



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO. 288 OF 2014

RUTH WANJIRU.....APPELLANT

VERSUS

C.P WAMBUA1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

(Being an appeal from the Judgment of Hon. Obulutsa (Mrs.) SPM dated and delivered on 25th June, 2014 in Nairobi CMCC No. 7778 of 2008)

JUDGEMENT

1. Ruth Wanjiru (*the appellant*) sued the defendants jointly and severally for general and special damages plus costs of the suit. The claim was predicated on alleged negligence on the 1st defendant in shooting Rahab Njeri who died as a result of the injuries inflicted.

2. The entire claim was denied by the defendants who inter alia averred that the suit was time barred and fatally defective.

3. At trial, the plaintiff testified that on 23.09.2005 at 7.00 p.m she heard gun shots. Her child was playing outside. She went out to check and found out her child had been taken to hospital. The child died on the way to hospital. The plaintiff was informed that it is C.P Wambua who had shot the child. The child was aged 10 years. She was in school and active in athletics.

On cross examination she confirmed she was not present when the shooting occurred. She confirmed that the notice sent to the Attorney General in respect of the case referred to one Lucy Muthoni as the victim of the alleged shooting. She also confirmed that there was delay in filing of the suit as she was seeking letters of administration.

4. The plaintiff called Dr. Okemwa who testified that he did a post mortem on the deceased. He produced the report which summed up the cause of death as right massive hemothorax and gunshot wound to the chest.

5. The defendants called no evidence.

6. In a judgement dated 24/6/2014, the trial magistrate dismissed the suit on the basis that the plaintiff had failed to on a balance of probability establish negligence on the part of the 1st defendant and liability on the part of the 2nd defendant.

7. At Page 9 of the judgement the trial magistrate stated;

“The plaint has been seen. It is stated the deceased Rahab Njeri was shot on 23.9.2005 and the suit was filed on 9.12.2008. The defence filed denied these allegations and raised the issue of the claim being statute barred. Under the Public Authorities Limitation Act, any claim against the government founded on negligence should be filed within 12 months meaning suit should have been filed before 22.9.2006. There is no evidence that leave was sought to file out of time. As to the plaint not being dated and signed, the court record does show it is in fact signed and dated.

The notice of intention to sue has been seen and indicates that the person shot was Ivy Muthoni yet the plaint and evidence states it is Rahab Njeri. When Dr. Okemwa first testified, he conceded that the post mortem report he had did not have the name of the deceased on who he conducted the post mortem. When he testified a second time, he then has a report for Rahab Njeri.

On the above issues, it is evident suit was filed 3 years later after the statutory period had expired. No leave was obtained to file suit out of time and it is therefore time barred.

On the second issue, it is clear there is inconsistency on who was shot. The notice served on the A.G as required by law shows it is Lucy Muthoni who was shot yet the evidence given in court and the plaint indicates Rahab Njeri. The discrepancy has not been explained. Whereas PW 1 Ruth states it is the 1st defendant who shot the deceased, no evidence has been given to support this as her testimony is hearsay and inadmissible. She did not bring the person who saw the 1st defendant shoot the deceased.

On a balance of probability based on the above, the plaintiff has failed to establish negligence on the part of the 1st defendant and liability on the part of the 2nd defendant.”

8. Aggrieved by the said judgement, the appellant appeals against the whole decision and raises the following grounds in her memorandum of appeal;

1. **That the honourable magistrate erred in fact and in law in arriving at a finding that the plaintiff failed to prove her case on a balance of probabilities when her evidence on record remained uncontroverted by the defence who did not offer any evidence to the Court.**

2. **That the honourable magistrate erred in fact and in law in arriving at a finding that the plaintiff had filed the suit out of time without the defence having led any evidence to support the allegation when it was not a dispute that the plaintiff had been granted leave to file suit out of time in Misc. App. No. 315 of 2006.**

3. **That the honourable magistrate erred in fact and in law in arriving at a finding that the post mortem report produced by PW 2 Dr. Okemwa before the honourable court did not have the name of the deceased contrary to the evidence on record reflecting the contrary.**

4. **That the honourable magistrate failed to consider and/or apply the legal proposition that the plaintiff's evidence on record had not been controverted by defence who attempted to introduce evidence through written submissions filed in court in which other evidence documents were introduced to Court contrary to the Civil Procedure Rules requirements.**

5. **That the honourable magistrate erred in fact and in law in failing to consider the plaintiff's evidence implicating the defendants who opted not to attend court to defend the suit through evidence.**

6. **That the honourable magistrate erred in fact and in law by coming to a finding that was contrary not only to both legal principles and facts on record but also on the basis that the finding was also not supported by any evidence from the defence.**

9. This being a first appeal, the court's duty is to re-evaluate the evidence and draw its own conclusion while giving allowance for the fact that it did not have the opportunity to hear and see the witnesses testify. (see Selle –vs- Associated Boat Co. Ltd (1968) EA 123, Peter –vs- Sunday ROA Ltd 91958)EA 424, Williamson Diamonds Limited –vs- Brown (1970) EA 1.)

10. The appellant's evidence is one of the weakest nature. She was not at the scene of the incident. She was told that it is the 1st respondent who shot Rahab Njeri. The person who allegedly told her so is not called as a witness. The notice to sue issued to the Attorney General indicates the victim of the shooting was one Lucy Muthoni. The burden of prove lay on the appellant to show that Rahab Njeri was shot and that it is the 1st defendant who shot her.

11. The evidence of the doctor who conducted the post mortem is cagey. When he appeared the first time for hearing, he had a post mortem report without a name of the deceased. On the 2nd appearance, he now had a post mortem which bore the name of Rahab Njeri.

12. Section 107(1) of the Evidence Act Cap 80 Laws of Kenya provides that;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

13. In our particular case, the burden of proof lay on the plaintiff to establish that it is the 1st respondent who shot Rahab Njeri through his negligence. This, in my view, she failed miserably to do.

14. In Nairobi HCCA No. 152 of 2003, Statpack Industries Ltd –Vs- James Mbithi, quoted in Nakuru HCCA No. 320 of 2004, Timsales Ltd –Vs- Willy Ng'ang'a Wanjohi, it was held;

“It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce in evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury per se is not sufficient, to hold someone liable.”

15. The burden of proof remains the same even where no evidence is called by the defence. The Court of Appeal in Karugi and Another – Vs- Kahiga and 3 Others (1987)KLR 347 held that ***the burden on the plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defendant and that the burden of proof is in no***

way lessened because the case is heard by way of formal proof.

16. Another important aspect in this appeal is that the suit was time barred. This issue was pleaded by the defence. The plaintiff's answer to it is that she was seeking letters of administration hence the delay. It is not in doubt that the suit was filed 3 years after the statutory period had expired. The deceased is alleged to have been shot on 23.9.2005 and the suit was filed on 9.12.2008. Under the Law the claim was to be filed within 12 months. There is no evidence that leave to file suit out of time was sought.

17. In Rawal –Vs- Rawal (1990) KLR 275 the court held;

“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a lapse of time. It is not to extinguish claims.”

18. In Iga –Vs- Makerere University (1972) EA the court held;

“A plaint which is barred by limitation is a plaint barred by law. A reading of the provisions of Section 3 and 4 of the Limitations of Actions Act Cap 70 together with Order 7 Rule 6 of the Civil Procedure Rules of Uganda which has the same provisions with Limitations Act of Kenya seems clear that unless the applicant in this case had put himself within the Limitations period by showing grounds upon which he could claim exemption, the court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates as to bat the claim or remedy sought for and when a suit is time barred the court cannot grant the remedy or relief.”

19. The upshot of the above is that I find no basis upon which to fault the finding of the trial magistrate on liability and on the propriety of the suit. The plaintiff failed to prove her case on a balance of probability and in any event the suit herein was time barred and no leave was sought to file it out of time.

20. Had I found for the appellant, I would have not have disturbed the damages assessed being;

- Pain and suffering 20,000/=.
- Loss of expectation of life 100,000
- Lost years 500,000/=
- Special damages 0

21. The appeal lacks merit and is dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 27th day of February, 2020.

A. K. NDUNG'U

JUDGE