REPUBLIC OF KENYA

IN THE HIGH COURT OFKENYA AT NAIROBI

CIVIL APPEAL NO. 536 OF 2015

KENYA POWER AND LIGHTING COMPANY LTD.....APPELLANT

VERSUS

MICHAEL NZIBO MWATHI.....RESPODNENT

(Being an appeal from the judgment of Hon. L. Kassan (Mr) Senior Principal

Magistrate delivered on 23rd October,2015 in Civil Case No. 7139 of 2012 before the Chief Magistrates Court at Nairobi)

JUDGMENT

The respondent herein brought a suit against the appellant before the lower court claiming damages for injury sustained while he was on duty. It was his case that, he was injured as a result of defendant's breach of contract for failing to provide a safe system of work, and therefore should be held liable for the injuries sustained.

The appellant denied the respondent's claim *inter alia* on the ground that the plaintiffs claim was premised on tort law and therefore incompetent and bad in law, having been filed outside the prescribed period under the Limitation of Actions Act, Cap 22 Laws of Kenya.

After the full trial however, the lower court found in favour of the respondent on 100% liability and proceeded to award a total of Kshs. 1,005,000/= made up of general damages, future medical costs and the cost of medical report.

The appellant was aggrieved by the said judgment and lodged this appeal. In the Memorandum of Appeal, dated 13th and filed on 17th November, 2015 the appellant faulted the trial magistrate for failing to appreciate that, the appellant had pleaded the suit was incompetent because it was filed outside the limitation period, and that the court ignored the submissions and the authorities cited in that regard. The appellant also complained that the damages awarded were excessive in the circumstances of the case.

Both parties have filed submissions in advancing their respective positions in this appeal. As the first appellate court, it is my duty to evaluate the evidence adduced before the trial court and arrive at independent conclusions. The respondent sustained the injuries complained of on 28th April, 2008 while the suit was filed on 4th December, 2012. It is on that basis that the appellant raised the issue of limitation. In deciding the issue, the trial court held that the appellant ought to have called witnesses to prove that there was no contract between it and the respondent. The trial court declined to dismiss the suit on the basis that, a claim by the respondent was based on breach of contract. Since the appellant was said to have failed to call witnesses to challenge the plaintiff's evidence, liability was held at 100%.

The pleadings as set out in paragraph 4 and 5 of the plaint clearly point to alleged negligence on the part of the appellant. In fact the opening sentence of the judgment of the lower court clearly stated the respondent sought **"general damages, costs and interest as a result injuries sustained due to the defendants negligence."**

The substrum of the respondent's claim was injuries sustained while in the employment of the appellant as a result of negligence. This was not a claim based on breach of terms of employment such as wrongful termination, redundancy or dismissal. These would ordinarily be the foundation of claims under the contract of employment. Where there is a duty of care supposed to be accorded to an employee in the course of his employment, and as a result of breach thereof he suffers any injury, then that is an action in tort.

If that were the case, then Section 4 (2) of the Limitation of Actions Act shall come into operation. It is provided thereunder that 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. It cannot be said that employee has the right to elect whether or not to bring an action under Section 4 (1) or (2) of the Act. Even if one were to agree that this action should have been brought under the contract of service, Section 90 of the Employment Act would have defeated the respondent's claim. That Section supersedes the provisions of Section 4 (1) of the Limitation of Actions Act. It provides as follows,

"Notwithstanding the provisions of Section 4 (1) of the Limitation of Actions Act, no civil action or proceedings based or arising

out of this Act or a Contract of Service in general shall lie or be instituted unless it is commenced within three years next after the Act, neglect or default complained in the case or continuing injury or damage within 12 months next after cessation thereof."

The respondent suffered injuries in the cause of employment with the appellant and therefore the above section applies. His suit should have been filed within 3 years from the date of injury; but as can be seen from the computation of time, his plaint was filed more than 18 months after the end of three years.

Going by the authorities cited, any cause of action arising from the Employment Act removed such actions from the application of Limitation of Actions Act. If a different view were the case, then the legislature would have expressly provided that the Limitation of Actions Act was applicable. – see **Banking Insurance & Finance Union Kenya vs. Kirinyaga Co-operative Union Limited & Anoter** (2014) e KLR.

In the case of **Joseph Murai Kamau vs. Mawara Investment Limited (2005) e KLR** Visram J, as he then was stated as follows,

"This is clearly an action by an employee against an employer for breach of duty of care at common law. It is an action in tort, not contract. No agreement or terms of any contract relied upon are shown to have been breached. Indeed the Plaint does not plead the existence of any agreement. The fact that the parties have a contractual relationship, of an employer/employee as in this case, does not automatically follow that a law suit between them is founded on "contract". If the Plaintiff relies upon a contract, it is incumbent upon him to plead specifically the substance and effect of the agreement so far as is material, and he must show whether his claim is founded under or by virtue of any of the terms of his agreement, or whether it is founded upon a breach of the agreement.

Nothing of the sort is shown here. His claim is founded on the employer's breach of duty at common law, and that is a claim in tort, and ought to have been brought within the three year limitation stipulated in law."

The authorities cited by the respondent are clearly distinguishable in view of the above case which is persuasive. In view of the foregoing, I find that the respondent's suit against the appellant was time barred by virtue of Section 90 of the Employment Act as read with Section 4 (2) of the Limitation of Actions Act and ought to have been dismissed.

If I were to uphold the claim as pleaded, going by the injuries sustained by the respondent, that is, broken hip joint, right inter trochanteric fracture, multiple soft tissue injuries, I would have agreed with the assessment of damages by the trial court that is Kshs. 850,000/= general damages, 150,000/= costs of future medical attention and Kshs. 5000/= paid to the doctor. However, that is not the case and therefore this appeal succeeds in its entirety in favour of the appellant. The circumstances of this case dictate that each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 10th Day of April, 2019.

A.MBOGHOLI MSAGHA

JUDGE