Momul Tea Factory Company Limited v Orero (Employment and Labour Relations Appeal E007 of 2023) [2024] KEELRC 1019 (KLR) (3 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 1019 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

EMPLOYMENT AND LABOUR RELATIONS APPEAL E007 OF 2023

HS WASILWA, J

APRIL 3, 2024

BETWEEN

MOMUL TEA FACTORY COMPANY LIMITED ..... APPELLANT

AND

JANET CHEBET ORERO ..... RESPONDENT

JUDGMENT

1. This appeal arose from the Judgement of the Chief Magistrates Court at Kericho, Honourable S. M Mokua, in Kericho CMCC No. 129 of 2016, delivered on 30th October, 2018, where the Appellant was the defendant and the Respondent was the Plaintiff. The grounds of the Appeal are as follows; -

    1. That The Honourable trial Magistrate erred in law when he held without any consideration of the applicable statute and case law that he had jurisdiction to hear and determine the case.

    2. The Honourable trial Magistrate erred in law in assuming jurisdiction to determine the case when he did not have any such jurisdiction in law to do so.

    3. The Honourable trial Magistrate erred in law when he held that the suit was not time barred.

    4. The Honourable trial Magistrate erred in law in failing to find and hold that the Plaintiff's suit was time barred under the *Employment Act* and the *Work Injury Benefits Act*, 2007.

    5. The Honourable trial Magistrate erred in law and fact in holding that the Appellant was estopped by Section 39 of the *Limitation of Actions Act* from pleading limitation while no such matter was pleaded.

    6. The Honourable trial Magistrate erred in law and fact in failing to realize that the Plaintiff did not plead either that there was an agreement not to plead limitation or that the Respondents were estopped from pleading limitation and that the court could not decide the case on unpleaded issues.

7. The Honourable trial Magistrate erred in law in holding that time was not running when the Defendant gave an impression that it could settle the claim without any evidence as to when that promise was given and without any finding as to when the time stopped and or started running.

8. The Honourable trial Magistrate failed to hold that time did not stop running merely because the Defendant had allegedly given an impression that it would settle the claim and that it was incumbent upon the respondent to bear in mind the provisions of Section 90 of the *Employment Act* even as she hoped for settlement.

9. The Honourable trial Magistrate failed to hold that that Section 39 (1) of the *Limitation of Actions Act* applied only if the grounds therein are established and further that as none was established, the suit was time barred.

10. The Honourable trial Magistrate erred in law and fact in holding that the Appellant had established a case against the Respondent as required by Law.

11. The Honourable trial Magistrate decided the case on an issue raised by the Plaintiff for the first time in her submissions and upon which no notice or evidence was given.

12. The Honourable trial Magistrate erred in law and in fact in failing to find that the Respondent had not established her case as pleaded in the manner required by the law.

13. The Honourable trial Magistrate erred in law and fact in ignoring and completely disregarding the submissions made by the Appellant.

14. The Honourable trial Magistrate considered extraneous matters, conjectures and suppositions which were not on record in arriving at his decision to the detriment of the Appellant.

15. The quantum of general damages is inordinately high erroneous, oppressive and punitive and amounts to a miscarriage of justice.

16. The Honourable trial Magistrate ignored and/or paid lip service to the Appellant's submissions and especially the precedents cited therein.

17. The Learned trial Magistrate erred in law when he held that the appropriate award was Kshs. 700,000.00 without any reason thereto.

18. The Learned Magistrate erred in law and fact in making an inordinately high award without considering and applying the principles enunciated in the authorities referred to him or to the evidence before him, or taking them into account.

19. The Learned trial Magistrate applied the wrong principles in the assessment of the award which was arbitrary, unjust and was high as to amount to an error in law in this particular case.

