



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR**

**RELATIONS COURT AT MOMBASA**

**CIVIL APPEAL NUMBER 15 OF 2017**

**BETWEEN**

**DAVID KIMAIGA NYAIGO.....APPELLANT**

**AND**

**STEEL MAKERS LIMITED.....RESPONDENT**

**[Being an Appeal against the entire Judgment dated 7<sup>th</sup> November 2017 in Mombasa SRMCC NO. 2046 of 2014 by Learned Principal Magistrate the Honourable H. Nyakweba)**

**BETWEEN**

**DAVID KIMAIGA NYAIGO.....PLAINTIFF**

**VERSUS**

**STEEL MAKERS LIMITED.....DEFENDANT**

***Rika J***

***Court Assistant: Benjamin Kombe***

***M. A. Ananda & Company Advocates, for the Appellant***

***Messrs M.L. Alwenya & Company Advocates for the Respondent***

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**JUDGMENT**

1. The Appellant herein was the Plaintiff, in the Civil Case whose details are shown above, in a claim for work injury, brought against his Employer, the Respondent herein.
2. He sought General and Special Damages, Costs and Interest.
3. He averred he was employed as a Mill Fitter. His right foot was burnt by a hot steel rod on 29<sup>th</sup> January 2011, while in the course of discharging his duty.
4. He filed his Claim before the Senior Resident Magistrate’s Court, on 22<sup>nd</sup> October 2014.
5. In its Judgment delivered on 7<sup>th</sup> November 2017, the Trial Court dismissed the Claim, finding that the Claim was filed outside the period of 3 years allowed under Section 90 of the Employment Act 2007.
6. The Trial Court also found and held that the Appellant had not established that he was injured as pleaded.

7. In his Memorandum of Appeal on record, the Appellant challenges the Decision of the Trial Court, listing 11 Grounds of Appeal.

8. Principally, he argues that the issue of time-bar had not been pleaded by the Respondent. Secondly, he argues that Parties had already recorded consent on liability at 65% against the Respondent and 35% against the Appellant. All the Trial Court was required to do, was to assess damages, not go out of its way, to source for material to support an unfavourable Decision against the Appellant.

9. Parties agreed to have the Appeal considered and determined on the basis of Written Submissions. They confirmed filing of Submissions on 13<sup>th</sup> December 2019.

**The Court Finds:-**

10. Limitation of actions relates to the temporal jurisdiction (*jurisdiction racione temporis*) of the Court. It refers to the jurisdiction of a Court of Law, over a proposed action, in relation to the passage of time.

11. The Trial Court could not be seized with jurisdiction, on the strength of the consent order recorded by the Court on liability.

12. The Appellant was injured on 29<sup>th</sup> January 2011 and the Complaint filed on 22<sup>nd</sup> October 2014.

13. Paragraph 3 of the Complaint states that there was a contract of employment between the Parties. The Trial Court did not therefore misapprehend the law, in applying the time-bar imposed under Section 90 of the Employment Act.

14. Section 90 of the Employment Act, operates notwithstanding the provisions of limitation of time, contained in Section 4(1) of the Limitation of Actions Act, Cap 22 of the Laws of Kenya.

15. The Respondent had pleaded in its Statement of Defence, before the Trial Court that the Claim was time-barred under the Limitation of Actions Act.

16. The Appellant states that the Trial Court erred, by adopting the Employment Act, while the Respondent pleaded limitation under Limitation of Actions Act.

17. The Court does not think the Trial Court erred. It simply found it did not have temporal jurisdiction.

18. If the Trial Court did not have jurisdiction *ab initio*, as correctly concluded in its Judgment, it would not have jurisdiction to record partial Judgment on liability. It was correct in revisiting the consent, and setting it aside. Parties could not confer jurisdiction on the Court by consent.

19. It was a correct finding that the Appellant failed to establish his injury. He did not give evidence, and did not provide primary treatment records. What was given to the Trial Court was a Report by Dr. Ajoni Adede, prepared 3 years after the alleged factory accident.

20. There was no basis even had the Court been seized with jurisdiction, to conclude that the Appellant was injured, and proceed to assess General Damages.

IT IS ORDERED:-

**a) *The Appeal is dismissed.***

**b) *No order on the Costs of the Appeal.***

**Dated and delivered at Mombasa this 20<sup>th</sup> day of February 2020.**

**James Rika**

**Judge**