



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CIVIL APPEAL NO 16 OF 2017

NELION TRADING LIMITED.....APPELLANT

VS

DAVID OKENO ONAYA.....RESPONDENT

(Appeal from the Ruling of Hon. Francis Kyambia, SPM delivered on 24th November 2017 in Mombasa RMCC No 1610 of 2016)

JUDGMENT

1. This appeal arises from the ruling of Hon. Francis Kyambia, SPM delivered on 24th November 2017. The ruling itself was triggered by a preliminary objection raised by the Appellant by way of notice dated 21st August 2017.
2. The basis of the objection was that the Respondent's suit was time barred by dint of Section 4(2) of the Limitation of Actions Act which provides that actions founded on tort may not be brought after the expiry of three years from the accrual date of the cause of action.
3. The learned trial Magistrate overruled the objection and being dissatisfied by that decision, the Appellant filed the present appeal. In its Memorandum of Appeal, the Respondent raises the following grounds:
 - a) That the learned Magistrate erred in law and in fact in interpreting the provisions of Section 4(2) of the Limitation of Actions Act, Cap 22 of the Laws of Kenya;
 - b) That the learned Magistrate erred in law and in fact by failing to appreciate that a tortious claim should by law be instituted within 3 years from the date the cause of action arose;
 - c) That the learned trial Magistrate erred in law and in fact by allowing the Respondent to institute proceedings against the Appellant for tort without leave to enlarge the time within which the Respondent ought to have filed the suit;
 - d) That the learned Magistrate erred in law and in fact by holding that the Respondent's cause of action against the Appellant was a breach of an employment contract;
 - e) That the learned Magistrate erred in law and in fact by overlooking the provisions of Section 90 of the Employment Act, 2007 vis-a-vis Section 4(1) of the Limitation of Actions Act, Cap 22 Laws of Kenya;
 - f) That the learned Magistrate erred in law and in fact in considering that the Preliminary Objection was anchored on jurisdiction as raised in *Malindi Constitutional Petition No. 3 of 2016: Malindi Law Society v Attorney General & 4 others*;
 - g) That the learned Magistrate erred in law and in fact in not considering the effect of Section 90 of the Employment Act as read with Section 4(2) of the Limitation of Actions Act hence he did not appreciate that the Respondent's suit against the Appellant was filed after the statutory limitation had been exceeded;
 - h) That the learned Magistrate erred in law and in fact in failing to consider and apply his mind to the submissions filed by the Appellant;
 - i) That the learned Magistrate erred in law and fact by departing from the binding authority in *Kiamokama Tea Factory Co. Ltd v Joshua Nyakoni [2015] eKLR*;
 - j) That in all instances, the ruling and orders of the trial court are unsupportable by law and facts.

4. The single issue for determination in this appeal is whether the Respondent's suit before the trial court was statute barred and thus improperly before the Court.

5. In his ruling delivered on 24th November 2017, the learned trial Magistrate stated thus:

“I hasten to add that such claim as the Plaintiff's may be classified as tort or contract. The Plaintiff having filed it within 6 years prescribed I found the objection not merited.”

6. The Appellant submits that the Claimant's claim which arises from a work injury is tortious not contractual. In urging its position in this regard, the Appellant relied on the High Court decision in ***Kiamokama Tea Factory Co. Limited v Joshua Nyakoni [2015] eKLR*** where it was held that breach of the statutory duty of care imposed on an employer to an employee is a tort.

7. With tremendous respect, I hold a different view on this issue. To my mind the duty of care as to the safety of employees at the work place is contractual. I say so because an employee who is injured at the work place would not have met the accident if he had not been an employee of the employer.

8. The dominant cause of action therefore arises from contract although determination of the claim may borrow heavily from tort principles. To this extent, I am persuaded by the decisions in ***Athibeta Minayo v Robers Chelimo & another [2005] eKLR*** and ***European Committee for Agriculture Training Rural Development (C.E.F.A) Kenya v Moses Muriuki Matiri [2015] eKLR***.

9. I therefore agree with the learned trial Magistrate that the cause of action herein arose from contract but this is where my concurrence terminates. In reaching its decision that the Respondent's claim was well within time, the trial court adopted the Limitation of Actions Act as the applicable limitation law. However, the accident having happened on 17th December 2010, the applicable limitation law was in fact Section 90 of the Employment Act, 2007 which provides as follows:

90. Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

10. Applying this law, which leaves no room for discretion, the Respondent ought to have filed his claim within three (3) years of accrual of the cause of action. As a result, the Respondent's claim filed on 30th August 2016 was evidently out of time and the trial court erred in disallowing the objection taken by the Appellant. In reaching this decision, the Court disregarded the unsubstantiated submission by Counsel for the Respondent that Section 90 of the Employment Act took effect in 2012.

11. Consequently, the appeal is allowed and the ruling dated 24th November 2017 together with all attendant orders are set aside.

12. In light of the relationship between the parties, I direct that each party will bear their own costs in the appeal and in the proceedings in the court below.

13. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 31ST DAY OF JANUARY 2019

LINNET NDOLO

JUDGE

Appearance:

Mr. Kithinji for the Appellant

Miss Munyari for the Respondent