2. The Appellant sought for the following orders; -

a. The judgment and order of the Honourable trial magistrate allowing the Respondent's suit be set aside.

b. The judgment and order on quantum of the Honourable trial Magistrate be set aside, varied and/or be substituted with a suitable award.

c. The costs of the appeal and of the trial be paid by the Respondent to the Appellant.

d. Alternatively, that judgment and decree of the Honourable trial Magistrate be varied and be substituted with such judgement as meets the ends of justice.

Brief facts.

3. The trial court case is a work injury claim in which the Appellant herein had employed the Respondent and on 9th December, 2012, while at work in the withering section of the Appellant's farm, he sustained injuries i.e. deep extensive cut wound associated with muscle loss and tendons severing. The Appellant denied ever employing the Respondent or that the respondent was injured at work. After analyzing the case by each party the trial Court found, Firstly, that the suit herein though filed 3 years and 4 months, the employer had made an impression of settling the matter out of court and the fact that the plaintiff was still ill and therefore unable to institute this suit on time.

4. On jurisdiction issue raised, the trial Court held that it has jurisdiction but did not give further details. In conclusion, the court awarded the Respondent Kshs 700,000 general damages for pain and suffering and special damages of Kshs 7,000.

5. It is this decision of the trial Court that prompted the filling of this Appeal.

6. Directions were taken for the appeal to be canvassed by written submissions with the Appellant filing on the 10th January 14th December, 2023 and the Respondent filed on 13th February, 2024.

Appellant' Submissions.

7. The Appellant urged this Court from the onset to reconsider the evidence, evaluate the fact and evidence and draw its own conclusion, this being a first appeal. In this they relied on the Court of Appeal case of Association for the Physical Disabled of Kenya V Kenya Union of Domestic Hotels Educational Hospital and Allied Workers Union & Another [2018] Eklr.

8. The Appellant submitted on the jurisdiction of the trial Court to hear and determine the matter and argued that the trial Court lacked jurisdiction to hear the case as stated under Article 162(2)(a) of the Constition as read with Section 4 of the Industrial Court Act and Section 87(2) of the *Employment Act*. The basis being that since the injury occurred on 9th December, 2012, the only Court that had jurisdiction to handle any employment and related claim is the Employment and Labour Relations Court. However, that if the suit was to be heard as a work man injury claim, then the Director of Occupational Safety and Health Officer(DOSH) was the one empowered to hear the injury claim, therefore that in both angles, the trial Court lacked jurisdiction to hear the claim. To support this, the Appellant relied on the case of Attorney General V LSK [2017] eklr and the case of Law Society of Kenya V Attorney General & Another [2019] eklr where the Court held that;-

> "In agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of the Act, litigation relating to work-injuries had gone on and a number of the suits had progressed up to decree stage; some of which were still being heard; while others were still at the preliminary stage. All such matters were being dealt with under the then existing and completely different regimes of law. We thus agree with the Appellate Court that claimants in those pending cases have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked. However, were it not for such legitimate expectation, WIBA, not being unconstitutional and an even more progressive statute, as we have shown above we opine that it is best that all matters are finalized under Section 52 aforesaid."

9. Accordingly, that the trial court suit was filed on 19th April, 2016, after enactment of WIBA Act, 2007 and thus cannot be saved by the decision of LSK Vs AG because the case herein only saved those matters filed prior to the enactment of the Act . Therefore, that the Court had not Jurisdiction and ought to have downed it tools.

10. On whether the suit was barred by limitation of actions, it was submitted that if the claim was an employment claim then having been injured on 9th December, 2012, he ought to have filed the suit within 3 years from that time as per section 90 of the *Employment Act*, but for work Injury claim, the same ought to have been filed within 12 months as per section 26 of the WIBA. On that basis, the Appellant submitted that the claim herein has been caught up by limitation of actions both under the *Employment Act* and Work Injury and Benefits Act. To support this the Appellant relied on the case of Bata Shoe Company (K) Limited V Laban Chema Libabu[2013] eklr and the case of Samuel Munyua Mwangi V K.H.E Nanyuki Farm Limited [2016] eklr.

