



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 157 OF 2018

HON. ATTORNEY GENERAL.....1ST APPELLANT

THE PERMANENT SECRETARY MINISTRY OF

TOURISM & INFORMATION.....2ND APPELLANT

CALEB OUMA AWUOR.....3RD APPELLANT

- V E R S U S -

MONICA NTHIKWA SILA.....RESPONDENT

(Being an appeal from the judgement and decree delivered on 24th March 2016

by Hon. D. W. Mburu SPM in Chief Magistrate's Court Civil Case No. 1417 of 2011)

JUDGEMENT

1) Monica Nthikwa Sila, the respondent herein, filed a compensatory suit against the Attorney General, the appellant herein and two others for the injuries she sustained when she was hit by motor vehicle registration no. GKA 670H Toyota Hiace while walking on a pedestrian crossing along Outering Road in Nairobi on 28.1.2009.

2) The suit was defended by the appellant together with the co-defendants. Hon. D. W. Mburu, learned Principal Magistrate heard the suit and gave judgment in favour of the respondent in the sum of ksh.3,500,000/= for general and special damages. The appellant being dissatisfied preferred this appeal and put forward the following grounds:

i. THAT the learned magistrate erred in law and in fact in finding that the respondent's claim for negligence was proved on a balance of probabilities despite the failure by the respondent to adduce evidence of negligence on the part of the appellant.

ii. THAT the learned magistrate erred in law and in fact in awarding the respondent a wholly erroneous, exaggerated and global sum of ksh.3,500,000/= as general damages without any basis for the same.

iii. THAT the learned magistrate erred in law and in fact in finding that the respondent's claim for negligence was proved on a balance of probabilities without having due regard to the pleadings and the evidence before the court.

iv. THAT the learned magistrate erred in law and in fact in failing to find that the suit against the appellant was time barred.

v. THAT the learned magistrate erred in law and in fact in awarding costs to the respondent.

vi. THAT the learned magistrate erred in law and in fact in failing to find that the respondent had failed to prove his case on a balance of probabilities.

vii. THAT consequently the learned magistrate's decision occasioned a miscarriage of justice.

3) When the appeal came up for hearing, learned counsels prompted this court to issue directions to the effect that the appeal be disposed of by written submissions. At the time of writing this judgement, the appellant was the only party which had filed its submissions. Though the appellant put forward a total of seven grounds of appeal, this court is of the opinion that three main grounds commend themselves for determination.

First, whether the suit was time barred.

Secondly, whether the respondent had tendered evidence proving liability against the appellant on a balance of probabilities.

Thirdly, whether the award on damages is inordinately high.

4) The first issue, as to whether or not the suit before the trial court was time-barred was also argued and determined by the trial court. I have re-evaluated the evidence and the rival submissions made before the trial court. In paragraph 7 of the plaint dated 13th May 2011, the respondent expressly stated that on 28.1.2009 she was hit by motor vehicle registration no. GKA 670H while walking on a pedestrian crossing along Outering Road, Nairobi.

5) In her written and oral evidence, the respondent restated the same averment. The appellant denied those averments in its defence dated 4th July 2011. In the written submissions filed before the trial court, the appellant submitted that the suit was time-barred under Section 3(1) of the Public Authorities Limitation Act.

6) It is submitted that the issue was raised at the hearing of the suit in cross-examination. The learned Principal Magistrate considered the rival submissions and came to the conclusion that the preliminary objection had no merit because the jurisdiction of the court was admitted in the defence and because the issue was not raised in the earliest time-possible. It is therefore apparent that the merits of the preliminary point was not determined.

7) It is clear from the evidence that the cause of action arose on 28.1.2009 and the suit was filed on 13th May 2011 that is to say that the suit was filed 2 years 4 months after the accident. Under Section 3(1) of the Public Authorities Limitation Act no proceedings founded on tort like in this case should be brought against the government or a local authority after the end of twelve months from the date on which the cause of action accrued. It is therefore obvious that the suit was filed outside the time fixed by statute.

8) I have already stated that the appellant's objection was dismissed on the basis **inter alia** that the issue was not raised in earliest time possible. It is appreciated by the trial court that the issue can safely be regarded as a preliminary point of law. The same can therefore be raised at any time of the proceedings.

9) In this appeal, the issue was raised during the respondent's cross-examination and at the time of submissions. The parties therefore had adequate opportunity to address the trial court over the issue. The trial Principal Magistrate therefore fell into error by dismissing the appellant's preliminary objection without considering its merits.

10) After re-evaluating the arguments made before the trial court, I am satisfied that the appellant's preliminary objection should have been upheld. Consequently, the order dismissing and or rejecting the preliminary objection is set aside and is substituted with an order allowing and or upholding the preliminary objection. The consequence is that the suit is for dismissal for being statute-barred.

11) The second ground which the appellant argued is on the question touching on liability. It is the submission of the appellant that the respondent was not on the lookout while crossing the road. It is said that the respondent crossed the road while it was not clear hence not safe. The appellant is of the submission that the respondent should have been found to have partly contributed to the accident.

12) The recorded proceedings show that the respondent told the trial court that she was crossing the road at 8.30pm when she was hit upon reaching the edge of the road. She stated that the motor vehicle was speeding. P. C. Raymond Mutua (P.W.1), stated that the driver was wholly to blame for the accident.

13) It is apparent from the record that the appellant did not present any evidence to controvert the evidence presented by the respondent. It is also clear from the record that the appellant's driver pleaded guilty to the charge of two counts i.e. careless driving and driving an unroadworthy motor vehicle.

14) I am satisfied that the trial Principal Magistrate arrived at the correct decision in finding the appellant's driver wholly liable for the accident. The appeal against liability must therefore fail.

15) On quantum, the learned Principal Magistrate awarded the respondent as follows:

- | | |
|---|------------------------|
| a. General damages for pain & suffering | ksh.2,000,000/= |
| b. Special damages | ksh. 650/= |
| c. Future medical expenses | <u>ksh.1,500,000/=</u> |

Ksh.3,500,650/=

16) The appellant is of the submission that the award of ksh.3,500,000/= is wholly erroneous, exaggerated and without any basis.

17) I have re-evaluated the evidence presented on the injuries the respondent sustained. It is apparent that the respondent suffered the following injuries

- i. *Fracture of the right femur*
- ii. *Fracture of the right tibia*
- iii. *Swollen and deformed right thigh and knee*
- iv. *Right lower limb laterally rotated*

18) The appellant argued that the award of ksh.2,000,000/= as general damages was excessive in view of comparable awards for similar injuries. The appellant cited the case of **Florence Njoki Mwangi =vs= Peter Chege Mbitiru (2014) eK.L.R** where this court award ksh.700,000/= as general damages for near similar injuries.

19) The appellant proposed the amount awarded to be adjusted downwards to ksh.400,000/=.

20) The record shows that the respondent had relied on the case of **Catholic Diocese of Kisumu =vs= Tete (2004) eKLR** in which the Court of Appeal awarded ksh.1,300,000/= as general damages for near similar injuries.

21) It is important to note that the above case was decided in the year 2004 about 14 years ago. Taking into account the inflationary trends, I find the award ksh.2,000,000/= given by the learned Principal Magistrate to be reasonable. Consequently, I find no reason to disturb the award on general damages.

22) The appellant has also challenged the award on future medical expenses arguing that the claim was not pleaded nor proved. The trial magistrate came to the conclusion that the claim was specifically pleaded and proved.

23) I have carefully looked at the respondent's plaint dated 13.5.2011 and it is clear that the claim for future medical expenses was pleaded. I have also considered the evidence of the medical doctor (PW3) and I am satisfied that he gave expert evidence showing that the respondent will incur a sum of ksh.1,500,000/= for future medical expenses. With respect, the appeal as against the award is found to be without merit.

24) In the end, the appeal as against quantum and liability are dismissed. However, the appeal as against the order dismissing the appellants preliminary objection is allowed.

25) Consequently, the order dismissing the preliminary objection on the competency of the suit is set aside and is substituted with an order upholding the appellant's preliminary objection. Therefore, the trial court's

judgement/decreed is set aside and is substituted with an order dismissing the suit for being statute-barred. In the circumstances of this appeal, a fair order on costs is to order which I hereby direct that each party meets its own costs.

Dated, Signed and Delivered in open court this 9th day of November, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondents