



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NAIROBI

Civil Appeal 363 of 2004

NOAH OUMA OGERO ..... APPELLANT

VERSUS

MIMASA LIMITED ..... RESPONDENT

(An Appeal from the Judgment of Hon. C. Meoli, SPM  
in Milimani Commercial Courts Civil Suit No. 4598 of 2003  
delivered on 13th May, 2004).

JUDGMENT

On 25th July, 1995 the Appellant suffered injury in a motor vehicle accident when his employer's motor vehicle registration no. KAE 423 B, in which he was a passenger at the time, was involved in a collision with another motor vehicle, whose driver or owner were not sued.

By a Complaint dated 26th July, 1999 and filed on 27th July, 1999, the Appellant claimed general and special damages both in contract and tort against his employer, the Respondent. He alleged that the accident was caused by the negligence of the Respondent's driver. Alternatively, he claimed that the Respondent was liable for the damages occasioned on account of its breach of the terms of his contract of employment in that it failed to provide a safe system of work at the premises; allowing him to work under dangerous conditions; failing to provide protective gear, etc. The Respondent, on its part, denied any negligence, or breach of any duty to its employee, and pleaded that the action in tort was statute barred, as the same had been filed outside the period of limitation.

The lower court found that the action in tort was indeed time-barred, and dismissed the same. With respect to the claim in contract, it found that the Appellant had not established any breach of duty of care, and also dismissed the action based on contract. This is how the lower court expressed itself:

**“Beyond these assertions the plaintiff did not lead any other evidence to prove the terms of the employment agreement with the defendant that imposed a duty on the latter to take reasonable precautions for the safety of the plaintiff. Indeed he did not lead evidence to breach of any such duty. No connection was made between the alleged negligent conduct of Gurmit Singh the driver and the defendant's alleged duty of care. This suit was to my mind prosecuted as if it was purely a tortious action rather than a combination of tort and breach of contract as pleaded in the plaint. The plaintiff all along has had notice of the defendant's objections that their suit is statute barred. It is surprising that the plaintiff's counsel never considered it safe to apply for leave to file suit out of time in order to secure the plaintiff's interest. Admittedly the plaintiff sustained serious injuries and has suffered greatly as a result. While I sympathize with him, I think that my hands are tied by statute. His suit has**

**clearly come out as a tortuous action camouflaged also as an action for breach of contract. This camouflage was in my view intended to protect the plaintiff's suit from the operation of the provisions of Limitations of actions Act. Regrettably it has not succeeded. The court finds that the plaintiff's claim is based on tort and is statute barred having been instituted four years after the cause of action arose."**

It is against this Judgment that the Appellant has appealed to this Court, on the following four grounds of appeal:

- 1. That the learned Magistrate erred in law and in fact in finding that the plaintiff's suit was time barred at the time of filing.***
- 2. That the learned Magistrate erred in law and in fact in finding that the plaintiff's suit is not based on contract.***
- 3. That the learned Magistrate erred in law and in fact in dismissing the plaintiff's suit on the ground that it is not founded on contract.***
- 4. That the learned Magistrate erred in law and in fact in failing to consider the real issues in this case and basing her decision on issues already decided earlier at the on set of the dismissed suit.***

In his submissions before this Court, Mr Omindo, for the Appellant, argued that the Appellant's suit in the lower court was based on contract and hence not statute barred (as the six-year limitation period had not expired when the suit was filed); that the appellant had established that he was an employee of the Respondent, and hence entitled to sue in contract; and that he was injured in the cause of his employment. He cited the case of ***Kenya Cargo Handling Services vs David Ugwang (1982 – 88) I KAR 672*** in support of his argument that the Appellant had a right to sue both in contract and tort.

In reply, Mr Mwangi, Counsel for the Respondent, conceded that the Appellant was indeed an employee of the Respondent at the material time, but argued that the claim in contract had not been established. He submitted that the Appellant did not show how the Respondent had breached its contractual duty of care to its employee; and that all the grounds of appeal were based on a misapprehension of the Judgment.

As this is a first appeal, it is my duty to assess and re evaluate the evidence before the lower court, bearing in mind that this court has neither seen or heard the witnesses and should, therefore, make allowance for the same. I must be sure that the findings of facts made by the learned magistrate are based properly on the evidence before her and that she has not acted on wrong principles in reaching her conclusion. Now, having warned myself of that, let me examine the relevant evidence before the lower court.

The Plaintiff filed in the lower court clearly set out a claim both in contract and tort. It was the Appellant's right to do so (***See Kenya Cargo case*** – supra), and his obligation to lead evidence to establish his case on a balance of probability. The lower court was correct in holding that the suit, in so far as it was based on "tort" was statute barred because it was filed outside the period of the limitation provided for in law. The lower court did not say, as the first ground of appeal alleges, that "the suit was time barred at the time of filing". (at least not in relation to the claim in contract). And the lower court did not find that the suit was not based on contract, as the second ground of appeal alleges. In fact, the lower court entertained the suit, because it found, that it was indeed based both in tort and contract. However, the court was not satisfied that the Appellant had discharged the burden of establishing his case on a balance of probability.

Having reviewed the evidence before the lower court I am satisfied that it did not err in its conclusion that the Appellant did not show how the Respondent had breached its contractual duty of care.

Now, there is a common law duty of care that an employer has in respect of all his employees. This is a duty

***“to take reasonable care for the safety of his workers and to provide them with the necessary plant and equipment and is therefore liable if any accident is caused through the absence of some item of equipment” (see Winfield and Jolowicz on Tort by W. V. H. Rogers, 14 ed. at p. 213.***

The Appellant claims in his Plea that the Respondent failed to provide a safe system of work at the said premises, allowed the plaintiff to work under such dangerous conditions, failed to provide the plaintiff with protective gear and failed to warn the plaintiff of possible danger.

However, he led no evidence to prove any of these allegations. He did not show how the employer failed to provide a safe system of work “at the premises” (note this accident did not even take place “at the premises” – it was a motor vehicle accident); he did not show how his employer allowed him to work under “dangerous conditions” or what protective gear he expected, or one that would have prevented the injuries.

None of these particulars of negligence had any relevance or connection with the nature of the accident. The Appellant led no evidence to show how the Respondent breached his contractual duty of care. Not every accident at a place of work is necessarily a result of the employer’s breach of duty of care. And there is no strict liability for every accident at the place of work. It is incumbent upon the employee to show by evidence, and on a balance of probability, that the employer owed a duty of care arising from the employment contract, and how it was breached. The Appellant failed to do so, and the lower court was correct in its decision that the Respondent was not liable in contract. What the Appellant attempted to do in the lower court was to present a case of negligence (in Tort) under the cover of “contract”. As I have said before the claim in tort was statute barred, and properly rejected.

Accordingly, I find no basis to this appeal, and dismiss the same with costs to the Respondent.

Dated and delivered at Nairobi this 5th day of July, 2005.

**ALNASHIR VISRAM**

**JUDGE**