REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. E013 OF 2020

PATRICK KIMATHI.....1ST APPELLANT

FRANCIS MURIUKI M'MWARANIA.....2ND APPELLANT

VERSUS

MAGDALINE KAREGI MBURUGU

(Suing as the administratrix and legal

representative of the estate of BMM (deceased).....RESPONDENT

(An appeal from the Judgment and Decree of Hon. E.M Ayuka

(S.R.M) in Nkubu SPMCC No. 65 of 2015) delivered on 8/10/2020)

JUDGMENT

1. By a Plaint dated 13/07/2015, the respondent, as a personal representative to the estate of the deceased, sued the appellant seeking general damages under both the Law Reform Act and the Fatal Accidents Act for pain, suffering and loss of amenities, special damages of Ksh. 11,825/= and costs of the suit plus interest at court rates. His claim was pleaded to be that on or about 5/12/2004, the deceased was lawfully walking beside Nkubu-Kathera Road near Nkubu Polytechnic when the 1st appellant so negligently, carelessly and/or dangerously drove the 2nd appellant's motor vehicle Registration No. KAN 864 J Toyota Hiace that it hit and fatally injured the deceased. The deceased, who did odd jobs from which he earned approximately Kshs 5,000 per month, was aged 23 years and in good health. Due to the deceased untimely death, his dependants and his estate had lost the financial support which they used to get from him while he was alive.

3. The evidence before the trial court was in summary that, **PW1 Magdaline Karegi,** the mother of the deceased was granted leave by the court to file the suit out of time. She adopted her list of documents and supplementary list of documents dated 13/7/2015 and 16/9/2019 respectively. She testified that the deceased used to help her as he used to farm tomatoes and other crops as well as dairy farming. She sought compensation from the appellants, costs of the suit and interest. She produced the death certificate (PExh 1), grant of letters of administration Ad Litem (PExh 2), Police Abstract (PExh 3), 2 Receipts for Misc No.3/2015 and Misc. 22/2015 (PExh 4), Notice before court(PExh 5) and Letter from area chief (PExh 6) in support of her case.

4. During cross examination, she stated that delay of 11 years in filing the case was occasioned by a problem with the insurance company and that she had recorded her statement with the police after the accident. She stated that after burial in 2004, the deceased wife did not come back and that she had filed the suit for her own benefit. She had never seen the wife to the deceased since then and that the deceased did not have any children. The deceased was a standard 7 drop out and he did not have any land of his own. He used to deliver milk for the dairy society but she did not have records for the same. She was notified by PW2 that the deceased, whom she had sent to Nkubu, had been involved in a road accident

5. In re-examination, she reiterated that she was allowed by the court to file the case out of time and that the wife to the deceased was called Rebecca while Murugi and Karimi were his daughters.

6. **PW2, Miriam Wanja Mbaya**, an eye witness, testified that the accident occurred between deliverance and Marimba on Nkubu-Mikumbene road at about 7.30 pm as the deceased was walking off the road on the left side when he was hit and thrown into the road by the motor vehicle, belonging to the 2nd appellant. The motor vehicle did not stop but instead sped off. She did not know who was driving the motor vehicle at the material time.

7. During cross examination, she stated that on the material day, she had visited her parent's home, and was on her way back to Mikumbene. She was the one who notified the respondent of the accident although they were not related. She relied on her 2nd statement that although it

was dark, she saw the deceased. She was walking together with the deceased as they chatted when the motor vehicle suddenly hit him. She knew the deceased and his wife very well but after his death, his wife left, with their 2 children.

8. In re- examination, she stated that she had clarified in her latter statement what transpired and maintained that the deceased was not on the road.

9. **PW3 James Mugo**, the court Administrator of Nkubu Law Courts, stated that the court issued an order on 13/7/2015 granting leave to the respondent to file the suit out of time. He produced the Court file Misc. Civ. Application No. 3/2015 as PExh.7.

10. He was not cross examined and the respondent closed her case.

11. The appellants filed an amended statement of defence in which he denied the claim, and particularly the allegation that the said accident was occasioned by their negligence and prayed for the respondent's suit to be dismissed.

12. In support of the defence, **DW1, Francis Muriuki Muthaura,** testified by adopting his witness statement recorded on 24/9/2019 as his evidence in chief. He confirmed that he was aware of the accident of 5/12/2004 involving his motor vehicle registration number KAN 864 J Toyota Hiace. The motor vehicle was being driven by the 1st appellant at the time of the accident and the 1st appellant informed him that the deceased was wholly to blame for the accident. A traffic case was unsuccessfully brought against the 1st appellant but the same was dismissed. He was surprised that the respondent brought the suit against him almost 11 years from the date of the accident.

13. During cross examination, he reiterated that the 1st appellant was his driver as at the time of the accident. He had authorized the 1st appellant to drive the subject motor vehicle, which was involved in the accident. He did not know how the accident occurred because he was not at the scene of the accident. The 1st appellant called to inform him he had knocked someone and they had proceeded to the hospital, but the victim later succumbed to the injuries. He concluded that the 1st appellant was no longer his employee. Upon re-examination, he stated that he did not investigate in Misc. No.3/2015 and how the order extending time was made.

14. After trial, the trial court found that the respondent had proved her case on a balance of probabilities and entered judgement in her favour against the appellants as follows:

a) Pain and suffering Ksh.50,000

b) Loss of expectation of life Ksh.100,000

c) Loss of dependency Ksh.821,599.80

d) Special damages Ksh.11,625

Total award **Ksh.983,224.80**

15. Aggrieved by the said decision, the appellants filed their Memorandum of Appeal on 5/11/2020 listing 9 grounds of appeal. The appellants faulted the trial court for failing to employ the doctrine of laches to this case, because the respondent had failed to demonstrate why she took 11 years to prefer the case against the appellants, thereby occasioning injustice to them. They faulted the trial court for misreading, misinterpreting and placing heavy reliance on the evidence of PW2, notwithstanding that the said witness had not recorded a statement with the police, and her initial statement substantially differed with her subsequent one. They complained that the trial court erred in holding that they had failed to call evidence in support of their case when in deed there were witness statements clearly filed, and which formed part of the court record. They faulted the trial court for making an excessive award under both the Law Reform Act and the Fatal Accidents Act, without discounting the award made in the former or even applying its mind on the applicable law. They complained that since the evidence of the investigating officer was not tendered, there was no conclusive evidence regarding the exact point of impact where the deceased was hit.

16. The parties filed their submissions in respect to the appeal on 28/6/2021 and 28/9/2021 respectively. The gist of the appellant's submission was that the respondent's suit was time barred as stipulated by the provisions of Sections 4(2) and 27 of the Limitation of Actions Act, and the leave granted was irregular and erroneous, as it did not fall within the conditions provided in the aforestated Act. They relied on **Jones M. Musau & anor v Kenya Hospital Association & anor (2017) eKLR, Kenya Power & Lighting Company Ltd v Agumba Aboge (2016) eKLR and Francis Mughani Mugula & anor v Anwarali Brothers Ltd & anor (2014) eKLR** to support the submissions that there was no proof of disability to support extension of time. They further submitted that the respondent slept on her rights when she took too long without bringing an action against the appellants and equity does not aid the indolent. They cited **Ngatu v Mpinda & 3 others (2019)eKLR, where Justice Mbugua** quoted with approval Court of Appeal judges in **Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited [2014] eKLR** adopted the opinion of Lord Selbourne L.C. in **Lindsay Petroleum Co v Hurd (1874) L.R. 5 P.C. 221** said at page 240 thus :

> **"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material."**

17. They alluded to great variances of crucial facts in PW2's initial and subsequent statements and the fact that she did not record a statement

with the police. The faulted the trial court for introducing its own evidence in place of that of the eye witness, PW2, and for erroneously finding that the appellants did not call evidence to rebut the respondent's case yet in addition to filing a witness statement, DW1 testified in court.

18. At the hearing, appellants intimated that they had wholly abandon ground 6 of appeal questioning the award under both Acts without discounting one award against the other. The court was however faulted for failure to find that the suit was statute barred and that the orders for enlargement of time was not properly made; for adopting a multiplier approach while no basis was established to show what the deceased earned, yet the respondent had suggested a lump sum approach. They submitted that the multiplier and multiplicand method adopted by the trial court in the circumstances was erroneous, and cited **Kitale Industries Ltd & anor v Zakayo Nyende & anor (2018) eKLR**, where an award of Kshs 900,000/= for loss of dependency was reduced to Kshs 600,000/= for the estate of a 12 year old deceased who was an average student in school. They faulted the trial court for relying solely on the contradictory evidence of PW2 to find that the deceased was hit on the road, yet no evidence was led by the investigating officer to shed light on the point of impact. According to them, dependency was not proved at all and the award made under this head by the trial court was excessive, since no evidence was led to show that the deceased was in any way supporting PW1. They concluded that the appeal should be wholly allowed and the judgement of the trial court set aside.

19. On her part, the respondent submitted that it was not disputed that the subject motor vehicle was being driven by the 1st appellant, who did not appear in court to testify. She submitted that the appellants did not challenge the leave which had been granted by the court before filing the suit. She urged the court to find that she had satisfied the requirements of Section 27 of the Limitation of Actions Act. She contended that the appellants were estopped from raising issues herein which were not before the trial court. She submitted that it was not mandatory for the eye witness to record a statement with the police for the reason that the police were not at the scene of the accident, and therefore their evidence would amount to hearsay. Further, DW1's admission that he was not at the scene, meant the evidence of the eye witness, PW2 was unchallenged. She submitted that the appellants failed to call evidence to challenge her case and therefore the submission on apportionment of liability was misleading, because it was not raised as a ground of appeal. She submitted that the trial court considered the evidence on record and applied the law correctly in arriving at its decision. She contended that the award of Ksh. 821,599.80 for loss of dependency was indeed very reasonable taking into account the deceased died from injuries sustained from the accident. She submitted that the case of **Kitale Industries Ltd & anor v Zakayo Nyende & anor (2018) eKLR** cited by the appellants was inapplicable to this case, for the reason that the appellants did not tender any evidence to controvert her evidence on liability. Further, the issue of the driver having been charged with a traffic case was immaterial, because the appellants did not object to the production of the police abstract in court. She submitted that it was unnecessary to call the investigating officer where there was overwhelming evidence from the eye witness. She urged the court to find that the trial court arrived at the correct decision and proceed to dismiss the appeal with costs. The cases of **Robert Mworia v Autoselection Kenya Ltd & anor (2010) eKLR, Transworld Safaris Kenya Ltd v Somak Travel Ltd(1997) eKLR, V.K Construction Company Ltd v Mpata Investment Ltd(2009)eKLR, Rosemary Wanjiru Kungu v Elijah Macharia Githinji & anor(2014)eKLR, Veronica Gathoni Mwangi v Samuel Kagwi Ngure & anor(2020)eKLR, Kenya Power & Lighting Co v Julius Muthuri Cyprian & others(2021)eKLR, Hellen Waruguru Waweru v Kiarie Shoe Stores Ltd (2015) eKLR, Robinson Ochola Awuonda v House of Manji (2015) eKLR** were cited in support of her submissions.

Analysis and determination

20. This being a first appeal, this court is enjoined to revisit the evidence that was before the trial court afresh, analyze it, evaluate it and arrive at its own independent findings and conclusions, but always bearing in mind that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanour and give allowance for that. See ***Selle v Associated Motor Boat Co. & others [1968] E.A. 123.***

21. On the ground of the suit being statute barred, Section 28 of the Limitation of Actions Act provided that, **"An application for the leave of the court for the purposes of section 27 of this Act shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action. (2) Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient— (a) to establish that cause of action, apart from any defence under section 4(2) of this Act; and (b) to fulfil the requirements of section 27(2) of this Act in relation to that cause of action."**

22. In this matter the starting point must be grounds 1 and 2 in the memorandum of appeal which fault the court on how it treated the plea of statute bar. That matter was specifically pleaded at paragraph 11 of the Amended statement of defense and it appears that no response was filed to deny that assertion. It was thus by dint of Rule 12 of Order 1 deemed to have had issues joined and thus a matter the court ought to have isolated and determined in *limine* as a way of ascertaining the propriety of the suit. In fact question of limitation goes to jurisdiction and it was thus imperative that the matter be rested by the trial court before the merits are delved into.

23. A reading of the judgment reveals that the trial court wholly glossed over that very serious defence. Even in its summary of the pleadings, no reference is made of that defence just as no consideration is given to it in the judgment on liability. That I find to reveal a grave error of failure to take into account what the court was obligated to take into account. **In SELLE & ANOTHER -VS- ASSOCIATED MOTOR BOAT CO. LTD. [1968] EA, 123, the court of Appeal set failure by the court to take into account a material matter it ought to take into account as one of the basis of interfering with a decision on appeal even on findings of fact.**

24. Before the trial court was produced Nkubu CMC Misc Appl No. 3 of 2015 in which time was extended to file the suit. That record was produce without any challenge by the applicant. However, in the submission filed, quite some effort was put forth in showing that no thresholds had been met to merit enlargement of time. That was the legal thing to do and once such effort was made the court was mandated to consider whether or not the time was validly extended. Now that the trial court opted not to give it a consideration, this court is obligated to reappraise the entire record and come to own conclusions.

25. In my duty as aforesaid, I have read the application yielding the order for extension of time and I note that the reasons advance for delay was the alleged to have been a moratorium declared by the court in Nbi HCC Misc Application No. 213 of 2010 on 29.07.2010 against filling of suits against the owners of motor vehicles insured by Ms Standard Assurance Company Ltd. That is clearly not one of the reasons for

grant of extension of time under section 27(2) of the Limitation of Actions Act. That provision provides:

> **(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—
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> **(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
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> (b) in either case, was a date not earlier than one year before the date on which the action was brought.

26. Under the law, an applicant for extension of time must prove that a material fact or facts regarding the cause of action was outside his knowledge and that he only came by it after the period of limitation had passed or within the last one year of that period. The respondent never came near satisfying being entitled to an order for enlargement of time and in enlarging the time the court wholly erred. Having so erred, there was no window for revising the error until the hearing of the resulting suit. That opportunity was indeed presented but the court looked the other way. That was equally erroneous and the kind of an error I find calls for reversing the decision thereby resulting.

27. The upshot is that I find that the suit was filed out of time on the basis of improperly enlarged time and therefore did not lie for being time barred. If time barred, the court had no jurisdiction to deal with it on the merits but was obligated to strike it out. On that basis and finding, I do allow the appeal, set aside the judgment on both liability and quantum of damages and in its place substitute an order that the suit was statute barred and is hereby struck out. I award the costs to the appellant.

DATED, SIGNED AND DELIVERED AT MERU THIS 25TH DAY OF NOVEMBER, 2021

Patrick J.O Otieno

Judge

In presence

Miss Mukaburu for the respondent

Mr. B Gitonga for the appellant

Patrick J.O Otieno

Judge