11. It was submitted that the allegations that the Appellant had led the Respondent to believe he would be paid his claim and thus delayed in filling the claim was not supported by any evidence and law, therefore cannot be a ground to enlarge time to file the trial court case or can the Appellant be estopped under Section 39 of the Limitations of Actions Act from pleading Limitation.

12. It was submitted further that the defence to the Limitation must have been specifically pleaded by the Respondent to as is required under Order 2 Rule 4 of the Civil Procedure Rules and reiterated by the Court in the case of National Bank of Kenya Vs Data Solve Limited & 2 Others [2017] eklr and the case of Samwel Mukora & Another V Samwel Kipngetich Soi [2020] eklr. where the Court held that;-

> " 23. A party relying on limitation should specifically plead it. If the defence is taken, it is up to the plaintiff to bring his case within any of the exceptions to the *Limitation of Actions Act* or other statute of limitation as may be the case. I find that there are good reasons for the position of the law that the defence of limitation should be pleaded specifically as such:
>
> (i) To avoid ambush upon or taking the plaintiff by surprise on such a fundamental issue as limitation of actions.
>
> (ii) To notify the Plaintiff of the defence of limitation; in effect to tell the Plaintiff that his claim is not maintainable in law.
>
> (iii) To give the plaintiff an opportunity to plead such facts as are necessary to bring his claim within the exception of Section 27 of the *Limitation of Actions Act*. Ordinarily, he will do so in his reply to defence. I therefore find that the Appellant failed to plead the issue that the suit was statute time barred and He cannot raise it at this stage. I agree that the Trial court fell into error in applying order 50 rule 4 to the provisions of the *Limitation of Actions Act* to extend time for filing of the respondent's claim. However, the Appellant is estopped from relying on the defence as the same was not pleaded."

13. To buttress its arguments. The Appellant cited a plethora of cases including the case of Chalicha Farers Co-operatives Society Limited V George Odhiambo & 9 others [1987] eklr, Rubangura Rose V Petrocom S.A (Rwanda)[2015] eklr, Global Vehicle Kenya Limited V Lenana Road Motors

[2015] eklr and the case of Agricultural Finance Corporation & Another V Kenya Alliance Insurance Company Ltd & Another [2002] Eklr.

14. On whether the court ignored the Appellant's submissions, it was submitted that they referred the trial Court to several authorities, in which, the issue raised were addressed by the superior Court and had the trial court considered their submissions, it would have arrived at a different conclusion.

15. On whether the claim of negligence was proved, it was submitted that the respondent herein had not tendered evidence in support of the negligence in that he merely alleged that he was cut but did not state how the machine was faulty or precautionary measures that the employer was supposed to undertake to prevent the injury. To support this, the Appellant relied on the case of Esther Nduta VS Hussein Transporters Machakos HCCC 46 of 2007 and the case of Chatterhouse Bank Limited (Under statutory management) Vs Frank N Kamau [2016] eklr.

16. Accordingly, that in absence of evidence linking the Employer to negligence and being that the Respondent stated that the machine was stepped on by another person causing it to cut him, the claim for negligence ought to fall.

17. On damages, it was submitted that the trial court was firstly devoid of jurisdiction in giving the award, secondly that the award given of Kshs. 700,000 was inordinately high in that the cases relied by both parties made awards ranging from Kshs 200,000 to Kshs 400,000, for the injury of deep cut wound, that the Respondent suffered. On the contrary the Court awarded Kshs 700,000 relying on the case of East Coach Limited Vs Emily Nyangasi[2017] eklr in which the plaintiff had suffered facial injuries, injury to chest, injury to hand and cut would and right leg cut wound, which injuries are not comparable to the Respondent's injuries herein as such the compensation was not commensurate to the injuries sustained.

