



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO. 184 OF 2007

OL- NJOROWA LIMITED.....APPELLANT

VERSUS

ALFRED WATILA WEKESA.....RESPONDENT

**[An Appeal from the Judgment and decree of Hon. N. N. Njagi, Principal Magistrate, in Naivasha
S.P.M.C.C. No.736 of 2006**

dated 3rd October, 2007]

JUDGMENT

The main, perhaps the only issue this appeal raises is whether the respondent's action in the court below was statute barred. It is common ground that the respondent was employed by the appellant as a general (casual) worker. On 19th November, 2001 while fixing polythene on the roof of a green house, the timber truss broke and the respondent fell down, some 20m below, suffering multiple soft tissue injuries. He filed a plaint on 26th September, 2006 claiming general and special damages from the defendant.

The appellant denied liability but more importantly raised the question of ambiguity of the cause of action the respondent was pursuing.

After considering the evidence (only presented by the respondent), submissions and authorities cited by counsel, the learned magistrate, N.N. Njagi, P.M., found that the suit was properly instituted within the limitation period as the claim was based on contract. He also found that the appellant was in breach of contract of employment and awarded to the respondent in general damages Kshs.100,000/= less 15% contributory negligence attributed to the respondent, reducing the award to Kshs.85,000/= plus special damages in the sum of Kshs.2,5000/=. The appellant was aggrieved hence this appeal.

Although the appellant lists 5 grounds of appeal, I reiterate that the only question is whether the respondent's claim was brought outside the period prescribed by statute. The appellant's counsel argued that the respondent's claim was based on the tort of negligence which by dint of **section 4(2)** of the

Limitation of Actions Act (the Act) ought to have been brought within 3 years from the date the cause of action accrued.

Counsel for the respondent on the other hand while conceding that the action was brought after the expiration of 3 years, argued that the respondent's claim was premised on contract, an action for breach of which must be brought within 6 years in terms of **section 4(1) (a)** of the **Act**. That the claim is also based on the tort of negligence.

I have noted earlier that the accident was on 18th November, 2001 while the suit, the subject of this appeal was instituted on 26th September, 2006, approximately 5 years from the date of the accident. The respondent pleaded his case in the plaint as follows:

“3. At all material times relevant to this suit, the plaintiff was employed by the defendant as a general worker

4. It was a term of the said contract of employment between the plaintiff and the defendant and/or it was the duty of the defendant to take all reasonable precautions for the safety of the plaintiff while he was engaged upon the said employment, not to expose the plaintiff to a risk to damage (sic) or injury of which they knew or ought to have known and to provide a safe and proper system of working and effective supervision of the same.”

That was all the respondent pleaded with regard to contract of employment. No particulars of breach of that contract of employment were provided. Instead of the 11 paragraphs constituting the plaint, other than the two reproduced above, the rest deal with negligence, complete with particulars of negligence. It is now settled beyond debate on the authority of **Kenya Cargo Handling Services Limited Vs. Ugwang** (1985) KLR 593, perhaps the first decision on this point in Kenya, that a claim for damages for personal injuries arising in the course of employment may be the subject of an action either for a breach of an implied term in the contract of employment, or in tort, at the election of the claimant. A claimant in the position of the respondent herein can elect, depending on whether the limitation period has run out, to bring an action against his employer to recover damages suffered in the course of employment for breach of contractual duty instead of negligence. In this matter, it has been argued that the plaint is based both on breach of contract and negligence. That is not so. It is clear to me that the respondent's claim is premised on the tort of negligence.

In allowing this appeal, I can do no better than to repeat what the Court of Appeal stated in the case of **Divecon Limited Vs. Shirinkhann Sadrudin Samani**, Civil Appeal No.142 of 1997:

“This Court in Kenya Cargo Handling Services upheld the ruling of Bhandari, J that in the circumstances of that case, the plaintiff's suit was based both on contract and on tort. If the plaint of the respondent had also contained similar averments, we might have agreed with the learned Judge of the Superior Court in his holding that the respondent's action was founded both on tort and on contract. We are, however, unable to do so as the respondent's plaint by which she is bound, leaves no doubt at all that the basis of her plaint was the alleged tortious negligence of the appellant and not a breach of any contractual relationship between captain Samani and the appellant”

The respondent's action being founded on negligence was definitely statute barred and ought to have been dismissed by the court below.

This appeal is allowed with costs to the appellant and the judgment and the decree of the lower court are set aside and costs in that court similarly awarded to the appellant.

Dated, Delivered and Signed at Nakuru this 6th day of May, 2011.

W. OUKO

JUDGE