



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL APPEAL 162 OF 2005**

*[Being an appeal from the Judgment of the Hon. G.C. MUTEMBEI – SPM in Nakuru - Chief Magistrate’s Court CMCC No. 812 of 2004 delivered on 17<sup>th</sup> August 2005]*

**EVEREST ODHIAMBO ..... APPELLANT**

**VERSUS**

**GILGIL TELECOMMUNICATIONS INDUSTRIES LTD .... RESPONDENT**

**JUDGMENT**

The appellant, *Everest Odhiambo* was the plaintiff in **Nakuru CMCC 812 of 2004** in which he had sued *Gilgil Telecommunications Industries Ltd* for general damages for the loss and future medical expenses and for special damages for Kshs.2,000/-. This claim was as a result of injuries that the appellant sustained on the 11<sup>th</sup> September 2000 while working for the respondent.

The respondent denied any responsibility for the accident and the injuries sustained by the appellant. The respondent also contended that the appellant’s claim which was based on negligence was statute barred by virtue of the **Limitation of Actions Act Cap 22 of the Laws of Kenya**. The matter was heard and by a brief judgment delivered on 17<sup>th</sup> August 2005, the learned trial magistrate dismissed the appellant’s claim as time barred and the respondent was awarded the cost of the suit. Indeed this is the short judgment of the trial court;

*“The plaintiff has sued the defendant seeking damages for injuries which he sustained while working for the defendant on 11<sup>th</sup> September 2000. The plaintiff’s claim is based on tort. He filed his suit on 15<sup>th</sup> April, 2004. This was after the statutory limit allowed for claims based on tort. The plaintiff never applied to any court for leave to file suit out of time.*

*I dismiss the plaintiff’s claim as time barred. I award costs of the case to the defendant.”*

The appellant being dissatisfied with the above judgment has appealed to this court and raised the following grounds of appeal: -

**1. That the learned trial magistrate erred in law and in fact in failing to give a concise statement of**

the case and points for determination in his judgment.

2. That the learned trial magistrate erred in law and in fact in holding that the plaintiff's/appellant's right of action had expired before the filing of the suit by the plaintiff/appellant.
3. That the learned trial magistrate erred in law and in fact in failing to appreciate that the plaintiff had sufficiently proved his claim on contract as the plaintiff's cause of action was based on both contract and tort and that Section 4 (2) of the Limitation of Actions Act does not affect actions in contract for damages for personal injuries.
4. That the learned trial magistrate erred in law and in fact in failing to assess the quantum of damages.

In further exposition of the above grounds of appeal, learned Counsel for the appellant, **Mr. Ndubi** invited this court to rewrite the judgment as the judgment by the lower court does not conform with the requirements of the provisions of the Civil Procedure Rules that requires in a contested matter the court is required to state the issues for determination and give reasons for such determination.

Counsel for the appellant also invited this court to find that the dismissal of the claim on the basis that it was statute barred was erroneous. The court also did not quantify the claim which was also based on contract since the appellant was employed by the respondent as a casual worker. The claim by the appellant can be based on both contract and tort.

Counsel also contended that although the respondent had indicated in their defence that they would raise a preliminary objection based on the fact that the claim was statute barred, none was raised which means there was a waiver and the suit proceeded to full hearing.

The trial court was faulted for failing to consider the evidence on record which on a balance of probability clearly established that the respondent was to blame and was in breach of the statutory duty of care by exposing the appellant to injury.

Counsel put forward the authorities in the case of Kenya Cargo Handling Services Limited Vs Ugwang KLR [1985] page 593 where the Court of Appeal held

1. *"A claim 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 simpliciter, and a claimant may make an election as which of those actions he intends to pursue.*
2. *Section 27 of the Limitation of Actions Act (Cap 22) does not lay down any period of limitation. All it does is to state certain circumstances under which the period of limitation provided for actions in tort does not apply. That section does not affect actions for personal injuries founded on contract as it relates exclusively to actions founded on tort."*

Counsel also invited this court to quantify the clam for damages that was suffered by the appellant and to take into account several decisions in similar cases which were quoted.

On the part of the respondent, Counsel for the respondent, **Mr. Kangondu** urged this court to uphold the decision of the trial court on the grounds that the appellant failed to establish that the plaintiff was in breach of contract. The appellant also did not prove the particulars of negligence in particular was not able to establish what was the unsafe working environment or how the use of an helmet would have prevented the accident. The work of stacking poles did not require skills or supervision and there was no duty of care required of the respondent.

Lastly, Counsel submitted that no evidence was adduced by the appellant to show that he was unable to work as a result of the accident and there was no recommendation for further treatment. The appellant was awarded Kshs.117,870/- per the **Workman's Compensation Act** and in view of the fact that he contributed to the accident, the appeal should be disallowed.

This being the first appeal, this court is mandated to evaluate the evidence before the trial court while bearing in mind that it never saw or heard the witnesses and therefore make due allowance for that.

The principles to be followed by the first appellant court have been set out in several decisions; the case of **Peter Vs Sandy [1958] E.A 424** is one of such leading authorities

I. ***“Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellant court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's collusion.***

II. ***The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence;***

III. ***The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question.”***

The issues that are raised in this appeal are threefold; firstly, whether the appellant's case which was both based on tort and contract was statute barred. The authority in the case of **Kenya Cargo Handling Services Ltd** answers this issue as it is clearly held that a claim for personal injuries arising in the course of employment may be subject of an action on a breach of contract or a tort. And **Section 27 of the Limitation of Actions Act** did not apply and therefore the learned trial magistrate's decision in dismissing the suit on this ground is erroneous.

