



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 158 OF 2016

MAJANI MINGI SISAL ESTATE.....APPELLANT

VERSUS

GEORGE WESOMGA NYONGESA.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Eldama Ravine Principal Magistrate's Civil Case No. 13 of 2013 by Hon. M. Kasera, P.M. delivered on 27th day of September, 2016)

J U D G M E N T

1. The respondent who was the appellant's employee filed a suit seeking general and special damages against the appellant for injury he sustained on 23rd November 2009 while working for the appellant. Judgment was entered for the respondent against the appellant for kshs.255,000.00 plus costs and interest.
2. The appellant being dissatisfied with the judgment rendered filed this appeal on the following grounds:-
 - i. That the trial Magistrate erred in law in making finding on liability against the appellant, which was not supported by evidence on record.
 - ii. That the trial Magistrate erred in law and fact in failing to appreciate the preliminary objection raised on the issue of limitation of time as addressed in the Limitations Act to the extent of institution of the suit.
 - iii. That the learned Magistrate erred in law and in fact in failing to appreciate and apply the principles applicable in a claim of negligence.
 - iv. That the learned trial Magistrate erred in finding the appellant 100% liable at all on the face of all the available evidence.
 - v. That the learned trial Magistrate erred in law and fact in failing to take consideration to the compensation made to the plaintiff under the Work Injury Benefit Act while making the award for general damages.
 - vi. That the learned trial Magistrate erred in law and in principle in failing to appreciate the defendant's/appellant's submissions and the recent comparable cases cited therein and thus making a prejudicial award to the plaintiff/respondent as against the defendant/appellant.

APPELLANTS SUBMISSIONS

3. Counsel for the appellant submitted that the trial magistrate erred by not finding that the suit was statute barred under Limitation of Actions Act Chapter 22 Laws of Kenya. The claim is based on tort and under section 90 of Employment Act, the claim is barred to a limitation of 3 years. He submitted that the respondent had been compensated under work injury Benefit Act. The respondent was content and laid back for 5 years; that statute of limitation do not help persons who through ignorance and dilatoriness do not do what a reasonably informed citizen would have done.
4. Counsel further faulted the trial magistrate's finding on 100% liability to be borne by the appellant. He submitted that the respondent failed to wear gloves and despite alleging that he was not issued with gloves, he never adduced evidence to corroborate the allegation; he further submitted that he at the time of injury, the appellant was working on a machine not assigned to him.
5. Counsel further submitted that the respondent never proved that the appellant failed to provide safe working environment nor provide protective gadgets. He further submitted that the respondent failed to prove that acts and omissions by the appellant created a situation resulting in the injury of the respondent.

6. On Quantum, the appellant submitted that the trial magistrate failed to consider comparable cases cited in the appellant's submission and made a prejudicial award. He urged court to look at other cases cited.

SUBMISSIONS BY RESPONDENT

7. On suit being time barred, the respondent submitted that the suit was properly before court as the respondent could either elect to institute the suit under tortious liability or under breach of contract. He cited the case of **Kenya Cargo Handling Services LTD vs Ogwang [1985] KLR593** where the court held that Section 27 of Limitation Act does not lay any period of limitation but only state certain circumstances under which the period of limitation provided in tort does not apply.

8. Respondent submitted that, the import of this suit is that, it is founded on breach of contract, which is not subject to Section 27 of Limitation of Action Act. He submitted that the appellant was injured on 23rd November 2009 and the suit was filed on 2nd may 2013 which is three and half years after the injury; that the suit was properly in court as limitation period is 6 years.

9. On liability, counsel for the respondent submitted that, a defective machine assigned to the respondent on that particular day injured him. Further, that the machine was not fenced as required by Sections 23, 24 and 25 of Factories Act; neither was the respondent provided with safety apparels.

10. Counsel urged court to find that the appellant failed to provide safe working environment and be held 100% liable. He cited 3 authorities which include **Mumias Company LTD vs Mamatiti CA151 of 1987** where the court of appeal held as follows:-

“An employer is required by law to provide safe conditions of work in the factory and if an accident occurs where an employee is handling machinery; the employer is responsible and will be required to compensate the injured employee”

11. The court of appeal made similar finding in **Narobi Civil Appeal no.263 of 2006 Oluoch Eric Gogo vs Universal corporation Limited and Boniface Muthama Kavita Vs Carton Manufacturers Limited Civil Appeal No.670 of 2003[2015]eKLR.**

ANALYSIS AND DETERMINATION

12. I have considered arguments by counsels herein and consider the following as issues for determination:-

- i. Whether suit is founded on tort or contract and whether it was time barred at the time it was being filed.
- ii. Whether the respondent acted negligently or in breach of employment contract
- iii. Whether award made is excessive

13. On the issue of limitation, I have perused pleadings before the lower court and note that the plaintiff attributes the occurrence of the accident causing injury to negligence on part of the defendant evidenced by particulars of negligence in paragraph 6 of the plaintiff. In paragraph 7 he has particularized alternative particulars under breach of contract and/or statutory duty on part of the defendant. He stated that failure to perform as per contract or statutory duty by the defendant resulted in the accident. Among particulars listed are failure to provide safe working condition and assigning him a defective machine.

14. On perusal of the proceedings, I note that the plaintiff adduced evidence to prove that he was injured as a result of machine allocated to him. He said the machine was defective and was not covered as required.

15. Further, he said that that was not his usual machine, there is no prove from the appellant that the respondent defied instructions and allocated to himself a machine that he was not used to; Further, there is no indication from appellant that before he commenced using the machine that he worked on that day; he was trained to use it.

16. From the foregoing, I find that this suit is founded on both tort and contract. Appellant's pleading demonstrate reliance on contract as an alternative. Having found that evidence adduced proved breach of statutory duty as a cause of injury, I find that the claim should be confined to limitation period of 3 years but 6 years.

17. Defence availed on witness who confirmed that the respondent was the defendant's employee and that he was injured while working in a machine. In fact he said the respondent was injured in his presence. He further confirmed that the machine had a problem that day and the mechanic and machine operator were concerned with the machine had been called. He also said it was not the responsibility of the respondent to cover the machine. Despite saying the respondent was given gloves, he never showed any document to prove issuance of gloves. He also failed to prove any record of allocation of work to confirm that the respondent was doing work he was not allocated to do.

18. From the forgoing, it is evident that the appellant allowed the respondent to work on a defective machine and therefore failed to provide a safe working environment thus breached statutory duty of care.

19. In so far as quantum is concerned I have compared the injury with injuries suffered in the cited authorities and find the award reasonable. It is not excessive to warrant interference by this court.

FINAL ORDER

The appeal is hereby dismissed with costs to the respondent.

Judgment Dated, signed and delivered at Nakuru this 2nd day of May 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Jared Court Assistant

Mawenzi Counsel for Appellants

Njuguna Holding Brief for Murimi Counsel for Respondent