



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 73 OF 2018**

**COMMERCIAL TRANSPORTERS LIMITED.....1<sup>ST</sup> APPELLANT**

**JOHN MBURU KIGE.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**ELIJAH NGIGE KURIA.....RESPONDENT**

*(Being an appeal from the Judgment and decree of Senior Principal Magistrate Hon. E. K. Usui,*

*delivered on the 12<sup>th</sup> of February 2018 in Nairobi Milimani CMCC no. 10524 of 2007 )*

**JUDGEMENT**

- 1) Elijah Ngige Kuria, the respondent herein, a turn boy, employed by **Commercial Transporters Ltd**, the 1st appellant herein was involved in a road traffic accident along Mombasa Highway at Emali on 25th April 1997 and as a result he sustained serious injuries.
- 2) The respondent filed a compensatory suit before the Chief Magistrate's Court, Milimani vide the plaint dated 30.11.2007 against **Commercial Transporters Ltd** and **John Mburu Kige**, the 1st and 2nd appellants respectively.
- 3) The appellants filed a joint statement of defence denying both Liability and the claim. The appellants also pleaded that the respondent's claim was time-barred having been filed more than 10 years after the cause of action arose.
- 4) The suit proceeded for hearing before Hon. E. K. Usui on 10<sup>th</sup> October 2017. On the aforesaid date, the appellant's advocate sent a colleague to hold her brief and seek for the adjournment of the hearing of the suit on account of her indisposition.
- 5) The application for adjournment was rejected and the hearing of the suit proceeded without the participation of the appellants' advocate since the advocate holding brief had no instructions to proceed with the hearing on behalf of the instructing principal.
- 6) The appellants' advocate filed an application before delivery of judgment and sought to have the case reopened to enable her cross-examine the respondent on the issue touching on limitation of Actions Act. The appellants' application was dismissed on 1st November 2017. The appellants filed an appeal contemporaneously with an application for stay of proceedings.
- 7) On 12<sup>th</sup> February 2018, the trial magistrate delivered her judgment in favour of the respondent before the determination of the appellants application.

8) The appellants were aggrieved by the dismissal order hence they preferred this appeal and put forward the following grounds:

*a) That the learned magistrate erred in law and in fact in finding the appellants 100% liable for the plaintiff's injuries without testing the evidence.*

*b) That the learned magistrate erred in law and in fact in condemning the defendants unheard by dismissing their applications numerous. In so doing the said magistrate acted contrary to the principles of natural justice which provides for the principle of audi alteram partem meaning the right to be heard.*

*c) That the learned magistrate erred in law and in fact by acting contrary to the Articles 10 (b) which provides that the national values and principles of governance shall bind all State Organs, State Officers, Public Officers and all persons whenever any of them*

*(a) Enacts, applies or interprets any law ; or*

*The learned magistrate also acted contrary to Article 25(c ) of the Constitution of Kenya 2010 which provides the right to a fair hearing is a right that cannot be limited.*

*d) That the learned magistrate erred in law and in fact in ignoring the fact that the suit herein being a suit based on the tort of negligence is time barred as the same was filed on the 3<sup>rd</sup> December 2007 whereas the cause of action arose on the 26<sup>th</sup> April 1997;*

*e) That the learned magistrate erred in law and in fact in dismissing summarily the defendants' advocate's application dated 30<sup>th</sup> October 2017 to recall the plaintiff for further examination in chief and to canvass the issue of statutory limitation of time as had been expressly directed by the same court on the 28<sup>th</sup> October 2010;*

*f) The learned magistrate erred in law and fact in awarding damages that were manifestly high and excessive. The amount awarded was an erroneous estimate of the alleged injury. The magistrate may have acted on the wrong principle of law.*

9) When this appeal came up for hearing, this court with the concurrence of learned counsels directed the appeal to be disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival submissions of learned counsels together with the authorities cited.

10) Though the appellants put forward a total of six grounds of appeal, I am minded to take into account three main grounds in which the appellants are challenging the trial court's conduct in refusing to give them a right of hearing.

11) It is the submission of the appellants that the trial magistrate erred by condemning them unheard by dismissing their applications in which they sought for the court's accommodation of adjournment.

12) The appellants further argued that the trial magistrate erred when she summarily dismissed the appellants' application dated 30<sup>th</sup> October 2017 in which they applied to recall the respondent for cross-examination on the issue touching on limitation of actions and yet the record shows it was an issue the court had directed to be raised at the hearing of the suit.

13) In response to the appellants' submissions, the respondent argued that the appellants' application dated 1<sup>st</sup> November 2017 seeking to recall the respondent for further examination was dismissed by the trial magistrate upon hearing both sides.

14) It was pointed out that the dismissal order has not been challenged on appeal.

15) The respondent further argued that the trial court declined to stay the delivery of judgment as requested by the appellants for the reason that there was no order from the High Court to stay delivery of judgment by the trial court.

16) I have purposely avoided to determine the grounds of appeal which seeks to challenge the merits of the trial court's judgment but instead concentrated on how the proceedings were conducted. It is apparent from the record that on 12<sup>th</sup> February 2018, Hon. Ragot, learned Senior Principal Magistrate stated in her ruling that the preliminary objection on whether or not the suit was time-barred should be raised and determined when

the suit comes up for substantive hearing.

17) It is also apparent that when the suit came up for hearing on 10th October 2017 the appellants' advocate sent a colleague to hold her brief to seek for the hearing of the suit to be adjourned on the basis that she was unwell.

18) The trial magistrate refused to adjourn the hearing of the suit on the basis that there was no evidence that the appellants' advocate was sick. The suit therefore proceeded for hearing without the participation of the appellants.

19) It is also clear from the record that the appellants appeared at the time the suit had been fixed for judgment and sought to persuade the trial magistrate to defer the delivery of judgment and re-open the hearing of the case to enable the appellants recall the plaintiff to cross-examine him on the question as to whether or not the suit was time-barred. The trial court declined to entertain the appellants' request and proceeded to deliver its decision.

20) With respect, I agree with the appellants that the trial court failed to accord them with a right of hearing. There was no cogent evidence to show that the appellants' advocate was not indisposed when her colleague sought for the adjournment of the hearing of the suit. I am therefore convinced that the appellants were denied a right of hearing. The trial court in essence unfairly made the appellant suffer for the mistakes of their advocate.

21) It is also clear that the trial court did not make a finding as to whether or not the suit was time-barred. The issue was reserved to be determined at the time of hearing of the substantive suit.

22) When the appellants attempted to seek to re-open the hearing of the suit to have the issue heard and determined, the trial court flatly rejected such an invitation yet in the ruling of Hon. Ragot delivered on 16th September 2010 the issue was reserved to be raised at the hearing of the substantive suit.

23) With respect, I agree with the appellants that they were unfairly denied their constitutional right of hearing by the trial court.

24) In the end, I find the appeal meritorious and is allowed.

Consequently, the judgment delivered on 12th February 2018 is set aside. This court issues an order directing the suit to be remitted back to the Chief Magistrate's Courts, Nairobi for re-hearing before another magistrate of competent jurisdiction other than Hon. E. K. Usui (Mrs.) on priority basis.

25) In the circumstances of this case, a fair order on costs is to direct which I hereby do, that each party meets its own costs.

**Dated, Signed and Delivered virtually via Microsoft Teams at Nairobi this 3<sup>rd</sup> day of July, 2020.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Appellant

.....for the Respondent