



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 88 OF 2019

COUNTY GOVERNMENT OF KILIFI.....APPELLANT

VERSUS

EDWARD FONDO KALAMA AND MARY BAYA KARISA

(suing in their capacity as the administrators of the estate of

GEORGE KATANA FONDO (Deceased).....RESPONDENTS

(Being an appeal from the Judgment of Hon L.N.Juma – SRM in the Senior Resident Magistrate’s Court

SRMCC No.270 of 2018 at Kilifi delivered on the 2nd day of October, 2019)

Coram: Hon. Justice R. Nyakundi

Okello Kinyanjui & Company Advocates for the Appellant

P.A.Osino & Co. Advocates for the Respondent

JUDGEMENT

This is an appeal by the defendant in **SRMCC No.270 of 2018** at **Kilifi Magistrate’s Court** in a judgment delivered on **2.10.2019** by **Hon L.N.Juma – Senior Resident Magistrate** granting the plaintiff herein the Respondent leave to file a claim under the tort of negligence in which general and special damages were applied for by the administrators to the Estate of the deceased George Fondo. The defendant herein referred as the appellant is aggrieved with exercise of that discretion to extend time to file the aforesaid suit based on the following ground;-

- 1. The learned magistrate erred in law and in fact in not properly appreciating that she had no jurisdiction to determine the suit in the subordinate court as the suit was time barred by virtue of the provisions of the Limitation of Actions Act, Cap 22.***
- 2. The learned magistrate erred in law and in fact in failing to understand and/or properly appreciate the appellant’s submissions on challenging the erroneous leave to file suit out of time.***
- 3. The learned magistrate erred in law and in fact in finding that the respondents had any valid reason for not filing suit within the statutorily prescribed time.***
- 4. The learned magistrate erred in law and in fact in finding that the respondents’ explanation for filing suit out of time, i.e that the respondents had filed a succession matter, was a valid reason in law to grant leave to file the suit out of time;***
- 5. The learned magistrate erred in law and in fact in finding that leave to file the suit out of time was properly granted.,***
- 6. The learned magistrate erred in law and in fact in failing to find that leave to file the suit in the subordinate court out of time was improperly granted.***
- 7. The learned magistrate erred in law and in fact in failing to find that the suit was time barred by virtue of the provisions of the Limitation of Actions Act, Cap 22.***
- 8. The learned magistrate erred in law and in fact in considering irrelevant matter and failing to consider relevant matter while***

making a decision whether the suit in the subordinate court was time-barred.

9. The learned magistrate erred in law and in fact in considering irrelevant matter and failing to consider relevant matter while making a decision whether the suit in the subordinate court was time-barred.

10. The learned magistrate erred in law and in fact in making a finding that the appellant bore the greater responsibility for the accident when there was no evidence on record to support that finding.

11. The learned magistrate erred in law and in fact in not finding that the appellant bore the greater responsibility for the accident when there was no evidence on record to support that finding.

12. The learned magistrate erred in law and in fact in purporting to shift the burden of proof from the respondents to the appellant.

13. The learned magistrate erred in law and fact making a finding in favour of respondents' testimony without any valid reason.

14. The court erred in law and in fact in making a finding of negligence on the part of the appellant when there was no evidence of the same.

15. The learned magistrate erred in law and in fact in failing to realize and/or find that the burden of proving damages for negligence rests primarily on the respondents who to maintain an action against the appellant must show that the respondents was injured by an act or omission which the appellant is in law responsible.

*16. The learned magistrate erred in law and in fact in completely ignoring the decision of the Court of Appeal in *Nandwa Vs Kenya Nazi Ltd* [1988] eKLR which decision laid the principle that the respondents had the burden of proving that the accident was caused by the negligence on the part of the appellant and that the formal burden of proof does not shift.*

17. The learned magistrate erred in law and in fact in not following and/or ignoring the first principles of the doctrine of stare decisis.

18. The learned magistrate erred in law and fact in awarding damages for pain and suffering when there was clearly no evidence that the death of the deceased was not instantaneous.

19. The learned magistrate erred in law and in fact by finding that there was any evidence that the deceased was alive after he was knocked down.

20. The learned magistrate erred in law and in fact in failing to find that the deceased died instantaneously.

21. The learned magistrate erred in law and fact in finding that the respondents were entitled to damages for pain and suffering when there was no evidence to support this.

*22. The learned magistrate erred in law and in fact in finding that the respondents were entitled to damages for loss of expectation of life at the same time as damages for loss of dependency in clear violation of the principle propounded by the Court of Appeal in *Kemfro Africa Ltd T/A Meru Express Services*[1976] & another V *Lubia & another*(No.2)(1985)eKLR.*

*23. The learned magistrate erred in law and in ignoring and or failing to follow the first principles of the doctrine of stare decisis with regard to the decision of the Court of Appeal in *Kemfro Africa Ltd T/A Meru Express Services* (1976) & another (No.2) (1985).*

24. The learned magistrate erred in law and in fact in finding that respondents were entitled to damages of Kshs.5,000,000 for loss of dependency when there was clearly no evidence to support such a finding.

25. The learned magistrate erred in law and in fact in making a finding on damages that was too high in the circumstance.

26. The learned magistrate erred in law and in fact in considering irrelevant matter and failing to consider relevant matters in making his award for damages.

27. The learned magistrate erred in law and in fact in generally making erroneous findings in the suit.

Background

The respondent in a plaint 31.7.2018 sued the appellant for general and special damages for breach of duty of care in negligence. The suit concerned an accident which occurred on or about 20.9.2014 in which the deceased was properly and carefully riding his motor cycle registration number KMDB 940G at Matsangoni along Kilifi – Malindi Road and while trying to make a right turn at Roka – junction after indicating his intention to do so the defendants servant, driver, or employee negligently managed or contributed the motor – vehicle registered number KBY 967C at very high speed permitting the same to hit and knock down the deceased. As a direct result whereby, the deceased was fatally injured.

Before commencement and filing of the claim at the very earliest of the proceedings was a consideration of an application filed to the trial court seeking leave to extend time under the provisions of section 4 (1) as read with sections 27,28, 29 and 30 of the limitations Act. That leave having been granted Exparte had to be challenged as an issue within the trial of the main suit by the appellant. The learned trial magistrate in her final determination ruled the appellant as being out of order with regard to that objection that the suit was time barred, as extension of time had been properly considered and determined.

Submissions by the Applicant

In the written submissions urged of the appellant counsel contended that the learned trial magistrate erred in failing to appreciate the structure and interpretation of the provisions to grant leave to file a suit which is already time barred. Counsel submitted and maintained that the suit so filed was outside the provisions of section 4 (2) of the limitations act for a tort of negligence can be adjudicated with its facts within the 3 years' period. Counsel, attacked the wrong exercise of discretion which gave the order for leave to extend time in absence of satisfying the criteria as envisaged in section 27, 28 and 30 of the Act. This was in his view contrary to the predominant principles in *Oruta & another V Nyamato[1988]eKLR*, *Bernard Mbithi V Mombasa Municipal Council & another[1993]eKLR*. Counsel relying on the provisions of the Act and time bound principles urged this court to exercise discretion on appeal to find that the claim was statute barred and any such leave to extend time was erroneously granted contrary to section 27,28 and 30 of the limitations Act. The suit ought not to have been instituted by the respondent.

On liability, Counsel for the appellant reiterated the evidence adduced before the trial court to poke holes at the impugned judgement and findings made by the learned trial magistrate in apportioning liability at 80%:20% as between the parties. He first adumbrated the undisputed facts and thereafter the applicable law on the standard of proof. Furthermore, counsel delved into the law on the elements of contributory negligence, with particular emphasis on the dicta in *Nandwa V Kenya Nazi Ltd [1988] eKLR* and *Abu Chiaba Mohammed Bakari & 2 Others [2015] eKLR*.

It was urged on behalf of the appellant that liability in negligence leave alone contributory negligence was never discharged by the respondent. This being the case counsel forcibly submitted that the suit was a non-starter from the word go, and it's time for the appeals court to review the decision by setting it aside.

On assessment of damages counsel submitted that clearly from the preponderance of evidence the position taken by the learned trial magistrate adopting a multiplier – multiplicand approach was erroneous giving rise to inordinately high award for the benefit of the deceased estate. He opined that in the circumstances of the case not more than a total award of Kshs. 283,000/ should have been assessed by the learned trial magistrate.

