REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

HCCA NO. E025 OF 2024

KENYATTA KAMAU MUIGAI ..... 1ST APPELLANT

ERIC ANTHONY KIMANI KARUNGO ..... 2ND APPELLANT

-VERSUS-

COUNTY GOVERNMENT OF MAKUENI ..... RESPONDENT

(Being an Appeal against a Decree emanating from the Judgment of Hon. Otieno Resident Magistrate, which was delivered on 23rd June 2022 in MAKUENI CMCC No. 37 of 2020)

JUDGMENT

Introduction:

1. This appeal arises from the judgment and decree of the Chief Magistrate's Court at Makueni delivered on 23rd June, 2022 in **CMCC No. 37 of 2020**. In that suit, the Plaintiff, a County Government, sought recovery of

special damages arising from a road traffic accident which occurred on or about 1st April, 2017 along the Nairobi–Mombasa Road at Sultan Hamud.

2. The Plaintiff's case before the trial Court was that its motor vehicle was lawfully stationary by the roadside after being flagged down by traffic police officers during a routine inspection when it was rammed into by the Defendants' motor vehicle, which was being driven by the 2nd Defendant at the material time. Negligence was pleaded and attributed wholly to the Defendants, with the 1st Defendant being alleged to bear vicarious liability. The claim was brought under the doctrine of subrogation and sought recovery of repair costs and related expenses.

3. The Defendants filed a joint statement of defence denying liability and disputing, *inter alia,* the manner in which the accident was alleged to have occurred. They blamed the Plaintiff's driver for improper parking near the roadway and further pleaded that the suit was statute barred under the **Public Authorities Limitation Act.** At the hearing, each side tendered evidence in support of its respective position.

4. Upon consideration of the evidence and submissions, the learned trial magistrate found the Defendants wholly liable for the accident and entered judgment for the Plaintiff in the sum of Kshs.434,753/= together with costs and interest at court rates. The trial Court declined to entertain the challenge mounted against the constitutionality and applicability of the statutory limitation provisions, holding that it lacked jurisdiction to determine constitutional questions.

5. Aggrieved by that decision, the Defendants lodged the present appeal, challenging both the finding on liability and the determination that the suit was properly before the trial Court. The grounds of appeal were framed as follows:

a) THAT the learned trial magistrate erred in law and in fact in the manner that she assessed the evidence on liability and in reaching a conclusion that the Appellants were 100% blame for the accident.

b) THAT the learned trial magistrate erred in law and in fact in failing to consider the

Appellants' submissions by failing to find the suit was statute barred and in so doing she arrived at an erroneous decision.

SUBMISSIONS:

6. The Appellants submitted that the learned trial magistrate erred both in law and fact in holding them 100% liable for the accident. They contended that the Respondent failed to prove negligence on a balance of probabilities as required under **Sections 107, 108** and **109** of the **Evidence Act**. According to the Appellants, the burden of proof lay squarely with the Respondent, and this burden was not discharged.

7. It was argued that the Respondent's case on liability rested almost entirely on the testimony of its driver, whose evidence was said to be inconsistent and at variance with the pleadings. The Appellants pointed out that whereas the Plaint alleged that the Respondent's motor vehicle was stationary when it was hit from the rear, the driver testified that he had parked off the road, only to later concede under cross-examination that the vehicle was stationary but not off the road.

8. The Appellants submitted that parties are bound by their pleadings and that evidence which departs from or contradicts those pleadings must be disregarded. In support of this proposition, reliance was placed on the decision of the Court of Appeal in *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR*, where the Court reaffirmed that evidence led outside the scope of the pleadings goes to no issue.

9. The Appellants further submitted that no independent or eyewitness evidence was tendered to explain how the accident occurred. They emphasised that the Respondent failed to call the investigating police officer to testify or to produce a sketch map of the scene, which, in their view, would have been crucial in establishing the manner in which the accident occurred and who was to blame.

10. They contended that the police abstract on record merely indicated that investigations were ongoing and did not conclusively attribute liability to any party. The Appellants also relied on the fact that the 2nd Appellant was never charged with any traffic offence, arguing that

this significantly weakened the Respondent's case on negligence.

