



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL NO. 16 OF 2016

TEITA ESTATES LIMITED.....APPELLANT

v

MUNYAO MUNYOKI.....RESPONDENT

Being an Appeal from the judgment of Ms. E.K. Usui Senior Principal Magistrate delivered on 16 July 2016 in Nairobi SPMCC No. 2666 of 2015 Munyao Munyoki v Teita Estates Ltd

JUDGMENT

1. In a judgment delivered on 6 July 2016, the trial Court entered judgment in favour of Munyao Munyoki (now Respondent) in the sum of Kshs 580,000/- general damages, and Kshs 3,000/- special damages on account of breach of statutory duty of care (injury in the work place).

2. On question of liability, the Court held that the Respondent was 10% liable for the injuries.

3. Teita Estates Ltd (Appellant) was dissatisfied and it filed a *Memorandum of Appeal* on 27 July 2016 listing some 8 grounds of appeal, being

1. **THAT**, the learned Magistrate erred in law and in fact in failing to hold the suit was time barred.

2. **THAT**, the Learned Magistrate erred in law and in fact in failing to hold that the Respondent was a highly skilled and experienced machine operator.

3. **THAT**, the Learned Magistrate erred in law and in fact in failing to hold that the proving cause of the Respondent's injuries was in the Respondent failing to follow the safety procedures by failing to switch off the machinery prior to lifting the roller.

4. **THAT**, the Learned Magistrate erred in law and in fact in failing to apply the principle of proximate cause in determining what was the cause of the Plaintiff's injuries.

5. **THAT**, the Learned Magistrate erred in law and in fact in apportioning liability in the ratio of 10:90 in favour of the Plaintiff as against the Defendant.

6. **THAT**, the Learned Magistrate erred in law and in fact in holding that the Plaintiff had sustained two distinct fractures while in fact the fracture was one, to the left ankle joint.

7. **THAT**, the Learned Magistrate erred in law and in fact in failing to consider the medical report of Dr. Wambugu as to injury sustained and degree of permanent incapacity.

8. **THAT** the Learned Magistrate erred in law and in fact in awarding general damages of Kshs 580,000/-.

4. On 27 February 2019, the Court directed the parties to file/exchange submissions.

5. The Appellant filed its submissions on 20 March 2019 while the Respondent filed his submissions on 26 March 2019.

6. The Court has considered the record and the submissions.

Limitation

7. The first ground of appeal related to limitation, and because limitation is a *jurisdictional question*, a determination in favour of the Appellant will be determinative of the whole Appeal.
8. It was not disputed that the Respondent was injured in the workplace on 23 February 2012 and that he filed his cause of action on 14 May 2015.
9. It was also not disputed that the Appellant raised the issue of limitation in its *Statement of Defence*, and that the trial Court failed to deal with the question in the course of trial as a preliminary issue, or in the judgment.
10. The Court has perused the record keenly.
11. The Respondent must have been on notice that the question of limitation was up. He did not advert to or lead any evidence that the dispute had been reported to the Cabinet Secretary for Labour for conciliation.
12. The only material which was available to the trial Court was the evidence on date of injury, and when the Cause was filed.
13. The trial Court did not use the material available to address itself to the limitation. It therefore fell into error.
14. This Court will therefore look at the issue of limitation instead of remitting it back to the lower Court.
15. According to the Appellant, in terms of section 90 of the Employment Act, 2007, the action should have been instituted within 3 years.
16. The Appellant urged that the leave granted to the Respondent in Chief Magistrate's Misc Application (O.S) No. 224 of 2015 was in error because of the legal principle set out in *Divecon v Samani* (1995-1998) EA 48 that a Court could not extend time/grant leave in claims anchored on contract.
17. Confronting the limitation challenge, the Respondent urged that time for purposes of imitation does not run during conciliation process as provided for in the Labour Relations Act.
18. The Respondent drew the attention of the Court to *Francis Muthini Mue v Rakesh Anand t/a Raunaq Restaurant (a.k.a) Jeatz Restaurant* (2013) eKLR, *Kenya Scientific Research International Technical & Allied Workers Union v Rainald Schumera* (2012) eKLR and *Kenya Plantation & Agricultural Workers Union v Mununga Leaf Base* (2013) eKLR (the 3 cases were decided by this Court differently constituted).
19. This Court in *Kenya Electrical Trades & Allied Workers Union v Kenya Power & Lighting Co. Ltd* (2015) eKLR addressed extensively the case law on limitation including whether time stops running during conciliation.
20. In the said decision, this Court opined that if the parties stuck to the timelines set out in the Labour Relations Act, conciliation should take about half a year.
21. In terms of section 67 of the Labour Relations Act, a conciliator has 30 days within which to determine a trade dispute.
22. The Court of Appeal in *Attorney General & Ar v Andrew Maina Githinji & Ar* (2016) eKLR dealt at length with when a cause of action accrues within the employment context where criminal proceedings based on the same allegations were pending.
23. According to the authority, the pendency of criminal proceedings did not stop time for purposes of limitation from running.
24. In the same vein, this Court is of the view that the proposition that time for purposes of limitation comes to a standstill during pendency of conciliation does not find support in the applicable statutory framework because the conciliation process should ordinarily take about a half year in terms of statutory parameters.
25. The cause of action advanced by the Respondent was based on tort. Under section 4(2) of the Limitation of Actions Act, the prescribed limitation period is 3 years.
26. The Respondent moved the Court outside the prescribed period, if at all it applied.
27. In terms of contractual causes of action, section 4(1) the Limitation of Actions prescribes for 6 years.
28. However, in respect of employment contractual causes (anchored or arising out of a contract of service), section 90 of the Employment Act, 2007 has reduced the limitation period to 3 years.
29. If the breaches contended by the Respondent had both *contractual* and *tortious* foundation, he should have moved the Court within 3 years. He did not.
30. The Court will therefore reach a conclusion that the cause of action presented before the lower Court was statute barred in terms of section 90 of the Employment Act, 2007 as well as under section 4(2) of the Limitation of Actions Act.

31. Limitation being jurisdictional, the Court will allow the Appeal and strike out the Cause which was instituted before the lower Court.

32. No order as to costs.

Delivered, dated and signed in Nairobi on this 5th day of July 2019.

Radido Stephen

Judge

Appearances

For Appellant C.W. Githae & Co. Advocates

For Respondent Musili Mbiti & Associates

Court Assistant Lindsey