REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 88 OF 2011

BERNARD NJUGUNA KARANJA……..…….……..1ST APPELLANT

FRANCIS KIOKO KITHUKA…….....2ND APPELLANT

VERSUS

HYNESS MUTAVI KIVUVA (Suing as the

legal representative of the Estate of Miriam

Mumbua Kakui also known as Miriam Mumbua Makumi(Deceased).....RESPONDENT

(An Appeal arising out of the judgment of Hon. B.T. Jaden CM delivered on 19th May 2011 in Machakos Chief Magistrate's Court Civil Case No. 537 of 2009)

JUDGMENT

Introduction

The Appellants were the original Defendants in Machakos Chief Magistrate's Court Civil Case No. 537 of 2009, and have appealed against the judgment of the learned trial Magistrate, which was delivered in the said suit on 19th May 2011. The Respondent was the original Plaintiff in the said suit and sued in his capacity as the legal representative of the deceased Mirriam Mumbua Kakui (hereinafter referred to as "the deceased"), who died in an accident that occurred on 13th July 2004. The learned magistrate in her judgment found the Appellants 100% liable for the said accident, and awarded the Respondent a total award of Kshs 594,200/= as general and special damages.

The Appellants subsequently moved this Court through a Memorandum of Appeal dated 10th June 2011 in appealing against the judgment and decree of the trial magistrate in CMCC No. 537 of 2009 in Machakos. The grounds of appeal raised by the Appellants are as follows:

- The learned trial magistrate erred in law in finding that the appellants were liable in the absence of any evidence on record.
- The learned trial magistrate erred in law and in fact in not finding that the respondent suit was time barred.
- The learned trial magistrate erred in law and in fact in not taking into account the submission of the appellants.

- The learned trial magistrate erred in law and in fact in not finding that the grounds for extension of time to file suit out of time by the respondent were not covered by the Limitation of Actions Act.
- The learned trial magistrate erred in law and in fact in not finding that the respondent did not prove his case on a balance of probability.
- The learned trial magistrate erred in law and in not following the law relating to award general damages and liability.

The Appellants are praying that the judgment delivered in favour of the Respondent on 19th May 2011 and the resultant decree be set aside, vacated, and/or replaced with an order which this Court may deem just, or an order dismissing the Respondent's suit. They also prayed that the Respondent be condemned to pay the costs of this appeal and of the suit in Machakos CMCC 537 of 2009.

The Facts and Evidence

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts, and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661 , Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424.**

I will therefore firstly proceed with a summary of the facts and evidence given in the trial Court. The Respondent instituted a suit in the lower court by filling a Plaint dated 6th May 2010, wherein he claimed that on or about 13th July 2004 the deceased was lawfully being carried by a bicycle along Nairobi-Mombasa road and off the road, when the 1st Appellant's vehicle registration Number KAQ 248G which was being driven by the 2nd Respondent carelessly veered off the road and hit the deceased causing her serious bodily injuries and occasioning her death.

The Respondent claimed that when the deceased died she was 43 years old and enjoyed good health. That prior to her work she was business lady who earned an average of Kshs. 7,000/= per month and was the sole bread winner. Further, that upon the deceased's death the Respondent dropped out of school while in form 2 and is the sole survivor of the deceased's estate.

The Appellant sought general damages under the Fatal Accidents Act and the Law Reform Act as a dependant of the deceased' estate. He also sought special damages as follows:

a. Police abstract Kshs. 200/=
b. Death Certificate Kshs. 100/=
c. Costs of obtaining limited grant Kshs. 30,000/=

Kshs. 30,300/=

The Appellants filed a defence dated 8th February 2010 wherein they denied the allegations of an accident having occurred, and put the Appellant to strict proof. They averred that if any injury had been suffered by the Respondent, then it was solely by his own negligence and recklessness. They also intimated that they would raise a preliminary objection on a point of law that the suit was time barred.

From the record of the trial court proceedings, the suit proceeded to full hearing on 30th June 2010, when three witnesses gave evidence for the Respondent. The first witness (PW1) was P.C Jonathan Kasavi who testified that according to the police file, a fatal accident occurred at Kima on Mombasa Nairobi involving motor vehicle registration number KAQ 248G Isuzu lorry and a pedal cyclist carrying a passenger. The deceased was the passenger, and that she died while being treated at Sultan Hamud Hospital on the same day. He further stated that the cyclist and the vehicle were headed in the same direction, and that the vehicle hit the cyclist from the rear while overtaking on high speed. PW1 produced the police file and the police abstract as an exhibit.

The Respondent testified as PW2, and his testimony was that the deceased who was his mother died on

the day of the accident on 13th July 2004, and that he reported to the Salam Police station where he got the details of the accident. He stated that he was 19 years at the time of his mother's death and was not mature enough to follow up on the accident.

PW2 produced receipts to show ownership of the said motor vehicle, a letter evidencing that he left school in 2005, and a receipt of the legal fees he paid to get the grant of letters of administration.

PW3 was the cyclist involved in accident on 13th July 2004 when he was ferrying the deceased along Mombasa-Nairobi road. He stated that he had been cycling on the edge of the tarmac when they were knocked down by a lorry from behind and he was thrown about ten metres away. It was his account that they were rescued and taken to Sultan Hamud Hospital for treatment where the deceased passed away.

The Appellants did not call any witnesses or evidence during the trial in the lower court and relied on written submissions filed therein.

The Issues and Determination

The Appellant and Respondent canvassed this appeal by way of written submissions. The Appellants' learned counsel, Jackson Omwenga & Co. Advocates, filed submissions dated 21st October 2015. It was argued therein that there was no sufficient evidence adduced against the Appellants to hold them liable for the accident. Further, that it was the evidence of PW 1 that there was no contact between the cyclist and the lorry. According to the Appellants, the deceased was not fatally injured by the lorry.

The Appellants cited the decisions in **Alice Njoki Wachichi vs Langat Koech & 5 Others ,(Nairobi HCCC No. 2104 of 1998), Feisal M. Mughal vs K.S Matharu (Nairobi HCCC No. 6823 of 1992)** and **Mary Ayo Wanyama & Others vs Nairobi City Council,(Nairobi C.A.C.A No. 252 of 1998**. In this regard.

It was also argued that the suit must fail since there was no eye witness and/or investigating officer, and /or any evidence of negligence on the part of the first Appellant to warrant the court to enter judgment on liability in favour of the Respondent. The Appellants cited the decisions in **Egara Kabaja V Gordon Nguka Civil Appeal No. 16 of 2014** and in **Chivatsi Simba Mwangiri V Boniface Musyoka (2011) eKLR** in support of this position.

On the issue of the suit being filed out of time, the Appellants submitted that this issue was pleaded in their defence, and that the onus of proof was upon the Respondent to demonstrate to the court that he met the requirements of section 27(2) and 29 of the Limitation of Actions Act. Reliance was placed on the holdings in **Cozens vs North Hospital Management Committee and Another, (1966) 2 ALL E.A 799**and **Divecon Ltd vs Shirinkhanu S. Saman (Nrb C.A.C.A No. 142 of 1997** for this position.

It was opined on the issue of quantum of damages, that the same were not supposed to be punitive. Reference was made in this regard to the decisions in **Westch & Sons Ltd vs Shepard (1964) A.C 345** and in **Tayab V Kinangu,(1982-1988) I KAR 90.** Finally, the Appellants submitted that the award of party to party costs of Kshs. 4200/= was not pleaded and proved, as required by the holding in **Wilberforce Osodo vs Sarova Hotels Ltd Anor, (Nrb) HCCC No. 18 of 1994.**

The Respondent's learned counsel, Mutiso Makau & Company Advocates filed submissions dated 5th November 2015, wherein it was admitted that the Respondent's suit was time barred, but that it fell within the exemption to section 4(2) of the Limitations of Actions Act. It was submitted that the Respondent was young at the time and was not aware of the material facts, nor was he aware he could be party to the suit. Reference was made to the decisions in **Divecon Ltd vs Shirinkhanu S. Saman, Nrb C.A.Civ.App No. 142 of 1997** and in **Yunes K. Oruta & 7 Others vs Samuel M. Nyamota, Court of Appeal Case No. 96 of 1984.**

On the issue of liability, it was submitted that the burden of proof moved from the Respondent to the

Appellants as they did not deny the existence and occurrence of the accident, and during cross-examination of PW1 they only questioned the point of impact. It was opined that the authorities cited by the Appellants were not applicable in this case. Lastly, on the issue of damages, it was submitted by the Respondent that any award made on costs is upon the court's discretion as provided by section 27 of the Civil Procedure Act, and in **Cuossens V Attorney General, (1999) EA 40.**

From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, it is evident that there are three issues raised that require determination. The first is whether the Respondent's suit in the trial Court was time barred. The second is if the suit was not time barred, whether there was a basis for finding the Appellants liable for the accident that occurred on 13th July 2004. The last issue is, whether the damages awarded against the Appellants were justified if they are found to be liable.

On the first issue as to whether the Respondent's suit in the trial Court was time barred, section 4 of the Limitation of Act provides the circumstances when a suit founded on contract or tort may be time barred as follows:

> (**1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued -**
>
> **(*a*) actions founded on contract;**
>
> **(*b*) actions to enforce a recognizance;**
>
> **(*c*) actions to enforce an award;**
>
> **(*d*) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;**
>
> **(*e*) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.**
>
> **(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:**
>
> **Provided that an action for libel or slander may not be brought after the end of twelve months from such date.**

In the cases of actions founded on negligence, section 27(1) and (2) of the Limitation Act provides for the extension of time when there is ignorance of material facts as follows:

> **(1) Section 4 (2) does not afford a defence to an action founded on tort where -**
>
> **(*a*) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and**
>
> **(*b*) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and**
>
> **(*c*) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and**
>
> **(*d*) the requirements of subsection (2) are fulfilled in relation to the cause of action.**
>
> **(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 -

(*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

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

The procedure as regards pleading and proving limitation of action and the exceptions thereto is as follows. A party relying on limitation should specifically plead it as required by Order 2 Rule 4(1) of the Civil Procedure Rules which provides as follows:

"4.(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statue of Limitation or any fact showing illegality –

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raised issues of fact not arising out of the preceding pleading"

Similar provisions were provided by Order VI Rule 4(1) of the repealed Civil Procedure Code which was in operation at the time the suit in the trial court was filed. If the defence of limitation of time is taken, it is then up to the plaintiff to bring his case within any of the exceptions to the Limitation of Actions Act or other statute of limitation as may be the case.

A perusal of the record of the trial Court and the submissions therein show that the Appellants did raise a preliminary objection that the suit was time barred in paragraph 10 of their Defence filed in the trial Court dated 8th February 2010. An *ex parte* order of leave of time to file suit was granted by the trial Court on 16th April 2009 in **Machakos Chief Magistrate's Court Misc. Civil Application No. 15 of 2009**. The grounds given by the Respondent for the leave were his lack of knowledge of, and advice on court processes, and his financial inability to initiate legal proceedings.

An e*x parte* leave to file suit out of time can be challenged during trial as held in **Oruta & Another vs. Nyamato, [1988] KLR 590 and Divecon Ltd vs.Shrinmkhana S. Samani, Civil Appeal No. 142 of 1997.** The trial court in its judgment found on this issue that it could not disturb the extension of time that had been granted, as the issue was not raised during the proceedings**. The Appellants did however during cross-examination in the trial Court question the Respondent on his age and state of knowledge at the time of the subject accident, and it is therefore not** entirely correct as held by the trial magistrate that the issue of limitation of action *remained unchallenged during the proceedings.*

The correct approach therefore in deciding whether section 27 of the Limitation of Action Act is applicable in this appeal is to first inquire whether the facts of which the Respondent was unaware were material facts. If they were, the next step is to ascertain whether they were of a decisive character. If so, it must then be ascertained whether those facts were within the means of knowledge of the applicant before the specified date.

Section 30 of the said Act defines material facts relating to a cause of action as the following—

a. the fact that personal injuries resulting from the negligence, nuisance or breach of duty constituting that cause of action;
b. the nature or extent of the personal injuries resulting from that negligence, nuisance or breach of duty;

c. the fact that the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty, or the extent to which any of those personal injuries were so attributable.

Under section 30(2), material facts are of a "decisive character" only if a reasonable person knowing those facts and having sought appropriate advice would regard those facts as showing that an action would (apart from the expiration of the limitation period) have a reasonable prospect of success and result in an award of damages sufficient to justify the bringing of an action.

Further, section 30(3) of the Act provides that for the purposes of section 27, a fact shall be taken at any particular time to have been outside the knowledge (actual or constructive) of a person, if but only if he did not know that fact; and in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining it; and lastly, in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances.

In section 30(5) “appropriate advice” is defined as meaning in relation to any facts or circumstances “advice of a competent person qualified in their respective spheres, to advice on the medical, legal or other aspects of that fact or those circumstances, as the case may be.

Arising from the foregoing interpretations, it is my view that a Court when determining whether or not a person has undertaken reasonable steps to ascertain material facts, should make an objective assessment taking into account the background and circumstances of that person. In the present appeal, the Respondent claimed that he was not at the time sufficiently knowledgeable or informed to be aware that negligence has occurred, and could not able to access the needed legal advise in this respect.

The Respondent’s evidence in this respect was not controverted by the Appellants. It will not be reasonably expected that the Respondent would then have conducted enquiries to ascertain the material facts, such as determining whether the death of his mother from the accident that occurred on 13th July 2004 gave rise to a cause of action, and whether the Appellants were legally accountable. I therefore find that the Respondent could rely on the exceptions in section 27 and 30 of the Limitation of Action Act for these reasons, and his action was not time barred.

On the second issue of liability, I have evaluated the evidence given in the trial Court, and concur with the finding by the trial magistrate that there was sufficient evidence to show on a balance of probability that the Appellants were to blame for the accident that occurred between the lorry registration number KAQ 248G and the deceased on 13th July 2004. In particular, the 1st and 2nd Appellants have not contested the finding by the trial Court that they were the owner and driver respectively of the said lorry. In addition, the evidence of PW1 that the bicycle in which the deceased was being ferried as a passenger was hit from the rear by the Appellants’ lorry was corroborated by PW3 who was driving the bicycle.

The argument by the Appellants that the sketch plan in the police file did not show the point of impact or blood stains was not sufficient to controvert this fact, in the absence of evidence by the Appellants that there were different set of facts as regards the occurrence of the said accident. Lastly, the evidence by the Respondent that the lorry was driving at high speed and was overtaking the bicycle at the time of the said accident was not controverted.

As regards the last issue on damages, It is an established principle of law that that the Appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR** and **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5)**.

The Appellants in this respect did not contest the award of Kshs 10,000/= for pain and suffering. On the question whether the amount of Kshs 480,000/= awarded by the trial court as damages for loss of dependency was based on any known factors or principles of law, this Court is guided by the manner of assessment of damages for loss of dependency under the Fatal Accidents Act. The applicable method was aptly explained by Ringera J. (as he then was)in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 of 1988** as follows;

> **The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."**

In the present appeal, a multiplicand of Kshs 5000/= minimum wage per month and a multiplier of 12 years was used by the trial Court on the basis that the deceased was aged 43 years at the time of her death. The trial Court also adopted a dependency ratio of 2/3. Given that the Respondent did not produce any evidence to show that the deceased was a business lady and earned an average sum of Kshs 7,000/= per month as pleaded in his Plaint, I find the said multiplicand and the award of Kshs 480,000/= to be e reasonable.

I however note that in law and practice, where a claimant get awards for loss of life both under the Law Reform Act and the Fatal Accidents Act, the former should be deducted from the latter. This principal was explained by the Court of Appeal in **Kemfro v A. M. Lubia & Another,[1982-1988] KAR 727** as follows;

> "**The net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act.'**

It is clear in the present appeal that the trial magistrate did not consider that the award under loss of expectation of life was to be deducted from the grand total once an award for lost years was made, and therefore erred in this respect when it came to the computation of damages.

Lastly, the Appellants contested the award of Kshs 4,200 /= on the ground that it was not pleaded and proved. The principle of law in this regard is that special damages must first be specifically pleaded, and then strictly proved. See in this regard the decisions in **Kampala City Council vs. Nakaye [1972] E.A 446** and **Hahn vs. Singh [1985] KLR 716**.

The Respondent did plead special damages of Kshs 30,000/= for the costs of obtaining a limited grant. However, as correctly found by the trial magistrate, he did not provide any evidence of this expenditure. It is also my view that the trial magistrate did correctly find that an award of party and party costs of Kshs 4,200/= would be reasonable in this respect, since the Respondent did produce evidence of the grant of letters of administration as his exhibit 4.

I therefore set aside the said award in the trial court of Kshs 594,200/=, and substitute it with a total award of Kshs 494,200/= which has been computed as follows arising from the findings in the foregoing:

(a) Pain and suffering 10,000.00

(b) Loss of expectation of life 100,000.00

(c) Lost years 480,000. 00

(d) Special damages 4, 200.00

594,200.00

Less loss of expectation of life 100,000.00

Total 494,200. 00

Each party shall bear their costs of the appeal.

It is so ordered.

DATED AT MACHAKOS THIS 24TH MAY 2016.

P. NYAMWEYA

JUDGE