



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CIVIL APPEAL NO. 268 OF 2007

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EAST AFRICAN PACKAGING INDUSTRIES LTD
..... APPELLANT/ ORIGINAL DEFENDANT

VERSUS

CHARLES ONYANGO OWUOR RESPONDENT/ORIGINAL
PLAINTIFF

*(Being an appeal from the Judgment and decree of Hon.A. N. Ongeru Esq Principal Magistrate in Civil
Case No. 186 of 2005 dated 30th March 2007 at Milimani Commercial Courts, Nairobi)*

J U D G M E N T

I. **BACKGROUND**

1. Charles Onyango Owino filed suit on the 30th January 2005 against his employer M/s East African Packaging Industries Ltd (herein referred as the employer).
2. It was the employee's case that he worked for the employer between 1988 to January 2004. This work entailed a corrugator tractor. He at first manned a board making machine upto the year 1993 when he was thereafter deployed to carry out finished products from the factor. He was a trolley man. This he did for 7 years. This required that he pushes the load – a duty he diligently undertook.
3. The employee began to have abdominal pains and swelling in his groin area. By the time he was aware of his ailment, he had undergone two operations. It was in the month of March 2003 when the doctors notified him that his injuries was as a result of work related injuries. That it was the defendant's employer's evidence and defence that the plaintiff/employee failed to heed instructions from the employer. That the employer was negligent.
4. The witness who came to court on behalf of employer stated that the employee was employed as a hand plater and not a trolleyman. The automation of the work done as alleged by the employee was automated. This from the evidence seen to have been in the year 2000.
5. The trial magistrate on hearing the suit that was filed by the employee held that the employer was liable at 100% and awarded the employee damages of Ksh. 300,000/=.
6. Being aggrieved, the employer appealed to this High Court.

7. The appeal was filed on the 17th April 2007 although the memorandum was dated 20th April 2007.
8. The appeal was admitted on 22nd November 2010 (Maraga J) and directions taken on 22nd July 2011 (Ang'awa J.)

II APPEAL

9. The memorandum of appeal stated that the Hon. Trial Magistrate erred in law and fact by not holding that:

9.1 ... *the suit was time barred under the limitation of actions act.*

9.2 ... *the suit was time barred.*

9.3 ... *the injuries of the respondent was contrary to the doctor's report where something was in 1997.*

9.4 ... *failed to allow the applicant to raise the issue of limitation of actions.*

9.5 ... *failed to take into account the doctor's evidence.*

9.6 ... *failed to find that the ailment was pre-existing.*

9.7 ... *failed to note contradiction and inconsistencies in the evidence.*

9.8 ... *failed to take into account respondent averments in RMCC 1383/04 Misc. Application 89/04*

9.9 ... *failed in finding appellant liable for the injury.*

9.10 ... *failed by awarding damages*

9.11 ... *failed in awarding damages that was inordinately high.*

9.12 ... *prayed the appeal be allowed and the suit be dismissed.*

10. It was the employer's applicant's argument through their advocate that the employee had failed an earlier suit seeking termination benefit. This described him during the work of hand plater. This contradiction should have been taken into account.

11. It was further the employer's argument that the employee was injured in a pre-existing ailment that should not really concern them. Further the ailment was one in which occurred long before the actual cause of action arose and therefore the plaint was filed out of time. The matter being statute barred, the case should have been dismissed.

12. The respondent stated in reply that whereas the issues raised by the employer were never pleaded in their defense and therefore they are precluded from claiming the same two case laws were brought to the court's attention.

13. The first being the case of

Kenya Cargo Handling Services Ltd

Vs

David Ugwang

Where it was held that the relationship between an employer/employee is one of both contract and TORT in an injury claim. The employee in the case was permitted to file suit within 6 years of the cause of action.

14. The second case is that of:

Central Absetos Co. Ltd

Vs

Dodd

(1973) EA 518

Whereby the cause of action for injury began to run from the time the works became aware of the ailment.

15. The employee prayed that the appeal be dismissed.

III OPINION

16. In a suit before court, a party is bound by their pleadings. In this case, the employer did to raise a defence of Limitation of Action. In paragraph 8 of their defence, they stated that:

“The jurisdiction of this Honourable Court is admitted.”

