



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL APPEAL NO. 3 OF 2019

MOHAMED HAMUD SHEIKH.....APPELLANT

-VERSUS-

ISLAMIC RELIEF.....RESPONDENT

(An appeal from the judgment delivered by Honourable JJ Masiga (Senior Resident Magistrate) on 18th February, 2019 in Garissa Civil Suit No. 1 of 2018)

JUDGEMENT

Background:

1. The appellant is the Plaintiff in Civil Suit No. 1 of 2018 whereas the respondent was the Defendant. In the aforesaid suit, the Plaintiff filed a plaint dated 17th January, 2018 seeking damages for injuries sustained in the course of the appellant employment with the Respondent.
2. The appellant alleges that he was involved in a road traffic accident while in the course of his employment with the Respondent where he suffered serious injurious particularized as loss of consciousness, fracture of the skull and hearing loss affecting the left ear. The particulars of negligence of the Respondent are failing to provide a conducive working environment, failing to ensure the motor cycle was in good condition and providing a defective motor cycle.
3. On 11th April, 2018 the matter came up for formal proof when the Defendant had not filed their defence, the appellant proceeded and the matter was concluded and the trial court issued an ex parte Judgment on 6/6/2018. The Respondent subsequently filed an application to set aside the ex parte judgment which application was settled vide consent and the Respondent given an opportunity to defend the suit.
4. The matter proceeded for hearing on 26/9/2018 when the appellant testified and closed his case and the Respondent equally called one witness and closed their case, the parties were directed to file their written submissions on 23/10/2018. Through their filed submissions the Respondent challenged the court jurisdiction arguing that the suit was time barred based on the Limitation of Action Act. The court delivered its judgment on 28/11/2018 dismissing the suit for being time barred as the alleged accident occurred on 13th June, 2013 and the suit being filed on 17th January, 2018 a period of over five years.
5. Being aggrieved by the aforementioned decision, the appellant lodged an appeal to this court. The memorandum of appeal is premised on the following grounds, namely:

- 1. THAT the learned magistrate fundamentally and grossly erred in dismissing the Plaintiff suit.**
- 2. THAT the grounds upon which the learned Magistrate relied upon in dismissing the Plaintiff's suit are untenable.**
- 3. THAT the learned Magistrate fundamentally and grossly erred in dismissing the Plaintiff suit on the basis of submissions filed by the Respondent.**
- 4. THAT the learned Magistrate fundamentally and grossly erred when he dismissed the Plaintiff suit on the basis of submissions filed by the Respondents without affording the Plaintiff an opportunity to be heard.**
- 5. THAT the learned Magistrate grossly and fundamentally erred when he refused failed and/or neglected to appreciate, comprehend and apply the principles of a fair hearing.**

6. THAT the Learned Magistrate grossly and fundamentally erred when he dismissed the Plaintiff suit which in itself was in contravention of Article 50(1) of the Constitution of Kenya 2010.

7. THAT the Learned Magistrate grossly and fundamentally erred when he failed, refused and /or neglected to comprehend, apprehend, appreciate, understand and apply the concept and principles that are outlined in Article 159 of the Constitution of Kenya in Particular Article 159(2)(d).

8. THAT the learned magistrate grossly and fundamentally erred when he on his own motion raised, argued and determined a point of law.

9. THAT the learned magistrate Fundamentally and grossly erred when he failed, refused and/or neglected to appreciate, apply and comprehend the Principles that guide the raising of Preliminary Objection on points of Law.

10. THAT the learned Magistrate fundamentally and grossly erred when he failed, refused and or neglected to understand and appreciate that the appellants had not been given Notice of Preliminary Objection on a point of Law.

11. THAT the learned magistrate fundamentally and grossly erred when he failed, refused and /or neglected to comprehend, appreciate and apply the Principle that Preliminary Objections arise from pleadings and not submissions.

12. THAT the learned magistrate fundamentally and grossly erred when he failed, refused and /or neglected to comprehend, appreciate and apply the provisions of the Limitation of Actions Act.

13. THAT the learned magistrate fundamentally and grossly erred when he failed refused and /or neglected to comprehend, appreciate and apply the Provisions of Work Injuries Benefits Act.

14. THAT the learned magistrate fundamentally and grossly erred when he failed, refused and /or neglected to comprehend, appreciate the distinction and applicability of the Limitation of Actions Act and the Work Injuries Benefits Act.

15. THAT the learned magistrate Fundamentally and grossly erred when he failed, refused and /or neglected to comprehend, appreciate and apply the provisions of section 1, 1a, 1b, 3 AND 3a of the Civil Procedure Act.

