



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**CIVIL APPEAL NO. 169 OF 2009**

KIAMOKAMA TEA FACTORY CO. LIMITED ..... APPELLANT

VERSUS

JOSHUA NYAKONI ..... RESPONDENT

*[Being an Appeal from the Ruling and Order of Hon. Were (Senior Resident Magistrate) dated and Delivered on the 24<sup>th</sup> day of July 2009 in Keroka SRMCCC NO. 110 of 2009.]*

**JUDGMENT**

**INTRODUCTION**

0. This is an appeal from the decision of the learned trial magistrate, Hon. Were (Senior Resident Magistrate) in Keroka SRMCCC NO. 110 of 2009 where the court rejected a preliminary objection, principally, on jurisdiction that the action was time-barred, having been filed outside the three year period provided for torts under section 4 (1) of the Limitation of Actions Act and for causes of action based on a contract of service under section 90 of the Employment Act, 2007, and that the Magistrate's Court had no jurisdiction as section 87 of the Employment Act, 2007 reposed that jurisdiction with the Industrial Court established under the Act.
0. The trial court held that the action before the court was based both under contract and tort, and that, consequently, plaintiff could file suit therefore within 6 years after the cause of action arose, and that as the cause of action arose in 2004 before the enactment of the Employment Act, 2007, the magistrate's court had jurisdiction to entertain the dispute.
0. By a Memorandum of Appeal dated 11<sup>th</sup> August 2009, the appellant listed six grounds of appeal and sought Orders that:
  - a. *The Ruling and Decision of the learned Trial magistrate dated 24<sup>th</sup> day of July 2009, be set aside and/or quashed and the same substituted with an order dismissing the Respondent's suit vide Keroka SRMCC No. 110 of 2009.*
  - b. *Costs of the Appeal and those incurred in the Subordinate Court be borne by the Respondent.*
  - c. *Such further and/or other orders be granted as this Honourable Court may deem fit and expedient.*

**THE PLAINTIFF'S SUIT**

0. At paragraphs 3-7 the plaintiff's claim is set out as follows:

**“PLAINT**

3. *At all material times, the Plaintiff was employed by the Defendant as a General Labourer at Kiamokama Tea Factory.*
4. *At all material times, it was the statutory duty of the Defendant to keep and maintain a safe and proper system of work for all its employees and not to expose any employee including the Plaintiff to any risk of damage or injury which they knew or ought to have known and to provide and maintain adequate and suitable measures to enable the Plaintiff to carry his work in safety.*
5. *On or about the 16 day of June 2004, the Plaintiff was working at Kiamokama Tea Factory when he got a dislocation on the thigh of the right leg from a fall which was caused by rear wheel of a trolley that came out thus sustaining injuries as a consequence whereof he suffered pain loss and damage.*
6. *The Plaintiff avers that the said accident was solely caused by the Defendant's breach of statutory duty of care pleaded in paragraph above.*

**PARTICULARS OF BREACH OF STATUTORY DUTY OF CARE:**

- a. *Failing to make or keep safe at the Plaintiff's place of work.*
  - b. *Employing the Plaintiff without instructing him as to the dangers likely to arise in connection with his work or without providing him with any sufficient training in work, or without providing any adequate supervision.*
  - c. *Failing to provide or maintain safe means of access to the Plaintiff's place of work*
  - d. *In the premises failing to provide a safe system of work.*
7. *Further, or in the alternative, the said accident was caused by reason of the negligence and/or breach of duty and/or breach of the said contract of employment and the terms thereof on the part of the Defendant, its servant or agents.*

**PARTICULARS OF NEGLIGENCE....”**

On the basis of the averments in the Plaintiff, the plaintiff prayed for special and general damages together with interest and costs.

**THE TRIAL COURT'S RULING**

0. Upon the preliminary objection on jurisdiction, the trial court ruled as follows:

**“RULING**

*At this stage the plaintiff does claim that he was an employee of the defendant engaged as a general labourer. In the substance of this claim laid out of paragraphs 4, 5, 6 and 7 the plaintiff has laid his claim both in tort and contract. It is a claim in tort because the plaintiff has pleaded on statutory breach of duty and negligence on the part of the defendant that led to the injury he sustained. It is also a claim in contract because the plaintiff has also pleaded that he had a contract of employment with the defendant and the defendant breached the terms of the contract when it failed to provide a safe working environment.*

*I defer to the sentiments expressed in the cited authority, save that we are not availed the benefit of the pleadings to ascertain what was in the claim in Robin Cahule vs. T.S Nandhra and 3 others.*

***Where a plaintiff pleads this claim both as tort and contract, then he has the benefit of relying on either of the limitations periods set out for tort and Contract. In the present case the plaintiff's case is grounded both on tort and contract which do have a limitation period of 3 and 6 years respectively. In***

**that regard, I would not deem appropriate to sniff out the plaintiff's claim at this point. I deem it proper that the suit proceeds to hearing on the issue and a determination be made at the full trial.**

On the 2<sup>nd</sup> issue, I take note that section 87 does oust the jurisdiction of this court in regard to any contract of employment. I do note that the section only provides for recourse within the board as established by the act or by filing a claim at the Industrial Court. The present Act came into operation on 01.07.08 upon gazettment of the commencement by the minister for labour. The cause of action arose on 16.06.04 about 4 years before the Act commenced. Can the act therefore have a retrospective effect? I do not deem so. **The repeal of the Employment Act cap 226 did not interrupt plaintiff's claim. It would be a breach of the plaintiff's right to subject his claim to a provision of the law that did not exist at the time when the cause of action arose....”**

[Emphasis mine]

## **SUBMISSIONS**

0. Counsel for the Parties, M/S Oguttu Mboya & Co. Advocates for the appellant and M/S G. J. M. Masese & Co. Advocates for the Respondent filed written submissions and on 15<sup>th</sup> May 2013 judgment was reserved. On account of engagement with the election petitions of that year and subsequent transfer of this Judge to sit at Mombasa, the matter was regrettably not dealt with expeditiously, and the judgment could not earlier be delivered.
0. The Submissions made for the appellant can be summarised under the two heads as regards limitation of actions and jurisdiction of the magistrate's court, corresponding respectively to grounds 1, 2 & 3 and 4, 5 & 6 of the Memorandum of Appeal. On limitation of actions, firstly, Counsel relied on the Court of Appeal decision in **Robin Cahill & 9 Ors. v. T.S. Nandhra & 3 Ors.**, Civil Appeal No. 57 of 2002 (cited in **Kenya Airways Corporation Ltd. v. Tobias Oganya Auma & 5 Ors.** Civil Appeal No. 350 of 2002) for the proposition that breach of statutory care is a claim in tort and that, therefore, the plaintiff's cause of action herein having been occasioned by a breach of statutory duty of care and negligence both causes of action in tort were subject to the limitation period of 3 years under section 4 (1) the Limitations of Actions Act. Counsel charged that the trial court had refused to follow the decision in **Robin Cahill**, which was binding on that court, as regards the status of breach of statutory duty as a tort
0. Secondly, the action was said to be time barred by virtue of section 90 of the Employment Act 2007, which repealed the former Employment Act cap. 226 and came into force on 2<sup>nd</sup> June 2008, long before the suit was filed on 19<sup>th</sup> March 2009, and which provided that any cause of action touching and or concerning a contract of service be filed within 3 years after the cause of action arose. It was contended that the plaintiff's cause action which arose on 16<sup>th</sup> June 2004 was under the Act of 2007 statutorily time barred by the Act when it was filed in court on the 16<sup>th</sup> March 2009.
0. On the jurisdiction of the Magistrate's Court, it was contended that section 87 of the Employment Act, 2007, which removed jurisdiction over all disputes arising under a contract of service to the Industrial Court created under the new Act. Counsel cited the High Court decision (Ringera, J. as he then was) in **Adero & Anor. v. Ulinzi Sacco Society Limited** (2002) 1 KLR 577 that jurisdiction is granted by statute and the non constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.
0. For the respondent/plaintiff, it was submitted that –

## **“SUBMISSIONS**

**Your Ladyship**, paragraph 7 of the respondent's plaint/pleadings it is very clear that the respondent's suit is premised on both contract and breach of statutory duty. **Your Ladyship**, it is trite law that actions founded on simple contract or on tort shall not be brought **after the expiration of six years from the date on which the cause of action accrued**. **Your Ladyship**, the respondent has a cause of action which discloses a breach of contract which accrued when the breach occurred i.e. on 16.06.04 when the

respondent was working at Kiamokama Tea Factory. **Your Ladyship**, the damage does not accrue until the damage is in fact sustained and **Your Ladyship**, when the defendant has acted negligently in the performance of a contract the plaintiff may be able to formulate a claim both in contract and in tort and to take advantage of the fact that the limitation period starts to run at a later date in tort. **Your Ladyship**, we are guided by: -

**Law of Contract by M.P. Furmston page 619 paragraph 1 and 2.** In this authority it is clear that the plaintiff may formulate his claim on both contract and tort. **Your Ladyship**, an appeal therefore based on grounds that the respondent's suit is caught up by limitation is baseless.”

### **THE ISSUES FOR DETERMINATION**

0. The issues before the court are, therefore, as follows
  - a. Whether the cause of action is based in contract or tort or both;
  - b. Whether the cause of action is time-barred by the Limitation of Actions Act; and
  - c. Whether the Resident Magistrate’s Court has jurisdiction to entertain a cause of action based breach of contract of service arising before the commencement, but filed after the commencement, of the Employment Act 2007.

#### **Whether the cause of action is based in contract or tort or both**

0. Although the Court of Appeal in **Robin Cahill**, supra, cited in the **Kenya Airways** case did deal with a cause of action in tort could be filed as a representative action, it also upheld the decision of Ringera J. on the issue of breach of statutory duty being a tort as well as a claim in negligence and fraud, as observed by the Court in the **Kenya Airways** case at page 10 of the Judgement:

“In **Robin Cahill & 9 Others v. T.S. Nandhra & 3 Others** – Civil Appeal No. 57 of 2002 (unreported) this Court upheld the decision of Ringera J. (as he then was) when he held:

“The claim in the present suit sounds in tort contrary to the opinion of the plaintiff’s counsel. **Breach of statutory duty of care is to my mind a claim in tort essentially, so is the claim in negligence and fraud.** Of the cases cited, the one which in this context is most pertinent is **Prudential Assurance Co. Ltd vs. Newman Industries Ltd and Others** (1979) ALL ER 507. As seen earlier, the same case is authority for the proposition that a representative action could lie in tort even though the members of the class have separate causes of action provided care is taken to ensure that the action did not confer on any member of the class a right that he could not have claimed in a separate action or bar a defence which the defendant could have raised in such separate action.””

[Emphasis mine]

0. I agree with the position that breach of statutory duty is a tort. Although the Limitations of Actions Act only defines ‘tort’ broadly to include *devastavit*, **Black’s Law Dictionary** 8<sup>th</sup> ed. defines tort as “a civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons who stand in a particular relationship to one another.” The statutory duty of care imposed on an employer to his employee is clearly a tort.
0. To be fair, counsel for the plaintiff appears to concede that breach of statutory duty is a tort as it is sought to base the claim not only on the tortious breach of statutory duty but also as a breach of contract when it was submitted that “*paragraph 7 of the respondent's plaint/pleadings it is very clear that the respondent's suit is premised on both contract and breach of statutory duty.*”
0. The trial court also reasoned that as the plaintiff had based his claim under both contract and tort, it was prudent to let the case proceed to hearing on the merits when the issue would be finally determined. The learned magistrate said:

“Where a plaintiff pleads this claim both as tort and contract, then he has the benefit of relying on either of the limitations periods set out for tort and contract. In the present case the plaintiff’s case is

***grounded both on tort and contract which do have a limitation period of 3 and 6 years respectively. In that regard, I would not deem appropriate to sniff out the plaintiff's claim at this point. I deem it proper that the suit proceeds to hearing on the issue and a determination be made at the full trial.***

0. With respect, there is no magic in mentioning in a plaintiff the term breach of contract as a basis of the suit so to give it the 6 year protection against the Limitation of Actions Act. It is the substance of the claim that must be examined not the nomenclature! Other than using the phrase 'breach of contract' in paragraph 7 of the Plaintiff, there is no related averment in the entire Plaintiff. The claim is purely presented as a breach of statutory duty and in negligence, and the particulars of the breach of statutory duty and the particulars of negligence are given in paragraphs 6 and 7 of the Plaintiff as shown above. No particulars of breach of contract are given.
0. The factual basis of the plaintiff's suit is set out in paragraph 5 of the Plaintiff as follows:

***"On or about the 16 day of June 2004, the Plaintiff was working at Kiamokama Tea Factory when he got a dislocation on the thigh of the right leg from a fall which was caused by rear wheel of a trolley that came out thus sustaining injuries as a consequence whereof he suffered pain loss and damage."***

0. At paragraph 4 of the Plaintiff, the plaintiff lays out the legal basis of the claim as a breach of statutory duty as follows:

***"At all material times, it was the statutory duty of the Defendant to keep and maintain a safe and proper system of work for all its employees and not to expose any employee including the Plaintiff to any risk of damage or injury which they knew or ought to have known and to provide and maintain adequate and suitable measures to enable the Plaintiff to carry his work in safety."***

0. The contract of service between the parties is simply pleaded at paragraph 3 of the Plaintiff as follows:

***"At all material times, the Plaintiff was employed by the Defendant as a General Labour at Kiamokama Tea Factory."***

No terms of the contract the breach of which may be asserted as the basis of the claim are pleaded.

0. As I understand the matter, the duty of care stipulated by the statute in employment cases is a civil obligation which arises where a relationship of employment exists, hence the need to plead the contract of employment. The contract of employment is a condition precedent for the crystallization of the statutory duty of care. This duty remains a tort which only arises in the context of a contract of service. Breach of the statutory duty is not a breach of the contract but breach of duty of care in tort and therefore the subject of the limitation period prescribed for actions based on tort in the Limitation of action of Actions Act.
0. To hold otherwise would elevate duties imposed by statute without choice of the parties to the same status as contractual stipulations entered into by parties to a contract who transact at arm's length, with full knowledge of consequences of breach and independence to contract. The statutory provisions are a legal imposition on parties in a particular contractual relationship must, for lack of the elements of freedom of contract, occupy a lower position relative to contractual conditions and warranties.

Accordingly, I find that the plaintiff's suit herein is an action in tort.

### **Whether the cause of action is time-barred by the Limitation of Actions Act**

0. With respect to counsel for the plaintiff, it is not a question of when time starts running for purposes of the limitation of action as that is agreed as the date of the accident on 16<sup>th</sup> June 2004. It is a question whether the nature of claim based on the accident is barred by the relevant provisions of the Limitations Act. Having found that the claim is based on breach of statutory duty, which is a tort, the applicable period of limitation is 3 years under section 4 (1) of the

Limitations of Actions Act. The filing in 2009 of the suit on the cause of action in tort, which arose on the date of the accident on 16<sup>th</sup> June 2004, is clearly outside the 3 years permitted for causes of action based on tort, and it is therefore statutorily time-barred by virtue of section 4(1) of the Limitation of Actions Act.

**Whether the Magistrate's Court has jurisdiction to entertain a cause of action based breach of contract of service arising before, but filed after, the commencement of the Employment Act 2007.**

0. Section 87 of the Employment Act, 2007 is in the following terms:

**“87. Complaint and jurisdiction in cases of dispute between employers and employees**

*(1) Subject to the provisions of this Act whenever—*

*(a) an employer or employee neglects or refuses to fulfill a contract of service; or*

*(b) any question, difference or dispute arises as to the rights or liabilities of either party; or*

*(c) touching any misconduct, neglect or ill-treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.*

**(2) No court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1).**

*(3) This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute.”*

[Emphasis mine]

0. The limitation of actions under the Employment Act of 2007 is in the following terms:

**“90. Limitations**

***Notwithstanding the provisions of section 4 (1) of the Limitation of Actions Act (Cap. 22), 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 or in the case of continuing injury or damage within twelve months next after the cessation thereof.”***

[Emphasis mine]

0. Does the Act apply retrospectively on causes of action accruing before the Act came into force? The Act came into force on the 2<sup>nd</sup> June 2008. It is trite law that law do not act retrospectively unless the law expressly so provides. There is nothing in the new Employment Act 2007 that it would act retroactively to affect causes of action accruing before it was enacted. It does not affect rights accruing before the enactment of the Act. Such right in my view is the right to sue on a cause of action accruing before the coming into force of the Act. So that if the cause of action herein was otherwise within the statute of limitation, the suit would still be competent even if filed outside the period prescribed under the new statute which comes into force after accrual of the cause of action. I agree with the learned trial magistrate that the Act of 2007 cannot take away a right of the plaintiff that accrued before its enactment. However, on account of the finding of this court regarding the cause of action herein being already time-barred nothing turns on the finding of non-retroactive effect of the Act.
0. In providing under section 87 of the Employment Act 2007 for one mechanism for the resolution of employment disputes, whether arising out of a contract of service or “*touching any misconduct, neglect or ill-treatment of either party or any injury to the person or property of either party,*

*under any contract of service,”* the obvious object of Parliament is to establish a single regime for the adjudication of employment related disputes. It would be inconsistent with the spirit of the legislation to permit multiple fora for the consideration of employment disputes, some which arise before the enactment of the Act and therefore adjudicate outside its provisions and those arising subsequent to the Act, which are dealt in accordance with the Act. I therefore hold that although the plaintiff’s right to sue accruing on the 16<sup>th</sup> June 2004 would substantively and with regard to statutory limitation remain unaffected by the Employment Act which comes into force subsequently, the place of filing of the suit which was done after the new Act came into force should have been done in accordance with the Act in order to achieve the object of the Act.

0. This holding would appear to coincide with intention of the Parliament set out in the transitional provisions of the Employment 2007 as follows:

**“93. Transitional provisions**

*A valid contract of service, and foreign contract of service to which Part XI applies, entered into in accordance with the Employment Act (now repealed) shall continue in force to the extent that the terms and conditions thereof are not inconsistent with the provisions of this Act, and subject to the foregoing every such contract shall be read and construed as if it were a contract made in accordance with and subject to the provisions of this Act, and the parties thereto shall be subject to those provisions accordingly.”*

[Emphasis mine]

**CONCLUSION**

0. The court finds that the plaintiff’s suit before the Resident Magistrate’s Court being Keroka SRMCCC NO. 110 of 2009 is an action in negligence and breach of statutory duty both which are causes of action in Tort and which, therefore, are subject to the 3 year limitation period under section 4 (1) of the Limitation of Actions Act. The three year limitation period generally provide for all causes of action relating to contract of service under section 90 of the Employment act of 2007, would not having retroactive effect, apply to causes of action accruing before the enactment of the Act. In accordance with the spirit of the Employment Act of 2007 for a unified specialised adjudication procedure, the plaintiff’s suit, if competent, should have been filed in the Industrial Court. Having held that the suit was filed outside the applicable 3 year period of limitation under section 4 (1) of the Limitations of Actions Act, the suit was statutorily time-barred irrespective of the forum of suing.

**COSTS**

0. Costs are in the discretion of the court under section 27 of the Civil Procedure Act. As the plaintiff filed his suit in honest pursuit of his claim for compensation for personal injury, which has not been determined on its merits for reason of being statutorily time-barred and want of jurisdiction of the Court, the order on costs that commends itself to this Court is that each party bears its own costs both in the trial Court and in this Court.

**ORDERS**

0. Accordingly, for the reasons set out above, the appeal is allowed, the ruling an order of the trial Court in set aside and in its place an order upholding the preliminary objection dated 28<sup>th</sup> April 2009 is granted and the suit dismissed with no order as to costs.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 17TH DAY OF APRIL 2015.**

**D. WAKIAGA**

**JUDGE**

In the presence of: -

Mr. Onchwangi for the Appellant

No appearance for the Respondent

Mr.Bibu -Court Assistant.