



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MERU**

**Civil Appeal 41 of 2001**

**PAUL MURIUKI MWITARI ..... APPELLANT**

**VERSUS**

**KENYA BREWERIS LTD ..... RESPONDENT**

*(An appeal from the judgment/decision of Hon. Mr. Njeru Ithiga, S.R.M. in Meru delivered on 20<sup>th</sup> March 2001 being CMCC No. 1016 of 1998 delivered on 20<sup>th</sup> March 2001)*

**JUDGMENT**

The appellant in the Meru Chief Magistrate Court Case No. 1016 of 1998 filed a claim against the respondent seeking for general and special damages which he said he suffered after being shot at the respondent's premises by robbers. That incident occurred on 18<sup>th</sup> July 1992. The suit in the chief magistrate court was filed on 17<sup>th</sup> November 1998. From a casual look at those two dates, it is clear that the appellant suit was filed beyond the 3 years limitation period provided under Section 4 of the Limitation of Actions Act Cap 22. In evidence the appellant stated that he was employed as a casual by the respondent. Whilst on duty on 18<sup>th</sup> July 1992 he heard a gun shot then felt that he had been hit at the

abdomen. He was taken to hospital and was admitted for 3 days. By the time he was giving evidence he said that the bullet was still lodged in his body. As a result of the shooting, he is unable to stand, sit or sleep for long. He also said that he is unable to work as efficiently as he did before the shooting. On cross examination the appellant said that he had obtained leave of the court to file the action before the Chief Magistrate court out of time. All that he produced however to prove that leave was given was a chamber summons filed as a miscellaneous application interestingly filed on the same day that the action was filed before the chief magistrate court. The respondent called their business development manager who confirmed that the appellant was working for the respondent by loading beer crates. On that fateful day workers were being paid. As this witness was preparing the payments for the workers he heard a bang then heard screams. Robbers came to where he was with a pistol and ordered everybody to lie down. They took away the money that was meant to be payment for workers. This witness denied that the respondent was liable to the injuries the appellant suffered. The learned magistrate in his considered judgment dismissed the appellant suit for being filed out of time without leave of the court. The appellant has filed this appeal against that judgment. He has brought before court 2 grounds which are as follows:-

- 1. The learned senior principal magistrate erred in law and in fact in holding that the appellant's claim was statutory barred by limitation when there was clear evidence that leave of the court was sought before filing the suit out of time vide Misc. Application number 145 of 1998.***
- 2. The learned senior principal magistrate erred in law and in fact in failing to consider the evidence of the appellant at all, hence arrived at a wrong judgment.***

I have considered the evidence adduced in the lower court. It is clear that the appellants claim was that the respondent was negligent and as a consequence of that negligence he was shot by robbers. In common law when a party pleads negligence he has a burden to prove that negligence. Having considered the short testimony of the appellant, I find that he failed to prove the link between his injury and the duty of care that the respondent had for him. The respondent's witness in evidence said that they had watchmen on the premises on the day the robbery took place. The respondent therefore had taken all the precaution it can be expected to take in the circumstances. They, in my opinion, cannot be held to have been negligent by the mere fact that robbers came to their premises. They cannot be blamed for the incident that occurred. On liability therefore, I find that the appellant failed to prove his case. On the other issue of the suit being filed out of time, I am in total agreement with the finding of the lower court. The suit was filed 6 years after the incident. A claim in tort should be filed within 3 years. The appellant did not prove that he was granted leave to file his claim out of time. The mere production of a miscellaneous application seeking leave was not sufficient to prove that leave was granted. As stated before even that miscellaneous application seem to have been filed on the very same day that the action was filed before the chief magistrate. Then one wonders, when did, if at all, the appellant get the leave? In my view, no such leave was before court and the appellant suit was therefore incompetent. The learned magistrate according to the submissions of the appellant failed to quantify the damages for the appellant in respect of the injuries he suffered. I have considered the authorities that the appellant relied on at the lower court. I have also considered the medical report adduced in evidence. It is clear that the appellant suffered greatly from the injuries he suffered. The medical report stated that the bullet remained lodged in the appellant body. The doctor was of the view that that bullet could continue to poison the appellant whilst lodged in the body. In my view, the fair award for the injuries suffered by the appellant would have been Kshs. 500,000/=. The appellant did not prove special damages and therefore was not entitled to an award in that regard. In the end however, this appeal does fail because I am of a similar finding as the learned magistrate that the appellant suit is incompetent for having been filed out of time without leave of the court. Further, I find the appellant did not prove negligence on the part of the

respondent. This appeal is hereby dismissed with costs being awarded to the respondent.

Dated and delivered at Meru this 26<sup>th</sup> day of November 2009.

**MARY KASANGO**

**JUDGE**