**Sila v Attorney General (Civil Appeal 224 of 2019)**
**[2025] KECA 498 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KECA 498 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL 224 OF 2019**

**P NYAMWEYA, AO MUCHELULE & GV ODUNGA, JJA**

**MARCH 21, 2025**

**BETWEEN**

**MONICA NTHIKWA SILA ..... APPELLANT**

**AND**

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

***(Being an appeal from the judgment and decree of the High Court at Nairobi (Sergon, J.) dated 9th November 2018 in HCCA No. 157 OF 2018 arising from the decision made on 24th March 2016 by the Chief Magistrate's Court at Nairobi (Hon. D.W. Mburu PM) in Civil Case No. 1417 of 2011)***

## JUDGMENT

1. On 28th January 2009 the appellant, Monica Nthikwa Sila, was crossing Outer Ring Road in Nairobi when he was hit and injured by motor vehicle registration number GK A670H Toyota Hiace which belonged to the Ministry of Tourism and Information. The driver of the vehicle was Caleb Ouma Awuor, who has since died. Following the accident, the driver was charged with careless driving contrary to section 49(1) of the *Traffic Act*, Cap. 403. He was convicted, and never appealed.

2. The appellant sued the Attorney General (the respondent herein), the Ministry and the driver, seeking general and special damages for the injuries he had suffered. He claimed that the accident had been caused by the negligent driving of the driver of the Ministry.

3. In the joint statement of defence, the accident, negligence, injuries and damages were all denied. The alternative plea was that, if the accident had occurred, it had been solely or substantially caused by the negligence of the appellant. The jurisdiction of the court (the Chief Magistrate's Court at Nairobi) was admitted.

4. During the cross-examination of the appellant, the issue that the suit was statute barred by limitation was raised; that the accident having been on 28th January 2009 and the suit filed on 13th May 2011,

this was beyond the period prescribed under section 3(1) of the *Public Authorities Limitation Act* that provides that no proceedings founded on tort were to be brought against the government after the end of twelve (12) months. In the final submissions by the respondents before the trial court, the issue of limitation was canvassed, and authorities cited, to show that the suit was unsustainable on account of limitation. The trial court, in its judgment, found that, because the issue of limitation had not been pleaded in the statement of defence, the objection taken regarding the jurisdiction of the court was not sustainable. The court found that the driver was negligent and had caused the accident. Judgement on liability was entered against the respondent. General damages in the sum of Kshs.2,000,000/=, special damages in the sum of Kshs.650/=, and future medical expenses in the sum of Kshs.1,500,000/= were awarded. Then costs and interests.

5. The respondent was aggrieved and filed an appeal to the High Court in Nairobi. One of the grounds was that the learned Magistrate had erred in law and fact in failing to find that the suit against the appellant was time barred. The leaned Judge, Sergon, J. heard the appeal. He had given directions that parties file written submissions on the appeal. Only the respondent filed written submissions. In the judgment delivered on 9th November 2018, the learned Judge dismissed the appeal against liability and quantum, but found that the suit was, however, time barred. The learned Judge observed that the issue of limitation can be raised at any time during the proceedings; it had been raised as a preliminary point of law during cross-examination; and that the trial court had fallen into error by dismissing the point "without considering its merits". The appeal was allowed on this point; that the claim had been caught up by limitation.

6. It is this finding that has brought the appellant to this Court. His argument, as espoused in the written submissions on his behalf, is that, because the issue of limitation was not pleaded in the joint defence and the issue of the jurisdiction of the court had been admitted in the defence, the learned Judge was wrong to find that the objection to jurisdiction on account of limitation had been properly taken during cross-examination and submissions. That the respondent had waived any defence on limitation or on jurisdiction when he had not pleaded it. Learned counsel for the appellant relied on several authorities that we shall shortly refer to.

7. On the other hand, learned counsel of the respondent defended the decision of the learned Judge on the issue of limitation. Relying on the decisions in Zipporah Njoki Kangara -vs- Rock and Pure Limited & 3 Others [2021] eKLR, Hassan Ali Joho & Another -vs- Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013 and IEBC -vs- Jane Cheperenge & 2 Others [2015] eKLR, it was submitted that the preliminary point on jurisdiction could be raised at any time during the proceedings, and that, in this case, although not pleaded in the defence, it arose by clear implication out of the pleadings.

8. Quite interestingly, both sides relied on Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd [1969] EA 696 when urging their respective cases.

9. We have considered the record of appeal, the rival submissions and the authorities cited to us by counsel. This is a second appeal, and therefore we shall confine ourselves to matters of law only, unless it is demonstrated to us that the courts below considered matters, they should not have considered or failed to consider matters they should have considered or that looking at the entire decision, it is perverse. (See Maina -vs Mugiria [1983] KLR 78 and Stanley N. Muriithi & Another -vs- Bernard Munene Ithiga [2016] eKLR).

10. We are basically asked to consider the question of jurisdiction as was determined by learned Judge. The question is found in paragraphs 1 and 4 of the grounds of appeal as follows:-

> 1) THAT the learned Judge erred in failing to find that the trial court's jurisdiction was admitted by the respondent in their defence dated 4th July 2011 at paragraph 13 thereof.
>
> 2) .....
>
> 3) .....
>
> 4) That the learned Judge erred in law and in fact in determining and allowing an issue which was not pleaded, which could not at all arise by implication from the pleadings and despite a formal application to dismiss the suit not being lodged."

11. It was common ground that the accident subject of the appeal had occurred on 28th January 2009, and the suit had been filed on 13th May 2011. The suit was filed well beyond the 12 months prescribed period under section 3(1) of the Public Authorities Limited Act. When the joint defence was filed, the jurisdiction of the court to hear and determine the suit was admitted. The issue of limitation was not pleaded, either directly or impliedly.

12. Order VI Rule 4(1) of the Civil Procedure Rules (Registered 1998), then in force, provided 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; or
>
> b. which, if not specifically pleaded, might take the opposite party by surprise; or
>
> c. which raises issues of act not arising out of the preceding pleadings.
>
> (2) Without prejudice to sub-rule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient."

13. This Court in Kutima Investments Limited -vs- Muthoni Kihara & another [2015] eKLR and Stephen Onyango Achola -vs- Edward Hongo Sule & Another KSM CA Civil Appeal No. 209 of 2004 [2004] eKLR was confronted with the question whether a defendant who has not pleaded limitation can raise it during the course of the proceedings as a preliminary point of law. It was found that, given the clear and mandatory provisions of the law, it was imperative that a defendant who wishes to rely on limitation as a defence must plead it in his defence. In Kutima Investment Limited case, this is what this Court stated:

> " The duty that the 1st defendant bore to specifically plead the statute of limitation in her defence is plain, express and inescapable from a reading of that provision, which is in terms

such as are found in Halsbury's Laws of England, 4th Edition, Vol. 36 at paragraph 48(p38). This Court has itself pronounced on this in Stephen Onyango Achola & Anor vs. Edward Sule Hongo & Anor Civ. Appeal No. 209 of 2001 when overturning the decision of the High Court that upheld a preliminary objection and struck out a plaint on the basis of a matter that had not been pleaded as required. The Court was emphatic that;

> " The second respondent having failed to specifically place the issue of limitation in its defence, it was not entitled to rely on that issue and base its preliminary objection on it; nor will the second respondent be entitled to rely on that defence during the trial of the suit unless it amends its defence. It is trite law that cases must be decided on the issues pleaded and we need not cite any authority for that proposition.""

14. Coming back to this appeal, the respondent first raised the issue of limitation during the cross-examination of the appellant. The point had not been pleaded in the joint defence, and neither was it the subject of any notice of preliminary objection. The respondent having admitted the jurisdiction of the trial court to hear and determine the suit, it cannot be argued the issue had arisen by clear implication out of the pleadings, as is contemplated in Mukisa Biscuit Manufacturing Company Limited (supra). Secondly, the learned Judge fell into error when he observed as follows:-

> " The trial Principal Magistrate therefore fell into error by dismissing the appellant's preliminary objection without considering its merits."

15. The trial magistrate, in his judgment, expressly indicated that whether the suit was time barred was an issue for determination. He set out the respective cases, and made reference to Mukisa Biscuit Manufacturing Company Limited (supra), Stephen Onyango Achola (supra) and the High Court case of Karanja Kabage -vs- Joseph Kiuna Kariambegu Nganga & 2 Others [2013] eKLR, and found that the issue of limitation could not be raised in the manner done by the respondent.

16. We wish to reiterate the point that parties are bound by their pleadings, and cannot be allowed during proceedings to raise an issue not pleaded or call evidence on such an issue. This Court in Mohammed Fugicha -vs- Methodist Church in Kenya (Suing through its registered trustees) & 3 Others [2016] eKLR observed as follows:-

> " We apprehend that the primary purpose of pleadings is to communicate with an appreciable degree of certainty and clarity the complaints that a pleader brings before the court and to serve as sufficient notice to the party impleaded to enable him to know what case to answer."

17. When the respondent sought to rely on limitation, it was required to cause the amendment of its defence to be allowed to urge the point. Otherwise, the learned Judge fell into error when he found that, in the circumstances of the case, the respondent would successfully urge the point of limitation.

18. The result is that we allow the appeal, set aside the judgment of the High Court delivered on November 9, 2018 and, in its place, there shall be judgment for the appellant against the respondent in terms of the judgment dated March 24, 2016 delivered by Chief Magistrate's Court at Nairobi (Hon. D.W. Mburu, PM) in Civil Case No. 1417 of 2011.

19. Costs of the appeal shall be paid to the appellant by the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH, 2025.**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**A.O. MUCHELULE**

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**JUDGE OF APPEAL**

**G.V. ODUNGA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**