IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), NAMBUYE & KOOME, JJ.A)

CIVIL APPEAL NO. 111 OF 2017

BETWEEN

ANACLET KALIA MUSAU (Suing of behalf of the estate of **VINCENT**

MANGALO KALIA (DECEASED)................................. APPELLANT

AND

THE HON. ATTORNEY GENERAL......................1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE........2ND RESPONDENT

JOHN KIPTARUS KIPKERYO............................3RD RESPONDENT

(An appeal from the Judgment of the High Court at Nairobi (R.E. Aburili, J.) at dated 24th *September, 2015 in H.C.C.C No.30 of 2013)*

****

JUDGMENT OF THE COURT

The appellant herein is the administrator of the estate of his late son, Vincent Mangalo Kalia (deceased). He instituted the suit against the respondents before the High Court claiming damages under the Law Reform Act and Fatal Accidents Act following a fatal road accident involving motor vehicle Registration No. GKA 376S belonging to the 2nd respondent and the deceased. Although the accident occurred on 30th June, 2011 the claim was not instituted until 8th February, 2013. And because of the provisions of the Public Authority Limitations Act, suit against the 1st and 2nd respondents were struck out by the court below (Aburili, J), the learned Judge being of the view that;

> **"21. The material accident having occurred on 30th June 2011, the plaint or claim against the Attorney General and Inspector General of Police ought to have been instituted on or before 30th June 2012. It is trite that the claim having been instituted on 8th February 2013, it was caught by the statutory limitation period, as the claim is against the Government and therefore Section 4(2) of the Limitation Actions Act does not apply….**
>
> **…**
>
> **23. Accordingly, I find that the suit herein and therefore the claim as instituted against the Government of Kenya and its employees in their official capacity was instituted outside the statutory limitation time and is therefore incompetent.**
>
> **....**
>
> **25. Albeit the issue of the suit being statute barred was not raised by the defendants who did not participate in these proceedings, that matter goes to the jurisdiction of the court to determine whether it can entertain a claim which is statute barred."**

In other words, though the appellant and his witnesses presented evidence on how the accident occurred and the nature of loss the appellant suffered as a result of the death of the deceased, that evidence was of no purpose as the learned Judge decided to determine the whole dispute on the question of limitation. The only issue in this appeal, therefore, is whether that course was open to the Judge.

By taking this course, the learned Judge realized that, by a stroke of the pen she had driven the appellant from the seat of justice without considering his case on merit and expressed this fact thus;

> **"31. I therefore find that in as much as the court would have wished to assist the plaintiff to access justice in the court for the sad and sudden regrettable loss of his beloved son, failure to institute suit against the Government within the stipulated statutory period of one year or twelve months from the date when the cause of action arose, extinguished the suit *in limine*".**

Just to add that the appellant had invited the trial court to find the driver, that is the 3rd respondent negligent and being an employee of the 2nd respondent, the latter vicariously liable for the accident. The 3rd respondent was charged before the Magistrate's Court in **Traffic Case No. 20179 of 2011** with the offence of causing death by dangerous driving. By the time the suit giving rise to this appeal was filed, the traffic case was yet to be determined. But the Judge, relying on the provisions of **section 3(1**) of the Public Authorities Limitations Act expressed the view that even though the 3rd respondent was sued in his own capacity as the driver and would have been liable in his own capacity as an individual, the fact of the matter was that he was sued as an employee of the 2nd respondent, in whose name the motor vehicle in question was registered. He was, to that extent, an agent or a servant of the 2nd respondent. According to the learned Judge therefore the 3rd respondent could not be delinked from the 1st and 2nd respondents who were vicariously liable for his actions. As such, the Judge, as we have noted earlier, struck out the suit against all the three respondents.

Naturally, aggrieved by this decision, the appellant has preferred this appeal on 6 grounds and urged us to allow it and to find that the learned Judge erred by: stating that she had no jurisdiction to hear and determine the suit on account of jurisdiction yet jurisdiction was expressly admitted by the parties; holding that the suit was filed outside the limitation period whereas the issue was not raised or disputed by any of the parties; holding that the issue of limitation is a substantive statutory provision which cannot be cured by the provisions of the law; finding that the suit against the 3rd respondent was bad in law whereas he was sued as an independent party and in his personal capacity as the driver of the vehicle that caused the accident; and failing to make an assessment for damages.

It was further submitted that the respondents in their defence admitted liability; that under **section 5** of the Public Authorities Limitation Act, an extension of limitation was permitted for up to a further period of 12 months from the date when the party ceases to be under a disability; and that death, like here, of the deceased, ought to have been treated as an absolute disability.

Further, it was posited that it was erroneous for the Judge to have determined the issue of jurisdiction at the judgment stage without giving the parties the opportunity to make any representations on the same; that the issue of limitation was neither pleaded nor canvassed by the parties before the Judge; that by proceeding in the manner she did, the Judge condemned the appellant unheard contrary to **Article 50** of the Constitution.

On ground 3, it was submitted that **section 3** of the Public Authorities Limitations Act should be interpreted broadly in view of **Article 50(1)** of the Constitution; that it should be interpreted purposively to allow access to justice rather than to act as an impediment to that access; that the Judge ought to have appreciated that the appellant had to, first obtain a grant of representation before he could have the capacity to sue; and that the process of obtaining a grant is long and rigorous.

On ground 4, it was submitted that the learned Judge, despite finding that the 3rd respondent would be liable in his own capacity as an individual driver of the accident motor vehicle, fell into error when she went on to hold that the 3rd respondent could not be delinked from the other respondents by virtue of the principle of vicarious liability; that this finding was erroneous because it ignored the nature of the claim that was against the respondents "jointly and severally", an expression that the appellant was alive to the possibility that it was not always guaranteed that a finding of liability against one of the respondents automatically meant that all the other respondents were also liable. As a result, the appellant was of the view that the 3rd respondent was liable and the learned Judge ought to have assessed the quantum of damages, especially after an interlocutory judgment had been entered against him.

Lastly, on ground 6, it was submitted that the learned Judge failed to follow the long standing practice where trial courts, when dismissing claims for award of damages, nonetheless, assess the quantum it would have awarded had the action succeeded.

Mr. Ngumbi, learned counsel for the 1st and 2nd respondents, opposed the appeal and submitted that the issue of jurisdiction, both territorial and pecuniary were pleaded; that the learned Judge properly exercised her discretion in determining the dispute on the issue of limitation; and that, though the issue of time was not pleaded, that failure alone could not preclude the learned Judge from applying the law on her own motion. The respondents conceded that interlocutory judgment was indeed entered against the 3rd respondent but insisted that, the appellant in his plaint had referred to the 3rd respondent as "an officer of the 3rd defendant"; that in any case, the 3rd respondent was an employee of the Government and was on official duty when the accident occurred, as a result of which the Government was vicariously liable but for the statute of limitation; and that the same limitation barred the appellant from pursuing the suit against the 3rd respondent. Lastly, we were urged to ignore the submission that a court must assess damages even when a case is dismissed because that is a mere practice that is not based on any law.

We remind ourselves of what this Court has said time and again that on a first appeal, the primary role of the Court is to re-evaluate, re-assess and re-analyze the extracts on the record and then independently determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates** (2013) eKLR.

The solitary issue in this appeal is, whether the suit before the High Court was statutorily time barred. To demonstrate that time limitation is a jurisdictional question and that if a matter is statute-barred a court has no jurisdiction to entertain it, we cite the decision of the Supreme Court in the case of **Nasra Ibrahim Ibren V. Independent Electoral and Boundaries Commission & 2 others,** Supreme Court Petition No. 19 of 2018, where that court stressed the fact that jurisdiction is everything and that a court may even raise a jurisdictional issue *suo motu*. It said:

