



REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

CIVIL APPEAL NO. 141 OF 2017

REUBEN WACHIRA.....APPELLANT

VERSUS

SOS CHILDREN VILLAGE KENYA.....RESPONDENT

(An appeal from the judgment and decree in Eldoret CMCCC No 227 of 2017

delivered on 24th October 2017) by N. Mosei (RM)

JUDGMENT

1. The appellant (**REUBEN WACHIRA**) had been sued in the lower with prayers which sought a refund in the sum of **Kshs. 1,886,296/-** plus interest and costs to the respondent (**SOS CHILDREN VILLAGE KENYA**). In the year 2011 to 2013 the appellant was employed as a data clerk to support the accounts programme by the respondent which is a non-governmental body (**NGO**) at its **Eldoret** branch. The appellant's responsibility was to receive the total funds collected per day, for banking. In the course of time, the respondent became uneasy about the goings-on at its institution, and engaged the firm of **MBAYA AND ASSOCIATES (Certified Public Accountants)** to carry out a thorough forensic audit on the **SOS MEDICAL CENTRE** and family strengthening programme situated within Eldoret. The purpose of the audit exercise was to get a reflection of the amounts collected from patients *vis a vis* the amounts banked by various staff, and also to review the petty cash system and procedures.

2. The audit carried out revealed that the appellant who was serving as a banking cashier, received money from patients but did not bank them into the respondent's account. Upon discovering the loss, the appellant was called to a meeting where he allegedly confessed to having embezzled funds of up to the amount afore-mentioned, over a progressive period between August 2011 up to and including October 2013. A report was made to **ELDORET CENTRAL POLICE** station, and the appellant was arrested and charged vide **ELD CMCRC NO 5178 OF 2013**, which was still on-going then. The prayers in the plaint were that he refunds the monies.

3. The appellant in contesting the suit argued that:

- a) The court did not have jurisdiction to hear the matter**
- b) The suit was time-barred**
- c) The respondent had not proved its case**

4. In its judgment, the trial court held that it had jurisdiction as the cause of action did not involve a labour relations dispute as contemplated by section 12 of the Industrial Court Act 2011, since the claim was for recovery of money which the appellant had converted.

5. As regards the time the cause of action arose, the trial court observed that the financial status inquiries begun in October 2013, and the action arose **AFTER** the report had been presented in March 2016, and the suit subsequently filed in 2016, and could therefore not be time barred under section 4 of the Limitation of Actions Act

6. The trial court also found that the respondent had proved its case as the cash summary register showed the several transactions in which the appellant received collections and he acknowledged receipt by signing and making remarks against them. That the appellant stated in his statement that he was charged with the responsibility of verifying the amount of cash received, and hand over the same to the receptionist for onward to the accountant for banking, but no documents were produced to support this assertion transmission. The court rejected the FSP work plan which the appellant sought to rely on, as unlawful, because it was for **ALL** sections in the entire organization for the year ended 31st December, while the matter at hand related to the Medical Centre. The trial court pointed out that the audit report specifically focused on

the Medical Centre for the period 2011, 2012 and 2013, which it accepted as a credible account of the financial position of the Medical Centre for the period in question. The court thus held that the evidence that money was lost had not been credibly rebutted and ordered the appellant to refund to the respondent the sum of Kshs 1,886,296/- plus interest and costs.

7. Being aggrieved with the decision the appellant filed the present appeal.

APPELLANT'S CASE

8. The appellant relied on section **12 of the Employment and Labour Relations Court** to contend that the trial court did not have jurisdiction to handle the suit, insisting that the suit should have been handled by the **Employment and Labour Relations Court**. He submitted that the dispute arose out of the employment relationship and therefore the magistrate's court was devoid of jurisdiction. He cited the case of **Naivasha Self Service Stores v Henry Lagat Cheruiyot & 3 others**. That the dispute could only have been determined by the ELRC court based on the interpretation of the employment contract.

9. The appellant argues on the basis of provisions of section **29 of the ELRC act and section 9 of the Magistrates Court Act** that the trial magistrate had no jurisdiction. Further, being a claim of a matter arising out of an employment relationship, it ought to have been instituted through a statement of claim and not a plaint. The suit is faulted as a violation of **section 12 of the ELRC Act and rule 4 of the Industrial Court (Procedure rules) 2010(revoked)**. He relied on the case of **Speaker of National Assembly v James Njenga Karume (2002) 1 KLR (EP) 428**.

10. The appellant submitted that the suit was time barred as the cause of action arose under section 4 of the Limitation of Actions Act. The claim in the plaint is that the appellant failed to bank monies he received progressively from 2011 up to and including 2013, yet the suit was lodged in 2016 and the trial court ought to have found that the claim was time barred.

11. The trial magistrate is also faulted as having erred by failing to consider and address himself to the cumulative effect of **section 90 of the Employment Act**, taking into account that the sum referred to were allegedly received on various and diverse dates between 2011 and 2013 which can be classified as a **continuing injury under section 90 of the Act**. The contention is that the entire claim was time barred based on section 90 of the Employment Act, and that the respondent admitted to the application of the aforesaid law.

12. The appellant relied on the case of **Iga v Makerere University (1972) E.A 65** to submit that the respondent failed to establish that he came into contact with the alleged sum as pleaded. That the job description did not encompass handling of money at any time as a data clerk. And no evidence was given by the respondent to show that it updated the appellant's duties to include receipt of cash for banking services. The respondent alleged that a duty to bank collection existed on the part of the appellant and it was its duty to produce a written contract embodying the said duty, which the respondent failed to produce.

