six months next after the doing or committing of such damage ceases, and not afterwards.” Lord Dunedin, in the *British Columbia* case, at p. 1039, said: “To get the benefit of the limitation expressed in s. 60 the appellants must shew that the present suit is one for ‘indemnity for damages sustained by reason of the railway or the operations of the company’. Indemnity obviously means indemnity to the plaintiff in the suit, in respect of wrong done to the plaintiff and damages sustained by him owing to the railway or the operations of the company.” To get the benefit of the limitation expressed in the Public Authorities Protection Act 1893, on the other hand, a defendant in a similar action must show not that the suit is one for indemnity for damages sustained by the plaintiff in respect of wrong done to the plaintiff but that it is an action in respect of neglect or default in the execution by the defendant of a duty or authority. Lord Dunedin, in the *Gentile* case, quoted with approval earlier dicta to the effect that Lord Campbell’s Act gave to the dependants of deceased an entirely new cause of action, in particular the following at p. 1040: “And, finally, in the case of *Seward v. Vera-Cruz* (*Owners of*) Lord Selborne L.C. said: ‘Lord Campbell’s Act gives a new cause of action clearly, and does not merely remove the operation of the maxim “*actio personalis moritur cum persona*”, because the action is given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt sueing in point of form in the name of his executor.’ And Lord Blackburn said: ‘I think that when that Act is looked at it is plaint enough that if a person dies under the circumstances mentioned, when he might have maintained an action if it had been for an injury to himself which he had survived, a totally new action is given against the person who would have been responsible to the deceased if the deceased had lived; an action which, as pointed out in *Pym v. Great Northern Ry. Co*., is new in its species, new in its quality, new in its principle, in every way new.” Lord Dunedin concluded that a suit brought under the provisions of the Families Compensation Act of British Columbia was not a suit for indemnity for damages or injury sustained by the plaintiff by reason of the operations of the defendants. The Privy Council he said did not agree with the reasoning and result in *Markey v. Tolworth Joint Isolation Hospital*, [1900] 2 Q.B. 454 which they considered directly in conflict with the law as laid down in *Seward v. Vera-Cruz* (1884), 10 A.C. 59. Although the *Vera Cruz* case was cited in the course of the argument in *Markey’s* case, Darling, J. said: “The proper construction of the Act is that there has been an injury done to the deceased and that the remedy which he cannot himself exercise is given to his widow.” It was apparently with this failure to accept the view that Lord Campbell’s Act gave a new cause of action grounded on the injury suffered in consequence of the death that the Privy Council disagreed. They were not concerned with and did not consider the objects and the drafting of the Public Authorities Protection Act 1893. These were fully considered by the Irish Courts in *Gawley v. Belfast Corporation*, [1908] 2 I.R. 34 where it was held that the Public Authorities Protection Act 1893, applied to an action under the Fatal Accidents Act 1846. The report is not available here and I quote from the judgment of McCardie, J. in *Venn v. Tedesco*, at p. 230–231: “I now refer to the important case of *Gawley v. Belfast Corporation*, where an action was brought by a widow under Lord Campbell’s Act. The facts were these. Her husband was injured on June 13, 1906. He brought an action against the Belfast Corporation on July 30th of that year. He died on February 28, 1907. His widow then brought her action in April, 1907. The defendants pleaded that her action had not been brought within six months from the alleged act of negligence, and that it was therefore barred by the Public Authorities

Protection Act, 1893. The point was argued first before Palles, C.B. (a most weighty Irish judge) and Andrews, J. They held that the defendants’ plea was valid, and that the action failed. the plaintiff then went to the Court of Appeal, and the question was considered by the Lord Chancellor of Ireland (Sir Samuel Walker) and by FitzGibbon and Holmes, L.JJ. That Court unhesitatingly and unanimously upheld the decision of Palles, C.B. and Andrews, J. The keynote of the judgment is shown by a sentence in the Lord Chancellor’s decision when he says: ‘The policy of the Act of 1893 is to protect public bodies from the consequences of torts committed by them after six months have passed.’ FitzGibbon, L.J. said: ‘[Time] was running against the injured man in his lifetime, and it ran on against his personal representative after his death’; and Holmes L.J. said: ‘The effect of [the Act of 1893] is in my opinion to strike out the proviso as to twelve months after the death in [Lord Campbell’s Act], and to substitute for it six months after the act, neglect, or default.’“ In *Williams v. Mersey Docks and Harbour Board*, [1905] 1 K.B. 804 an action was brought under the Fatal Accidents Act 1846, following the death of the deceased which occurred two years after the accident from which it resulted. Matthew, L.J. at p. 807 said: “In this case no action was brought by the deceased man in respect of his injuries, and the present action is brought by his widow after the lapse of a period much longer than six months after the act, neglect, or default complained of in the action. It appears to me clear, having regard to the provisions of the Public Authorities Protection Act, 1893, that the action is not maintainable. We have been referred to a long series of decisions on the subject, which deal with the effect of the Act of 1846 upon cases of a similar kind. It has been pointed out over and over again that the test of the right to sue under the Act is whether an action could have been maintained by the deceased in respect of his injuries. We are asked now to discard those authorities. I see no ground for doing so.” Cozens-Hardy, L.J. after quoting the dictum of Lord Blackburn in the *Vera Cruz* case said: “In the present case the deceased could not at the date of his death, or at any time after the lapse of six months from his injury, have maintained an action in respect of that injury against the defendants; and therefore his representative cannot maintain this action.” That case is not I think distinguishable from the instant case by the fact that the deceased in that case had an opportunity to bring an action before his death. Lord Dunedin it may be observed referred briefly in the *Gentile* case to the decision in *Williams v. Mersey Docks and Harbour Board* and said it was rightly decided. I am with the greatest respect to McCardie, J. unable to follow his decision that the Public Authorities Protection Act 1893 is inapplicable to proceedings under the Fatal accidents Act 1846. The Public Officers Protection Act was an “Act to provide for the protection of persons acting in the execution of public duties”. An action, prosecution or other proceeding against any person in respect of any alleged neglect or default in the execution of any public duty or authority had to be commenced within six months of the act, neglect or default complained of. An action under the Fatal Accidents Act although grounded on the injury suffered by the family of the deceased resulting from his death as distinct from the injury suffered by the deceased himself is nevertheless I think an action in respect of an alleged neglect or default and if this neglect or default occurred in the execution by the defendant of a public duty or authority and the action was not commenced within the limitation period he was entitled to plead the Public Officers Protection Act. The expression “or in the case of a continuance of injury or damage, within three months next after the ceasing thereof” calls for brief consideration. This suit was not commenced within six months of the neglect or default complained of and in so far as it is based on the allegation that the second defendant was a public officer in the execution of a public duty it cannot be maintained. Since however there is an alternative claim against the second defendant I do not order the dismissal of the suit. I order the name of the Attorney-General, the first defendant, to be struck out. The plaintiff will pay the costs of the first defendant. *Order accordingly*

For the plaintiffs:

*D Mutinda* (instructed by *Kivuitu & Co*, Nairobi)

For the first defendant:

*PK Mureithi* (State Counsel)