



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**APPEAL CAUSE NO. 17 OF 2018**

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

**OGEMBO TEA FACTORY LTD.....APPELLANT**

**VERSUS**

**PETERSON OMWOMA ROSANA .....RESPONDENT**

**JUDGMENT**

1. The main issue for determination in this Appeal is whether the suit was time barred in line with the provisions of section 90 of the Employment Act 2007 as read with section 4(2) of the Limitation of Actions Act CAP 22 Laws of Kenya.
2. The suit was filed vide a plaint dated 11<sup>th</sup> May 2010. In the plaintiff's claim it was alleged that on or about the 13<sup>th</sup> February 2003, while the plaintiff was within the course of his employment in the Defendant's premises sorting tea leaves, he was cut by a trolley and sustained injuries and suffered pain, loss and damage. The plaintiff prayed for general damages costs and interest of the suit.
3. The plaintiff obtained leave of court to file suit out of time on 17<sup>th</sup> December 2009 as stated in paragraph 10 of the plaint filed the suit being founded on tort and not contract perse.
4. The order granting leave is on page 43 of the record of appeal. The respondent/ appellant did not appeal the ruling of the court that enlarged time in 2009 before the suit was filed and that particular record of miscellaneous application is not before court.
5. The reasons why the particular magistrate enlarged time for filing in terms of Part III of the Limitation of Actions Act Cap 22 laws of Kenya in the miscellaneous application are not before this court and cannot be the subject of our consideration in this Appeal.
6. Furthermore, the cause of action arose in 2003 before The Employment Act 2007 was enacted and so section 90 of the Act is not applicable as pleaded by the appellant.
7. The appellant cannot be heard to raise that matter many years down the line. This is different from suits decided by this court where prior leave to file suit out of time was not sought and matters were simply filed and proceeded to full trial without the court deciding the issue of time bar.
8. The matter proceeded by way of formal proof before the trial Magistrate on 11<sup>th</sup> July 2013 and ex parte Judgment was entered on 9/9/2013.
9. By consent of the parties the ex parte Judgment was set aside on 18<sup>th</sup> October 2013 and the Appellant/Defendant filed a statement of defence dated 18<sup>th</sup> October 2013.
10. The matter proceeded to full hearing and the plaintiff/Respondent called 3 witnesses and the Appellant/Defendant called one witness.
11. Judgment was delivered on 17<sup>th</sup> May 2017 in which 100% liability was entered in favour of the plaintiff/Respondent against the Appellant. General damages of Kshs. 350,000 were awarded and special damages of Kshs. 6,500 was also awarded with costs to follow the event.
12. The Appeal was filed at the High Court of Kenya at Kisii but was transferred by Majanja J. on 12<sup>th</sup> June 2018 to the E & LRC Kisumu.
13. This being a first Appeal the Court has the primary responsibility to re-evaluate and reconsider the evidence on record and draw its own conclusions as was provided in **Selle –VS- Associated Motor Boat Co. Ltd (1968) EA. 123.**

14. The court has carefully evaluated the evidence by the plaintiff/respondent and that adduced by the respondent /appellant. The court has also carefully considered the judgment by the trial magistrate and is satisfied that the trial court did not misdirect itself in evaluating the evidence before it on the issue of liability and the court therefore arrived at a correct decision on liability which this court upholds.

15. Similarly, the trial court did not err on the principles applicable in the assessment of damages and the court finds no reason to interfere with the quantum of damages arrived at by the trial court.

16. In the final analysis the appeal is dismissed in its entirety and the court upholds the award of KSH. 350,000 in general Damages and KSH. 6,500 special damages to the respondent.

17. The appellant to meet the costs incurred before the trial court and this court.

**Dated, Signed and Delivered at Nairobi this 17<sup>th</sup> Day of September 2020**

**Mathews N. Nduma**

**Judge**

**ORDER**

In view of the declaration of measures restricting court operations due to 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 ruling 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**

**Appearance:**

Mr. Onyinkwa for Appellant

Mr. Nyankosi for Respondent.

Chrispo: Court clerk