13. The appellant cited **section 80 of the Evidence Act** and maintained that the court ought to have been guided by that, in support of his arguments that the trial magistrate erred in failing to find that the **SOS Medical Center Collection 2011 book** required expert evidence to establish whether the appellant had placed his signature in it to signify the receipt of the cash. He relied on the case of **Jennifer Nyambura Kamau v Humphrey Mbaka Nandi (2013) eKLR** to support the submission that the respondent failed in its duty to prove that the appellant signed the book.

14. The appellant also stated that the magistrate erred in finding that the report by **Mbaya & Associates** was an accurate reflection of the financial state of the **Medical Centre** as opposed to his report by **Ernst & Young Certified Public Accountants**. That the trial magistrate departed from the duty of the court to weigh conflicting evidence, contending that if **Ernst and Young** never raised anomalies for 3 years, **Mbaya & Associates** were estopped from contradicting the reflections by the former. That the conclusion by the magistrate that **Mbaya & Associates** had narrowed down to the Medical Center was without the benefit of evidence as the said Accountants indicated that they had investigated the entire bank account where the respondent was banking his monies. It had not been proven that Ernst & Young did not review the records of the Medical Centre.

15. The magistrate is also said to have erred in reversing the onus of proof to the appellant and failed to appreciate the contents of the document. The words used in it exempted admissibility and use in court. The missing documents render the authenticity of the report to be of the least probative value, and that one would be at a loss as to how the accountants were able to confirm cash was collected at the medical center and the receipt books were clearly indicated as missing.

16. The appellant argues that the FSP work plan 2011 though disregarded by the magistrate was a very vital document in pointing out to whom the responsibility to bank collections had been placed. No litigation was brought against Everlyne, who it was upon to collect the money.

The appellant urges that the appeal be allowed and judgment set aside.

RESPONDENT'S CASE

17. The respondent submits that the appellant had misused funds that he had been entrusted with and at one stage opted to refund the same. That the report by **Mbaya & Associates** was an internal document where interrogatories were held and inspections done, and both parties interviewed on the issues. The respondent contends that the appellant cannot now cry wolf, yet he never disclosed to the court that he requested an independent report which was denied. That in any event he willingly subjected himself to the audit of **Mbaya & Associates** wherein, some of the entries made in the documents referred to were in his own handwriting and signature.

18. The respondent associates itself with the findings of the trial court and urges that the appeal be dismissed with cost

ISSUES FOR DETERMINATION

1. Whether the trial court had jurisdiction
2. Whether the suit was time barred
3. Whether the case was proven on a balance of probabilities

WHETHER THE TRIAL COURT HAD JURISDICTION

19. It is the appellant's contention that the dispute arose out of an employment relationship.

Section 12 of the Employment and Labour Relations Act provides;

(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

(a) disputes relating to or arising out of employment between an employer and an employee.

It follows that the court must establish the cause of action and whether the same arose out of an employment relationship between an employer and an employee. The claim arose from conversion of money for personal and private use, money that he handled as an employee of the respondent. He was in charge of receiving the medical centre collection. The cash summary register filed shows that on several occasions the appellant received cash and signed for the same. However, the appellant also contended that it was not in his job description to carry out the duties. This therefore raises the question as to whether the dispute arose out of the employer and employee relationship.

20. The appellant cited the case of **Naivasha Self Service Stores v Henry Lagat Cheruiyot & 3 others (2012) eKLR** cited by the appellant where the court held;

From the above averments, it is plain that the plaintiff's cause of action has its roots in the relationship the defendants have with it as its employees. Indeed, the defendants are said to be liable to the plaintiff by virtue of the "policy of the plaintiff." In my judgment, the dispute between the plaintiff and the defendants arises from their relationship as employer and employee.

Given that the appellant himself stated that it was not in the job description or the duties assigned to him, then it follows that the dispute was not ripe for the ELRC court, and he has shot himself in the foot!

WHETHER THE SUIT WAS TIME BARRED

Section 4 of the Limitation of Actions Act provides;

(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(a) actions founded on contract;

(b) actions to enforce a recognizance;

(c) actions to enforce an award;

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.

21. The actions complained of were continuous from **1st August 2011 to 31st October 2013**. The action could only arise after the anomalies had been established and the report communicated. In my view the trial magistrate did not err in finding that the time begun to run from October 2013. The suit was not time barred.

WHETHER THE CASE WAS PROVEN ON A BALANCE OF PROBABILITIES

22. The evidence provided by the respondent in the trial court showed that the appellant was the main recipient of the cash. As revealed by the collection register, a large amount of the monies collected were never banked. The audit report by **Mbaya & Associates** proved that there was underbanking of Kshs. 2,413,371 which the defendant had received 1,886,296/- which he could not account for.

23. The claim that the fact that **Ernst & Young** never found any anomalies estopped the second auditors from producing their results as evidence was not produced at the trial, and is belated mourning. I have perused the appellant's list of documents as presented at the trial, and the report was not among the documents presented. The audit report proved on a balance of probabilities that the appellant had indeed participated in the embezzlement of the funds, and indeed at the trial he did not produce any evidence to rebut the respondent's evidence.

I hold and find that that the appeal fails on all limbs and is dismissed with costs.

E-Delivered and date this 29th day of May 2020 at Eldoret

H. A. OMONDI

JUDGE