"40 <u>A jurisdictional issue is fundamental and can even be</u> <u>raised by the court</u> *<u>suo motu</u>* as was persuasively and aptly stated by Odunga J in <u>Political Parties Dispute</u> <u>Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were</u> [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in <u>Owners</u> <u>and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B"</u> [2008] 1 EA 367 stated thus:

"25. What I understand the Court to have been saying is that <u>it</u> <u>is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded</u>…" (Emphasis supplied)

We fortify that view by quoting yet another passage from the East African Court of Appeal in the matter of **<u>Iga V. Makerere University</u> (1972) E.A 62**, where it was stated that;

"The limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time-barred, the court cannot grant the remedy or relief…….

The effect then is that if a suit is brought after the expiration of the period of limitation, <u>and this is apparent from the plaint,</u> and no grounds of exemption are shown in the plaint, the plaint must be rejected." (Our emphasis)

The learned Judge in this appeal, no doubt did not err when she determined whether, by operation of the law, she had to down tools for want of jurisdiction.

In reaching the conclusion that has been challenged in this appeal, the learned Judge relied on the provisions of the Public Authorities Limitation Act, an Act of Parliament that provides **"for the limitation of proceedings against the Government and a local authority, and for purposes incidental to and connected with the foregoing"**.

Section 3(1) of the Act that was at the core of the impugned decision reads as follows:

"3. (1) <u>No proceedings</u> founded on tort shall be brought against the Government or a local authority <u>after the end</u> <u>of twelve months from the date on which the cause of action accrued</u>." (Our emphasis).

The claim against the three respondents was founded on tort of negligence. Of the three respondents, the Hon. Attorney General was joined in the suit by virtue of **section 2 (2)(a)** of the aforementioned Act, as the proceedings involved a Government motor vehicle and public officers, namely the Inspector General of Police and the driver.

Whereas it is common factor that no proceedings could be brought against the 1st and 2nd respondents 12 months from 30th June, 2011, the question is whether that protection could be extended to the 3rd respondent. The answer to this question depends on whether the 3rd respondent could be said to have caused the accident when engaged in the course of duty as a driver. As Newbold P. said in **<u>Muwonge V. A.G. of Uganda</u>** [1967] E A 17:

"The law is, so long as the driver's act is committed by him in the course of his duty, even if he is acting deliberately, wantonly, negligently, or criminally, or even if he is acting for his own benefit or even if the act is committed contrary to his general instructions, the master is liable."

So that the liability on the owner of a car for the negligence of a driver will depend on whether at the material time the driver was acting on the owner's behalf as his agent; that the driver was using the car at the owner's express or implied request and was doing so in the performance of the task or duty delegated to him by the owner.

See **<u>Morgans V. Launchbury & Others</u>** [1972] 2 ALL E R 607.

To answer the question, we have posed above directly, **section 3(3)** of the Public Authorities Liability Act protects the 3rd respondent just as it protects the 1st and 2nd respondents from litigation brought outside the statutory period. It stipulates that;

"(3). Where the defence to any proceedings is that the defendant was at the material time acting in the course of his employment by the Government or a local authority and the proceedings were brought after the end of—

> **a. twelve months, in the case of proceedings founded on tort…….from the date on which the cause of action accrued, the court, at any stage of the proceedings, if satisfied that such defendant was at the material time so acting, shall enter judgment for that defendant".**

Time does not stop running for a party seeking to sue the Government but has first to obtain grant of letters of administration, as was pleaded by the appellant. See **<u>Mehta v Shah</u>** [1965] EA 321. We also reject the invitation by the appellant to regard the death of the deceased as a disability under **section 5** of the Public Authorities Limitation Act. That section provides that;

"5. Notwithstanding the provisions of section 4 of this Act, if, on the date when a right of action accrues for which a period of limitation is prescribed by this Act, <u>the person</u> <u>to whom it accrues is under a disability</u>, the action may be brought at any time before the end of twelve months from the date when that person ceases to be under a disability". (Our emphasis).

