REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 32 OF 2018

CHARLES WANJOHI WATHUKU.....APPELLANT

VERSUS

1. ESTHER KIOME.....1ST RESPONDENT

2. UAP INSURANCE COMPANY.....2ND RESPONDENT

(Appeal from judgment and decree in Chief Magistrates Court Civil Case No. 170 of 2016 (Hon. P. Mutua, Senior Principal Magistrate) delivered on 22 May 2018)

JUDGMENT

By a judgment dated 22 May 2015, the appellant's claim against the respondents in the magistrates' court for damages in libel was struck out on the sole ground that the suit was time-barred. In reaching this conclusion, the court (Hon. Mutua, Senior Principal Magistrate) invoked the proviso to section 4(2) of the Limitation of Actions Act, cap. 22, which restricts the initiation of proceedings for libel or slander to 12 months from the date the cause of action accrued. That section reads as follows:

> **4.(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.**

The appellant's suit arose out of an insurance contract executed between the appellant and the 2nd respondent. According to the insurance policy document, the appellant was covered by the 2nd respondent for accidental bodily injuries resulting to temporary or permanent disability and death; the cover was valid for the period between December 2013 and 16 December 2014.

Sometimes February in 2014, the appellant was mauled by a dog as a result of which he sustained multiple bodily injuries. These injuries, no doubt, constituted an insured event under the insurance policy and for this reason, the appellant lodged a claim with the 2nd respondent for indemnity.

The 2nd respondent initiated investigations into the circumstances under which the appellant was injured and thereafter set in motion the steps necessary for processing of the appellant's claim. It proposed to award the appellant the sum of Kshs. 2,120,000/= and, in this regard, it forwarded to the appellant a discharge of this sum for the appellant's execution.

The 2nd respondent did not, however, settle the claim as envisaged; it reneged on its obligation ostensibly because it had established that the claim was not authentic. Inevitably, the appellant lodged a complaint not only with the 2nd respondent itself but also with the Insurance Regulatory Authority which is a statutory government agency established under the Insurance Act (Amendment) 2006, cap. 487 to regulate, supervise and develop the insurance industry. One of the Authorities functions is to protect consumers and promote high degree of security for policyholders,

Amongst, the ensuing correspondences exchanged among the appellant, the respondents and the Insurance Regulatory Authority, was an email by the 2nd respondent dated 22 April 2015 addressed to Emily Onyango and Catherine Mboga in which she stated as follows:

> ***Dear Emily,***
>
> ***I would like to give you a brief on this matter so that we can agree on the best way forward. We can meet on Tuesday afternoon I (s) this is okay with you.***

It is true we issued a discharge voucher but we later realized that the insured was claiming for injuries that he had been paid by ICEALION.

We are waiting for final report from the investigator which I trust we shall have it by Friday this week.

Insured has confessed to me he did not injure his back which was the basis of assessment. He is aware we are reinvestigating this claim and we are waiting for report.

I am out of office. In the meantime, I request Catherine to pass the file papers to you for your perusal as we await the final report.

Regards,

Esther Kiome

Claims Manager

The addressees were officers working with the Insurance Regulatory Authority and the 2nd respondent's branch office at Nyeri respectively.

Another letter material to the appellant's suit was the 1st respondent's letter dated 8 May 2015, addressed to the appellant and copied to Emily Onyango and the 2nd respondent's branch office at Nyeri. Again, owing to its relevance to the appellant's suit and, certainly, to this appeal, it is necessary that I reproduce it here verbatim.

"Charles Wanjohi Wathuku

P.O. Box 2531-10100

NYERI

Dear sir,

CLAIM REF; 070/093/9/004220/2014

OUR INSURED: YOURSELF

<u>INJURY FOLLWING A DOG ATTACK ON 10/02/2014</u>

The above matter refers,

We confirm having finalized investigations and we hereby wish to highlight the following;

· ***The dog bites indeed occurred however; the assessment was exaggerated to include the back injuries suffered in 2008 injury claim which was duly paid by ICEALION.***

· ***On the proposal form completed by yourself, you clearly indicated that you had no previous insurance for personal accident and no known claim/ injuries however; on investigation this was found to be false.***

· ***The Doctor who attended and assessed you, indicated that he did not know there was another injury and so his assessment was misguided. We therefore, wrote to you and requested for a medical reassessment to which you declined and became uncooperative.***

In view of the above, we are sorry to advise that this claim is not payable due to non-disclosure and misrepresentation of material facts.

Yours faithfully,

Esther Kiome

CLAIMS MANAGER

CC: 1. Nyeri Branch underwriting Department

(Please cancel policy number 070/093/1/020354/2013

2. IRA-Att: Emily Onyango"

The appellant's claim in the lower court was based on these two letters which, in his respectable view, were defamatory of him. Paragraphs in his plaint pertinent to this sort of action read as follows:

> ***"9. On or about 8th May 2015, the first defendant wrote and published a letter containing the following defamatory words regarding the person of the plaintiff;***
>
> *"It is true we issued a discharge voucher but we later realized that the insured was claiming for injuries that had been paid by ICEALION."*
>
> ***The said letter was published to one Emily Onyango of Insurance Regulatory Authority and Nyeri branch manager of the second defendant.***
>
> ***10. Further on 8th May, 2015, the defendants sent a malicious decline letter to pay the plaintiff's claim alleging that among other excuses the plaintiff's claim was not payable for "non-disclosure and misrepresentation of material facts." The same letter was copies (sic) to the Nyeri Branch of the 2nd defendant and the Insurance Regulatory Authority.***
>
> ***11. The words complained of in their natural and ordinary meaning meant and were understood to mean;***
>
> ***(a) That the plaintiff is a dishonest person.***
>
> ***(b) That the plaintiff is a passion of no good morals.***
>
> ***(c) That the plaintiff is a person of questionable character.***
>
> ***(d) That the plaintiff is a greedy person who will go to any lengths to make money. (e) That the plaintiff is a manipulator who did in fact manipulate the defendant's doctors.***
>
> ***12. By reason of the aforesaid publication, the plaintiff (sic) reputation has been seriously compromised, has suffered considerable distress and anxiety as his character has been disparaged and his credit impeached in the eyes of the right thinking members of the society."***

The respondents not only denied the appellant's claim but also urged in their statement of defence that:

> ***"11. The publications complained of in paragraphs 9 and 10 of the plaint are alleged by the plaintiff to have occurred on 8th May, 2015. All such matters were time barred under section 4 of the Limitation of Actions Act on 8th May, 2015 and the plaint should be struck out."***

The learned magistrate agreed with the respondents, as it has been noted, and struck out the appellant's suit. In his judgment, the learned magistrate stated as follows:

> ***"13. Under the provision (sic) to section 4 (2) of the Limitations of Actions Act, an action for libel or slander may not be brought after the end of twelve months from the date on which the cause of action occurred-see also Kuloba vs. Oduol (2001) KLR 647. The plaintiffs (sic) case as pleaded is that the two letter (sic) he is complaining of and hence the publications here done on 8/5/2015. However, from te evidence on record, one of the letters which is an email was done on 22/4/2015. The period of limitation therefore for the email ended in 21/4/2015 (sic) while in respect of the letter, it ended on 7/5/2015 (sic). From the record, the plaintiffs (sic) claim stands time barred and the court has no jurisdiction to entertain the same.***
>
> ***14…I find and hold that the plaintiff's claim is statute/time barred."***

It is this decision that the appellant is aggrieved by and, for that reason, has filed the present appeal. In his memorandum of appeal, he has raised only two grounds and which have been framed as follows:

> ***"***
>
> ***1. That the learned trial magistrate failed in law and fact for ruling as he did that the appellant's suit before him was time barred without evidence or at all being led to that fact.***
>
> ***2. That the learned magistrates (sic) judgment was against the weight of the evidence tendered and thus a miscarriage of justice was occasioned."***

Ordinarily, as the first appellate court, I would be enjoined to examine the evidence afresh and reach my own conclusions independent of those that the magistrates' court came to though bearing in mind that it is the lower court that had the benefit of seeing and hearing the witnesses. **(See Selle Vs. Associated Motor Boat Co. [1968] EA 123 and Kiruga Vs. Kiruga & Another [1988] KLR 348)**.

But the decision of the lower court was not so much based on evidence; it was rather founded on a point of law notwithstanding that the

learned magistrate took the evidence of the contesting parties. No wonder the appellant's appeal rests mainly on the question whether the learned magistrate was correct in holding that his suit was time barred and therefore the court was deprived of jurisdiction to dispose of it. This is a question of law the determination of which was capable of disposing of the appellant's suit, one way or the other. Having been escalated to this court, it is also a question whose answer should determine the present appeal.

Going by the appellant's own averments in his plaint, the letter that jolted him into action is the 1st respondent's email of 22 April 2015; it is in that communication the alleged defamatory words, *"it is true we issued a discharge voucher but we later realized that the insured was claiming for injuries that had been paid by ICEALION"* are said to have been conveyed. However, in his pleadings, the appellant misrepresented the date of the letter in which these words were contained as having been dated 8 May 2015. It is not clear whether this was a genuine error or was a deliberate attempt to misrepresent the facts.

Whatever the case, there is no dispute that if there was any defamation as a result of this email, the cause of action accrued on 22 April 2015. It follows that an action in tort as a result if this email could only be instituted between 22 April 2015 and 21 April 2016 when limitation period of twelve months prescribed by section 4(2) of the Limitation of Actions Act lapsed. The appellant's suit was filed on 9 May 2016, way beyond the deadline; in the absence of leave of court to file the suit outside the limitation period, I agree with the learned magistrate and the learned counsel for the respondents that the appellant's suit was time-barred.

The fact that the respondents wrote another letter on a later date, more precisely on 8 May 2015, did not, by itself, vary the period when time when the cause of action accrued in respect of the email dated 22 April 2015 and, by extension, when the clock started ticking against the appellant.

The letter dated 8 May 2015, being a separate and distinct letter could, at best, be deemed a repeat publication of what the appellant considered as defamatory and which, therefore, would constitute a separate cause of action distinct from the one that arose out of the letter dated 22 April 2015. At any rate, there was no option of the latter letter redeeming an action that was otherwise time-barred.

Two options were open to the appellant; he could either sue the respondents both for the original publication and for the repeat publication as separate causes of action or, in the alternative, he could sue on the original publication only and seek damages in the same action in respect of the further loss caused by the repeat publication. **(see, Cutler vs. McPhail (1962) 2Q.B. 292; Slipper vs. BBC (1991)2Q.B**. 283).

In this latter case the plaintiff, who was in 1974 a detective chief superintendent, flew to Brazil to try to bring back to the United Kingdom a convicted robber who had escaped from prison after being sentenced to 30 years' imprisonment for his part in a major and highly publicised train robbery. On 3 November 1988, the defendants showed a film about the plaintiff's abortive trip to Brazil in a preview to press and television journalists. On 11 November the defendants broadcast the film to the public at large. Following the transmission reviews of the film appeared in the national press. The plaintiff brought one action for libel against the defendants in respect of the press preview and another in respect of the public broadcast, alleging that he was portrayed in the film in a manner which was defamatory, both personally and professionally, and in particular that he was portrayed as an incompetent police officer and a ridiculous buffoon. The plaintiff in his statement of claim alleged that the reviews of the film, which repeated the defamatory sting of the libel, were relevant to the assessment of the general damages to be awarded in respect of the libel published by the defendants in the public broadcast.

The defendants pleaded justification and fair comment. They also applied to strike out the claim based on the repetition of the libel in the reviews. The master refused the application and on appeal by the defendants the judge upheld the master's decision. The defendants appealed to the Court of Appeal, contending, *inter alia*, that they were not liable for the repetition of a libel by an independent third party unless the third party was authorised or intended or morally bound to repeat it, and that the damages claimed for the repetition were too remote to be recoverable.

It was held that although *prima facie* the court would treat the unauthorised repetition of a libel as a *novus actus interveniens* which broke the chain of causation between the original publication and the damage suffered by the injured party through the repetition or republication, nevertheless where it was appropriate on the particular facts the repetition of the sting of a libel by an unauthorised third party would be treated as the natural and probable consequence of the original publication so as to expose the original publisher to a claim for damages in respect of the repetition. The question whether or not it was foreseeable or a natural and probable consequence that the reviews of the defendants' film would include the sting of the libel was a question of remoteness of damage and not liability. Accordingly, there was no case for striking out the plaintiff's subsequent claim. The appeal was therefore dismissed.

The point is, there would be nothing wrong if the appellant exercised the option of instituting two separate suits since they arose out of separate causes of action. In the **Slipper vs. BBC** case (supra) the suits which the plaintiff instituted against the British Broadcasting Corporation were consolidated.

The plaintiff's suit was certainly not a consolidation of two suits; as much as it made reference to the letter of 8 May 2015, it was mainly based on the email of 22 April 2015. Since it was time barred, it was properly struck out.

One thing that the lower court did not do which it ought to have done, was to assess the damages in the event the appellant's suit succeeded. The appellant still has the option of going to a higher court if he is dissatisfied with this judgment. In view of this possibility and for the reason that the trial court has the obligation to assess the damages payable in suits such as the appellant's even where the claimant is not successful, I will remit the suit to the magistrates' court for this purpose. Since evidence had been taken, the assessment of damages should not be a difficult task.

The appellant's appeal is otherwise dismissed with costs. Orders accordingly.

Signed, dated and delivered on 4th June 2021

Ngaah Jairus

JUDGE