



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.110 OF 2011

WALLACE NJENGA.....APPELLANT

VERUS

ATTORNEY GENERAL.....1ST RESPONDENT

JOHN MUTURI.....2ND RESPONDENT

(Being an Appeal from Judgment/Decree and Orders of Honourable T.C. Wamae the Senior Principal Magistrate delivered on 7th June, 2011 in Naivasha SPMCC No. 308 of 2009)

JUDGMENT

1. The appeal hereof hinges on the interpretation compliance and constitutionalism of **Section 13A of The Governments Proceedings Act, Chapter 40 Laws of Kenya.**

2. The appellant sued the Attorney General and another following a traffic road accident that occurred on the 3rd December 2008 involving the appellant as a passenger in a government vehicle Registration No.GK A 562Q along the Nakuru/Naivasha road whereof the appellant sustained injuries.

3. Upon service of summons, The Honourable The Attorney General filed a defence not only denying liability but also stating that the suit was bad in law and incompetent for failure to comply with the mandatory provisions of **Section 13A of the Government Proceedings Act.**

4. On the 9th October 2009, the Respondent raised preliminary objection that the suit was incompetent for failure to comply with Section 13A of Cap 40. The Learned Magistrate rendered that it was upon the plaintiff/appellant to adduce evidence and demonstrate to the court that the above provision was adhered to.

The suit then proceeded to full hearing. The appellant testified, produced a copy of the Notice to the Attorney General pursuant to Section 13A but no proof of its service upon the Attorney General was tendered.

5. In his judgment dated the 7th June 2011, the Honourable Magistrate stated:

“I find that failure by the plaintiff to show that they complied with Section 13A of the Government Proceedings Act is fatal to his case and it must fail on that non-compliance with a mandatory provision of the law.”

6. The appellant proffered five grounds of appeal. In their totality the appellant challenges the

interpretation applicability and constitutionality of Section 13A as stated above.

This court is urged to set aside the above findings and dismissal of the appellants suit and thereafter to evaluate the evidence on record and render a decision.

7. I have considered the evidence on record and the submissions by counsel on this appeal.

The learned trial magistrate in her judgment made findings that had the appellant served the mandatory statutory notice upon the Attorney General, based on the evidence on record, she would have found the 1st and 2nd Respondents liable at 100 % jointly and severally. The trial court awarded general damages for pain and suffering of Kshs.80,000/=, together with Kshs.5,000/= as special damages.

8. The controversy surrounding **Section 13A of the Government Proceedings Act** has been finally put to rest by the Learned Judges of Appeal (Hon. Waki, G.B M Kariuki and Ouko JJ.A) in the case **CA 297 of 2004 David Njenga Ngugi -vs A.G.(2016) e KLR**. They rendered themselves that while appreciating that the notice under Section 13A it was their finding that failure to give such notice did not render a suit incompetent or fatal. That the notice was made to enable the Attorney General to take instructions from the government department concerned with a claim. They further made findings that **Government Proceedings Act (Cap 40)** must be construed to carry out the intention of parliament that was not to deprive an intending litigant her/his cause of action on account of not complying with the said Section.

The Honourable Judges further rendered themselves that **Section 13A** though couched in mandatory terms is merely directory, and cannot be regarded as imperative so as to render a competent suit incompetent for failure to comply.

In **Kenya Bus Service Ltd -vs- Minister for Transport & 2 Others (2012) e KLR**, the constitutionality of Section 13A was challenged and referring the Article 468 of the Constitution that:

“48. The state shall ensure access to Justice for all persons, and if any fees is required, it shall be reasonable and shall not impede access to justice.”

Majanja J too in the above case held that **Section 13A of the Governments Proceedings Act** violates the provisions of **Article 48** of the **Constitution**.

At the end, the Learned Court of Appeal Judges allowed the appeal and set aside the dismissal decision of the trial court on account of none compliance with **Section 13A**.

12. I have perused the authorities above. I have no reason whatsoever to depart from the Court of Appeal findings.

I further add that **Article 159(2)(d) of the Constitution** enjoins courts to administer justice without undue regard to procedural technicalities.

In conclusion I hold that none compliance with the provisions of **Section 13A** of the **Government Proceedings Act** does not render a suit incompetent or fatally defective.

For those reasons, the appeal is allowed and the trial magistrates Judgment is set aside.

14. I have stated above that neither the Appellant nor the Respondent had any quarrel with the trial magistrates findings on both liability and *quantum* of damages. I have not been urged by either party to interfere with the said findings. I shall not attempt to.

15. The trial magistrate had she not declared the suit incompetent and dismissed it, she would based on the evidence on record, find the Respondents jointly and severally 100% liable in negligence, and awarded the appellant Kshs.80,000/= damages for pain and suffering and Kshs.5,000/= as proven special damages. Those findings shall not be interfered with. I uphold the same.

16. Consequently the appeal is hereby allowed and Judgment is hereby entered for the Appellant that:

(a) The Respondents are jointly and severally wholly liable in negligence.

(b) That the appellant is awarded Kshs.80,000/= in damages for pain and suffering and Kshs.5,000/= in special damages.

(c) The awards above shall accrue interest at court rates from the trial court's judgment on the 7th June 2011.

(d) The Costs of this appeal and the case below shall be borne by the respondents.

Dated, Signed and Delivered this 28th Day of February 2017.

J.N. MULWA

JUDGE