



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

APPEAL NO. 4 OF 2020

(Originally Nairobi High Court Civil Appeal No. 153 of 2017)

JOSEPH KAMAU MAINA..... APPELLANT

v

ENDMOR STEEL MILLERS LIMITED.....RESPONDENT

(Being an appeal from the decision of the Chief Magistrates Court at Milimani (the Honourable Mr. Orengi K.I.) dated the 7th March 2017 in Civil Case No. 7908 of 2014)

JUDGMENT

1. Joseph Kamau Maina (Appellant) sued Endmor Steel Millers Ltd (Respondent) before the Magistrates Court on 31 December 2014 alleging breach of statutory duty (negligence in the course of work) which had occurred on 24 October 2011.
2. In its Defence, the Respondent raised a question of limitation, anchored on section 90 of the Employment Act, 2007.
3. The plea was followed with a *Notice of Preliminary Objection* filed on 15 November 2016, but now citing section 4 of the Limitation of Actions Act.
4. The Magistrates Court heard the parties on the plea and in a Ruling delivered on 7 March 2017 upheld the objection on the basis of section 4(2) of the Limitation of Actions Act.
5. On 6 April 2017, the Appellant filed a *Memorandum of Appeal* contending
 1. The learned judge erred in law and fact by 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. The learned magistrate erred in law and in fact by failing to appreciate the fact that the claim was both contractual and tortious.
 4. The defendant/applicant's in their submissions acknowledged and admitted that the matter was employer/employee relationship matter and thus not contending the fact that the Appellant herein was in an employment contract with the Respondent, a fact that the learned magistrate erred in.
 5. The learned magistrate erred in law in overlooking the fact that the Defendant/Applicant in their submission conceded that paragraph 4 of the Plaint captured and addressed the fact that there existed a contractual relationship, if not express, implied.
 6. The learned magistrate erred in law in failing to put much consideration on the authority cited by the Plaintiff in the submissions (*Kenya Cargo Handling Services v David Ugwang*).
6. On 21 January 2020, the High Court transferred the Appeal to this Court. This Court gave directions on 26 February 2020.
7. The Appellant filed his submissions on 13 March 2020 while the Respondent's submissions were not on file by 27 March 2020 as directed (the Court gave extension directing parties who had not filed submissions due to COVID19 pandemic to do so before 30 April 2020. The Respondent still did not comply).

8. The Court has considered, re-evaluated and analysed afresh the record before the Magistrates Court and the submissions.

Limitation

9. It is not in dispute that the Appellant set out the date of his injury in the workplace as 24 October 2011 and that he commenced legal action on 31 December 2014. The Respondent's objection was that action was commenced outside the prescribed limitation period.

10. Limitation goes to jurisdiction and it is not correct as urged by the Appellant that it was improper for the Magistrate to deal with it at a preliminary stage. It is trite law that where a Court finds a cause is statute/time barred, it would not have jurisdiction to move further.

11. Such a finding on limitation/jurisdiction is capable of determining the cause/action conclusively and it was proper for the Magistrate to address it as a foundational question.

12. The record show that the Magistrate determined the limitation question on the basis that the cause of action was founded upon tort, hence his reliance on section 4(2) of the Limitation of Actions Act.

13. Even assuming that the Magistrate was wrong and that the action was contractual, section 90 of the Employment Act, 2007 (which was pleaded in the Defence) prescribes a limitation of 3 years in actions arising out of contracts of service.

14. The Appellant did not institute his action within the 3 year period and had the Magistrate considered the same, the outcome would have been the same.

15. The Court finds no merit in the Appeal and it is dismissed with costs to the Respondent, both in this Court and the Magistrates Court.

Delivered through video/email, dated and signed in Nairobi on this 22nd day of May 2020.

Radido Stephen

Judge

Appearances

For Appellant Ngugi & Co. Advocates

For Respondent Mbigi Njuguna & Co. Advocates

Court Assistant Judy Maina