11. In support of the submission that negligence must be proved and not presumed, the Appellants cited ***Statpack Industries v James Mbithi Munyao, HCCA No. 152 of 2003,*** where Visram J. (as he then was) held that a Plaintiff must establish a causal link between the alleged negligence and the damage suffered. They also relied on ***Benter Atieno Obonyo v Anne Nganga & Another [2021] eKLR,*** in which the Court held that the failure to call the investigating officer or to produce a sketch map diminished the plaintiff's ability to prove liability on a balance of probabilities.

12. On the doctrine of *res ipsa loquitur*, the Appellants submitted that it was inapplicable in the present case. They argued that the doctrine was neither pleaded nor supported by evidence giving rise to an inference of negligence. Reliance was placed on *Mercy Ben & Another v Mt Kenya Distributors & Another [2018] eKLR and Sally Kibii & Another v Francis Ogaro [2012] eKLR*, where the Courts held that the mere occurrence of an accident, without more, is insufficient to invoke the doctrine, and

that a plaintiff must prove facts consistent with negligence on the part of the defendant as against any other cause.

13. In the alternative, and without prejudice to the foregoing submissions, the Appellants urged the Court that if it were inclined to find any liability on their part, then liability ought to be apportioned equally at 50:50, on the basis that the Respondent failed to demonstrate what reasonable measures its driver took to avoid the accident.

14. On the second ground of appeal, the Appellants submitted that the suit before the trial Court was statute-barred. They argued that the Respondent, being a County Government, was subject to the **Public Authorities Limitation Act, , Cap 39**and that pursuant to **Section 3(1)** thereof, no proceedings founded on tort could be brought after the expiry of twelve months from the date the cause of action accrued. They further relied on **Section 42(1)(e)** of the **Limitation of Actions Act** to argue that where the **Public Authorities Limitation Act** applies, the **Limitation of Actions Act** is expressly excluded.

15. The Appellants contended that allowing County Governments to institute suits outside the twelve-month limitation period applicable to public authorities amounted to unequal treatment and offended **Article 27** of the **Constitution.**

16. They urged the Court to adopt a purposive interpretation of the statutory provisions and the Constitution so as to ensure equality before the law. On this basis, they prayed that the appeal be allowed, the judgment of the trial Court be set aside, and the Respondent's suit be dismissed with costs.

17. The Respondent on its part submitted that the appeal is devoid of merit and ought to be dismissed in its entirety. It was contended that the learned trial magistrate properly evaluated the evidence on record and correctly found the Appellants wholly liable for the accident.

18. On liability, the Respondent submitted that its driver testified that on the material day he had been lawfully flagged down by traffic police officers during a routine road check and had accordingly parked by the roadside when the Appellants' motor vehicle rammed into his vehicle while it was stationary.

19. It was argued that this evidence was consistent, unshaken on cross-examination, and was corroborated by the police abstract, which attributed blame to the driver of the Appellants' motor vehicle. According to the Respondent, the Appellants failed to adduce any evidence capable of dislodging the Respondent's version of events.

20. The Respondent further submitted that the defence advanced by the Appellants, namely that another vehicle allegedly applied emergency brakes, thereby causing the accident, was not supported by any evidence. In particular, the Appellants did not enjoin the alleged third party as a third party to the proceedings, nor did they call any witness to substantiate that version of events. The Respondent argued that in the absence of such evidence, the trial Court was entitled to accept the Respondent's account and to find the Appellants wholly negligent.

21. It was the Respondent's position that the absence of a sketch plan or the testimony of the investigating officer was not fatal to its case, as liability in civil proceedings may be proved through credible oral evidence. The Respondent maintained that the standard of proof was met and that negligence on the part of the 2nd Appellant

was established on a balance of probabilities, with the 1st Appellant being vicariously liable.

