



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO.9 OF 2018

SAMWEL MUKORA.....1ST APPELLANT

AM TRANSPORTERS.....2ND APPELLANT

V E R S U S

SAMWEL KIPNGETICH SOI (Suing as the Administrator of the Estate

of the Late GIDEON KIPCHIRCHIR SOI (Deceased....1ST RESPONDENT

(Being an Appeal from the Judgment of Hon. S. M. MOKUA (CM) in Kericho CMCC No.12 of 2017 delivered on 27/5/2018)

J U D G M E N T

1. This is an Appeal from the Judgment of Hon. S. M. Mokuia (C.M.) delivered on 27/5/2018 in a claim under the Law Reform Act and the Fatal Accidents Act filed by the Personal Representatives of the Estate of **GIDEON KIPCHIRCHIR SOI (Deceased)**, a minor who involved in a road traffic accident along Kericho-Kisumu Road at Samutet Area.
2. The Deceased was a pedestrian when the accident occurred on 22/12/2013 involving Motor Vehicle Registration No.KAY 441J as a result of the driver losing control of the vehicle and hitting the Deceased who was off the road.
3. The Trial Court relied on the testimony of an eye witness (PW.2) who said that at 11 a.m. on the material day, the said Motor Vehicle was heading towards Kisumu when it lost control and hit the minor who was standing off the verge of the road.
4. The Appellants who were the Defendants did not adduce evidence. In their defence filed in Court on 22/3/2017 they denied that the accident was as a result of negligence, carelessness and/or recklessness of the Defendant’s driver, agent and/or servant.
5. The Appellants raised the issue of limitation – that the suit was filed outside the limitation period.
6. The Trial Court found that the issue of limitation was raised at submission stage. The Trial Court further made a finding that the suit was filed within the time stipulated taking into account computation guidelines enshrined in Order 50(4) of the Civil Procedure Rules.
7. The Trial Court held the Defendants 100% liable and assessed damages as follows:-

Damages for pain and sufferingKshs.20,000/=

Less of Expectation of lifeKshs.80,000/=

Less of Dependency.....Kshs.500,000/=

Special Damages.....Kshs. 57,775/=

TOTAL.....Kshs.657,775/=

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8. The Appellants have appealed against the said Judgment on the following grounds:-

(i) ***THAT the suit was statute time barred according to the provisions of the Limitation of Actions Act Cap 22 Laws of Kenya.***

(ii) ***THAT the award of damages was manifestly Excessive.***

9. The parties filed written submissions in the appeal which I have duly considered. The Appellant submitted that the Trial Court misdirected itself by applying Order 50 Rule 4 of the Civil Procedure Rules which provides that time does not run between 21/12 in any year and 13/1 the next year.

10. Further that the Court excluded the Christmas recess period for each year commencing 2013 until 2016 which had the effect of Extending the limitation period and erred in failing to strike out the suit.

11. The Appellant relied on the case of **MAERSK KENYA -VS- MURABU CHAKA & SUMA [2017] eKLR** where the Court said Order 50 Rule was not intended to be applied to the time limits fixed by the Limitation of Actions Act.

12. The Appellant also submitted that the accident occurred on 22/12/2013 and under Section 4(2) of the Limitation of Actions Act, the suit ought to have been filed before 22/12/2016 but it was filed on 27/1/2017 slightly more than a month without leave of the Court.

13. On the issue of Quantum, the Appellants submitted that the deceased died at the age of 5 years and one cannot with audacity foretell the future life without risking the danger to wonder into the random conjuncture and speculation.

14. The Appellants urged the Court to have regard to the following decisions in assessing quantum of damages.

(i) ***M. N. (suing on behalf of a minor, L. K. (Deceased) -vs- PAUL KIPTOO [2016] eKLR where Kshs.280,000/= was awarded for loss of Dependency.***

(ii) ***H K M(Suing on behalf of the Estate of the Deceased***

Son K M -vs- FRANCIS MWONGELA NGBERE [2017] eKLR where Kshs.200,000/= was awarded for loss of Dependency of a minor aged 7 years attending school.

15. The Respondent opposed the appeal and submitted that the Trial Court was right in making a finding that the suit was not statute time barred.

16. The Respondent further submitted that the issue of limitation was raised during the submission and it was not pleaded and the Appellant is not entitled to rely on it.

17. On the issue of quantum of damages, the Respondent submitted that the award cannot be interfered with unless it is shown that the Trial Court took into account irrelevant factors or left out relevant factors or that the award was too high or too low as to amount to an erroneous estimate or where it is not based on evidence.

18. The first duty of the first Appellate Court is to re-evaluate the evidence before the Trial Court and to arrive at its own independent conclusion.

19. It was held by the court of appeal in **Bidco Refineries Ltd vs Rosslyn Developments Ltd C.A Civil Appeal No.227 of 2007 (Nrb) (unreported) at page 8** as follows;

“The principles upon which an appellate court would interfere with the decision of a court of first instance are now well settled and have been restated many times by this court. 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 misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. An appellate court also has jurisdiction to review the evidence in order to determine whether the conclusion reached upon the evidence should stand, but this is a jurisdiction which should be exercised with caution – see Makube – vs Nyamira [1983] KLR 403 and Kiruga vs Kiruga & Anor. [1988] KLR 3483.”

20. In this case, the issues for determination are as follows: -

(i) Whether the suit is statute time barred.

(ii) Whether the award was manifestly excessive.

21. On the issue of limitation, I find that the Appellants failed to raise the said issue in their pleadings as required by Order 2 rule 4 of the Civil Procedure Rules. They are estopped from raising it at appeal stage. The Trial Court already found that the issue was not raised during in the pleadings or hearing but only during submissions.

22. Order 2 rule 4 of the Civil Procedure provides that:

“4.(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release,

payment, fraud, inevitable accident, act of God, any relevant Statute of Limitation or any fact showing illegality –

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raised issues of fact not arising out of the preceding pleading

23. A party relying on limitation should specifically plead it. If the defence is taken, it is up to the plaintiff to bring his case within any of the exceptions to the Limitation of Actions Act or other statute of limitation as may be the case.

24. I find that there are good reasons for the position of the law that the defence of limitation should be pleaded specifically as such;

(i) To avoid ambush upon or taking the plaintiff by surprise on such a fundamental issue as limitation of actions.

(ii) To notify the Plaintiff of the defence of limitation; in effect to tell the plaintiff that his claim is not maintainable in law.

(iii) To give the plaintiff an opportunity to plead such facts as are necessary to bring his claim within the exception of Section 27 of the Limitation of Actions Act. Ordinarily, he will do so in his reply to defence.

25. I therefore find that the Appellant failed to plead the issue that the suit was statute time barred and He cannot raise it at this stage.

26. I agree that the Trial court fell into error in applying order 50 rule 4 to the provisions of the Limitation of Actions Act to extend time for filing of the respondent's claim. However, the Appellant is estopped from relying on the said defence as the same was not pleaded.

27. On the issue of the quantum of damages, I find that there is no basis for interfering with the discretion of the Trial Court.

28. In **Butt -vs- Khan 1977 1 KAR** the principles were laid down upon which an appellate court would disturb an award for damages as follows;

“An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate, it must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence on some material respect and so arrived at a figure which was rather inordinately high or low.”

29. I find that this appeal lacks in merit and I accordingly dismiss it with costs to the Respondents.

Delivered, Dated and Signed at Kericho this 2nd Day of October, 2020

A.N. ONGERI

JUDGE