



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**APPEAL NO. 1 OF 2019**

*(Before Hon. Justice Mathews N. Nduma)*

**TOM ONSONGO NYAIRO.....CLAIMANT**

**VERSUS**

**TOMBE TEA FACTORY COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

1. This is an appeal from the judgment of N. Okumu, Resident Magistrate at Nyamira in which the trial court entered judgment in favour of the respondent for general damages in the sum of Kshs. 80,000 and special damages in the sum of Kshs. 6,500 with interest and costs.

2. From the record of appeal, the suit commenced by a plaint filed on 1<sup>st</sup> April 2012.

3. The cause of action as set out in the plaint is that on or about 15<sup>th</sup> May 2006, while the plaintiff was loading firewood to the company vehicle, a piece of firewood fell from the vehicle and hit him on the forehead. The plaintiff sustained injuries to the head, bones on the left hand and cut wound on the left leg. That the injuries occurred in the cause and within the scope of his employment with the defendant. That the accident occurred due to the negligence and for breach of statutory duty of the defendant.

4. Particulars of negligence and/or breach of statutory duty are set out in the plaint and the plaintiff prayed for general and special damages in respect of the sustained injuries in the cause of duty.

5. The Appellant filed statements of defence on 25<sup>th</sup> July 2012 in which it denied that the plaintiff was in its employ when the alleged injuries were sustained by the plaintiff. In the alternative, the Appellant denied the particulars of negligence and breach of statutory duty.

6. The respondent testified in support of his case as PW1 and the Appellant called DW1 Peter Henry Mango, a supervisor at Tombe Tea factory who testified in defence of the case.

7. Following the decision in Selles case, this being a first appeal, the court is bound to evaluate the pleadings, and evidence before the trial court afresh and arrive at its own conclusion of fact and law bearing in mind that it had no opportunity to hear the testimony of the witness directly.

8. The court is also guided by the Court of Appeal from East Africa in ***Peters vs Sunday Post Limited (1958) EA 424, cited with appeal by Joel Ngugi J. in Ndungu Dennis vs Ann Wangari Ndirangu and another, Civil Appeal No. 54 of 2016*** as follows:

*“it is a strong thing for an appellate court to differ from the finding on a question of fact of the judgment who tried the case and who has had the advantage of seeing and hearing the witnesses. An Appellate court has indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution, it is not enough that the appellate court might itself have come to a different conclusion”*

9. The trial court was faced in its judgment with the issue whether or not the suit was time barred and the trial magistrate rendered herself thus on the matter.

*“From the plaint it appears the causes of action are breach of employment contract as explained by paragraph 4 of the plaint and negligence as captured by paragraph 6 of the plaint. It is noteworthy that actions founded on contract may not be brought to court at expiry of six (6) years from the date on which the cause of action occurred (See Section 4(1) (a) of limitation of Actions, Act 22).*

*Actions founded on tort may not be brought to court at expiry of three (3) years (See Section 4(2) of Cap 22). Negligence as a cause of action is a tort, the same applies to the breach of duty”*

10. The trial magistrate erred in law and fact with regard to the issue of limitation.

11. This court has carefully considered the cause of action pleaded by the respondent and is of the conclusion that the cause of action advanced by the respondent and remedies sought arose from a tort committed in the cause of employment.

12. This is because the liability pleaded and in respect of which PW1 testified on oath was purely based on negligence and/or breach of statutory duty by the appellant. There were no split causes of action in this matter, one based on tort and another based on contract as the learned trial magistrate erroneously found.

13. Having found that the claim for damages for injuries sustained by the respondent was founded on alleged negligence or breach of statutory duty by the respondent, the trial court ought to have reached a verdict that the entire suit was time barred and struck out the suit for having been filed outside the limitation period of three (3) years and without any application for condonation having been made by the respondent.

14. This is the conclusion the court has arrived at. The entire suit was time bared on this score alone.

15. As regards, the evaluation of the testimony by PW1 and DW1 by the trial magistrate, assuming the suit was not time barred, the court is satisfied that the conclusion reached upon by the trial magistrate on the issue of liability was correct. The trial magistrate faulted the credibility of DW1 and upheld the testimony of PW1 as corroborated by a medical report produced before court by consent of the parties. The trial court therefore correctly found, and this court proceeds to do that the respondent was injured in the cause of duty as a result of the negligence and/or breach of statutory duty by the Appellant.

16. The award of Kshs. 80,000 in general damages was not inordinately high in the circumstances of the case and this court finds no reason to interfere with the same.

17. In conclusion, and for the avoidance of doubt, the suit before court, having been entirely based on tort was filed outside the limitation period of three (3) years without any extension of time.

18. Accordingly, the Appeal succeeds in its entirety. The court sets aside the judgment of the trial court in its entirety.

19. The court finds this an appropriate case for each party to bear their costs of the suit. The trial court ought to have determined the issue of limitation at the outset and would have avoided the trial in the first place.

**Judgment Dated, Signed and delivered at Nairobi this 16<sup>th</sup> day of April, 2020**

**Mathews N. Nduma**

**Judge**

**ORDER**

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**Mathews N. Nduma**

**Judge**

**Appearances**

M/S Mose, Mose and Milimo and Company Advocates for the Appellant.

Ben K. Gichana Advocates for the Respondent

Chrispo: Court clerk