The second issue is that the trial court failed to comply with the provisions of **Order 20 Rule 4 of the Civil Procedure Rules**. The judgment did not contain a concise statement of the case, the points for determination and the reasons for the decision. The case of **Wamutu Vs Kiarie [1982] KLR page 481** the Court of Appeal held that

***“Judgments in defended suits shall contain a concise statement of the case, points of determination, the decision thereon and the reasons for such a decision as required by Order XX rule 4 of the Civil Procedure Rules.”***

In view of general provisions relating to appeals as provided for under **Section 78 (2)** this court can rewrite the judgment in accordance with the set principles. But it is important to state that the judgment by the learned trial magistrate did not comply with the provisions of the Civil Procedure Rules as the parties are entitled to a determination of the issues that were placed before the court.

The last issue is whether the appellant proved his case of injuries and whether the injuries were caused by the respondent's negligence in breach of duty and whether there should be contribution of negligence.

It is clear from the appellant's pleadings that he was working as a casual labourer on the material day when he and others were stacking poles when one of the poles bounced back and hit him on the left side of the head. He became unconscious for about a week and he was hospitalized for about one month. He produced discharge summary notes from the hospital. The appellant was also reviewed by **Dr. Obed Omuhoma** who said after examining the appellant; he suffered 40% permanent disability. He also produced a receipt for Kshs.5,000/- for the preparation of the medical report. The appellant admitted that he was paid Kshs.117,870/- being in respect of the Workman's Compensation for the injuries.

The appellant had also alleged before the lower court that he was not issued with an helmet and he was not experienced in the work of stacking poles unlike like his other colleagues with whom he was working.

The respondent's defence was supported by the evidence of **Walter Echuku** who confirmed that the appellant was a casual labourer and was not experienced in the work of stacking poles and as the time of injury, he had participated in this kind of work for one week when one of the poles rolled back and he was injured. He confirmed that the appellant fainted as a result of injury and was taken to hospital and was not able to come back to work.

The issue for determination under this heading is whether the respondent owed the appellant a duty of care. In the case of **Murenge Vs Deluxe Cosmetics Ltd [1990] KLR page 725**. The decision in the case of **Smith Vs Baker & Sons [1891] AC 325,362**, *Lord Herschell*, had this to say on the said duty of care.

***"It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition and so to carry on his operations as not to subject those employed by him to unnecessary risk."***

In our jurisdiction, just as in others, several statutes and regulations have been enacted imposing upon the employers a large number of statutory duties which are to the same effect as the common law. The industrial accidents such as the instant case are governed by the Factories Act enacted in 1950 stated to make provision for the health, safety and welfare of persons employed in factories. It a master or employer is in breach of either common law duty or statutory duty or both, he is liable to the servant for damages for personal injuries suffered by such servant. **Section 29 of the Factories Act (Cap 514 of the Laws of Kenya)** provides: -

***"No person shall be employed at any machine or in any process, being a machine or process liable to cause bodily injury, unless he has been fully instructed as to the dangers likely to arise in connexion therewith and the precautions to be observed and: -***

***a) has received a sufficient training in work at the machine or in the process; or***

***b) is under adequate supervision by a person who has a thorough knowledge and experience of the machine or process."***

I am satisfied that the appellant proved his case to the required standard that he was injured in the course of his duty and the appellant failed to provide him with a safe working environment by way of training and supervision. There is an aspect that, the appellant was to blame for the accident, however, it is clear that the appellant was newly employed and had not gained the skills of stacking the poles and there was no supervision.

On whether the liability should be apportioned between the appellant and the respondent, am of the view that the appellant also had a duty of exercising due caution when executing the duties and in this case I would apportion liability so that the respondent bears 70% and the appellant bears 30% of liability.

On the issue of quantum, **Dr. Omuhoma** gave an opinion that the appellant suffered a permanent disability of 40%. He sustained injuries of the head where he suffered cerebral contusion, complete deafness in the left ear and post traumatic epilepsy. He was hospitalized for one month although he said he continues to require medical attention, no evidence was adduced regarding the future medical expenses towards the treatment of the appellant.

Several decided cases were put forward by the appellant's Counsel to support his assessment of Kshs.900,000/- as general damages and loss of amenities. See case of **Gabriel Ochieng Vs Nyali Beach Hotel – Hccc No.604 of 1992 -Mombasa, Kenya Bus Services Ltd Vs Joseph K. Ayola civil Appeal 188 of 1992 – Nakuru.**

On the part of the respondents, it was suggested that a sum of Kshs.185,000/- be awarded as general damages. They also put forward several decisions where the claimants are said to have suffered head injuries. The injuries suffered by the appellant herein are more severe than in the cases cited by the respondents.

I have taken into consideration all the authorities that were cited in respect of quantum and the injuries that the appellant suffered which have been classified as grievous harm and resulting to 40% disability. The pain that he suffered and the loss of amenities and I hereby award the appellant Kshs.800,000/- as general damages for pain suffering and loss of amenities. I also award the appellant Kshs.2,000/- as special damages. This is the amount that is pleaded although the appellant produced receipts to show that he paid Kshs.5,000/- for the medical report and Kshs.2,500/- .

In the premises the judgment of the lower court is set aside and the order dismissing the suit with costs is substituted with an order of judgment for the appellant with costs as follows;

**On liability**

Shall be apportioned on the ratio of **70:30** (*the respondent to bear 70% while appellant bear 30%*).

**On quantum**

The plaintiff is awarded Kshs.800,000/- as general damages i.e  $800,000 \text{ less } 30\% = 560,000 \text{ less } 117,870$   
= **382,130/-**

The appellant shall also have the cost of this appeal.

**Judgment read and delivered on 16<sup>th</sup> day of March 2007.**

**MARTHA KOOME**

**JUDGE**