22. On the issue of limitation, the Respondent submitted that the Appellants' reliance on **Section 3 (1)** of the **Public Authorities Limitation Act** was misplaced. It was argued that the said statute was intended to apply to proceedings against the National Government and not to County Governments established under the **Constitution of Kenya, 2010.**

23. The Respondent relied on the reasoning in ***Patrick Mukono Kisilu t/a Mutomo Kandae General Agencies v County Government of Kitui [2019] eKLR,*** where the Court held that County Governments are distinct entities from the National Government and are bodies corporate with the capacity to sue and be sued in their own names pursuant to **Section 6 (1)** of the **County Governments Act.**

24. The Respondent further submitted that the suit before the trial Court was instituted under the **Limitation of Actions Act** and was therefore filed within the applicable limitation period. It was emphasised that the claim was

brought under the doctrine of subrogation by the Respondent's insurer, which had lawfully indemnified the Respondent and was entitled to recover the sums paid.

25. With regard to the constitutional argument raised by the Appellants, the Respondent associated itself with the finding of the trial Court that it lacked jurisdiction to determine questions relating to the constitutionality of statutes. Reliance was placed on **Article 165** of the **Constitution,** which vests such jurisdiction exclusively in the High Court.

26. The Respondent thus urged that the challenge mounted against the **Public Authorities Limitation Act** was improperly raised before the trial Court and did not afford a basis for upsetting the judgment.

Issues:

27. Upon a proper appraisal of the pleadings, the record of appeal, the judgment of the trial Court, and the rival submissions by counsel, the issues that arise for determination in this appeal are:

a. Whether the learned trial magistrate erred in law and fact in finding the Appellants wholly liable for the accident.

b. Whether the suit before the trial court was statute barred by virtue of the provisions of the Public Authorities Limitation Act.

Determination:

28. This being a first appeal, this Court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial Court, unlike the appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first-hand. In the case of **Mbogo and Another vs. Shah [1968] EA 93,** the Court stated**:**

"...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to

take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

29. In the case of **Peters vs Sunday Post Limited [1958] EA 424,** the court therein rendered itself as follows:-

"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"

30. It is further trite that it is the duty of a party alleging to prove their case to a balance of probabilities. **Section 107-109** of the **Evidence Act, Cap 80 Laws of Kenya** provides that:

"107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108.The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109.The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

31. Now to the issue of liability, Appellants' principal contention is that the evidence tendered by **PW2** was inconsistent with the pleadings, and that such inconsistency was fatal to the Respondent's case. It was argued that whereas the plaint pleaded that the Respondent's motor vehicle was stationary, **PW2** testified that he was parked off the road, later stating in cross-examination that he was about "40 metres outside the road," which, in the Appellants' view, amounted to a departure from the pleadings.

32. I disagree with that submission. The plaint pleaded, in clear terms, that the Respondent's motor vehicle was stationary when it was hit by the Appellants' motor vehicle. There was no pleading that the vehicle was in motion, nor was there any ambiguity on that material fact. **PW2's** witness statement, which he adopted as his evidence in chief, was consistent with the pleadings and stated that he had parked on the side of the road after being flagged down by traffic police officers.

33. In cross-examination, **PW2** stated as follows:

"I was about 40 metres outside the road."

34. In my view, this testimony did not contradict the pleadings. It merely clarified the extent to which the vehicle was off the carriageway. The pleadings did not particularize the distance from the road, and there was no legal requirement that they should have done so. Clarification of distance during cross-examination cannot be elevated into a material contradiction. The pleaded fact was that the vehicle was stationary, and that fact remained intact throughout **PW2's** testimony.

35. The Appellants' reliance on the principle that parties are bound by their pleadings is well-founded in law.

However, that principle does not prohibit a witness from giving further particulars consistent with the pleaded case. What is impermissible is evidence that introduces a new and inconsistent case. That is not what occurred here.

36. Turning to the defence evidence, **DW1**, the 2nd Appellant, testified in chief that:

> ***"There was a police car ahead which suddenly applied brakes and I veered off."***

37. In cross-examination, he stated:

> ***"There was no road block by police. The Plaintiff's vehicle harshly braked. I swerved left and there stood the Plaintiff's vehicle."***

38. In re-examination, **DW1** then stated that the Respondent's vehicle was on the "whole lane." This is simply contradictory. On one hand, **DW1** admitted that he was reacting to events ahead of him while driving, and that he swerved to avoid a collision. On the other hand, his account oscillated between a police vehicle braking, the Plaintiff's vehicle braking, and the Plaintiff's vehicle allegedly being on the lane. The learned trial magistrate

was entitled, and indeed correct, to treat this evidence with caution.

39. More significantly, even on the Appellants' own version of events, it is clear that the 2nd Appellant was unable to stop or manoeuvre safely in response to traffic conditions ahead of him. Whether the Respondent's vehicle was 40 metres off the road, at the side of the road, or even partially on the carriageway, the duty rested squarely on the 2nd Appellant, as the driver approaching from behind, to maintain a proper lookout, regulate his speed, and keep a safe distance sufficient to enable him to stop or take evasive action safely.

40. A driver must at all times drive at a speed that allows him to stop within the distance he can see to be clear. The fact that the 2nd Appellant found himself swerving to avoid vehicles ahead of him is, in itself, indicative of a failure to keep a safe distance and to anticipate foreseeable road conditions, including stationary vehicles and police checks.

41. I am therefore satisfied, as the learned trial magistrate was, that on a balance of probabilities the Respondent

established negligence on the part of the 2nd Appellant. The evidence placed before the trial Court, when considered holistically, supported the conclusion that the Respondent's motor vehicle was stationary by the roadside and that the collision was occasioned by the manner in which the 2nd Appellant was driving. The 1st Appellant's vicarious liability was not seriously contested once negligence was established.

42. Accordingly, I find no basis upon which to interfere with the learned trial magistrate's finding on liability.

43. Regarding the second issue, the Appellants contend that the suit before the trial Court was statute barred under **Section 3 (1)** of the **Public Authorities Limitation Act, Cap 39,** on the basis that the Plaintiff was a County Government. They further argue that the differential treatment under the limitation regime is discriminatory and unconstitutional.

44. The text of **Section 3 (1)** of the **Public Authorities Limitation Act,** provides that no proceedings founded on tort shall be brought against the Government or a local

authority after the expiry of twelve months from the date the cause of action accrued. The operative phrase in that provision is “against the Government”.

45. In the present case, the suit before the trial Court was not brought against the County Government. Rather, it was a suit instituted by the County Government, acting pursuant to the doctrine of subrogation, on behalf of its insurer, following indemnification for the loss suffered. The statutory limitation under section 3(1) is therefore inapplicable on the face of it, as it is designed to shield public authorities from stale claims brought against them, not to restrict their capacity to institute proceedings for recovery.

46. Suffice to say, that distinction alone is sufficient to dispose of this argument. But, even assuming, for the sake of argument, that the applicability of the **Public Authorities Limitation Act** was in issue, I am not persuaded that the **Act** applies to County Governments in the manner suggested by the Appellants.

47. The **Constitution of Kenya** establishes two distinct and interdependent levels of government under **Article 6 (2),** namely the National Government and County

Governments. Further, **Section 6(1)** of the **County Governments Act** expressly provides that a County Government is a body corporate with capacity to sue and be sued in its own name.

48. It is also worth noting that whereas the limitation was pleaded in the statement of defence, there is no indication from the record that a Preliminary Objection was raised, argued, or determined before the trial Court. The matter proceeded to a full hearing on the merits. A plea of limitation, being a pure point of law capable of disposing of a suit at the threshold, ought to have been raised and prosecuted at the earliest opportunity.

49. Having submitted to the jurisdiction of the trial Court and participated fully in the proceedings, the Appellants cannot properly elevate the issue at the appellate stage without demonstrating a clear jurisdictional bar.

50. As regards the Appellant's gripe with **Section 3(1)** of the **Public Authorities Limitation Act,** as hitherto stated, no court of competent jurisdiction has declared the provision unconstitutional. In any event, the learned trial magistrate correctly declined to entertain that argument, as jurisdiction to determine the constitutionality of

statutes is vested in the High Court under **Article 165(3)** of the **Constitution** and cannot be invoked through submissions in an ordinary civil suit.

51. In the circumstances, I find that the suit before the trial Court was not statute-barred. This ground of appeal equally fails.

Disposition:

52. Accordingly, the appeal is hereby dismissed with costs to the Respondent.

53. It is so ordered.

DATED, DELIVERED and **SIGNED** at **NAIROBI** through the Microsoft Teams Online Platform on this **17TH** day of **DECEMBER, 2025.**

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Mr. Kiplagat, Advocate for the Appellant

No attendance for the Respondent