Submissions by the Respondent

On behalf of the respondent submissions counsel adopted a different approach in his submissions on the position taken at the primary court. He noted and acknowledged that notwithstanding the lengthy submissions by the appellant's counsel there was no error by the learned trial magistrate in the application of section 27,28,29 and 30 of the Limitations Act. It was posed by counsel that a proper interpretation of the provisions was accosted by the learned trial magistrate to give effect to the leave granted to extend time to justify filing suit outside the three (3) year period.

Counsel cited and relied on the cases which offered guidance on the law in relation to leave to extend time under the Limitations Act. A case in point was that of *Rosemary Wanjiru Kungu V Elijah Macharia Gikonyi[2014]eKLR*. From that consideration of the subject by the learned trial magistrate, he faced no error or misdirection in the exercise of that discretion as argued by the respondent counsel.

On the issue of liability counsel relying on the facts and the principles in *Egara Kabaji V Gordon Nguka[2015]eKLR*, *FMM & another V Joseph Njuguna Kuna & another[2016]eKLR*, *Sheikh D Dahmani T/A Malindi Bus V Deans James Kisimo CA No. 154 of 1993, Kenya Bus Services(Mombasa Ltd) V Africanns O. Wanjala CA No.106 of 1994* submitted that the situation as appraised by the learned trial magistrate gave rise and rightly so to apportionment of contributory negligence. According to counsel no new evidence or material has the appellant brought to the attention of the court to vary or interfere with the decision.

On quantum, it was an important part of counsel's submissions that the evidence on the fatal injuries suffered by the deceased is very clear from the record. To support the claim, counsel argued and submitted that factors like the age, probable income and the level of dependency came out depending came out to assist the trial court to assess damages payable by the wrong doer. From the deductible of evidence, Counsel further contended that the significant findings led the learned trial magistrate to adopt an appropriate multiplier – multiplicand to fairly assess damages under loss of dependency and loss of expectation of life. On behalf of the respondent counsel relied on the following authorities; - *Kenya Bus Services (Msa) Ltd & another V Africanus O.Wanjala Civil Appeal No. 106 of 1994 at Msa,Stare Decisis, Kenya Bus Service V Joseph Ayora – Civil Appeal No. 183 of 1992 at Nakuru(unreported)*, *Alexander Okinda V Reuben Mutuku[2015]eKLR*,*Loice W.Mwangi & another, Joseph W.Kamau -Hccc No. 229 of 2004(Nakuru)*, *Grace Sidi Matsila V S.A.Khamis & ano. – Hccc No. 795 of 1991(Msa)*, *Mwala K Mwagongo V Kenya Posts &Telecom – Hccc No. 16rd of 1997 – (Mombasa)*,*Philip Musyoka Mutua V Veronica Mbula Mutiso – Hcc No. 108 of 2008(Machakos)*, *Berly Betha Malowa Were(Suing as the Administrator of the Estate of the late JOHN PAUL LUBALO WERE – Deceased) V Kenya Ports Authority – Hcc No. 246 of 2009 – Mombasa, Kenya Ports Authority V Berly Betha Malowa Were(Suing as the Administrator of the Estate of the late John Paul Lubalo Were – Deceased) – HCCA No. 244 of 2011 – Mombasa, Jane Wambaire Chege & another V Rachel Chepkoech Koech[2019]Eklr*.

In counsel's view, there was no error or application of wrong principles by the learned trial magistrate in assessing damages on the various limbs as pleaded in the plaint. In the instant appeal counsel argued and submitted, in all circumstances, the grounds of appeal lack merit. His contention is for the appeal to be dismissed with costs.

Having considered the record of appeal, submissions by both counsels and subsequently the impugned judgment I see the crux of the matter from the court's view to be whether the judgment against the appellant should be allowed to stand.

Considering the arguments presented in this appeal, I would navigate the adjudication of this appeal under the broad contextual sub-headings of; -First, the jurisdiction of the court to grant leave to file the suit out of the limitations period. Second, if the first hurdle is passed whether the findings on contributory negligence as concluded by the learned trial magistrate can be faulted. Third, whether after setting out the relevant facts, the discretion to assess general and special damages was kept within the bounds of the law. Finally, what is the view taken by the court.

Analysis and determination

The principles guiding an appeals court are as outlined in *Peters V Sunday Post [1958] EA 424* just as a multi facet function of the court, a first appeals court has the duty to re-hear, and re-evaluate the evidence of the trial court and the findings made on the issues of in dispute. In that regard allowance should be accorded to the trial court when it comes to demeanor and credibility of witnesses as that advantage is never availed to this court. As with the dicta in *Bundi Marube V Joseph Omkoba Nyamuro[1982-88]IKAR, Hancock J A* as he then was had this to say;-

“However, a court of appeal will not normally interfere with a finding of fact by the trial court unless, it is based on no evidence, or on a representation of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his findings he did.”

The other seminal case on the duty of an appeals court is that of *Rahma Tayab & another V Anna Mary Kinamu [1982-88]1KAR 90* in which law JA also stated; -

“An appellate court will be shown to interfere with a judge’s findings of fact based on his assessment of the credibility and demeanor of witnesses who have given evidence before him.”

At the heart of this appeal is whether leave so granted by the learned trial magistrate to file the suit for damages, for the fatal injuries the deceased sustained in that accident should be allowed to carry the day by this court. The operative provisions are to be found in sections 4 (2),27,28 and 30 of the Limitations of Actions Act.

It’s apparent and expressly so stated under section 4(2) of the Act that an action founded on tort shall not be brought after the expiration of three (3) years from the date in which the cause of action occurred as against the defendant. According to section 28 of the Act the lodging of the claim can only be permitted upon leave being sought of that trial court or any other Court with concurrence jurisdiction to extend the limitation period for filing the suit. So, to that extent the learned trial magistrate in SPMCC 270 of 2018 heard the Exparte application under that Section to exercise judicial discretion in favor of the respondents to file the suit as legal representatives to the Estate of the deceased against the appellant. It is that leave, the appellant has insisted that it was wrongly granted by the trial court to initiate civil proceedings seeking an award of damages under the Fatal Accidents Act and or the Law Reform (Misc Act).

Counsel’s contention is to the effect that the language as expressly couched under section 28 on grant of leave ought to be read in conjunction with the requirements of section 27 of the Act. According to the appellant the purported leave granted to file the suit was an improper exercise of discretion as the contention in section 27,28,29 and 30 had not been fulfilled. The age long principle that ignorance of the law did not contribute to a material fact to file an action outside the limitation period still holds strong as a bar to persuade the court to exercise such discretion (*See Mweu V Kabi and another [1972] EA 24*). As a result, therefore ignorance of the existence of the statutory period of limitation does not qualify as a material fact within the scope of section 27 of the Act. According to a note in the case of *Bernard Mutunga Mbita V Municipal Council of Mombasa & another CA No. 3 of 1992*; -

“The court will grant an application for leave to bring an action after the expiry of the normal three years limitation period if the plaintiff proves that material facts relating to his cause of action, were or include facts of a decisive character hence were at all times outside the knowledge of the plaintiff until a date which was earlier after the end of the three year period or earlier than twelve months before its end and was, in earlier case, not more than twelve months before the date on which the action was brought. Material facts are restricted to three categories of fact, namely; -

- a) The fact that personal injuries resulted from the negligence, nuisance or break of duty constituting the cause of action.***
- b) The nature or extent of the personal injury so resulting and***
- c) The fact that the personal injuries were attributable to the negligence, nuisance, breach of duty or the extent to which they were so attributed.***

It is not sufficient that the facts unknown to the plaintiff should be material within the above definition, they must also be of a decisive character. ***“That is to say, they must be such that a reasonable person knowing that and having obtained appropriate advice with respect to them would have regarded them as determining that an action would have a reasonable prospect of succeeding and resulting in the award of damages sufficient to justify the bringing of the action. Finally, the plaintiff must prove that a material fact of a decisive character was outside his knowledge (actual circumstances).”*** In *Donovan V Gwentoyts Ltd [1990]1WLR 472* the Court observed that;

“The primarily principle of the limitation period is to protect a defendant from the injustice of having to face a state claim that is a claim with which he never expected to have to deal”

To my mind, on circumstances of this nature having a shared common law heritage the principles from the English Limitations Act 1980 may substantially apply in *pari materia* as our Limitations Act. When considering evidence necessary to exercise discretion in granting leave to extend the limitation period thus;

- a) *The length of and, the reasons for the delay on the part of the plaintiff.*
- b) *The extent to which having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or likely to be less cogent that if the action had been brought within the time allowed by section 11, or 12 of the Act or the case may be in section 4 (2) of the Limitations Act Cap 22 of the Laws of Kenya.*
- c) *The conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff cause of action against the defendant.*
- d) *The duration of any disability of the plaintiff arising after the date of the accrual of the cause of action.*
- e) *The extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant to which the injury was attributable might be capable at that time of giving rise to an action for damages.*
- f) *The steps if any taken, by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received”*

Also of significance are the principles in *Ronex Properties Ltd V John Lang Construction Ltd & Others [1983] QB 398* where *Stephenson L J* took the following position; -

*“There are many cases in which the expiry of the limitation period makes it a waste of time and money to let a plaintiff go on with his action. But in those cases, it may be impossible to say that he has no reasonable cause of action. The right course is therefore for a defendant to apply to strike out the plaintiffs claim as frivolous and vexatious and an abuse of the process of the court on the ground that it is statute barred. Then the plaintiff and the court know that the statute of limitation will be pleaded, the defendant can, if necessary, file evidence to that effect. The plaintiff can file evidence of an acknowledgement or concealed fraud or any matter which may show the court that his claims is not vexatious or an abuse of process, and the court will be able to do, I suspect most cases what was done in *Riches V Director of Public Prosecutions [1973]1 W.L.R* strike out the claim and dismiss the action.”*

The relevant facts of the respondent’s case are as follows; -The deceased George Katana Fondo died on 20.9.2014 as a result of a collision of two motor vehicles **KMDB 940** and **KBY967C** along Kilifi – Malindi road. His family filed suit on 31.7.2018 on particulars of negligence including claims for general and special damages under the Law Reform Act and Fatal Accidents Act with costs of the suit and interest at court rates. Prior to the filing of the suit an *Exparte* application was filed seeking leave to file the proposed claim outside the limitation period of 3 years. One central reason for the grant of the leave so applied for was founded on the delay of the succession court to issue letters of grant of administration intestate. Thereafter the stated suit was deemed to be filed within time. In such a situation the specified limitation period expired on 20.9.2017. There was therefore an overreach period of ten months.

It is therefore an issue before this court to determine whether in light of the circumstances of this case, the passage of time renders the suit inadmissible. Some valid considerations are as outlined in section 27,28,29 and 30 as read conjunctively together. As to whether the claim is time barred, the discretion to extend time for the benefit of the plaintiff has to be allowed within the yardstick of decisive material factor to excuse the delay.

Regardless of the uncertainty that might dissuade the court from denial or grant of the relief for leave to file the suit out of time, considerations of material factors, fairness and equity permeate the statutory limitations period. Such considerations admittedly are for the benefit of the plaintiff and the defendant in circumstances to promote the end of justice in the matter. Limitation period provide a time limit for the bringing of legal suits. They should not be seen or treated as arbitrary unrelated to the demands of justice or the general well-being of the society. The point is they represent legislature’s judgement that a democratic society governed by the Rule of Law is best served by causes of actions litigated within the prescribed time. It is therefore oppressive to a defendant to be dragged into civil claims long after the circumstances that gave rise have changed or lapsed since the occurrence of the loss and damage. The date of discoverability when the respondent knew that he can sue for the loss was far much earlier than the date he sought leave of the Court for extension of time.

Why is this situation of concern to this Court? The learned trial magistrate pronounced herself on the claim under the tort of negligence without giving proper interpretation to the provisions of section 27 on material facts of a decisive character and section 30 of the Act. For purposes of this appeal, I draw the respondent to the excerpts of section 30 which provides as follows; -

(1) In sections 27, 28 and 29 of this Act, any reference to the material facts relating to a cause of action is a reference to one or more of 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.*

(2) For the purposes of sections 27, 28 and 29 of this Act any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a reasonable person, knowing those facts and having obtained appropriate advice with respect to them, would have regarded at that time as determining, in relation to that cause of action, that (apart from section 4(2) of this Act) an action would have a reasonable prospect of succeeding and of resulting in the award of damages sufficient to justify the bringing of the action.

(3) Subject to subsection (4) of this section, for the purpose of sections 27, 28 and 29 of this Act 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—

a) He did not know that fact; and

b) 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 before that time for the purpose ascertaining it; and

c) 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.

The record presents a prima facie case that the respondents knew of the facts and did ascertain that following the accident, for purposes of a relief in damages a suit ought to be instituted before a court of law.

Jurisdiction of our courts to extend time under the Limitations of Actions Act is donated in terms of section 28 of the Act that being so in **Crispus Ned Ngari and another V Churchill Odera CA No.233 of 1998 (1999) 2 EA 241**, the requirements of section 27 (2) are stringent and if the court is satisfied that they are fulfilled it has no option, but to grant the application, but if not, it must reject it. Furthermore, as held in **Barclays Bank of Kenya Ltd V The Commissioner General of Kenya Revenue Authority CA No. 67 of 1998** (“in the context of statutory limitation, the length or shortness of the delay is irrelevant”).

The effects of delay on the fairness of civil trials was given by **Hardiman J. in his judgement n J.O’C V The Director of Public Prosecutions[2000]3 IR 478,499-500** which may be summarized as follows:-

a) A lengthy lapse of time between an event giving rise to litigation and a trial creates a risk of injustice.

b) The lapse of time may be so great as to deprive the defendant of his capacity to be effectively heard.

c) Such lapse of time may be so great as it would be contrary to natural justice and an abuse of the process of the court if the defendant had to face a trial in which he or she would have to try to defeat an allegation of negligence on her part in an accident that took place after a long lapse of time.

d) A long lapse of time will necessarily create inequity or injustice, and amount to an absolute and obvious injustice or even a parody of justice.

e) The foregoing principles apply with particular force where disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened in the past, as opposed to cases where there are legal issues only, or at least a high level of documentation or physical evidence, qualifying the need to rely on oral testimony.

There is need for the Court to enforce limitation period so as to discourage litigants from sitting on their rights and from delaying unreasonably in instituting proceedings. Undoubtedly there is a public interest in any litigation initiated before any Court of law. Its significance is as expounded by **Peart J. in Byrne V Minister for Defence [2005]1 IR 577,585** as follows; -

“a public interest, which is independent of the parties, in not permitting claims which have not been brought in a timely fashion, to take up valuable and important time of the Courts and thereby reduce the availability of that much used and need resource to plaintiffs and defendants who have acted promptly in their litigation, as well as increase the cost to the Courts Service and through that body to taxpayers, of providing a service of access to the Courts which serves best the public interest.”

In the instant appeal it’s of significant to appreciate that the respondents failed to show that their failure to file the cause of action within time was due to material facts of a very decisive character. From the outset it is clear that they took steps to petition for grant of letters of administration intestate on behalf of the estate of the deceased that means all along the respondent was aware of the rights to file a claim for damages against the appellant. In my view petitioning for a special grant Ad litem under section 54 of the Succession Act to prosecute the suit was at all times available to the Respondent. More importantly, the delay in filing the suit for damages is inexcusable. According to Section (4), (2) of the Limitation Act, the countdown on timelines began immediately after the occurrence of the accident.

The learned trial magistrate was wrong in granting leave to extend the statutory time line without first considering that the provisions of sections 27 and 30 (3) of the Limitations Act were not complied with to persuade her to invoke jurisdiction in section 28 to grant leave for them to file the suit out of time. The language used in those sections does not import an open guarantee of discretion to be exercised at whim or caprice by the trial court. By dint of these provisions, I am in agreement with the appellant that the claim for damages was statute barred. The approval of the court was nothing but erroneous exercise of discretion in the matter.

On the other hand, the case of the respondents is that it was the appellant’s driver who was negligent, in that he collided with motor cycle registration no. **KMDB 940G** at Matsangoni Kilifi – Malindi area. In that the appellant’s motor vehicle was wholly to blame in negligence, loss and damage which ensued against the deceased. At the close of the rial it was found as a fact by the trial court on examination of the evidence, parties contributed to the occurrence of the accident in her view the ratio of contribution stood at 80% for the appellant whereas the respondent shouldered 20% of liability. On appeal learned counsel submitted on this issue on contributory negligence on review of the evidence, it seems clear that the collision complained of had occurred as a result of negligence by someone. Of that there can be no doubt however, the two parties gave the impression to the learned trial magistrate that on negligence it was a case of contributory negligence.

In the instant case, the respondent had the burden to prove the element of tort of negligence on a balance of probabilities. In *Treadsetter Tyres Ltd V John Wekesa Wepukhulu*[2010]eKLR the Court stated;-

“In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf MUST consist of such, either proved or admitted and after it is concluded, two questions arise, (i) whether on that evidence, negligence maybe reasonably inferior and (2) whether, assuming it may be reasonably inferred, negligence is infact inferred.”

The trial Court did consider fully the case prosecuted by the Respondent and not only did she do justice in a balancing act of competing interest of the parties as to who between them was to blame for the accident. That evaluation of evidence by the witnesses she arrived at a finding this was a case of contributory negligence. From the onset I find no new evidence to warrant interference with the decision on liability.

Before attempting to fault or interfere with the findings and proportionality apportionment, I am minded of the principles in *Peter V Sundays Post*. This unique jurisdiction in essence provides saving principles to give allowances to the trial court when it comes to findings made based on the demeanor and credibility of witnesses. That advantage could only be validated by the trial court in its adjudicating process. By shielding the trial process from inadequate interference by a superior Court the hallowed concept of systems of courts under the constitution is given supremacy.

Now as to the facts relating to the issue on liability, I find it to be that the appellant has not demonstrated that the learned trial magistrate failed to appreciate the weight of the evidence and circumstances of existence of a fact on contributory negligence. There can be no question of interfering with the decision on liability, In absence of any evidence of misdirection or application of wrong principles or irrelevant factors in the decision.

I must now turn to the question of damages which on the state of the evidence of the respondents is not by any means an easy question. It is settled law from various decisions such as *Kemfro Africa Limited T/A Meru Express Service, Gathungo Kanini V A.M.Lubia and Olive Lubia* [1987]KLR 27.

***“That an appellant court in deciding whether it is justified in distributing the quantum of damages awarded by the trial judge must be satisfied that the judge, in assessing the damages, took into account an irrelevant factor, or relevant one, or that some of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage. See also Hassan V Nathan Mwangi Kamau Transporters* [1985] LLR 250.”**

Having carefully considered all the evidence and heard both counsels on appeal, I have no hesitation in accepting the submissions by the respondents on this issue for the claimant. I hold that the trial court took into account relevant matters, i.e factors under the Fatal Accidents Act and Law Reform Misc. Act as a measure of quantifying damages due to the Estate of the deceased. This court having carefully considered the case afresh and the significant awards made there is no evidence to interfere with the assessment by the trial Court. The damages assessed were a direct and natural probable consequence of the wrongful act complained of by the respondents.

The Law concerning the duty of the Appeals Court over decisions by an inferior tribunal or Court is now well settled as stated in *Kemfro Africa Ltd case*(*supra*). The Estate of the deceased is entitled to damages which were determined on account of evidence and comparable similar awards. On this ground the appellant failed to demonstrate that the factual matrix in this appeal falls within the principles laid down in *Kemfro case*.

Reverting to the gist of the appeal on extension of time I am of the view that Courts ought not be sympathetic to parties who infringe the statutory set limitation period for stale claims likely to infringe on the rights of the defendant. When faced with such an application to extend time the Court is entitled to conduct an inquiry as provided for under section 27, 28 and 30 of the Limitation of Actions Act Cap 22 of Laws of Kenya. The duty is to assess the extent of the substantial and compelling circumstances for such a leave to be granted to an intended litigant to file his claim in statute barred cause of action. The maxim ignorance of the law is no defence or excuse applies *Mutatis Mutandis* to the applicant under the provisions of the Act. The diligence rationale here shows the Respondents slept on their rights and no material factors of a decisive nature was presented before the trial Court to guarantee extension of time to file their suit against the appellant.

This fundamental principle on the suit having been barred by statute sums up the core of this appeal and is the key that brings into existence the cause of action. In the circumstances the judgement obtained by the Respondents on liability and award of damages remains non-suited. This appeal therefore succeeds and is allowed with no orders as to costs.

DATED, SIGNED AND DELIVERED via Email AT MALINDI THIS 8TH DAY OF JULY, 2021

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R. NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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