



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

APPEAL NO. 24 OF 2018

(Before Hon. Justice Mathews N. Nduma)

Ogembo Tea Factory Company Limited.....Appellant

VERSUS

Zerebath Oyaro Marita.....Respondent

JUDGMENT

1. The Appeal is from the judgment and decree of Hon. Wairimu SPM at Ogembo, delivered on 15th June 2016. The main ground of Appeal is that the learned trial magistrate erred in law and fact by failing to make a determination on whether or not the respondent's suit was time barred in terms of *section 90 of the Employment Act, 2007 read with section 4 of the Limitation of Actions Act Cap 22 Laws of Kenya*.
2. That the trial magistrate further erred in law and fact by holding the appellant liable in negligence and that injuries sustained by the respondent were sustained in the cause of employment with the Appellant.
3. Finally, the magistrate misdirected herself on the principles of assessing damages and therefore awarded excessive general damages and special damages.
4. The court is guided by the decision in *Selle vs Associated Motor Boat Company Limited (1968) EA 123*, this being a first appeal and shall re-evaluate and reconsider the evidence on record and draw its own conclusion keeping in mind that it did not have the advantage of hearing direct evidence from the witnesses.
5. The court is also guided by the *Court of Appeal decision in The Owners of the Motor Vessel 'Lilian S' vs Caltex Oil Kenya Limited*, which mandates the trial court to determine preliminary objection in the first instance and down its tools immediately if it found that the matter was time barred for want of jurisdiction.
6. From the Appeal record, the respondent filed ex parte originating summons on 24th November 2016 seeking leave of court to enlarge time to file the intended suit out of time.
7. From the application, the cause of action of the intended suit arose on 24th April 2003. The respondent/applicant deposed that the time for filing suit as prescribed under the *Limitation of Actions Act Cap 22 laws of Kenya* expired on 24th April 2009.
8. That the Appellant had promised to compensate the respondent and so he kept waiting until the suit was caught up by limitation. That the respondent eventually came to court upon realizing that the appellant would not compensate him.
9. The ex parte application brought under *Section 27(2) (a) of the Limitations of Actions Act, Cap 22 Laws of Kenya* was heard and determined by Hon. Chief Magistrate O. Ogola who made a ruling and issued an order granting the respondent leave to file and serve the intended suit upon the Appellant on 21st March 2013.
10. The respondent filed the plaint on 25th April 2013 approximately 13 years from the date the cause of action arose.
11. The appellant did not appeal the ruling of the Chief Magistrate, Ogola and the trial proceeded before a different magistrate, Hon. SPM Wairimu, hence the Appeal.

12. It is discernible from the plaint that the cause of action arose from an injury sustained by the respondent in the cause of duty at the Appellant's premises at the Ogembo Tea Factory on 24th April 2003. The respondent averred that the said accident arose from the sole negligence and breach of statutory duty by the Appellant hence the suit.

13. It is clear therefore that the suit is founded on tort and at the time the cause of action arose *section 90 of the Employment Act 2007* had not been enacted and so is not applicable in this matter.

14. The relevant provision for purposes of limitation of action of the present suit is 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 provided that an action for libel or slander may not be brought after the end of twelve months from such date”

15. Therefore, the present suit ought to have been filed on or before the 24th of April 2006. The same was however filed with leave of court on 25th April 2013.

16. Though the trial proceeded to conclusion, this court is bound to determine if the trial court had jurisdiction to entertain the suit at all since a plaint that is barred by limitation is a plaint barred by law and the court lacks jurisdiction to hear and determine the same on the merit. This was the finding in the case *of Iga vs Makerere University (1972) EA 65*.

17. In the present case, the respondent was granted leave to file the plaint out of time. A question arises whether the court may disregard the issue of time bar because that ruling was not appealed against within the time provided to file an appeal against a decision of the magistrate.

18. An issue of jurisdiction goes to the root of the suit and that cannot be gained by innovation or craft. Therefore, if there was no valid reason to extend limitation time, then it does not matter that the magistrate had clothed the plaint with a semblance of legality, notwithstanding the position of the law on the matter.

19. *Part III of the Limitation of Actions Act, Cap 22 Laws of Kenya* provide reasons for which applications for enlargement of time may be made under *sections 22, 26 and 27* which reasons including disability of the plaintiff; Fraud on the part of the defendant and or mistake or ignorance on the part of the plaintiff.

20. The application in the present case was brought under Section 27 which provides for extension of limitation period in case of ignorance of material facts in actions for negligence which provides specifically under 27(1) that:

“Section 4(2) does not afford a defence to an action founded on tort where:

- a. The action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and
- b. The damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and
- c. The court has whether before or after the commence of the action, granted leave for the purposes of this section; and
- d. The requirements of subsection (2) are fulfilled in relation to the cause of action”.

21. The requirement of this above sub-section is fulfilled if the plaintiff demonstrates that facts of a decisive character were at all times outside his actual or constructive knowledge until after the expiry of the three years limitation period or one year before the expiry and either case was a date not earlier than one year before the date on which the action was brought.

22. Since no appeal was filed in time against the ruling by the court on the matter of extension of time and no record of the proceedings on the *ex parte* originating summons filed by the respondent prior to the grant of leave to file the suit outside the limitation period, this court is in no position to fault the decision by the learned Chief Magistrate Ogola regarding his decision to enlarge the time within which the suit was filed.

23. The learned magistrate was satisfied by the affidavit evidence brought by the respondent/applicant that the failure to file the suit within time was due to promises by the Appellant that it would compensate him under the workman compensation Act which promises were false and never materialized.

24. Accordingly, the trial magistrate had jurisdiction to hear the suit on the merits and this court shall proceed to consider the Appeal on the merits.

25. The plaintiff/respondent (PW1) testified under oath that on 24th April 2003, he worked as a fundi at the respondent factory. He produced a letter of retrenchment by the Defendant/Appellant dated 26th October 2006. PW1 testified further that he worked in cutting, tearing and crushing (CTC) section where he repaired machines. That the machine was fuming and he was forced to insert his hand to remove tea stuck in the rolls.

26. That his hand was held by the conveyer which was partly tearing and held his hand. It also held his overall and pulled his hand into the rollers and broke the left hand bones of PW1. PW1 stated that he blamed the Appellant for the accident because the conveyer was old and worn out. That he was also not issued with gloves which would have prevented his hand from being held by the conveyer. That he worked under an in-charge named Andrew Ndolo and a supervisor named Onduko.
27. That PW1 was taken to Tabaka hospital by the factory manager and was admitted for 2 days. His hand was plastered. PW1 testified that he was thereafter examined by Dr. Oganda who made a medical report on his injury status and he paid Kshs. 6,500 for the report.
28. PW1 produced the medical report and the receipt. PW1 stated that he had not been compensated to date. He prayed for damages and costs.
29. PW1 was cross examined by Mr. Ayieko for the plaintiff in which he reiterated his evidence and admitted that he knew the machine was dangerous but blamed the company for the accident because the conveyer was old and ought to have been replaced to avert the danger. PW1 said his hand had a disability as described by the doctor.
30. PW2 Dr. Oganda Zoga testified that he examined the respondent on 15th February 2013. That PW1 sustained fracture of the left radius and ulnar bone while on duty at Ogembo Tea Factory. That the injuries had healed well though slight deformity was left. That he relied on treatment notes from Tabaka Mission Hospital and he prepared a report for which PW1 paid him Kshs. 6,500. He produced the report in court.
31. Under cross examination, PW2 classified the injury as grievous harm.
32. DW1, Hezekiah Kenama testified that he was senior supervisor at the company for more than 8 years. That on 24th April 2003, DW1 said he was not working at the company. That he knew PW1 who worked at the company on 24th April 2003. That DW1 lived within the tea factory. DW1 produced a master roll for the month of April 2003 which shows the respondent was on duty in April 2003.
33. DW1 produced an accident register which did not bear the name of PW1. DW1 said that PW1 ought to have repaired the machine since he was a mechanic. Under cross examination by Mr. Nyangosi for the respondent, DW1 confirmed that he was not employed by the Appellant on 24th April 2003 and that he relied on the records and had no personal knowledge of the accident sustained by PW1 though the records show PW1 was at work on 24th April 2003 and some correspondence show that he had sustained some injuries.
34. The trial magistrate delivered her judgment on 15th June 2016. The testimony by PW1 and PW2 places the respondent at the Appellant's company on 24th April 2003. The records produced by DW1 confirmed that PW1 was at the Appellant's premises on the date. The testimony by PW1 and PW2 also demonstrated that PW1 sustained injuries in cause of duty at the Appellant's factory.
35. PW1 blamed the company for the injury because they allowed the machinery to operate with a defective conveyer belt which caused the accident sustained by PW1. PW2 confirmed the nature of the injuries. DW1 did not have any personal knowledge of the matter since he was not an employee of the Appellant when the accident occurred.
36. It is the finding by this court that PW1 proved on a balance of probabilities that he sustained serious injuries described by PW2 due to the negligence and breach of duty of care by the Appellant.
37. The court finds that the learned trial magistrate did not misdirect herself on the issue of liability. This court finds that the Appellant was wholly to blame for the accident and the Appeal on liability lacks merit. DW1 did not adduce any evidence to show any contributory evidence by the respondent.
38. On the issue of damages, the court also finds that the trial magistrate did not misdirect herself on the principles applicable in the assessment of general and special damages. The trial court awarded the respondent special damages in the sum of Kshs. 6,500 being fees of the medical report as proved vide a receipt produced by PW2.
39. The trial court considered similar cases namely *Machakos HCC Appeal No. 28 of 2007, Peris Mwikali Mutua vs Peter Munyao Kimeto* where the high court awarded the plaintiff Kshs. 450,000 for similar injuries. The respondent sought an award of Kshs. 700,000 whereas the Appellant proposed an award of Kshs. 200,000 relying on the decision in *Christine Agnes Amanyo vs Martha Akumu Khadel (2014) eKLR* in which the court had awarded Kshs. 170,000 in general damages.
40. This court has considered the injuries sustained by the respondent; the authorities submitted by the parties and the passage of time leading to devaluation of amounts awarded earlier in cited decisions.
41. The court finds no reason to interfere with the decision by the trial court in awarding Kshs. 600,000 in general damages to the respondent. The court is alive to the position that an appeal court ought not to interfere with the award of damages simply because it would have awarded a different amount.
42. The court also finds that the award of general damages by the magistrate is not excessive to amount to a miscarriage of justice.
43. Indeed the sum of Kshs. 600,000 awarded is suitable compensation for the injuries suffered by the respondent in the circumstances of this case.
44. Accordingly the Appeal is dismissed in its entirety and the court makes the following final orders:

- a. The award of the general damages in the sum of Kshs. 600,000 is granted to the respondent against the Appellant.
- b. The Appellant to pay Kshs. 6,500 in special damages to the respondent.
- c. The Appellant to pay the costs of the suit before the trial court and this court.

Judgment Dated, Signed and delivered at Nairobi this 15th day of October, 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 15th 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 Onyinkwa Advocate for the Appellant.

M/S T.O Nyangosi Advocate for the respondent

Chrispo- Court clerk