



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

APPEAL NO. 28 OF 2019

(Before Hon. Justice Mathews N. Nduma)

ANDREW SHISALA ANGALUSHI.....APPELLANT

VERSUS

WEST KENYA SUGAR COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The appeal arises from a ruling by Evans W. Muleka, Senior Resident Magistrate delivered on 8th March 2018.
2. The nub of the Appeal is that the magistrate erred in law and fact in finding that the Appellant's suit is statute barred by virtue of the provision of *Section 90 of the Employment Act 2007 read with limitation of Actions Act Cap 22 Laws of Kenya*.
3. The suit was filed before the principal magistrate's court at Butali vide a plaint dated 29th July 2017. The cause of action as set out in paragraphs 3, 4 and 5 of the plaint was that the plaintiff while in ordinary course of his employment with the defendant feeding the boiler with sugar residue sustained finger injuries when the pulley system was suddenly set in motion due to the negligence of the defendant.
4. The plaintiff sought special and general damages as a result of injuries sustained from contractual and/or statutory duties.
5. In the statement of defence filed by the defendant on 11th October 2017, the defendant pleaded under paragraph 14 of the statement of defence that the suit is time barred in law and would raise a preliminary objection to the suit at the earliest instance for the suit to be struck out.
6. In his ruling the learned trial magistrate found that the claim was based on tort and therefore was covered under *Section 4(2) of the Limitation of Actions Act, Cap 22 Laws of Kenya*, which provides:

“An action founded on tort may not be brought after the end of three years from the date on which the cause of Action occurred”.
7. The magistrate found as a matter of fact that the cause of action arose on 20th August 2013 and the suit was filed on 27th July 2017, about 3 years and 11 months after the cause of action arose.
8. The Appellant faults this finding by the learned magistrate arguing that the cause of action was based on contract and not tort and that the magistrate ought to have relied on the provisions of *Section 4(1) of the Limitation of Actions Act, Cap 22 Laws of Kenya* which provides:

“The following Actions may not be brought after the end of six years from the date on which the cause of Action occurred:

(a) Actions founded on contract”
9. The Appellant submits that the court Aquo ought to have found that the six) 6) years limitation period applied to this suit and not the three (3) years limitation period the court applied to the suit.
10. This court has carefully analyzed the contents of the plaint filed by the claimant and has come to the same conclusion as did the learned trial magistrate that the cause of action in this suit was founded primarily on tort in that the plaintiff sought special and general damages as a result of injuries the plaintiff sustained on his left middle finger in the course of his employment with the respondent.

11. The learned magistrate correctly found that the suit was based on *Work Injury Benefits Act, (Cap 236) Laws of Kenya* and not the *Employment Act, 2007* the basis of which claims arising from breach of contractual obligations arising from employment relationships are founded.

12. The ruling of the court had far reaching consequences as it applied to 19 other suits listed in the said ruling delivered on 8th March 2018.

13. This court observes that even if the suit by the plaintiff was based purely on the contract of employment, the suit was equally caught by the doctrine of laches and was time barred by *dint of Section 90 of the Employment Act, 2007* which provides:

“Notwithstanding the provisions of Section 4(1) of the limitation of Actions Act Cap 22, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof”

14. The Court of Appeal in the case of the ***Hon. The Attorney General and another vs Andrew Maina Githinji and another (2016) eKLR*** found in the majority decision by Waki and Kiage J.J.A. that a suit based on Employment contract cannot be filed after the expiry of three (3) year limitation period notwithstanding the provisions of *Section 4(1) of the limitation of Actions Act Cap 22 laws of Kenya*.

15. The court of Appeal and this court has held in a plethora of cases that the court lacks jurisdiction to hear and determine the suit and once it finds that the suit based on employment contract was filed outside the three year limitation period it must strike out the suit at the earliest instance. The courts have held further that no court has jurisdiction to extend the period within which to file the suit based on contract and such court must strike out the suit for lack of jurisdiction.

16. In the present case, the trial magistrate relied on the decision of ***Industrial court at Nakuru Cause No. 204 of 2013, Nicodemus Marah vs Timsales Limited*** where Byram Ongaya J. ruled

“In the instant case, no power of the court has been established empowering the court to extend time of 3 years prescribed in Section 90 of the Employment Act 2007...”

17. Accordingly, the court finds that this suit was time barred by *dint of Section 4(2) (a) of the Limitation of Actions Act, Cap 22 Laws of Kenya*, the same having been founded on tort and no basis to extend the time within which to file the suit was argued or established before the trial magistrate and this court.

18. Accordingly the Appeal is dismissed for lack of any merit.

19. The court finds as the learned magistrate did, this to be a suitable case for each party to bear their own costs of the suit. The finding applies to all the 19 suits listed in the ruling by the learned magistrate delivered on 18th March 2018.

Judgment Dated, Signed and delivered this 20th day of February, 2020

Mathews N. Nduma

Judge

Appearances

Abok Odhiambo for the Appellant

M/S Onyinkwa for Respondent.

Chrispo – Court Clerk