



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

ELRC APPEAL NO. 19 OF 2018

(Before Hon. Justice Mathews N. Nduma)

OGEMBO TEA FACTORY CO. LTD.....APPELLANT

VERSUS

AMOSH OMBOGO MARANDO.....RESPONDENT

JUDGMENT

1. The Appeal is from judgment of the Principal Magistrate, Ogembo Hon. Naomi Wairimu delivered on 20th December 2017.
2. The grounds of Appeal may be summarized as follows:
 - i. Learned trial magistrate erred in law and fact in failing to hold that the suit was time barred by *dint of Section 90 of the Employment Act and Section 4(2) of the limitation of Actions Act Cap 22 laws of Kenya.*
 - ii. The trial magistrate erred in not finding that the respondent was not an employee of the claimant.
 - iii. The learned magistrate erred in law and fact in holding that the respondent sustained injuries in the course of employment with the Appellant and
 - iv. The learned magistrate erred in law and fact in awarding excessive damages in the circumstances of the case.
3. This being a first appeal, the court's primary role is to re-assess and consider the evidence on record and draw own conclusions based on the applicable law to the facts of the case. **See *Selle vs Associated Motor Boat Company Limited (1968) EA 123.***
4. The issues for determination are:
 - i. Whether the Respondent's suit was time bared and ought to have ben struck-off in the first instance.
 - ii. Whether grounds of Appeal on the merits of the case have substance.
 - iii. What relief ought the court to grant in the circumstances of the case.

Issue I

5. According to the record of Appeal and specifically, the plaint dated 26th January 2012, and filed on 9th February 2012, the cause of action arose on 20th November 2007, when the respondent sustained injuries in the cause of duty at the Appellant's employ by a loose metal bar.
6. The suit was filed four (4) years two months from the date the cause of action arose. The suit is founded on tort and therefore Section 4(2) of the limitation of Actions Act, Cap 22 laws of Kenya applies.
7. The Section reads:

“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.”

8. The respondent pleaded under paragraph 9 of the statement of defence that the matter was time barred and prayed that the suit be struck out.

9. The Appellant filed written submission in which the issue of time bar was canvassed however, the learned trial magistrate did not consider the matter at all in the judgment delivered on 20th December 2017.

10. It is this court’s considered finding that the trial court was bound to consider this issue at the first instance because it was part of the pleadings before court failing which the matter ought to have been revisited in the final judgment of the trial court. **See the cases of Owners of Motor Vessel “Lilian ‘S’ vs Caltex Oil (Kenya) Limited (1989) KLR and Samuel Kamau Macharia and another vs Kenya Commercial Bank Limited and 2 others; S.C Application No. 2 of 2012; (2012)**

11. It is the finding of the court that this suit was time barred by dint of Section 4(1) of the Limitation of Actions Act Cap 22 Laws of Kenya and on this basis alone, the Appeal is allowed and the suit struck off in its entirety.

12. Since the omission to deal with the issue was by the court, we find this appropriate case for each party to bear their costs of the suit and the Appeal.

Judgment Dated, Signed and delivered this 9th day of July, 2019

Mathews N. Nduma

Judge

Appearances

M/S. Onyinkwa for the Appellant.

Mr. Mbeche for the Respondent

Chrispo – Court Clerk