



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NUMBER 23 OF 2012

REGINA KAMANTHE (*Suing on behalf of the estate of*

BONFACE MUINDE NYAMSYO (Deceased) PLAINTIFF

VERSUS

ESMOND BRADMOND MARTIN. DEFENDANT

R U L I N G

The application before the court is a Notice of Motion dated the 27th June, 2012 and brought by the defendant in this suit. It sought for the following orders: -

- 1. That the plaint dated the 2nd November, 2011 and filed by the Plaintiff on the 2nd July, 2012, be struck out as against the Defendant for being time-barred under Section 4(2) of the Limitation of Actions Act which the plaint accordingly contravenes.**
- 2. That the plaint discloses no cause of action.**

Both parties filed written submissions which I have carefully perused. I have also perused the plaint dated the 2nd November, 2011 as well as the Defence dated 8th March, 2012.

It is not dispute that the deceased in whose behalf the plaintiff brings this suit, is alleged in the plaint to have been an employee of the Defendant. It is also not disputed that that the deceased was a night watchman employed by the Defendant up to and including the night he was attacked and killed in the course of his such employment.

In paragraph 4 of the plaint pleaded that it was an implied term of the deceased's contract of employment and a common law duty of employers to take care of the safety of the deceased, provide him with protective clothing and gear and provide him with a good working system with supervision. Furthermore, in paragraph 5 of the plaint, the plaintiff pleaded that the deceased was killed in the night of the 9th June, 2008 while performing his duties in the course of his employment with the Defendant. Thereafter in the said plaint, the plaintiff alleges the offending or negligent conduct on the part of the defendant which led to or caused the death of the deceased or for lack of which the injuries that led to the death of the deceased became inevitable. Finally, the plaintiff in the same Paragraph 5, pleaded how the alleged negligent conduct or lack of due care or attention by the Defendant amounted to a breach of the contract of employment with the Defendant for which or as a result of which the Plaintiff claimed damages under the Law Reform Act and Fatal Accidents Act.

It is clear to the court accordingly, that the plaintiff's claim in this suit is ultimately based on breach of

employment contract terms between the deceased and the Defendant.

Having concluded as above, the only other relevant issue is whether or not the Plaintiff had the right to choose whether to ground her claim on tort in so far as negligence was alleged or in contract in so far as breach of contract of employment was alleged.

In the **Athi River Marble and Granite Ltd vs Patrick Mutuku [2009] eKLR**, the High Court in circumstances similar to those in this case stated at page 7 paragraph 18: -

“the question as to whether an act or omission by an employer may support an action both in tort and for breach of contract was considered in Mathius Vs Kuwait Bechtel Corporation [1959] 2 All. E.R. 345 wherein it was held that such an action was maintainable at the option of the employee either as an action in tort or as an action in contract, there being an implied term of the contract imposing a duty of care of the employer.”

Similarly in the case of **Kenya Cargo Handling Services Ltd, Vs David Ugwang [1982-88] IKLR 672** the Court of Appeal stated thus: -

“Section 27(1) of the Limitation of Actions Act provides only that Section 4(2) does not afford a defence in actions of tort. It is not a substantive provision laying down any period of Limitation, nor does it restrict the period to three years in actions for breach of contract arising out of personal injuries”.

In this case, as earlier stated, the claim is based on the contract of employment, whether by choice or because an action in tort was already time barred. The claim was clearly not time barred in contract because six years provided under the limitation statute has not expired. The conclusion I accordingly arrive at is that the Plaintiff’s claim as it stands, is not time-barred and cannot accordingly be liable for striking out.

This application, therefore, has no merit and is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 13th day of November, 2013.

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D A ONYANCHA

JUDGE