18. In conclusion, the Appellant submitted that in the event this Court finds against them in all the other matters raised above, on liability, he urged the Court to interfere with the award of damages and grant the Respondent Kshs 300,000 as general damages, in this, the relied on the case of Mumias Sugar Company Limited V Bonface Anyona [2019] eklr where and the case of Akamba Public Road Services Limited V Rosemary Ampit [2018] eklr.

Respondent's Submissions.

19. The Respondent on the other hand submitted that he was employed by the Appellant as a casual labourer and sustained injuries on the 9th December 2012 while in the course of employment. That the appellant initiated the process of internal compensation and took the Respondent through relevant medical examination. However, the process was abandoned along the way compelling the Respondent to seek legal redress and a suit was filed before the trial court. The trial Court having heard the Respondent's evidence entered judgment in favour of the Respondent and awarded the Respondent Kshs 707,000.

20. On jurisdiction, the Respondent submitted that the issue of jurisdiction of the court to entertain work injury related claims has been the subject of back and forth battles in courts since the enactment of the *Work Injury Benefits Act* 2007. Section 16 of the Act ousted the court's jurisdiction to hear work injury related claims and the same was bestowed upon the Director of Occupational Safety and Health Services. However, on 22nd May, 2008 before the said Act would become operative, the High court vide Petition No. 85 of 2008 Law Society of Kenya vs Attorney General & another suspended the operation of section 16 and matters were to proceed as prior to the enactment of the Act.

21. It is argued that on 4th March 2009, section 16 of the Act among other provisions of the Act were declared unconstitutional thus null and void. This order remained valid law until it was set aside aside by the court of appeal on 17th November 2017. In the meantime, between 22nd May 2008 and November 2017 when the court of appeal rendered its ruling, claimants continued to suffer injury in the course of employment and employ and were entitled to seek justice in accordance to the relevant law applicable in which case was the High court ruling which declared the provisions unconstitutional meaning that workmen injury claims were to go through the normal court process as before until the court of appeal made its finding.

22. Similarly, that the Respondent herein was such claimant who was injured in the midst of the said dilemma. Therefore, that at the time of filing the claim herein on 19th April 2016, the trial court had jurisdiction pursuant to the court decree issued on 4th March 2009 and which had not been set aside or stayed till November 2017.

23. On limitation of action, it was argued that the accident, the subject of the suit herein, occurred on the 9th December 2012 and suit herein was filed on 19th April 2016 about three years and four months from the date of the accident. However, after the accident, the Appellant commenced the process of compensation and the Respondent was given exhibits P-exb 2 and 3 to fill. That this gave the Respondent an impression that indeed the Appellant had acknowledged the accident and it was going to compensate the Respondent for the injuries sustained thus a civil suit was not necessary.

24. With regard to these forms, the Respondent submitted that Exhibit 2 shows that first entries were made on 28 December 2012 and on the reverse side the Appellant's doctor filled it on the 7th November 2014 about two years after the accident. As at this time, the Appellant was still giving the Respondent hope that it was going to compensate her for the injuries sustained and especially after filling the document the Respondent could only expect payment. The origin and the contents of Pexb 2 were never disputed by the Defendant.

25. It was argued that the Appellant by its own conduct had intimated to the Respondent that it was willing to compensate her and there was no need to seek legal redress thus occasioning the delay herein therefore that tey seek solace of section 39 (1)(b) of the *Limitation of Actions Act*, that provides that a party cannot plead limitation if the same is estopped from so doing. He thus argued that the Appellant is estopped from pleading limitation in the case herein since by its own conduct assured the Respondent that there was no need to file a suit for recovery of damages.

26. To support this argument, they relied on the case of Sarah Njeri Mwabi vs John Kimani Njoroge HCCA NO 3140 2009 where the court held:

> "It therefore follows that where one party by his words or conduct, made to the other party a promise or assurance which was intended or affect the legal relations between them and to be acted on, the other party has taken his word and acted upon it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him but he must accept their legal relations subject to the qualification which he has himself introduced. "

27. Accordingly, that the conduct of the Appellant gave an assurance to the Respondent that she was going to be compensated and there was no need to file a suit to recover damages thus the Appellant cannot at this time be allowed to plead limitation.