17. At no time was the defence amended to include the issue that the suit had been filed out of time.

18. If per chance it had been raised, the two case laws raised by the employee as stated above explains why the suit is not time barred. I would support the findings of the Hon. Magistrate on this point.

19. As to there being a misdescription of the work done by the employee, the employee called evidence to prove the work assigned to him.

20. He testified that this would actually take a period of 7 years of doing the same work as a loader. The trial magistrate believed this evidence. The defence did not mention this in its pleadings.

21. I would find that the issue of liability was indeed established against the employer.

22. As to quantum, no issue was raised on this same that it was inordinately high, counter authorities were put to the Hon. Magistrate. The employee wanted Ksh. 700,000/ the Hon. Magistrate reduced this to Ksh. 300,000/=.

23. I am not inclined to interfere with the Hon. Magistrate’s findings herein.

24. I would hereby dismiss this appeal with costs to the respondent/original plaintiff in the magistrate’s court.

25. The decretal sum has been deposited in the joint names of the advocates. If per chance, it had not the interest on general damages for pain and suffering, it would run from the date of the magistrate’s court judgment being 30th March 2007. The interest on special damages from the date of filing suit. The interest would be at court rates.

DATED THIS 19TH DAY OF DECEMBER 2011 AT NAIROBI

M.A. ANG’AWA

JUDGE

Advocates :

i) *J.K. Njuguna holding brief for M/s Michael Owour & Co Advocates for appellant/original defendant*

ii) *Kamau Njuguna holding brief for M/s Wainaina Ileri & Co Advocates for respondent/original plaintiff*

Editorial Summary

1. *Civil Appeal*

2. *Subject of Subordinate Court Case*

TORT/CONTRACT

2.1 *Employer/employee relationship.*

2.2 *Employee, adult male in employment*

Between 1988 – January 2004.

2.3 *Loader*

2.4 *In year 2003 underwent operation twice.*

2.5 *Notified that bilateral inguinal hernia*

Caused by work place injury.

2.6 *Employer in its defence filed*

1st February 2005:

i) *Denies allegations.*

ii) *Injury sustained due to employee's
own negligence.*

iii) *Failing to heed instructions*

2.7 *During trial defendant raises issue that suit*

Statute barred.

Raises issue of another existing case

Contradicting the present case.

2.8 *Issues raised not pleaded in defence.*

2.9 *Employee aware of injuries in 2003.*

Time began to accrue then.

2.10 *Trial magistrate held:*

Liability against the employer at 100%

Quantum

General Damages

Pain and suffering

Ksh. 300,000/

3. *Appeal filed 17th April 2007*

Dated 20th April 2007

Admission 22nd November 2010, Maraga J

Directions 22nd July 2011

Hearing 7th December 2011

Memo of appeal:

Hon. Trial Magistrate erred in law and fact:

3.1 *... suit time barred under Limitation of Actions*

Act.

3.2 *Suit time barred.*

3.3 *Injuries of respondent contrary to doctor's*

Medical report – surety in 1997

3.4 *Failed to be allowed to raise issue of limitation*

3.5 *... failed to take into account doctor's evidence.*

3.6 *... failed to find ailment pre-existing*

3.7 *... failed to note contradictions and*

inconsistencies in evidence.

3.8 *... failed to take into account respondent's averments*

In RMCC 13831/04 Misc. application 89/04

- 3.9 ... *failed in finding appellant liable.*
- 3.10 ... *in awarding damages*
- 3.11 ... *in awarding damages inordinately high.*

4. *Appeal be allowed.:*

Suit be dismissed.

5. *In reply:*

Chance on limitation of actions

Case law

a) *Kenya Cargo Handling Services Ltd*
Vs

David Ugwag

b) *Central Absetos Co. Ltd*
Vs

Dodd

1973 EA 518

Supported quantum and award of case.

6. *Held:*

- i) *Tenancy uncontrolled.*
- ii) *Appellant bound by lease terms.*

7. *Case Law:*

8. *Advocates :*

i) *J.K. Njuguna holding brief for M/s Michael Owour & Co Advocates for appellant/original defendant*

ii) *Kamau Njuguna holding brief for M/s Wainaina Ireri & Co Advocates for respondent/original plaintiff*