



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

APPELLATE SIDE

Civil Appeal 33 of 2003

ESPAN AURIEN APPELLANT

VERSUS

E.A.T.E.C RESPONDENT

JUDGMENT

ESPAN AURIEN lost a case which he had filed against **E.A.T.E.C.** in the subordinate court.

Being aggrieved by the judgment which was delivered on 18/1/2002, Aurién, who feels that he had proved his case on a balance of probability, has now preferred this appeal which is mainly based on the grounds that the learned trial Magistrate erred in finding that his suit was time barred, and also that she relied on extraneous matters. I shall now refer to AURIEN as ‘the appellant’, and to E.A.T.E.C. as ‘the respondent’.

It was the submission of Mr. Kitiwa for the appellant that the learned Magistrate misdirected herself on a point of law as the cause of action was based on both tort and contract, in which case the particulars of breach of duty had been specified. He urged the court to find that since the respondent had indicated that the cause of action was primarily based on tort and contract, the period of limitation period would in the circumstances be 3 and 6 years respectively and not only 3 years. He relied on **Kenya Cargo Handling Services Limited v. David Ugwang (1982-88)** K.A.R page 673, where the court held that in instances where the claim is based on breach of contract and the tort of negligence, the period of limitation would be 6 and not 3 years.

He urged the court to allow the appeal and to make a finding on the general and special damages as well as costs, which should have been awarded by the subordinate court.

Mr. Kuloba, who opposes the appeal, urged the court to find that the judgment was proper and sound in law. It was his submission that the appellant had not alleged breach of contract in his plaint, neither had he given the particulars of the alleged breach of contract; that in the circumstances, the cause of action was therefore based purely on tort, and thus the suit had been filed late.

I agree with Mr. Kitiwa, that pleadings must be read as a whole. It is clear from his plaint, that the appellant had based his claim of negligence on breach of contract, whose existence was denied by the respondent.

The position in law is that an employer is under a duty to provide a safe working environment for his employees, and where an employee is able to prove on a balance of probability that an act of negligence

has arisen from that employment, it will constitute a breach of that contract by the employer, and the award would be in general damages. Needless to say, special damages will only be granted to compensate him for expenses incurred in connection with rectifying the act that was occasioned by the negligence which arose from that breach of contract. That being the position then, what was the appellant's case in the subordinate court?

The evidence on record was that he was employed to remove bark from trees at the respondent's Kapsaret estate and that he was injured when he fell off the respondent's tractor, which he had boarded on his way to work.

The issue that arises then is whether he was injured while he was on his line of duty. He did not adduce evidence to prove that he was authorised to ride on the tractor. Indeed it was his evidence that he had hiked a lift from the tractor driver as he was late for work. It was therefore clear that he was not on duty when he sustained the injuries.

It is trite law that parties are bound by their pleadings, and further that the onus of proof lies on the plaintiff, as it is he who alleges.

I find that his case did not support his pleadings, and in the circumstances, his claim lay in tort and not under his contract of employment.

The said accident occurred on 22/9/1995, and by the time when he filed his suit on 24/3/1999, the limitation period of 3 years had already expired.

It is for the above reasons that I find that this appeal is devoid of merit as the suit was already time barred. I do therefore dismiss this appeal, and uphold the judgment. The appellant shall bear the costs of this appeal.

Dated and delivered at Eldoret this 12th day of July 2005.

JEANNE GACHECHE

Judge

Delivered in the presence of:

Mr. Kutwa for the appellant

No appearance for the respondent