REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO.51 OF 2016

PAUL TEMU NDEREMO.....APPELLANT

VERSUS

GEORGE MAINA WANGAI.....1ST RESPONDENT

PETER KIBE WANGAI.....2ND RESPONDENT

(Appeal from the Judgment and decree of the Hon. J.O Onyiego CM in Nyeri CMCC No.480 of 2005 delivered on 21st September 2016)

J U D G M E N T

On 9th January, 1999 Angelica Gakii Maina is said to have been a passenger in motor vehicle Reg. No. KAG 136A along Kiganjo/Marua road. The motor vehicle was driven by Paul Temu Nderemo (1st defendant/appellant) and owned by Camp Garbatulla Catholic, 2nd defendant.

The motor vehicle was involved in an accident whereby Angelica sustained fatal injuries. She died leaving behind her husband George Maina Wangai and her two babies born on 1st March 1997 and 2nd October 1998 respectively. She was 30 years old.

On 14th March 2003 George Maina Wangai and Peter Kibe Wangai (the plaintiffs / respondents) obtained Limited Grant of letters of administration. It is also alleged that they filed ***Nyeri Misc Civil Application No.73 of 2003*** seeking leave to file the suit out of time and that Hon. Khamoni J granted the leave on 14th June 2005 giving them 14 days within which to file suit. They did so on the 27th June 2005 and filed **Nyeri CMCC 480/2005** as the appointed legal representatives of the Estate of Angelica Gakii Maina. This suit was heard and determined by the Hon. L. W. Gitari CM (Mrs.) (as she then was). On 30th April 2008 she dismissed the suit for being time barred.

The plaintiffs then proceeded to file separate appeals which were consolidated into Nyeri HCCA No.19/2009. The appeal was heard and determined by the Hon. Sergon J who in a judgment delivered on 17th September 2010 allowed the appeal and ordered for a retrial before a different Chief Magistrate.

The retrial was conducted by the Hon. Onyiego CM (as he then was) and on 21st September 2016 he found for the plaintiffs and awarded consolidated general damages at Kshs. 1,411,000/- plus costs and interest against the 1st defendant Peter Temu Nderemo, whom he found liable for the accident.

The 1st defendant was aggrieved by these findings on liability and damages and filed this appeal on five

grounds: -

That the learned magistrate erred in fact and law: -

i. in failing to appreciate the law on, the purpose of, and the spirit behind the provisions of the Limitation of Actions Act Cap 22, laws of Kenya entirely and specifically the provisions of Section 4 and 27 thereof

ii. and wholly misapprehending the principles governing the granting of leave to file suit out of time.

iii. in failing to appreciate that the plaintiffs failed to prove their case on a preponderance of probability in their favour and sufficient to tilt the burden of disproving the same to the appellant.

iv. in failing to appreciate that the evidence on liability given by the plaintiff's witness was sufficient to absolve the appellant of any blame worthiness for the subject accident.

v. in awarding costs of the suit to the respondents despite their failure to establish their case against the appellant.

The appellant seeks that the appeal be allowed, the entire Judgment and decree be set aside and the appellant be awarded costs in the Lower Court, costs of this appeal and costs of the entire suit and the court be pleased to grant such other or further reliefs as it may deem just and fit.

Parties agreed through their respective counsel Muthoga Gaturu & Company for the appellant, and Gathiga Mwangi & Company for the respondents, to dispose of the appeal by way of written submissions.

I have read the very detailed submissions. Each party has relied on a list of authorities.

The points of contention in this appeal are three.

1) Whether the plaintiffs established that they had leave to file suit out of time/whether the learned magistrate applied the proper principles in finding that leave granted was sufficient.

2) Whether the plaintiff/respondents proved their case/or whether the trial magistrate applied the proper principles in finding the appellant liable.

3) Who is to bear the costs of these suits?

On issue 1

The cause of action arose on 9th January 1999. According to section 4(2) of the Limitation of Actions Act Cap 22 Laws of Kenya, the action which is tortious ought to have been filed within 3 years i.e. by 9th January 2002. However, Section 27 (1) and (2) of the same Act provides for exceptions to this general rule. According to Section 27 (1) (c) where the court has – whether before or after the commencement of the action, granted leave and the requirements of Section 27(2) of the Act are fulfilled. That is to say that – it has to be 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 of the plaintiff until a date which *inter alia:*

a) Either was after the three-year period of limitation prescribed for that cause of action.

It is argued for the appellant that the learned magistrate failed to examine the 'leave' considering that the matter was brought three (3) years after the expiry of the limitation period. It has been pointed out that in Appeal No.19/09 Sergon J pointed out that there was ***"no evidence that the pleadings and proceedings leading to the issuance of the order extending time to file a suit out of time vide Nyeri HCC (OS) 73/03***

were produced before the trial court….in short the material which were presented before the Hon. Mr. Justice Khamoni which led him to file the suit out of time were not given to the trial magistrate".

During the re-trial the 1st plaintiff once again did not produce this specific evidence to support the claim that he had obtained leave from the High court to file the suit out of time. The learned magistrate was of the view that the High Court having granted leave, he would be overturning its decision if he were to go ahead and scrutinize the decision and find otherwise. He stated that, ***"I do not find any prejudice to hold that grant of leave to file suit out of time by the High Court was properly and regularly obtained hence a lower court cannot go overturning that order simply because it has not been addressed for the second time during the trial".***

This was contrary to the finding by Mativo J in the case of **Stephen Wangai (Minor suing through next friend George Maina Wangai) -Vs- Paul Temu Nderemo and Camp Garbatulla Catholic church Nyeri HCA 20/09** where he found that leave was not properly obtained and concluded ***"No leave was obtained and sought in the magistrate's court where the suit was filed. The effect is that leave was not properly sought and obtained in the court where the suit was ultimately filed"***.

With due respect, I must find that the learned magistrate was in error in his thinking that the granting of leave by the High Court (Khamoni J) could not be scrutinized during the trial.

The court in **Stephen Wangai** dealt with the issue in great detail- citing section 28 (5) of the Act which defines court in Section 27

> **"in relation to an action means the court in which the action has been or is intended to be brought"-**

Made the finding that

> **"……. the issue of the magistrate overturning a high court order cannot arise because there was no proper leave before her…."**

In the light of Sergon J's judgment on the issue while making the order for retrial, the learned magistrate herein was required to interrogate whether leave was properly obtained by the parties before they filed the suit out of time. Neither did he interrogate the related issue of the purport of the provisions of Section 28 (5) of the same Act defining the court where leave ought to have been obtained from.

The respondent did not abide by the clear directions of the appeal both in the ***Stephen Wangai*** case and in the appeal before Sergon J requiring him to present before the trial court the material he had presented before the High Court in obtaining leave; but more importantly abiding by the law which required him to file the suit in the court from which he had obtained the leave.

From the record the application for leave is indicated as having been brought vide ***Nyeri HC Misc Civil Application No.73/2003***. The order was given on 14th June 2005 in the following terms:

"In the matter of Limitation of Actions Act Cap 22 Laws of Kenya.

> ***In the matter between: -***
>
> ***George Maina Wangai)***
>
> ***Peter Kibe Wangai)*** ***Applicants/plaintiffs***
>
> ***Versus***
>
> ***Paul Temu Nderemo)*** ***Respondent/Defendant***

Order: -

Claim for: -

1. That this Honourable court be pleased to grant leave to the applicants' herein to file suit out of time in respect of personal injuries and fatal injuries sustained in an accident that occurred on 9th January 1999 along Nyeri/Karatina road.

The order then allows the applicants to file suit out of time within 14 days.

It bears no details of who was injured or who died hence the need for the trial court to obtain more detail as to what actually transpired. I believe that was the basis for Sergon J's argument that the material used to obtain the leave was not place before the trial magistrate.

It is therefore evident that the learned magistrate misdirected himself on the issue of leave to file suit out of time by failing to abide by the directions of the High Court to interrogate the same and hence arriving at the wrong conclusion.

Counsel for the plaintiff made submissions with regard to the application of section 2 (1) as read with section 22 of the Act to the circumstances of this case. Section 2 defines a minor: **"minor"** means a person under the age of twenty-one years, other than a person who is or has been married;

Section 22 provides for extension of limitation period in case of disability:

If, on the date when a right of action accrues for which a period of limitation is prescribed by this Act, the person to whom it accrues is under a disability, the action may be brought at any time before the end of six years from the date when the person ceases to be under a disability or dies, whichever event first occurs,…

Provided that:

(v) in actions for damages for tort—

(a) this section does not apply unless the plaintiff proves that the person under the disability was not, at the time when the right of action accrued to him, in the custody of his parent; and

(b) this section has effect as if the words "six years" were replaced by the words "three years".

He addressed the disability of the children of the deceased of the deceased in filing the matter as they were minors. When their mother died in the accident 2 children three months old, and 1 ½ years now aged 19 and 21 years respectively. The fact is that the adults in the lives of these children filed three suits out of the same accident and two of them went to the High Court on appeal – all with disastrous results on the one issue of leave. Counsel has point that these children have always been under a disability as provided for by s. 22 of the Act but the issue of extension of time for them to file suit was not the issue here. Neither was the issue of their capacity to file a claim for compensation an issue in the subordinate court from whence this appeal sprung. In fact, the matter before the learned magistrate and the subject of this appeal is the matter brought by the deceased's husband and her brother in law as the personal representatives of the deceased's estate. These two issues not having been issues before the lower court cannot be canvassed at the appeal stage.

Issue no. 2

The 2nd issue was whether the learned trial magistrate applied the right principles in apportioning liability.

It is common ground that an accident happened on 9th January 1999. It is not in dispute that the deceased was a passenger in the motor vehicle at the time of the accident.

The appellant relied on the case of **Silas Ntonjira –Vs- Mukiri Ikotha and Another (2017) eKLR** where Justice Mabeya dismissed the appeal on the basis that the plaintiff did not prove the case to the required standard.

The passage relied on by Mabeya Judge in the said case appears to be the same in the Court of Appeal case of **Nandwa -vs-Kenya Kazi Ltd (1988) eKLR** where the judges stated that throughout the trial in an action for negligence, the issue is whether the plaintiff has proved the same against the defendant. The Judge has ***"to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if not so satisfied the plaintiff's action fails. The formal burden of proof does not shift".***

Of relevance to this case is the rest of the passage and I quote; ***"But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favor unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential burden of proof resting on the defendants……."***

From the evidence on record, the motor vehicle was driven by the 1st defendant, a priest serving under the Isiolo Catholic Parish, the deceased was an employee of the Isiolo Catholic Parish. She was a passenger in the said motor vehicle when the Road Traffic Accident happened and she died. The fact that an accident happened, and a passenger died as a result prima facie creates a situation where the person who was in control of the motor vehicle and who survived the accident owes an explanation as to what exactly happened. The saying that dead men tell no tales is apt herein. There is no evidence that the motor vehicle was on auto when the Road Traffic Accident happened. It was under the control of the appellant as the driver, the person who deliberately refused to give an explanation as to what happened. He, as the driver, owed a duty of care to his passengers to drive the motor vehicle with care and attention to ensure a safe arrival to wherever they were going. The fact that one of his passengers died in a self-involving accident is prima facie evidence that he was negligent and the principle of evidential burden of proof in the **Nandwa case** above applied to the 1st defendant/appellant herein.

The appellant invited the court to consider the weight of the findings in the inquest proceedings said to have been that no one was to blame for the accident. The nature of inquest proceedings is to determine whether anyone was criminally culpability to warrant his or her being charged and prosecuted. The said proceedings were not produced to show whether anyone testified or not and if they did what evidence was given before the inquest magistrate. The mere statement that the court found that no one was to blame was not sufficient to be relied upon as evidence of the appellant's non blameworthiness.

I find no fault with the learned magistrate's finding that he, the driver of the motor vehicle was liable for the accident.

Issue no. 3

This brings us to the issue of costs. It is clear to me that the plaintiffs have a case against the defendants. It appears to me to be the reason why the appellant has not attacked the quantum of damages as awarded by the learned trial magistrate. Having found for the plaintiffs the learned magistrate had to award costs to the plaintiff/respondents. Costs follow the event. In conclusion

1. The learned magistrate found, properly that the appellant was to blame for the accident that caused the death of Angelica Gakii Maina. However, he misdirected himself with regard to the issue of leave to file the case out of time. The respondents failed to establish that they had obtained leave to file the suit out of time.

2. The issue regarding the extension of time and the capacity of the two minors to file suit as

provided for under s. 2 and 22 of the Limitation of Actions Act Cap 22 LOK were not issues canvassed in the lower court and could not be canvassed at the appeal.

3. The judgment and decree of the learned magistrate is set aside.

4. The appeal partly succeeds and the appellant will have half the costs here and below.

5. Right of Appeal 30 days.

Dated, delivered and signed at Nyeri this 21st day of September 2018

Mumbua T. Matheka

Judge

In the presence of:

CA albert

n/a for parties or counsel

Date taken in court