Submissions:

6. The appeal was canvassed by way of written submissions. The Appellant filed their written submissions dated 7th May, 2019 and filed on 9th May, 2019 and Respondent filed their submissions dated 30th May, 2019 and filed on 3rd June, 2019. The matter came up for highlighting on 3/7/2019.

Appellant's Submissions:

7. The appellant in their submissions identified three issues for determination. The first issue is on whether the trial magistrate erred in dismissing the suit on the ground that it was time barred under the Limitation of Actions Act. The appellant in this regard submitted that the Learned Magistrate erred in applying section 4(2) of the Limitation of Action Act instead of the provisions of the Work Injury Benefits Act, 2007 which they argue is solely applicable to the case.

8. In this they relied in the Supreme Court position in *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited and 2 Others, S.C Civil Application No. 2 of 2011* where it was held that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed arguing that the context of the instant suit can be determined within the Work Injury Benefits Act, 2007, which Act they allege was reinstated after being declared unconstitutional in *Law Society of Kenya vs Attorney General & 3 Others(2009) e KLR* and in *Attorney General vs Law Society of Kenya & Another (2017) eKLR*.

9. The relevant sections of the Work Injury Benefits Act, 2007 relied by the appellant is section 21 which requires employees to give written or verbal notice of the accident, and thereafter it is the duty of the employer to report the accident to the Director within seven days after having received notice of an accident. They allege that the testimony of DW1 confirms that the employer was aware of the said accident and that in the circumstances and under section 26 of the Act time limits do not apply. Further, they argue that under section 27 the right to compensation does not lapse if the employer is aware. And that under section 22 the question is what remedy would be available to an employee where the employer fails to commence compensation process. The Appellant relies on the case of *Nelion Trading Limited vs David Okeno Onaya (2019) eKLR*.

10. The second issue addressed by the Appellant is as to whether the Learned Trial Magistrate erred in dismissing the suit based on issues of law raised in the Respondent's submission. They submitted that the Preliminary Objection was only raised through the respondent's written submissions, a clear contravention of the rules on Preliminary Objections as outlined in law. They argued that the manner in which the issue of Jurisdiction and the submissions on the matter being time barred were raised without the appellant being given an opportunity to comment or file submissions in response arguing that they were never served with the Respondents submissions and therefore the same infringes their right to fair hearing protected under Article 50 of the Constitution. Additionally, they submitted that the same violates the concept and principle set out under Article 159(2)(d) of the Constitution and sections 1, 1A, 1B, 3 and 3A of the Civil Procedure Act.

11. In this regard the appellant relies in the following cases of *Kenpipe Co-operative Savings & Credit Society Limited vs Daniel Githinji Waiganjo (2017) eKLR, Kenya Council of Employment Migration Agencies vs Nyamira County Government & 10 Others (2015) and*

Kenya Ports Authority vs Timberland (K) (2017) eKLR.

12. The final issue is on whether the prayers sought ought to be granted, and in this regard, they submitted that they have laid a strong basis for the court to grant the same.

Respondent's Submissions:

13. The Respondents in their submissions addressed two issues and responded to the Appellants submissions. The first issue addressed is as to whether this court ought to interfere with the trial court finding of facts, and in this regard they submitted that the duty of this court at an appeal stage is to arrive at its own finding upon an independent analysis of the facts and evidence contained in the record, evaluate the same and draw its own conclusion, having in mind that it did not have the benefit of seeing and hearing the witnesses on the facts. In this they rely in the case of ***Teachers Service Commission vs Joseph Wambugu Nderitu (2016) eKLR.***

14. The second issue addressed by the Respondent is as to whether the trial court erred in fact and/or in law in dismissing the appellant's suit. In this regard they submitted that the court rightly dismissed the appellant suit under section 4(2) of the Limitation of Action Act Cap 22 Laws of Kenya, which provides that actions founded on tort ought not to be brought after lapse of three years. They submitted that the alleged accident occurred on 13th June, 2013 and the suit was filed on 28th January, 2018 a period of over 5 years. Therefore, the suit was time barred and the appellant did not seek leave to file the same out of time.

15. In support of this the Respondent relies in the following authorities ***E. Torgbor vs Ladislaus Odongo Ojuok (2015) eKLR*** and ***Adero & Another vs Ulinzi Sacco Society Limited (2002)1 KLR 577*** where it was held that whenever a matter is time barred the court has no jurisdiction to deal with it.

16. Further to the above, the Respondent submitted that the appellant failed to prove his case on preponderance of evidence, as the appellant failed to prove any particulars of negligence or breach of duty of care by the Respondent. They allege that the appellant failed to demonstrate that he suffered the injuries whilst at the employment of the Respondent, and that on cross-examination he admitted that he suffered injuries while riding the motor cycle outside the scope of his employment and that he failed to prove a causal link between the injuries and his employment.

17. Additionally, they submitted that the suit ought not to have been against the respondent as they did not provide any motorcycle to the appellant. They therefore submitted that the appellant failed to discharge the burden of prove, and in this they rely in Halsbury Laws of England 4th Edition on what ought to be proved in appellant circumstances and relied in the cases of ***Lucy Kimathi Wambui vs Samuel Muiruri Irungu (2014) eKLR***, ***Lochab Brothers Ltd & Another vs Johana Kipkosgei Yegon (2017) eKLR***, ***Abdalla Baya Mwanyule vs Said t/a Jomvu Total Service Station (2004) eKLR***, ***Statpack Industries vs James Mbithi Munyao (2005) eKLR***, ***Rashid Ali Faki vs A.O Said Transporters (2016)e KLR*** and ***Obwoji vs Aburi (1995-1998) EA 255.***

18. In Response to the appellant submissions, the Respondent submitted that the appellant claim was based on tort as evidenced by the plaint which particularized the incidences of negligence and therefore the appellant attempt to base his case on contractual relationship of employment with respondent and reliance on Work Injury Benefits Act, 2007 amounts to an introduction of a new cause of action at this appellate stage. They argue that parties are bound by their pleadings as was held in ***Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others (2014) eKLR*** and ***George Owen Nandy vs. Ruth Watiri Kibe (2016) eKLR.*** They therefore submitted that the trial court rightly dismissed the suit based on section 4(2) of the Limitation of Action Act as the suit was premised on tort of negligence.

19. Additionally, the respondent distinguished the two authorities of ***Nelion Trading Limited vs David Okeno Onaya (2019) eKLR*** and ***Rift Valley Railways (Kenya) Ltd vs Hawkins Wagunza Musonye & Another (2016) eKLR*** arguing that in the two cases the applicable section was section 90 of the employment Act which caps the limitation period at three years where the duty of care arises of employment contract. In this they argue it will apply where the injury was suffered at the work place, and in this case the appellant was riding the said motorcycle outside the scope of his employment.

20. Further, the Respondent in response to the appellant assertion that the limitation period in which the suit was dismissed based on was not pleaded, submitted the same false as the respondent vide their defence dated 19th September, 2018 averred at paragraph 12 that the jurisdiction of the court was not admitted. This they referred the court paragraph 2 of their supplementary Record of appeal and therefore the allegation that limitation was raised at submissions stage is misguided and that the appellant has attempted to mislead the court by filing a wrong statement of defence with a view of stealing a match.

21. In sum the Respondent submits that the appellant has failed to neither demonstrate that the suit was not time barred nor demonstrate that the injuries occurred during or in the course of employment with the respondent. They urged the court to find that the appeal lacks merit.

Issues and Analysis:

22. Considering the submissions of the parties in this appeal, and this being a first appellate court, I'm guided by the decision in ***Selle vs Associated Motor Boat Co. [1968] EA 123*** that the court is not bound necessarily to accept the findings of fact by the court below. A re-evaluation of the matter is allowed. In this regard the issues which emerge for the appeal are as to whether the trial court erred in its finding with regard to the application of the Limitation of Actions Act in dismissing the suit and which law ought to apply in the circumstances.

23. The employment of the appellant by the Respondent is not contested. The Respondent contests that there was no causal link between the injuries suffered by the appellant to his employment to the Respondent. The appellant on the other hand alleged that he suffered the injuries the subject of this within the employment of the Respondent, his claims are based on the alleged negligence and breach of a statutory duty and contract and seeking general and special damages.

24. The contest between the parties herein is in respect to the law applicable. The Appellant alleges that their suit was based on the Work Injury Benefits Act, 2007, whereas the Respondents allege that the Trial court rightly dismissed it under the Limitation of Action Act.

25. The Preamble of the Work Injury Benefits Act, 2007 provides-

“An Act of Parliament to provide for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes.”

26. In terms of time limitations for filing claims underwork Injury Benefits Act **Part IV** (four) lays out the provisions to follow once there is an industrial accident. A report must be made to the employer by the employee and upon which a report must be made to the Director of Occupational Safety and Health Services (the Director) and who must do an inquiry into the matter for assessment of the compensation due to the employee. Section 27 of WIBA provides as follows;

1. A right to benefits in accordance with this Act shall lapse if the accident is not reported to the employer within twelve months after the date of such accident.

2. Notwithstanding the provisions of subsection (1), the failure to report an accident to an employer as required in subsection (1) is not a bar to compensation if it is proved that the employer had knowledge of the accident from any other source.

27. **Section 10(4) of WIBA** on the other hand relates to right to compensation to an employee who is injured at work due to contravention of any law or instructions by the employer or which has occurred due to lack of instructions by the employer and provides as follows;

“10(4). For the purposes of this Act, an occupational accident or disease resulting in serious disablement or death of an employee is deemed to have arisen out of and in the course of employment if the accident was due to an act done by the employee for the purpose of, in the interests of or in connection with, the business of the employer despite the fact that the employee was, at the time of the accident acting—

(a) in contravention of any law or any instructions by or on behalf of his employer; or

(b) without any instructions from his employer.”

28. Any such industrial accident must therefore be reported to the Director. section 16 provides that;

“No action shall lie by an employee or any dependent of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee’s employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.”

29. The Court of Appeal has delved into work injury and the resulting time limitations in the case of *Attorney General versus Law Society of Kenya & Central Organisation of Trade Unions Civil Appeal No.133 of 2011 [2017] eKLR*, where it held:-

“The section [section 16] is to the effect that no employee or his dependents can institute a court action against the employer to claim damages in respect of work-related accident or disease resulting in the disablement or death of such employee. The recourse provided for such an employee or his dependant is to notify the Director, who under section 23(1) of the Act shall upon receipt of the notice of the accident;

“(1)..... or having learned that an employee has been injured in an accident the Director shall make such inquiries as are necessary to decide upon any claim or liability in accordance with this Act.”

Section 16 as read with section 23(1) confers powers of adjudication of any claim for compensation arising from injury or death in the workplace upon the Director and expressly bars institution of court proceedings by the aggrieved employee.

However by section 51(1) any person aggrieved by a decision of the Director may lodge an objection with the Director himself against his own decision. The Director is required to give a written answer, either varying or upholding his decision and giving reasons for the decision. Upon receipt of the answer the “objector” may appeal to the Industrial Court (now Employment and Labour Relations Court) against the decision.”

30. Therefore all work related injuries are subject to the Work Injury Benefit Act, and all industrial accidents are to be legally reported to the Director and not filed with the lower court, this has been the case since 20th December, 2007 when the Act came into place. Time limitations under the Work Injuries Benefits Act cannot be enlarged by the lower court and where a party has filed a claim/report or matter with the Director within the stipulated period and they are aggrieved, an appeal is to be filed in the Employment and labour Relations Court as envisaged under section 51 of the Act.

31. In the instant appeal, the appellant alleges he was involved in an accident on 13th June, 2013 where he suffered the described injuries; he then filed the suit on 28th January, 2018 a period of over 5 years later. He submitted that his claim is based on the Work Injury Benefit Act, however applying the foregoing provisions of the Act; he ought to have made report to the Director a situation that never transpired, and thus is claim is defeated for want of Jurisdiction under the Work Injury Benefit Act as relied by the appellant.

32. The Respondent on the hand claims that the injuries suffered have no causal link with his employment with the Respondent and therefore disputes any liability. If this Court were to adopt that position and take the matter as purely a tort negligence, then the applicable Law in terms Limitation of Action would be the Limitation of Action Act Cap 22, and in the circumstances the suit would fail as rightly held by the trial Magistrate as no leave was sought before filing of the suit.

33. Additionally, the appellant has alleged that his right to fair hearing protected under Article 50 of Constitution were infringed as he was not given an opportunity to submit to the trial Court over the issue of Limitation of Action, it is their submission that the Respondent did not serve them with their filed submissions and therefore they were never given an opportunity to respond. I have looked at the filed defence in the supplementary record of appeal which in my view is the actual statement of Defence filed in this a matter as opposed to the one in the record of appeal prepared by the appellant , and at Paragraph 12 the Respondent has disputed the jurisdiction the court citing the Limitation of Action. Therefore it is my finding that the allegation that the appellant was not given an opportunity has no basis.

Conclusion:

34. It is my finding that the appeal lack merits for the foregoing reasons. The suit was filed outside the timelines, it fails both under the Work Injury Benefits Act and the Limitation of Action Act, as it was filed 5 years after the alleged incident.

35. Appeal is thus dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT GARISSA THIS 28TH DAY OF OCTOBER, 2019.

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C. KARIUKI

JUDGE