



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 427 OF 2013

RAPHAEL MBASHU MWADIME.....APPELLANT

(Suing as the Administrator of Estate of

BENEDICT NYAMBU MWANDIME Deceased)

VERSUS

DAVID C. MUGO.....RESPONDENT

(Being an appeal from the Judgment delivered on 8th June, 2013 by

Hon. Cheruto C. Kipkorir (Resident Magistrate) Chief Magistrate's Court

at Nairobi in CMCC No. 1036 of 2011).

JUDGMENT

1. Vide a plaint dated 30th March, 2011 and filed in court on 15th April, 2011, the Appellant filed suit against the Respondent as the legal representative of the estate of Benedict Nyambu Mwadime (deceased) for general damages, special damages and costs. The Appellant blamed the death of the deceased on the Respondent's negligence in the manner motor vehicle registration KAG 656A was being driven when the fatal accident occurred on 15th April, 2006.
2. In the judgment the trial magistrate dismissed the Appellant's suit as time barred under the Limitation of Actions Act Cap 22 Laws of Kenya.
3. The Appellant was aggrieved by the said judgment and appeal to this court as follows:

“1. That the Honourable learned Resident Magistrate erred in law and fact in dismissing the Appellant's case and/or declining to grant the reliefs sought by the Appellant without any sufficient reasons for doing so.

2. That the Honourable learned Resident Magistrate erred in law and fact by misdirecting herself by holding that the Appellant's suit was time barred by statute without considering the court order dated 30th June, 2008 given by Hon. Justice Lessit in Milimani High Court civil suit No. 318 of 2008 (O.S) which stated that “the running time for the purposes of any law of limitation in respect of any notice, demand or claim by any policy holder or creditor of Invesco Assurance Company limited(Under Statutory Management) is suspended and shall remain suspended during the currency of the moratorium declared by the Statutory Manager on 1st March 2008” and the Invesco Assurance came court of Statutory management in 2010 when the moratorium declared by the Statutory Manager was lifted.

3 That the Honourable learned Resident Magistrate erred in law and fact by not appreciating the evidence through documents and annexures filed and produced by the Applicant in Court and misdirected herself by finding that the Applicant did not seek leave to file suit out of time yet in view of the orders of 30th June, 2008 which suspended the running time for purposes of limitation and when the suit was filed on 30th March, 2011 it was filed within time and there was no need to seek leave.

4. That the Honourable learned Resident Magistrate was incorrect in law and contrary to the provisions of the law in that

she dismissed the Appellant's case against the weight of oral and documentary evidence adduced in court in support thereof."

4. The appeal proceeded by way of written submissions. The Respondent did not file any though served. I have considered the submissions filed.

5. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".

6. The Appellant in his evidence produced as an exhibit an order issued on 30th June, 2008 in **High Court Milimani Commercial Courts HCCC No. 318 of 2008 in the matter of: Invesco Assurance company Limited (under Statutory Management) AND In the matter of: The Companies Act (Cap. 486 of the Laws of Kenya) AND In the matter of : the Insurance Act (Cap 487 of the Laws of Kenya) AND In the matter of An application by Geoffrey Njenga, the Statutory Manager of Invesco Assurance Company Limited** which orders reads as follows:

"1. That this application be and is hereby certified as urgent and shall be heard on priority basis;

2. That no civil proceedings of whatever nature or form shall be entertained and or filed in any court or tribunal against Invesco Assurance Company Limited (Under Statutory management) or its policy holders during the currency of the Moratorium declared by the Statutory Manager on 1st March, 2008;

3. That all civil proceedings whatever their nature or form and whatever their state currently subsisting in various courts and tribunals against Invesco Assurance Company Limited (Under Statutory Management) or its policy holders be and are hereby suspended and shall remain suspended during the dring the currency of the Moratorium declared by the Statutory Manager on 1st March, 2008;

4. That all taxation proceedings whatever their nature or form currently subsisting in various courts and tribunals against policy holders of Invesco Assurance Company Limited (Under Statutory Management) and for which the company may become liable be and are hereby suspended and shall remain suspended during the currency of the Moratorium declared by the Statutory Manager on 1st March, 2008;

5. That no statutory notices, demands or claims of whatever nature or form shall be issued or be effective against Invesco Assurance Company Limited (Under Statutory Management) or its property or its policy holders during the currency of the Moratorium declared by the Statutory Manager on 1st March, 2008;

6. That the running of time for the purpose of any law of limitation in respect of any notices, demands or claims by any policy holder or creditor of Invesco Assurance Company Limited (Under Statutory Management) is suspended and shall remain suspended during the currency of the Moratorium declared by the Statutory Manager on 1st March, 2008;

7. That the Applicant is hereby granted leave to publicize the foregoing orders by publishing them in the Kenya Gazette, the Daily Nation newspaper; and Standard newspaper; and

8. That the costs of this application shall be in the cause."

7. It is clear from the said orders that the said Moratorium prevented the Appellant from filing suit, *inter alia*, against the policy holders of Invesco Co. Ltd. At the same time the said orders held the running of time in abeyance for purposes of any law of limitation. Perhaps that may explain why the issue of limitation of time was not raised by the parties either in the pleadings or at any stage thereafter in the proceedings herein. However, the trial magistrate observed in the judgment that claim was filed out of time.

8. As observed in the case of **Mercy Nduta Mwangi T/a Mwangi Kengara & Company Advocates v Invesco Assurance Company Limited [2016] eKLR:**

"...The Respondent in my view also benefits from the evidence he produced of the moratorium imposed on the Applicant's cases after the Applicant was placed under statutory management on 1st March, 2008, when it obtained orders in the High Court of Kenya in H.C.C.C. No. 318 of 2008 until 15th November, 2012, and of the orders in H.C.C.C No. 1178 of 2007, wherein all proceedings that had taken placed during the moratorium were declared null and void.

I am of the view that the effect of the said orders was to also stay the running of time for purposes of the Limitation of Action Act, as a moratorium is in effect an authorized postponement of performing a legal obligations for the affected parties,

including the obligations set out in the Limitation of Actions Act. The Applicant in this respect cannot have his cake and eat it by benefiting from the moratorium and at the same time seeking that the Respondent does not benefit from the same. For these reasons I do not find that that the Bill of costs filed by the Respondent was time barred.”

9. It is noted that the trial magistrate fully heard the case but failed to assess the damages awardable if the Appellant’s suit had succeed. In the case of **Andrew Mwori Kasaya v Kenya Bus Service [2016] eKLR** the Court of Appeal while quoting

Lei Masaku Masaku v Kalpama Builders Ltd [2014] eKLR observed thus:

“There is the issue of failure to assess damages. It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established.”

10. Two witnesses testified on the Appellant’s side. PW1 Godfrey Mwakio Mwakio testified as an eye witness. His evidence was that the Respondent’s motor vehicle was at a high speed and lost control and hit the deceased who was standing at a bus stage. That the driver of the motor vehicle assisted in taking the deceased to the hospital and recorded a statement with the police and surrendered all his documents. PW1 maintained his line of evidence during cross-examination and denied suggestions that the deceased was crossing the road at the material time.

11. PW2 Raphael Mbashu Mwadime produced a copy of records which reflected that the motor vehicle was at the material time registered in the name of the Respondent, David C Mugo.

12. The Respondent closed his case without calling any witnesses. The Appellant’s evidence therefore remains uncontroverted. I find the Respondent 100% liable for the accident.

13. I award Ksh.10,000/= for pain and suffering and Ksh.100,000/= amount for loss of expectation of life.

14. The Certificate of Death reflects the age of the deceased as 40 years. A letter produced by the Appellant from the City Council of Nairobi dated 27th September, 2006 reflects that the deceased was it’s employee. The salary is not mentioned therein but according to the Appellant the deceased worked as a sweeper and earned Ksh.10,000/= per month.

15. As stated by the Court of Appeal in the case of **Hellen Waruguru Waweru (suing as the Legal representative of Peter Waweru Mwenja (deceased) v Kiarie shoe Stores Ltd & 2 others [2015] eKLR:**

“The court should find the age and expectation of working life of the deceased and consider the ages and expectations of life of his dependents, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependents. From this it should be possible to arrive at the annual value of dependency which must then be capitalized by multiplying by a figure representing so many years of purchase. As emphasizes above, the net income determines the multiplicand and it is only net of statutory deductions”

16. At the age of 40 years the deceased could have worked in the public sector where he was employed up to the age of 60 years. The imponderables of life however have to be taken into account. I adopt a multiplier of 15 years.

17. On the multiplicand applicable, I adopt the Minimum Labour Wages for year 2006 in Nairobi at around figure of Ksh.5,000/=. There was no credible evidence on the earnings of the deceased.

18. The deceased was not married but left behind parents and six siblings. I apply a dependency ratio 1/3.

Therefore dependency works out as $Ksh.5000 \times 12 \times 15 \times 1/3 = 300,000/=$

19. The special damages claimed were as follows:

(a) Mortuary bill Ksh.3,200.00

(b) Advertisement in Nation Newspapers Ksh.6,300.00

(c) Transport Ksh.46,200.00

(d) Food and Miscellaneous Ksh.10,000.00

ii. Obtaining letters of administration Ksh.1,000.00

iii. Search fees Ksh. 500.00

iv. Police abstract Ksh. 200.00

TOTAL Ksh.67,400.00

20. The special damages claimed were proved as per the receipts produced for the mortuary bill at Ksh.3,200/=, receipts of Ksh.6,300/= from Nation media Group Ltd for advertising, receipt for Ksh.46,200/= for transport charges and Ksh.500/= for search fees at Kenya Revenue Authority. The police abstract and the grant of letters of Administration were produced. The claim for Ksh.10,000/= for food and miscellaneous expenses is reasonable. I therefore allow the total claim of Ksh.67,400/= special damages.

21. The total award as follows:

Pain and suffering Ksh.10,000/=

Loss of expectation of life Ksh.100,000/=

Loss of dependency Ksh.300,000/=

Special damages Ksh.67,400/=

Total Ksh.477,400/=

22. Consequently, the appeal has merits and is allowed. I set aside the judgment of the lower court and substitute it with a judgment for Ksh.477,400/= interest and costs both in the lower court and this court.

Dated, signed and delivered in Nairobi this 9th day of April, 2019

B. THURANIRA JADEN

JUDGE