

G.H. G. 2.

44, 1954

No. 30 of 1952.

In the Privy Council.

38033

ON APPEAL
FROM THE WEST AFRICAN COURT OF APPEAL
(NIGERIAN SESSION).

UNIVERSITY OF LONDON
W.C.1.
23 MAR 1955
INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN

THE UNITED AFRICA COMPANY LIMITED
(Plaintiffs) *Appellants*

AND

10 SAKA OWOADE (Defendant) *Respondent.*

Case for the Respondent.

RECORD.

1. This is an appeal by Special Leave from a Judgment of the West African Court of Appeal (Nigerian Session) (Sir John Verity, Chief Justice of Nigeria, Presiding Judge ; Arthur Werner Lewey, K.C., Justice of Appeal, Gold Coast ; and Joseph Henri Maxime De Comarmond, Senior Puisne Judge) dated the 15th May, 1951, whereby the Judgment dated the 30th March, 1950, given in the Supreme Court of Nigeria (Lagos Judicial Division) by His Honour Mr. Justice C. W. Reece in favour of the Appellants for the sum of £4,732 13s. 4d. and costs, in an action brought by them against the Respondent, was set aside and a Judgment dismissing the said action with costs was substituted therefor.

p. 26.
pp. 17-19.
pp. 8-13.
p. 13, ll. 25-26.
p. 19, ll. 32-33.

2. At the trial, at the close of the case for the Appellants, the Respondent's Counsel called no evidence on behalf of the Respondent and submitted that there was no case for the Respondent to answer inasmuch as the only ground of liability alleged against him was based on, and the only issue raised, in regard to an alleged loss of the goods of the Appellants by the alleged theft thereof by one Adegbola Amao and by one Simeon Dejoh, allegedly employed by him as lorry driver and clerk respectively, was that he was a common carrier and that this allegation had not been established. This was conceded by Appellants' Counsel and the learned trial Judge found as follows :

Writ of Summons,
pp. 1, 2.
Statement of
Claim, p. 2.
p. 6, l. 39-p. 7, l. 1.
p. 11, ll. 17-22.

“ It seems to me beyond dispute that both in the writ of summons and the Statement of Claim the (Appellants) sought to rest his case solely on the liability of the (Respondent) as a common carrier. This ground of liability has been abandoned and indeed otherwise could not be done, for the evidence led on behalf of the (Respondent) wholly failed to establish that the Defendant was a common carrier.”

3. Notwithstanding the said finding the learned trial Judge then proceeded to hold as follows :—

p. 11, ll. 22-30.

“ The question for me to decide in the first place now is whether, “ as submitted by Counsel for the (Respondent) the (Appellants) “ having failed to establish the cause of liability on which he relied “ in paragraph 5 of his pleading ; the (Appellants) must fail and “ judgment should be entered for the (Respondent) or whether, “ having established by evidence that the relationship of master “ and servant existed between the (Respondent), the driver (the “ said Adegbola Amao) and the clerk (the said Simeon Dejoj), 10 “ the (Appellants) can rely on the liability of a master for the wrong “ of his servant and, as in this case, is the master liable for the “ criminal act of his servant.”

p. 2, ll. 30-31.

The learned trial Judge then enunciated a principle of pleading and proceeded as follows :—

p. 11, l. 37-p. 12, l. 8.

“ Counsel for the (Respondent) submitted that the (Appellants) “ in para. 5 of the Statement of Claim relied on the (Respondent’s) “ liability as a common carrier. Para. 5 of the Statement of Claim “ reads as follows :—

“ ‘ The (Respondent) is liable as a common carrier to make 20 “ ‘ good to the (Appellants) the value of the said goods but has “ ‘ failed to do so.’

“ In my opinion this paragraph violates the principle enunciated “ above from the case of *Gautret v. Egerton* (L.R. 2 C.P. 371) in “ that it is an inference of law and not a fact being pleaded and, “ as it were, encroaches upon the functions of the Judge to decide “ what are the legal rights of the parties. But para. 2 of the “ Statement of Claim sets out certain facts which have been proved, “ and, as it is for the Judge to decide, from the facts proved, what “ are the legal rights and duties of the parties, I am of the opinion 30 “ that it is within my province to examine such facts and ascertain “ whether they give rise to any rights and duties between the “ parties. Accordingly, I am unable to accept the submission of “ Counsel for the (Respondent) that, the (Appellants) having abandoned “ his claim that the (Respondent) was a common carrier, judgment “ should be entered for the (Respondent).”

The learned trial Judge then made a finding upon the evidence led by the Appellants that the relationship of master and servant between the (Respondent) the aforesaid Clerk, Simeon Dejoj and the aforesaid driver Adegbola Amao had been established, and having considered the 40 law as regards the liability of the Respondent for the alleged theft by the said Dejoj and Amao of the Appellant’s goods, the learned trial Judge concluded as follows : —

p. 13, ll. 17-26.

“ In the case before the Court, the Clerk and driver were “ authorised by the (Respondent) to accept goods for carriage to “ the Provinces for they were introduced by the (Respondent) to “ the Storekeeper ” (Emanuel Akanni Wey who was the second of “ the two witnesses called by the Appellants). “ The goods were “ delivered to Simeon Dejoj as the (Respondent’s) representative

p. 5, ll. 1-37.

“ and he took the goods purporting to transport them to Ilorin and
 “ Oshogbo, but stole them. On the evidence I am satisfied that
 “ Simeon Dejob and the driver were acting within the scope of their
 “ authority when Dejob signed the Way-Bills for the goods and
 “ had them delivered to the lorry. Guided by the decision in
 “ *Lloyd v. Grace Smith & Co.* [1912] A.C. 716 I enter judgment for
 “ the (Appellants) for the amount claimed in the writ, viz.
 “ £4,732 13s. 4d. [*sic*] and costs.”

Exhibits 1-6
 (in original).

4. The said finding of the learned trial Judge as regards the said
 10 relationship of master and servant between the Respondent and the said
 Clerk and the said driver as well as his said decision on the law and his
 said conclusion in regard thereto (as well as being in all respects in issue
 in the action) were challenged in the grounds of appeal lodged by the
 Respondent in the West African Court of Appeal against the learned trial
 Judge's said judgment. p. 14.

These said grounds, in view of the Judgment of the West African
 Court of Appeal, as set forth in the next succeeding paragraph hereof, it
 was not necessary for the West African Court of Appeal to consider and
 accordingly were not considered by it.

20 5. In the said Judgment of the West African Court of Appeal pp. 17-19.
 delivered by His Honour Mr. Justice De Comarmond, S.P.J., in which
 Their Honours Sir John Verity, Chief Justice, Nigeria, who presided, and
 Arthur Werner Lewey, K.C., Justice of Appeal concurred, he said as
 follows :—

30 “ The Defendant-Appellant's main ground of appeal is that
 “ the (Appellants) having failed to establish that the (Respondent)
 “ was a common carrier (which was the very basis of the claim) the
 “ action should have been dismissed. The Writ of Summons set
 “ out a claim for a certain sum of money alleged to be the value
 “ of certain goods delivered to and accepted by the (Respondent's)
 “ Clerk and the (Respondent's) lorry driver on behalf of the
 “ (Respondent), as a common carrier, for transport to the
 “ (Appellant's) Station at Ilorin which goods, the (Respondent)
 “ failed to deliver.

40 “ The Writ clearly means that the (Respondent) was sued in
 “ his alleged capacity as a common carrier and in no other capacity.
 “ The Clerk and the lorry driver are mentioned because they receive
 “ the goods on behalf of their employer (the common carrier). The
 “ Statement of Claim contained averments to the effect that the
 “ (Respondent) carried on a road transport business as a common
 “ carrier, that he had introduced his clerk and his driver to the
 “ (Appellants) and requested that goods for stations up-country be
 “ entrusted to him by the (Appellants) for transport. It was further
 “ averred that goods had been so entrusted and had been stolen
 “ by the said clerk and lorry driver.

“ The Statement of Claim concluded thus : ‘ The (Respondent)
 “ is liable as a common carrier to make good to the (Appellants)
 “ the value of the said goods but has failed to do so. Whereof
 “ [*sic*] the (Appellants) claim as per Writ of Summons.’

“ *The (Respondent) denied in his Statement of Defence that he was a common carrier. He also denied all the other averments affecting him and went on to aver that the so-called clerk had never been in his employ and that the driver had no authority to accept the goods for transport.* ”

p. 3, l. 41-p. 4, l. 9.

“ The learned Counsel for the (Appellants) stated when opening the case, that the (Respondent) was liable on two grounds (presumably in the alternative?) The first ground was that he was liable as a common carrier, and the second was that he was liable by virtue of the principle respondeat superior. The (Appellants) did not lead evidence to show that the (Respondent) was a common carrier, but sought to rest the claim solely on the alleged responsibility of the (Respondent) for the acts of his alleged servants. This was objected to by the (Respondent’s) Counsel who had not called evidence, and who submitted that neither the Writ nor the pleadings revealed that the (Appellants) had an alternative basis for his claim, and that the claim could not succeed because the (Appellants) had failed to establish the ground of responsibility invoked by him, namely, the (Respondent’s) responsibility as a common carrier. The learned trial Judge rejected the submission made by Counsel for the (Respondent). The gist of the reasons given by the learned Judge was that facts only are to be stated in pleadings and that paragraph 5 of the Statement of Claim violated the principle enunciated in *Gautret v. Egerton* (L.R. 2 C.P. 371) in that it set out that the (Respondent) was liable as a common carrier to make good to the (Appellants) the value of the goods. It is to be noted that the learned Judge made no reference to the Writ of Summons. I would point out also that, even if paragraph 5 of the Statement of Claim had not contained the words ‘ as a common carrier ’ there still remained paragraph 1 which clearly shows that the (Respondent) was sued in his capacity as a common carrier and in no other. Had the (Appellants) intended to sue the (Respondent) in the alternative, as a private carrier, he should have complied with Order XXII Rule 8 of the Supreme Court (Civil Procedure) Rules (Laws of Nigeria, 1948, Vol. X, p. 59) which reads in part as follows : ‘ Where the Plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they shall be stated as far as may be, separately and distinctly.’ I might also draw attention to Order II, Rule 2 of the Supreme Court (Civil Procedure) Rules ” (Op. Cit., p. 12) “ which lay down *inter alia*, that a Writ of Summons shall state briefly and clearly the subject matter of the claim and the relief sought for. Rule 6 of the same Order ” (Op. Cit., p. 13) “ makes it permissible to join several causes of action in the same suit. ”

p. 6, ll. 5-32.

p. 8, ll 1-8.

“ I cannot subscribe to the view that the Writ and the Statement of Claim in this case set out alternative causes of action. ”

“ I find it difficult to understand how the case of *Gautret v. Egerton* could be invoked against the Defendant-Appellant’s ”

10 “contention in the present case. That case makes it clear that
 “ ‘the Plaintiff must in his declaration give the Defendant notice
 “ ‘of what his complaint is . . . It (the declaration) ought to
 “ ‘state the facts upon which the supposed duty is founded, and the
 “ ‘duty to the Plaintiff with the breach of which the Defendant is
 “ ‘charged . . .’ I might also mention the case of *West Rand*
 “ *Central Gold Mining Company v. Rex* [1905] 2 K.B. 391, 399
 “ where Lord Alverstone, C.J., quoted from *Gautret v. Egerton*
 “ after saying ‘Upon all sound principles of pleading it is necessary
 “ ‘to allege what must, and not what may, be a cause of action . . .’

“ I am of opinion that the Plaintiff could not succeed in the
 “ Court below because he failed to establish the only cause of
 “ action that was before the Court, namely, that the Defendant
 “ was responsible as a common carrier . . .”

6. The Court of Appeal accordingly allowed the appeal, set aside the judgment of the Supreme Court and directed in effect that judgment be entered for the Defendant with costs.

7. It is submitted that the said judgment of the West African Court of Appeal was right (and that the West African Court of Appeal was
 20 furthermore right in setting aside, as it did, the said judgment of the learned trial Judge and substituting therefor a judgment dismissing the action with costs, on the grounds which, as aforesaid, in view of its said judgment did not arise and was accordingly not considered by it, namely, *By decree, dismissed the 23rd October 1957 by consent*
~~that it had not been proved that the goods had been stolen as was alleged nor was any case made out by the Appellants upon the evidence called by them, such as was found by the learned trial Judge, based upon the alleged relationship of master and servant between the Respondent and the said clerk and the said lorry driver either in fact or in law).~~

8. It is therefore respectfully submitted that the said judgment of
 30 the West African Court of Appeal was right and ought to be affirmed and this appeal should be dismissed with costs for the following amongst other

REASONS

- (1) BECAUSE the claim of the Appellants against the Respondent was based solely upon the liability of the Respondent as a common carrier and the said liability *ex concessis* and as found by the learned trial Judge had not been established.
- 40 (2) BECAUSE the claim being based solely upon the said liability and no case having been made out thereon—as was conceded by the Appellants and found by the learned trial Judge—necessitating an answer by the Respondent upon the said liability, the learned Counsel for the Respondent was justified in the course he took of calling no evidence for the Respondent and making the submission of no case to answer which he did.

- (3) BECAUSE for the reasons given in the said Judgment of the West African Court of Appeal and for other good and sufficient reasons (including the said grounds which as aforesaid did not arise and were not accordingly considered by it), the Respondent was entitled to Judgment.
- (4) BECAUSE the Respondent, upon the issues as pleaded and raised and upon the facts and the law applicable thereto, was entitled to Judgment.

S. N. BERNSTEIN. 10

✓The grounds, apart from those set out in the said judgment, on which it is submitted that, in any event, the said judgment of the learned Trial Judge was rightly set aside, may be shortly set out as follows:- for the Appellants to succeed against the Respondent as a private carrier, it would have been necessary for them to have shown that the goods in question were both received and stolen by the said clerk and lorry driver in the course of their employment by the Respondent or that the theft occurred through the negligence of the Respondent, and none of these were shown. ✓

In the Privy Council.

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(Nigerian Session).*

BETWEEN

**THE UNITED AFRICA COMPANY
LIMITED (Plaintiffs) *Appellants***

AND

SAKA OWOADE (Defendant) *Respondent.*

Case for the Respondent

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