REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO. 302 OF 2017

BETWEEN

MARGARET ATEKHA..... 1ST APPELLANT

DENNIS SHIRE ATEKHA ..... 2ND APPELLANT

(Suing as personal representatives of the estate of the late

FRANCIS SWEKENYA ATEKHA)

AND

RIFT VALLEY RAILWAYS LIMITED..... 1ST RESPONDENT

KENYA RAILWAY CORPORATION ..... 2ND RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate's Court at Nairobi Milimani Commercial Courts by Hon. Mmasi delivered on 13th June 2017 in Civil Case No. 1394 of 2015)

JUDGEMENT

1. This is an appeal from the decision of the trial court dismissing Nairobi Civil Case No. 1394 of 2015. In exercise of the mandate of this court as a first appellate court, I shall re-evaluate the evidence before the subordinate court and reach my own findings bearing in mind that I neither saw nor heard the witnesses and should make due allowance in that respect.

2. The sole witness before the trial court was the 1st appellant. Her case was that on 11th July 2011 the deceased, Francis Swekenya Atekha, had boarded a train at the Nairobi Railways Station as a fare paying passenger, he lost balance as he was alighting from the train at Kibera and was run over. The deceased suffered severe injuries and was rushed to Kenyatta National Hospital where he succumbed to his injuries on 15th July 2011.

3. The 1st appellant testified that on the material day, she was called by the authorities at Kenyatta National Hospital. She went to the hospital and talked to her son, the deceased, who asked her to take away a child he was carrying. She admitted that she had not witnessed the accident but testified that her son had told her that the train took off before he could alight. She blamed the accident on the negligent control of the train by the respondents' servants or agents.

4. She testified that the deceased was separated from his wife and she had been left to take care of his children. She explained that she got late in filing the suit as, apart from taking care of his children, she was also arranging for the deceased's burial. She testified that the deceased had been working with Rednel Limited and asked the court to compensate her to enable her take care of his two children.

5. After hearing the evidence, the trial magistrate dismissed the suit on the grounds that the appellants had not only wrongly sued the respondents but had also failed to prove their case.

PARTIES' SUBMISSIONS

6. Directions were taken to argue the appeal by way of written submissions. When the matter came up for hearing before me, the 1st respondent's counsel submitted that there had been no good reason to file the suit out of time as letters of administration were not required

for claims made under the Fatal Accidents Act.

7. The appellant's counsel countered that the point raised was not well taken and amounted to an ambush since no cross appeal had been filed. He submitted that the issue of limitation of actions had been raised and dealt with by the lower court.

8. Further, in their written submissions, counsel for the appellants faulted the trial court for failing to assess damages as is practice where the court dismisses a suit.

9. The appellants' counsel also argued that the principle of *res ipsa loquitur* shifts the explanation of the occurrence of an accident on the defendant where there may be no eye witness to a tortuous act attributed to a defendant. The appellants argue that the evidence of the 1st appellant concerning the incident had been told to her by the deceased and amounted to a dying declaration under section 33 of the Evidence Act. Having failed to call evidence to assert its position, the appellant contended that the 1st respondent failed to displace the legal principle of *res ipsa loquitur* and the 1st appellant's testimony remained uncontroverted.

10. The appellant also submitted that the trial court erred in adopting the evidence of the 2nd respondent by way of witness statements and documents, yet the same had not been produced in evidence. Counsel submitted that the issues of privatization of railways and details therein were matters within the knowledge of the 2nd respondent, to be proved by adducing credible evidence.

11. On the 2nd respondent which had claimed that it was entitled to indemnity from the 1st respondent, the appellant argued that there can be no indemnity without joinder of parties under order 1 rule 24 of the Civil Procedure Rules. The appellant submitted that the 2nd respondent was a proper party to the cause of action and could recover whatever damages it was called upon to settle from the 1st respondent.

12. In rebuttal, the 1st respondent's counsel contended that the appellant had been duty bound to prove the particulars of negligence pleaded and also prove whose agent had negligently controlled the train.

13. It was the 1st respondent's submissions that the appellant had not offered any evidence of the deceased having been a passenger aboard the train on the material day and the police abstract had in fact classified him as a pedestrian, which contradicted the appellants' case that he was a passenger. The 1st respondent submitted that the burden of proof never shifted to the respondents and that the appellants had been under a duty to prove their case which they failed to do.

14. The 2nd respondent on its part submitted that the magistrate was right in holding that the concession agreement between the 1st and 2nd respondent absolved it from any liability. It submitted that the agreement transferred third party liabilities from the 2nd respondent to the 1st respondent which was enjoined to compensate any forthcoming claims. It was argued that at the time of the accident, the contract was still in force and binding between the parties and by virtue of the agreement any liability if established, would be borne by the 1st respondent. Additionally, the appellants had not disputed the existence of the agreement between the two respondents.

ANALYSIS AND DETERMINATION

15. From the material placed before this court, the issues commending themselves for determination are as follows;

a. Whether the suit was statute barred;

b. Whether the appellants proved their case against the respondents;

c. Whether the trial court erred in failing to assess damages; and

d. Who should bear the costs of the appeal.

16. On the first issue, the 1st respondent submits that the reasons given for obtaining leave to file the suit out of time were not sufficient while the appellant counters that the issue amounts to an ambush as no cross appeal was preferred on it.

17. In as much as there was no cross appeal by the respondent, the issue of limitation of actions was raised at trial and it goes to the jurisdiction of the court. If the matter was statute barred the court had no jurisdiction to the deal with the matter in the first place.

18. Section 4 (2) of the **Limitation of Actions Act** provides that an action founded on tort may not be brought after the end of three years. The appellant's cause of action arose on 11th July 2011, when the deceased was run over by a train as a result of which he sustained fatal injuries and died on 15th July 2011. The appellants filed their suit on 19th March 2015 after the time prescribed by statute.

19. Prior to filing their suit, the appellants filed an *exparte* application dated 4th December 2014 vide Misc. Application No. 1131 of 2014 for leave to file suit out of time which was granted on 26th January 2015. That application was based on **section 27** and **28** of the **Limitation of Actions Act** which provide that one can make an application to file a suit out of time where material facts relating to the cause of action were not within the knowledge of the applicant.

20. In ***Gathoni v Kenya Co-Operative Creameries Ltd Civil Application No Nai 22 of 1981 [1982] eKLR*** the Court of Appeal held;

> The applicant's application for leave was made under Section 27, where the applicant has to show that her failure to proceed in time was due to material facts of a very decisive character being outside her knowledge (actual or constructive) … 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 (1) he did not know that fact; and (2) 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 (3) 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 … The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.

21. The record of the trial court shows that leave to file suit out of time was granted to the appellants on the 26/1/2015.

22. Once the leave was granted, the burden of proof shifted to the respondents to prove that it had not been properly granted. The High Court (Mabeya J) in **John Gachanja Mundia Vs Francis Muriira & Another [2017]eKLR** stated;

> "*The* long thread of cases on this subject from **Cozens –Vs- North Devon Hospital Management Committee and Anor (1966)Z ALL ER 799** to **Yunes K. Oruta –Vs- Samuel Mose Nyamato** establish that an objection regarding the granting of leave to file suit out of time can only be raised at the hearing of the suit. That objection was raised by the appellant and the incidence of proof shifted to the 1st respondent to show he was deserving the leave he had been granted."

23. The court went on to say;

> "*The* view this court takes is that a defendant can only challenge the leave at the trial by way of cross examination on the circumstances of late filing of the case. It is only after he successfully mounts such a challenge that the incidence of proof shifts back to the plaintiff to defend the leave obtained exparte."

24. In our instant suit the 1st respondent mounted the challenge to the leave obtained by the appellants. The appellants defended the leave granted at the trial court and the court made a finding thereon in favour of the appellants. As indicated earlier, the only legally sound avenue to challenge the finding of the trial court on the leave to file suit out of time would be through an appeal against that finding and none has been proferred.

25. As rightly submitted by counsel for the appellants, if the 1st respondent was aggrieved by the finding of the trial court on the issue of limitation of time, then the only avenue open to it was to file a cross appeal.

This would bring the issue of limitation squarely into the ambit of the issues for determination in this appeal otherwise as it stands now, raising that issue in submissions amounts to an ambush as the 1st respondent has not challenged the finding thereon in a cross-appeal.

26. In determining whether the appellants proved liability against the respondents, I turn to the evidence adduced before the trial court. The record shows that the 1st appellant was the only witness to testify before the trial court. I note that the trial court admitted the respondents' witness statements and lists of documents without the appellants' consent and without witnesses being called to testify; this was an infraction of evidential procedure. The respondents simply filed their defenses and called no witnesses to testify in support of their cases hence the appellants' case remained uncontroverted. Be that as it may, the appellants were still required to prove their case on a balance of probabilities.

27. When she gave her testimony before the trial court, the 1st appellant admitted that she had not witnessed the accident. She however stated that she saw the deceased at Kenyatta National Hospital where he was taken after the accident and he had told her that the train took off before he alighted. Whereas the 1st appellant's testimony amounted to hearsay, it was admissible as it fell within the exceptions to the hearsay rule provided under **section 33(a)** of the **Evidence Act**. The provision stipulates that a statement made by a deceased person relating to his cause of death is admissible in evidence.

28. In addition to her oral evidence, the 1st appellant had a police abstract showing that the accident occurred on 11th July 2011 and a certificate of death showing that the deceased died on 15th July 2011. This corroborated her evidence that she had communicated with the deceased before his death.

29. As for the respondents' contention that the appellants did not prove that their agents were in control of the train or that they caused the accident, the police abstract indicates that the train that caused the accident belonged to the 1st respondent. In ***Joel Muna Opija v East African Sea Food Limited*** **KSM CA Civil Appeal No. 309 of 2010 [2013] eKLR** the Court of Appeal held that when the abstract is not challenged and is produced in court without any objection, its contents cannot be denied later on. The argument that the ownership of the locomotive that caused the accident was not proved is therefore untenable since the police abstract indicated that the train belonged to the 1st respondent.

30. The appellants proved that the 1st respondent's agent or servant caused the accident and were wholly liable for the accident. For the 2nd respondent, I find that no cause of action was proved against it.

31. The 1st respondent also contended that the appellants' case should be struck out as its name had not been properly described. The 1st respondent contested its description by the appellants as "Rift Valley Railways" as opposed to "Rift Valley Railways (Kenya) Limited." The trial court agreed with this argument and identified it as one of the grounds it had dismissed the appellants' case.

32. Order 1 Rule 9 of the **Civil Procedure Rules** which deals with the effect of misjoinder of parties states as follows:

> 9. No suit shall be defeated by reason of the misjoinder or non -joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

33. Further, **Order 1 Rule 10 (1)** of the **Civil Procedure Rules** states:

> 10. (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

34. The foregoing rules are categorical that a suit shall not be dismissed for misjoinder of a party. The court is given wide discretion to ensure that the suit is determined on merit by substituting or adding a necessary party. I find useful guidance in the case of ***P C Desai vs Navin M Patel t/a Sandpipers Constructions & Civil Engineering Services & 13 Others Civil Appeal No 178 Of 2000 [2001] eKLR*** where the Court of Appeal held thus:

> The learned judge appreciated that the power to strike out a pleading is not to be lightly exercised. But when it is clear that wrong parties are sued and when the correct party to be sued is known no purpose could be served by letting the wrong party remain on record.

35. In ***Jiwa vs Jiwa & Another Civil Appeal No 59 Of 1986 [1990] eKLR*** the Court of Appeal emphasized on the court's discretion thus:

> Under sub-rule (2) the judge could at any stage of the proceedings, "either upon or without the application of either party,' exercise his discretion and order the substitution of the proper party.
>
> The fact that there was no formal application for an order of substitution and/ or that Mr Machira argued that there was nothing wrong with the plaint could not, in the slightest, fetter the exercise of the judge's discretion. It will be observed that sub-rule (2) of rule 10 negatives emphatically the proposition of the Judge that there are circumstances when it would be unreasonable and injudicious for the court to exercise its discretion without an application of either party.

36. In the same vein, I find that the 1st respondent herein entered appearance, filed their defence and fully participated in the proceedings. This was not a case where a new party would be prejudiced by being enjoined to the suit. It was therefore erroneous for the trial court to dismiss the suit on the grounds that the 1st respondent had been described improperly.

37. The trial court was also obliged to assess the damages it would have awarded had the suit been successful. (See ***Mordekai Mwangi Nandwa Vs Bhogal's Garage Limited [1993] KLR 4448***).

38. The appellants' claim for general damages was based on both the Fatal Accident's Act and the Law Reform Act. Under the Law Reforms Act, the appellants claimed compensation for loss of expectation of life and for pain and suffering. They proposed an award of Kshs. 500,000/= for loss of expectation of life and Kshs. 300,000/= for pain and suffering.

39. The appellants cited the case of ***Florence Ng'ongá & Another vs Eliud Ndung'u Ndekenye & Another HCCC No. 2132 of 2001*** where the court awarded a sum of Kshs. 300,000/= for pain and suffering for a deceased who was run over his hip and abdomen and died almost 2 months after the accident. The appellants' proposal for Kshs. 500,000/= for loss of expectation of life was based on the 1st appellant's testimony that the deceased had attained secondary school education and undergone training with the National Youth Service.

40. The death summary from Kenyatta National Hospital produced as exhibit 10 indicates that the deceased suffered a blunt chest injury, severe head injury and traumatic amputation of the right foot. He died 5 days after the accident and must have suffered excruciating pain in that period of time. I however find the proposal of Kshs. 300,000/= for pain and suffering excessive, as the deceased in the case of ***Florence Ng'ongá & Another (supra)*** died 2 months after the accident. In that case the court awarded Kshs. 70,000/= for loss of expectation of life of a police officer who died aged 39 years in the year 2003.

41. Taking into account the nature of the injuries, the element of inflation and the principle that an award must reflect the trend of previous, recent, and comparable awards, I find that an award of Kshs. 100,000/= would be reasonable compensation for the appellant for loss of expectation of life and an award of Kshs. 100,000/= sufficient compensation for pain and suffering.

42. For loss of dependency under the Fatal Accidents Act, the appellants proposed an award of Kshs. 4,279,104/=. They submitted that the deceased would have worked up to the age of 70 years and proposed a multiplicand of Kshs. 15,732/= which was the minimum wage for a building caretaker according to Legal Notice No. 64 of 2011.

43. The 1st respondent in its submissions before the trial court argued that there was no proof of dependency. They submitted that the death certificate described the deceased as unemployed and pointed out that PW 1 had admitted that there was no proof of the deceased's employment.

44. The appellants pleaded that the deceased died aged 36 years and was working as a caretaker of a property leased and managed by a company known as Rebnel Limited. They pleaded that he earned the minimum wage of a caretaker and a substantial part of his income was spent on his dependants including the 1st and 2nd respondents who are his mother and brother respectively and his two daughters. The 1st appellant reiterated this in her oral evidence which was not challenged. Although, she did not adduce proof that the deceased worked as a caretaker, it is reasonable to expect that he earned an income from which he supported his widowed mother and two daughters.

45. In reaching this conclusion, I have in mind the words of Nyarangi JA. in ***Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others MSA CA Civil Appeal No. 123 of 1985 [1986] eKLR*** where he held:

> "In general, in Kenya children are expected to provide and do provide for their parents when the children are in a position to do so and to the extent of their abilities. The children are expected to do that by the established customs of the various African and Asian Communities in Kenya."

46. As there was no proof of the deceased's exact income or occupation, I would adopt the minimum wage of a general laborer as stipulated in Legal Notice No. 64 of 2011 which is Kshs. 7,586/=. Taking the conventional retirement age of 60 years and factoring in the vagaries of life, a multiplier of 15 years would have been reasonable in the circumstances. I have already found that the appellants supported his mother and daughters hence a dependency ratio of 2/3 would be appropriate.

47. I would therefore have assessed the award under the head of loss of dependency at Kshs. 910, 320/= made up as follows:

7,586 x 2/3 x 15 x 12 = 910,320/=

48. For special damages, I would have awarded Kshs. 47,640/= for funeral expenses which was specifically pleaded. Reliance is also placed on the cases of ***Premier Diary Ltd v Amarjit Singh Sagoo & Another Court Of Appeal No. 312 Of 2009 [2013] eKLR*** and ***Jacob Ayiga Maruja & another Vs. Simeon Obayo Civil Appeal 167 of 2002 [2005] eKLR*** where the Court of Appeal held that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses as it would be wrong to expect bereaved families to be concerned with the issues of record keeping when their primary concern is that of a close relative who has died.

49. In the end, I find that the appeal herein succeeds. I allow the same and make the following orders:

1. The appeal is allowed.

2. The judgement of the trial court is set aside and substituted thereof with an order entering judgement for the appellants against the 1st respondent at 100% liability.

3. Damages in total assessed to Kshs. 1,157,960 are awarded to the appellants.

4. The appellants shall have the costs of this appeal.

Dated, Signed and **Delivered** at **Nairobi** this **20th** day of **January, 2020.**

A. K. NDUNG'U

JUDGE