28. On Liability, it was submitted that the trial court rightly held that the Appellant was solely liable. It was elaborated that the Respondent testified how she was instructed to clean a machine that was faulty

without any warning. She further testified that she was not supplied with any safety apparels in the course of work which would have prevented or at least mitigated the injuries sustained. This evidence was not controverted. That the Appellant though denied negligence on its part and attributed the injuries to the negligence on the part of the Respondent, no evidence was adduced to support the allegations as is required under the law and reiterated by the Court in the case of Joseph Kahinda Maina vs Evans Kamau Mwaura & 2 others [2014] eKLR where the court quoted with approval the finding of Lenaola J, (as he then was) in the case of Esther Nduta Mwangi & another vs Hussein Transporters Ltd Machakos HCCC No 46 of 2007) that:

> " Although the defendant denied the accident but leaded in the alternative that the accident was as a result of negligence on the art of the deceased the defendant chose to call no evidence whatsoever and that being: the case the particulars of negligence on the part of the deceased were not proved and are mere allegations. The plaintiff, on the other hand pleaded the doctrine of res ipsa loquitor and produced documents including police abstract showing the date and place of the accident although no eye witness to the accident was called. However, since the doctrine of res ipsa loquitor was pleaded, the burden of proof was shifted to the defendant to disprove the particulars of negligence attributed to him."

29. On quantum, it was argued that the Respondent sustained the following injuries; deep cut wound on the left hand associated with muscle loss and tendon severing, admitted in hospital for about six days and currently he cannot make use of the left hand as the tendons were severed. Dr. ogando opined that the injuries herein were severe leading to anklosis and total loss of fixation of the left hand and assessed permanent disability at 45%. The Appellant's doctor in Pexb 2 assessed permanent disability at 70%. . Hence the award of Kshs 700,000/= made by the trial court was on the lower side and cannot be said to be excessive. In this, they relied on the case of Thomas Muendo Kimilu vs Ann Maina & 2 others [2008] Eklr and the case of Florence Njoki Mwangi vs Peter Chege Mbitiru [2014] eKLR.

30. In conclusion, the Respondent submitted that the appeal herein lacks merit and urged this court to dismiss the same with costs.

31. I have examined all the evidence and submissions of the parties herein. This being a 1st appeal from the lower court, this court is obligated to reevaluate the evidence afresh and make a proper determination. Upon reevaluating the evidence as above, the issues for this court's determination are as follows:

    1. Whether the Lower Court had jurisdiction to handle the claim and if yes, whether the claim was time barred.

    2. Whether the quantum of the damages granted by the lower court was inadequately high.

    3. What remedies to award in the circumstances.

(i) Jurisdiction

32. The jurisdiction of the ELRC is drawn from Art 162 (2) (a) of *the Constitution* and Section 12 of the ELRC Act.

33. In relation to WIBA matters, in Kisumu ELRC Appeal No. 4 of 2019 West Kenya Sugar Company Ltd Vs. Tito Siecheli Tangale the court laid down the chronology of events that had taken place as follows:

> " In the court's view, the key to unravelling the uncertainty on jurisdiction can be resolved on three broad grounds. It is not in dispute that the cause the subject of this appeal was lodged

with the Magistrate's court on 8th June 2017 while the accident is said to have occurred on or around 20th October 2016...

On 22nd May 2008, the High Court at an Interlocutory stage stayed the operation of Section 16 (among other sections). On 4th March 2009, after hearing the petition on merit, the High Court declared section 16 of the Act as being inconsistent with *the Constitution* and therefore void of legal status..".