The person certified to have been under a disability is permitted to bring an action within twelve months after ceasing to be under that disability. The Act under **section 2(2)(c)** declares that;

> **"a person is under a disability while he is a minor or of unsound mind or is detained in pursuance of any written law which authorizes the detention of persons suffering from mental disorder or unsoundness of mind".** (Our Emphasis)

The court will consider only minors and persons of unsound mind for extension of time under **section 5** aforesaid. Death is not the kind of disability envisaged in this law.

We, with respect, agree with the Judge when she dismissed the suit against the 3rd respondent for the reason that;

> **"33.…….he was sued by virtue of his driving of the accident motor vehicle which belonged to the Government of Kenya in his capacity as an employee and agent or servant of the Government of Kenya who owned the offensive** (sic) **motor vehicle. Accordingly, this court would be acting in vain if it was to delink the 3rd defendant from the 1st and second defendants since the motor vehicle that was carelessly or dangerously driven belonged to a party that the suit herein is unsustainable against and who would be vicariously liable for acts of the 3rd defendant. In the end, the suit against all the defendants is struck out with no orders as to costs."**

To this, we may only add that the appellant in his plaint admitted that;

> **"5. At all material times the 2nd defendant was the registered owner of Motor Vehicle Registration No. GKA 376 (S) which was driven by an officer of the 3rd defendant.**
>
> **6. On or about the 30/6/2011 Vincent Mangalo Kalia (deceased) was standing off Langata Road near the Southern by pass, when the 3rd defendant, its agent, servant, or driver drove managed and/or controlled motor vehicle Registration Number GKA 376(S) so negligently that he lost control and hit the deceased as a result of which the deceased sustained fatal injuries.**

PARTICULARS OF NEGLIGENCE OF THE 3RD DEFENDANT, ITS AGENT, SERVANT OR DRIVER

> **a. Driving at excessive speed under the circumstances;**
>
> **b. Driving without any sufficient care and attention;**
>
> **c. Driving recklessly, carelessly and without due regard to the Highway Code;**
>
> **d. Failing to slow down, swerve, brake or in any other way control the said vehicle to avoid the accident;**
>
> **e. Causing the accident.**

And the 2nd defendant is vicariously liable".

In their statement of defence, the 1st and 2nd respondents did not dispute the fact that the 3rd respondent was engaged in the course of his employment when the accident occurred. As a matter of fact, they pleaded that he did not cause the accident but blamed the deceased for being negligent by standing on the road, failing to pay due regard and attention to his own safety and failing to heed and observe traffic laws and regulations.

The principle of vicarious liability is based on the doctrine of "*respondeat superior*" meaning "let the master answer". The master will only be liable for the tort committed by his servant, if it was committed by the servant acting in the course of his employment. But if the servant was on his own frolics, the master cannot be liable. See **Joel V. Morrison**, (1834) 6C & P 501 at p 503.

In this case, having been shown that the 3rd respondent was lawfully engaged as a driver at the time material to the matters herein, and being a servant of the 2nd respondent, **section 3** equally applied to him. The interlocutory judgment entered against him on 11th October, 2013 in default of appearance and defence was of no consequence as it was entered after the limitation period had set in. The suit ought to have been brought on 30th June, 2012.

Like the learned Judge, we can only sympathize with the appellant for his loss. But the overriding purpose of all limitation statutes is based on the maxim *interest reipublicae ut sit finis litium*, that it is in the public interest that there be an end to litigation. A party will not be permitted to prosecute stale claims. On the other hand, a party will be protected against such claims when he has lost evidence for his defence; and that a party with a valid cause of action should pursue it with reasonable diligence. See **Mehta v Shah** (supra).

For the reasons explained above, we find no merit in this appeal. It is accordingly dismissed with no orders as to costs.

Dated and delivered at Nairobi this 24th day of April, 2020.

W. OUKO, (P)

…………………….

JUDGE OF APPEAL

R.N. NAMBUYE

…………….………..

JUDGE OF APPEAL

M.K. KOOME

……………………..

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR