



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NO.160 OF 2012**

**JACQUELINE JEBICHII NGETICH.....APPELLANT**

**VERSUS**

**THE ATTORNEY GENERAL.....RESPONDENT**

*(An appeal from the judgment of Hon. S. Mungai (Chief Magistrate) delivered on 15<sup>th</sup> August 2012 in Nakuru CMCC NO. 1029 of 2004)*

**JUDGEMENT**

1. The issues raised in this Appeal are three fold:

- a. Whether the Appellant had served the mandatory statutory notice under Section 13A of Chapter 40 Laws of Kenya at least 30 days before institution of the lower court case.
- b. Whether the Appellants claim based on the tort of negligence against the Attorney General was time barred at the date it was filed.
- c. Whether Appellant proved special damages in the Sum of KShs.2,010,410/45.

2. The Appellant was injured in a traffic Road Accident on the 13<sup>th</sup> May 2001 while a lawful passenger in the Respondent's motor vehicle registration Number GK A 261B. She blamed the Respondent's driver and agent for negligence leading to the injuries and sought general and special damages in the sum of KShs.2,010,410/45 from the Respondent.

3. In her Amended Complaint dated 13<sup>th</sup> October 2014 and filed on the 14<sup>th</sup> October 2014 she stated that despite demand and Notice of Intention to sue duly given as required by the law, the defendant,(now the Respondent) failed and/or neglected to pay compensation to the Appellant (then the plaintiff).

4. In its statement of defence dated 9<sup>th</sup> June 2004, the Respondent denied the claim and stated that it would raise and argue a Preliminary Objection that the suit was time barred and ought to be struck out.

The Plaintiff/Appellant proceeded with her case and produced various documents to prove the case. The defendant did not tender any evidence.

On the 21<sup>st</sup> March 2005 after instituting the suit, the plaintiff sought leave of court to proceed with the suit notwithstanding that it had been filed out of time which leave was granted.

5. In his judgment the learned Chief Magistrate, Hon. S.M. Mungai dismissed the suit with costs on the

ground that the plaintiff failed to discharge the onus of proving the claim against the defendant as by law required, and stated that had she proved the claim, he would have allowed the sum of KShs.2,013,010/45 pleaded as special damages, and a sum of KShs.1,500,000/= in general damages. The Appellant preferred this appeal on five grounds that may be summarised into three, as appears at the beginning of this judgment. **Section 13A** of the Government Proceedings Act Chapter 40 Laws of Kenya is couched in mandatory terms that:

***“No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings.”***

6. In his judgment, the trial Magistrate in dismissing the suit stated that it was imperative upon the plaintiff to prove that she indeed served the notice before filing the suit and on that ground alone, her claim must, sad as it is, collapse. I have considered the plaintiff's evidence and documents produced as exhibits. I have not seen the Statutory Notice or even a demand notice alleged to have been served upon the Respondent though pleaded in the plaint that the said documents had been served.

On this issue the Appellant argues that the plaintiff inadequate! (inadvertently) failed to include the said document as part of the documents in support of the plaintiff's claim and it should not be fatal to the case as it is a matter of procedure and does not go to the substance of the case, and that the Respondent never raised the issue during trial in the lower court. He quoted **H.C. Misc. Appl. No. 72 of 2012 AG.R (minor) -vs- AGR**. I have perused the authority and I see no relevance of this case to the above issue.

7. On the other hand, the Respondent has urged dismissal of the appeal on this ground alone and relied on **Samson Lereya and 800 Others -vs- AG HCCC No. 115 of 2006 (2006) KLR** where a three judge bench dismissed the plaintiffs suit for failure to serve the Attorney General with the statutory notice within stipulated time of thirty(30) days. See also the case **Hudson Liase Walimbwa -vs- A.G HCCC No. 2714 of 1987**. I have no reason to come to a different finding. The claim was incompetent. The statutory notice was not served upon the Attorney General.

On the second limb of the of the Appeal, whether the claim was time barred, the Appellant, opted not to offer any submissions. The Respondent stated that the suit offended provisions of **Section 3(1)** of the Public Authorities Act, **Chapter 39**.

**Section 3(7)** States:

***“No proceedings founded on tort shall be brought against the Government or Local Authority after the end of twelve months from the date on which the cause of action accrued.”***

The accident subject of the claim occurred on 13<sup>th</sup> May 2001. The original plaint was filed on the 11<sup>th</sup> May 2004. It is obvious that the claim was time barred and therefore incompetent. This ground too fails.

8. The Appellant faulted the trial court in finding that there was no proof of special damages despite the same being proved in court.

I have considered the trial court's judgment. I fail to understand on what basis the trial court erred in law and fact. The court stated that:

***“---Turning to the special damages, she tendered receipts which confirm the expenditure of the pleaded KShs.2,013,010/45. Had she proved her claim I would have awarded her the same.”***

In my view, the above is a logical flow and consequence of the dismissal of the claim on liability against the Respondent. Once the claim on liability was dismissed an award of special damages even though proved would have been in vain and an academic exercise. It could not stand alone as it had no head. Legs cannot stand alone without the head.

9. Having so pronounced on the three limbs of the appeal, this court finds that the Appeal has no merit and must fail.

The Appellant shall bear the costs of this Appeal and in the lower court.

**Dated, signed and delivered in open court this 16<sup>th</sup> day of July 2015**

**JANET MULWA**

**JUDGE**

**In the presence of:**

Lawrence Mwangi for Wachira for Defendant/Attorney General

No appearance for appellant

Court clerk – Linah.