REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 180 OF 2017

AGRO IRRIGATION & PUMP SERVICES.....APPELLANT

-VERSUS-

GODRICK OTIENO NYONGESA.....RESPONDENT

(An appeal from the judgment delivered by Honourable G.A. Mmasi (Mrs.) (Senior Principal Magistrate) on 12th April, 2017)

JUDGMENT

1. The appellant was the defendant in Civil Suit No. 6265 of 2015 whereas the respondent was the plaintiff. In the aforesaid suit, the Respondent filed a plaint dated 15th October, 2015 seeking damages for injuries sustained in the course of the Respondent's employment with the appellant.

2. The Respondent essentially argued that the Appellant did not provide a secure work environment for him and that on the material day, while he was operating a lathe machine, he sustained serious injuries on his right ring finger. The respondent maintained that the said injuries resulted from the appellant's negligence.

3. The appellant filed a defence on 1st December, 2015 thereby denying the allegations made in the plaint. The Appellant denied that the accident took place, adding that in the event that the same occurred, the respondent was responsible for the injuries sustained. The Appellant in turn contended that the suit was barred by statute, having been instituted more than six (6) years after the alleged accident occurred. The Respondent thereafter filed a reply to defence on 18th December, 2015.

4. The Respondent testified at the hearing but the appellant did not call any witnesses. Parties filed their respective submissions and the trial magistrate delivered her judgment on 12th April, 2017 in favour of the respondent.

5. Being aggrieved by the aforementioned decision, the appellant lodged an appeal to this court. The memorandum of appeal is premised on three (3) grounds, namely:

> ***a) THAT the learned magistrate erred in law and in fact by not finding that the suit was statute barred.***
>
> ***b) THAT the learned magistrate erred in finding the appellant 100% liable for negligence instead of dismissing the respondent's case for failure to prove the same.***
>
> ***c) THAT the damages awarded by the learned magistrate were manifestly high and inordinately excessive.***

6. The appeal was canvassed by way of written submissions. The appellant submitted that the suit was statute barred by virtue of Section 90 of the Employment Act and that the learned trial magistrate did not consider the import of that provision and instead applied Section 4(1) of the Limitation of Actions Act. The appellant also argued that the respondent had failed to prove his case and the same ought to have been dismissed in place of finding the appellant fully negligent. It was also submitted that the injuries were not serious and hence nominal damages should have been awarded.

7. On the other hand, the respondent maintained that the suit resulted from an industrial accident and that he opted to file the suit under the law of contract in a civil suit. The respondent agreed with the trial magistrate's decision to find the appellant 100% negligent since no evidence was adduced or witnesses called by the appellant at the hearing. In the same manner, the respondent submitted that in consideration of the injuries sustained, the trial magistrate applied correct principles in awarding the damages.

8. In considering this appeal, the issues to be decided by this court are threefold; the first issue being whether or not the suit was barred by statute. In answering this, this court will need to determine whether the claim was tortious or contractual in nature. It is clear that the suit originated from a work injury claim. The learned magistrate determined that the suit was filed as a civil suit for breach of contract within the

limits set out in Section 4 (1) of the Limitation of Actions Act. In answer to the same, this court draws guidance from the case of **Spinners & Spinners Limited v Julius Mutunga Mutiso [2017] eKLR** where the court referred to the holding in ***Kiamokama Tea Factory Co. Ltd v Joshua Nyakoni (Kisii HCCA No. 169 of 2009***) that;

> ***"As I understand the matter, the duty of care stipulated by the statute in employment cases is a civil obligation which arises where a relationship of employment exits, hence the need to plead the contract of employment. The contract of employment is a condition precedent for the crystallization of the statutory duty of care. This duty remains a tort which only arises in the context of a contract of service. Breach of the statutory duty of care is not a breach of the contract but breach of duty of care in tort and therefore the subject of the limitation period prescribed for actions based on tort in the Limitations of Actions Act….Accordingly, I find the Plaintiff's suit herein is an action in tort."***

The court in the above cited case went ahead to reason that a work injury suit appears to be more tort-like especially for purposes of the statute of limitations. The position was similar in **Kenya Power & Lighting Company Limited v Collins Agumba Aboge [2016] eKLR** wherein the court appreciated that the claim, being of a work injury nature, was founded on tort and consequently became time barred upon the lapse of 3 years.

9. Having ascertained the above, attention is turned to the relevant provision in the Limitation of Actions Act, which is Section 4(2). In reference thereto, the respondent's claim ought to have been brought not more than three (3) years after the cause of action arose. The suit was filed close to six (6) years following the date of the alleged accident. This is clearly outside the bounds of Section 4(2) and thus statute barred. There is no indication that the respondent was granted leave to file the suit out of time. This court therefore finds that the learned trial magistrate was mistaken in this regard.

10. Since it has already been determined that the suit was time barred, any subsequent orders made by the trial magistrate cannot stand. Nonetheless, the court will address the remaining grounds as they are.

11. On the second ground of appeal, the appellant submitted that the respondent had not proved his case and consequently, the magistrate erred in finding the Appellant 100% negligent. Upon perusal of the record of appeal and proceedings, this court has established that the appellant did not call any witnesses or adduce evidence at the hearing, save for filing of submissions. Under the circumstances, there was no evidence against which the plaintiff's case could be weighed. In this court's view, it would appear that in the absence of a rebuttal, the trial court was left with little option but to exclusively consider the respondent's evidence but also bearing in mind that the Plaintiff was under duty to prove his case on a balance of probability.

12. This brings me to the third and final ground of appeal. The appellant's averments are premised on the fact that the injuries sustained by the respondent were slight and hence did not warrant the award of damages granted. The respondent on his part contended that the award given was reasonable given the circumstances, and backed his arguments with judicial precedents. With reference to the cited case of **Paul Kipsang Koech & Another v Titus Osule Osore [2013] eKLR** the court noted that the assessment of quantum of damages is purely discretionary and would thus only be interfered with if the trial court considered an irrelevant factor; or left out a relevant factor; or gave an inordinately low or high award.

13. According to the medical report dated 15th September, 2015 annexed on page 12 of the record of appeal, the injuries sustained by the respondent were categorized as 'grievous harm' and the degree of permanent incapacity estimated at 5%. On the other hand, the second medical report dated 7th March, 2016 on page 30 of the record of appeal indicated that the respondent had made a full recovery and that no permanent incapacitation occurred.

14. In deciding on the above issue, the court would ordinarily be called to exercise caution so as to keep from substituting a figure of its own, as expressed in the case of **East Africa Court of Appeal case of Henry Hidaya Ilanga v Manyema Manyoka (Civil Appeal No. 64 of 1961)** cited by the respondent. In granting an award of Kshs.300,000/= as general damages, the trial magistrate took into consideration the pain, suffering and loss of amenities experienced by the respondent while disregarding the permanent incapacity. This court is of the view that the trial magistrate overlooked the second medical report in which, taken into account, this court would have reduced the general damages to Ksh.200,000/= had the suit been properly before the court.

15. In the end, the appeal is allowed. Consequently, the judgment delivered on 12th April, 2017 is hereby set aside and replaced with an order dismissing the suit for being statute-barred. The respondent shall bear the costs of the appeal.

Dated, signed and delivered at NAIROBI this 13th day of December, 2018.

L. NJUGUNA

JUDGE

In the presence of:

……. for the Appellant

……. for the Respondent