Therefore, in this court's view, these citizens or employees who lodged their claim with the court from 22nd May 2008 when the High Court issued stay orders to 4th March 2009 when a full declaration of illegality was made were acting on the strength of the law. The court was not informed whether the Court of Appeal stayed the declaration by the High Court, but the research has shown that on 10th July 2009, the Court of Appeal dismissed a motion seeking stay of execution (see Nairobi Court of Appeal No 144 of 2009 UR 97/2009 and reported as Attorney General Vs. Law Society of Kenya & Another (2009) eKLR. The consequence being that the declaration by the High Court that Section 16 of the WIBA was still the law up to the time the Court of Appeal delivered judgment on 17th November 2017"

34. I wish to note that the LSK was not satisfied with the judgment of the Court of Appeal and appealed the Court of Appeal's decision vide Supreme Court Petition 4 of 2019 Law Society of Kenya Vs. Attorney General & Another. The Supreme Court saw no merit in the appeal and affirmed the Court of Appeal's decision and dismissed the petition.

35. On 28/4/2023, the Hon Chief Justice issued practice Directions relating to pending court claims regarding compensation for work related injuries and diseases instituted prior to the Supreme Court decision in Law Society of Kenya Vs. Attorney General & Another Petition No 4 of 2019 (2019) eKLR.

36. Of interest to this appeal is direction No 5 (c) which stated as follows:

> " Be that as it may, Claimants with pending cases have legitimate expectation that upon the passage of the Act, their cases would be concluded under the judicial process invoked".

37. This being the position in reference to this appeal, the lower court matter being appealed against was filed on 19/4/2016. This is within the period where there was uncertainty on stay of the High Court orders in Law Society of Kenya Vs. Attorney General and before the Court of Appeal pronounced itself on the appeal in 17th November 2017. Work injury matters filed within this period, were filed before the Chief Magistrate's court depending on the Injury incurred. All Magistrates courts had jurisdiction to handle Injury at work matters. It is in respect to this position that the Claimant the respondent herein filed the claim before the Chief Magistrate's court.

38. The import of the Court of Appeal and Supreme Court decisions and the practice directions is that the Claimant having filed the claim before the CM's court, he had a legitimate expectation that the matter would be concluded before this court and there was no error whatsoever on his part. The CM's court had jurisdiction to handle the matter and therefore I find the submissions by the appellant that the Chief Magistrate had no jurisdiction to handle the same without merit and is disregarded.

39. On issue of Limitation the Law guiding filing of Injury matters was at the time grounded under section 4 (2) of the *Limitation of Actions Act* Cao 22 of the Laws of Kenya which provides as follows:

> " An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued..."

40. The claim for Injury fell under tort and should then have been brought within 3 years. The claim herein was filed after expiry of the 3 years.

41. The Respondents have submitted that the appellants made them believe that they were resolving the matter and hence there was no need to file the case and so are estopped to plead Limitation.

42. Assuming that indeed the appellant led the Respondent to believe they were going to settle the claim and reneged on their promise, the Respondents still had an obligation to apply to court to file suit out of time as provided for under Section 27 of the *Limitation of Actions Act* which provides as follows:

    27.

        (1) section 4(2) does not afford a defence to an action founded on tort where-

            (a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of contract or by written law or independently of a contract or written law); and

            (b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and

            (c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section, and

            (d) the requirement of subsection (2) are fulfilled in relation to cause of action……"

43. The Respondent never filed/applied to file suit out of time as envisaged and the excuse of estoppel cannot lie.

44. It is my finding therefore that this claim was filed before the Magistrate's Court out of time and without leave to so file and so the trial Magistrate had no jurisdiction to handle the same.

45. I agree with the appellants that in the circumstances that the claim shouldn't have proceeded before the trial court. The court proceeded without jurisdiction the same having been ousted by time. This appeal therefore succeeds in the circumstances and is allowed. There will no orders of costs.

JUDGMENT DELIVERED VIRTUALLY THIS 3RD DAY OF APRIL, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE