



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 30 OF 2013

ANACLET KALIA MUSAU (suing on behalf of the estate of

VINCENT MANGALO KALIA(deceased.....PLAINTIFF

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....DEFENDANT

THE INSPECTOR GENERAL OF POLICE.....2ND DEFENDANT

JOHN KIPTARUS KIPKERYO.....3RD DEFENDANT

JUDGMENT

1. The plaintiff Anaclet Kalia Musau is suing on behalf of the estate of the deceased Vincent Mangalo Kalia as the administrator of the estate. He claims for general damages, costs of the suit and interest, against the defendants Honourable Attorney General who is sued as the principal Government legal advisor to the Government, on behalf of the Inspector General of Police and John Kiptarus Kipkeryo, a Government of Kenya employee.

2. The plaint filed on 8th February 2013 claims that on or about the 30th day of June 2011, the deceased Vincent Mangalo Kalia (deceased) was standing off Langata Road area the Southern by-pass near when the third defendant John Kiptarus Kipkeiyo who was the driver, agent, servant then driving, managing, controlling motor vehicle registration No. GKA 376(S) so negligently controlled the said motor vehicle that he negligently lost control and hit the deceased as a result of which the deceased sustained fatal injuries.

3. The particulars of negligence attributed to the 3rd defendant are:

- a. Driving at an excessive speed under the circumstances.
- b. Driving without sufficient care and attention.
- d. Driving recklessly, carelessly and without due regard to the Highway Code.
- d. Failing to slow down, swerve, break or in any other way control the said motor vehicle to avoid the accident.

e. Causing the accident.

4. The plaintiff also seeks to hold the 2nd defendant vicariously liable for the negligent acts of the 3rd defendant.

5. The 1st defendant and 2nd defendants entered an appearance and filed joint defence denying the plaintiff's claim and contending that if at all there was an accident involving the Deceased and the motor vehicle registration GKA 376 S then the deceased was wholly to blame for the accident. They also denied that the deceased's estate had suffered any loss or damage and prayed for dismissal of the plaintiff's suit with costs.

6. The plaintiff filed a reply to defence on 22nd April 2013 joining issues with the 1st and 2nd defendant's defence and reiterating the contents of the plaint as pleaded. The 3rd defendant neither entered appearance nor filed any defence to the plaintiff's claim. Interlocutory judgment in default was entered against him on 12th November 2013.

7. The plaintiff complied with pre-trial requirements and had the suit certified as read for trial on 14th May 2014 after the 1st and 2nd defendants failed to file any documents to support their defence.

8. The suit was heard on 13th May 2015 with the plaintiff testifying and calling one witness.

9. The plaintiff testified as PW1 relying on his witness statement filed on 13th May 2015 which the court adopted as his evidence in chief. In his sworn testimony, the plaintiff testified that the deceased was his son and that on 30th June 2011 while at his home in Nunguini area of Makueni County he was called and informed that his son had been involved in a road accident involving motor vehicle GKA 376S and that he had died. He further testified that he learnt that the 3rd defendant was the driver of the accident motor vehicle which belonged to the government of Kenya, Inspector General's Office. The said 3rd defendant was charged before the city Court Traffic court in Case No. 20179 of 2011 with causing death by dangerous driving and that PW1 testified in that court against the said defendant but that the case was still pending determination as at the time he recorded his statement.

10. The plaintiff further testified that his son was aged 25 years, leading a normal healthy life, employed as a mason earning a monthly salary of 20,000 survived by the plaintiff and his wife (the deceased's mother). That the deceased was the sole provider of the family and gave him kshs 14,000/- every month. He was also in the process of getting married. He used to give money for education of his younger siblings. The plaintiff stated that when he met the 3rd defendant the latter apologized for causing the death of his son.

11. The plaintiff prayed for damages and produced his list of documents which included copy of police abstract, limited grant of letters of Administration letters of employment, death certificate, letter from the chief and copy of death certificate for the accident motor vehicle as P exhibit 1-6.

12. The plaintiff also called PW2 Nicholas Kyalo Kimae who testified on oath that he lived along Langata Road and recorded and signed a statement which was filed which was adopted as his evidence in chief.

13. PW2 testified that on 30th June 2011 he was walking along Langata Road on the left side of the road facing Langata at 7.00pm and that there was a car parked at the Southern by-pass junction. A police vehicle came from Langata direction towards town on the wrong side of the road at a very high speed. Another motor vehicle coming from town nearly collided head on with the GK which swerved and hit the parked car and the latter car flew and hit the deceased who was ahead of PW2 off the road on the pedestrian walk way and 2 feet from the main road and threw him on the side and the GK vehicle fell in a ditch. The victim bled and died on the spot while being assisted. The witness checked in the deceased's pocket and found an identity card reading Vincent Kalia. He blamed the driver of the GK

vehicle for driving on the wrong side of the road and that because of that, the deceased could not have avoided the accident.

14. The plaintiff's case closed and as the defence never attended court, the plaintiff filed and served them written submissions.

15. Parties appeared before me on 15th June 2015 when the 1st and 2nd defendants were represented by Mr Moya holding brief for Miss Kasim and intimated that they wished to recall the plaintiff for cross examination. The court gave them the liberty to do so pending the delivery of this judgment but as at today, no such application has been lodged.

16. The plaintiff's counsel filed written submissions on 8th June 2015 reiterating the plaintiff's testimony that of his witness and the pleadings, and urging this court to find the defendants jointly and severally liable in damages to the plaintiff at 100%. He also prayed for the quantified damages under the Fatal Accidents Act and Law Reform Act to the tune of KShs 9,900,000, costs and interest.

17. I have carefully considered the plaintiff's claim, the pleadings, testimonies and documents produced in court, the written submissions and the cited authorities.

18. The only issue for my determination is whether the plaintiff's suit as filed is competent and if not, what orders I should make. The death certificate No. 207241 produced as P exhibit 4 shows that the deceased Vincent Mangalo Kalia died on 30th June 2011 aged 25 years, which date of death agrees with the date of accident as recorded in the police abstract form P exhibit 1 issued on 28th July 2011. The plaint dated 30th January 2013 was filed on 8th February 2013 and paragraph 6 therefore clearly states that the cause of action arose on 30th June 2011.

19. Proceedings against the Government or Public authorities are governed by the Government Proceedings Act Cap 40 (Laws of Kenya) and the Public Authorities Limitation Act, Cap 39 Laws of Kenya.

20. Under Section 3(7) of the Public Authorities Limitations Act.

“ No proceedings founded on tort shall be brought against the Government or Local Authority after the end of twelve months from the date on which the cause of action accrued.”

21. The material accident having occurred on 30th June 2011, the plaint or claim against the Attorney General and Inspector General of Police ought to have been instituted on or before 30th June 2012. It is trite that the claim having been instituted on 8th February 2013, it was caught by the statutory limitation period, as the claim is against the Government and therefore Section 4(2) of the Limitation Actions Act does not apply. Under Section 4(2) of the Limitation of Actions Act (Cap 22 Laws of Kenya), an Action founded on tort may not be brought after the end of three years from the date of which the cause of action accrued. However, the said Act, Under Section 42 excludes certain proceedings and in this regard, Section 42(1) (e) is clear, material to this suit that:

i. This Act does not apply to

a.

b.

c.

d.

e. Proceedings to which the Public Authorities Limitation Act (Cap 39) applies.”

22. In other words where the period of Limitation is provided by another statute like the Public Authorities Limitation Act, which is twelve months, then the 3 years period for bringing suit in an action for tort of negligence as contemplated under Section 4(2) of the Limitation of Actions Act, Cap 22 is inapplicable.

23. Accordingly, I find that the suit herein and therefore the claim as instituted against the Government of Kenya and its employees in their official capacity was instituted outside the statutory limitation time and is therefore incompetent. Once the statutory time lapses under Cap 39, not even leave of the court under Section 27 and 28 of the Limitation of Actions Act would be granted to revive the claim. This position was clearly stated in the case of **Bernard Mutonga Mbithi V Municipal Council of Mombasa & Ali Mbaraki t/a Mbaraki Contractor's CA No. 3 of 1992(Kwach, Muli & Gicheru JJA)** where the Court of Appeal was categorical that Sections 27 and 28 of the Limitation of Actions Act does not apply to Local Authorities.

24. For the foregoing reasons, it would be a waste of judicial time to delve into the merits and demerits of this suit as against the 1st and the court's jurisdiction to determine this suit would only crystallize where the suit was filed within the statutory period.

25. Albeit the issue of the suit being statute barred was not raised by the defendants who did not participate in these proceedings, that matter goes to the jurisdiction of the court to determine whether it can entertain a claim which is statute barred.

26. The locus classicus on jurisdiction is the case of the **Owners of the Motor Vessel "Lilian S" V Caltex (K) Ltd (1989) KLR 1** where the Court of Appeal. Nyarangi JA held, inter alia;

" I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court sized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court of law has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

27. In **Dhanesvar Vs Melita Manilal M Shah (1965) EA 321**, the court was clear that:

" The object of Limitation enactment is to prevent a plaintiff from prosecuting stale claims.....the effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case."

28. I also agree with Odunga J in **Republic Vs Principal Magistrate P. Ngare Gesora & 2 Others Exparte Nation Media Group Ltd (2013) e KLR** stated:

" However , where a certain cause of action is disallowed by law, the issues of the path of justice being clogged does not arise since in that case justice demands that a claim should not be brought. Justice, it has been said time without a number, must be done in accordance with the law....." It must however be remembered that what the law of Limitation Act provides is that certain causes of action may not be brought after expiry of a particular period of time. In other words, the Act bars the bringing of particular actions after the specified periods of Limitation....."

29. The above principles of law are in my view applicable to this case. Irrespective of the merits of the claim, the law is clear that such action shall not be brought against the Government after the expiry of twelve months and upon such expiry, the claim is extinguished such that the Limitation of Actions Act which allows similar causes of action against private individuals to be filed out of the stipulated statutory period with leave of court does not apply.

30. In addition, it cannot be said that the matter of Limitation of Actions is a procedural technicality

curable by Article 159(2) (d) of the Constitution or the overriding objectives principles espoused under Sections 1A and 1B of the Civil Procedure Act. In my view, statutory provisions limiting time within which a substantive cause of action should be brought cannot be equated to procedural technicalities envisaged under Article 159(2) (d) of the Constitution. They are not procedural lapses that do not go to the root or substance of the matter under consideration such as filing suit by way of Notice of Motion instead of plaint or citing wrong provisions of the law.

31. I therefore find that in as much as the court would have wished to assist the plaintiff to access justice in the court for the sad and sudden regrettable loss of his beloved son, failure to institute suit against the Government within the stipulated statutory period of one year or twelve months from the date when the cause of action arose, extinguished the suit in limine.

32. Consequently, I proceed and strike out the incompetent suit against the 1st ad 2nd defendants and I make no orders as to costs.

33. However, as against the 3rd defendant driver, albeit he was sued in his official capacity, he nonetheless would be liable in his own capacity as an individual driver of the accident motor vehicle. The only problem is that he was sued by virtue of his driving of the accident motor vehicle which belonged to the Government of Kenya in his capacity as an employee and agent or servant of the Government of Kenya who owned the offensive motor vehicle. Accordingly, this court would be acting in vain if it was to delink the 3rd defendant from the 1st and second defendant since the motor vehicle that was carelessly or dangerously driven belonged to a party that the suit herein is unsustainable against and who would be vicariously liable for acts of the 3rd defendant. In the end, the suit against all the defendants is struck out with no orders as to costs.

Dated, signed and delivered at Nairobi this 24th day of September 2015.

R.E. ABURILI

JUDGE