REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CIVIL APPEAL NO 20 OF 2018

[FORMERLY NAIROBI HIGH COURT CIVIL APPEAL NO 333 OF 2009]

RAQIB CONSTRUCTION COMPANY.....APPELLANT

VS

PETER MUSYOKI MWANGANGI.....RESPONDENT

(Appeal from the Judgment and Decree of Hon. Maxwell N. Gicheru, CM dated 3rd June 2009 in Garissa CMCC No 33 of 2008)

JUDGMENT

1. This appeal was initially filed in the High Court at Nairobi as Civil Appeal No 333 of 2008. By consent of the parties recorded before **P.J Otieno J** on 4thSeptember 2018, the matter was transferred to this Court for hearing and disposal.

2. Counsel for the parties highlighted their submissions before me on 12th November 2018.

3. In its Memorandum of Appeal dated 29th June 2009 and amended on 14thJanuary 2010, the Appellant raises the following grounds of appeal:

a. The learned Magistrate erred in law in holding that the action was founded in contract;

b. The learned Magistrate erred in law in holding that the Respondent's action was not barred by the Limitation of Actions Act, Cap 22 of the Laws of Kenya;

c. The learned Magistrate erred in law and in fact in finding that the Appellant was the employer of the Respondent;

d. The learned Magistrate erred in holding that the Appellant was liable for the injury sustained by the Respondent;

e. The learned Magistrate's award of general damages of shs. 600,000 was excessive and unreasonable.

4. The first ground of appeal is that that there was no employment relationship between the parties. Mr. Adere for the Appellant submitted that according to the Record of Appeal, the Appellant who had been awarded a tender by the United Nations to undertake construction works at Hagadera in Dadaab Refugee Camp, subcontracted the work to one Wambua Kithuku who recruited workers, including the Respondent.

5. Miss Esami for the Respondent submitted that the Respondent was an employee of the Appellant and that Wambua Kithuku who was an Artisan, was the Respondent's colleague. Counsel added that the Respondent was not issued with a letter of appointment. His employment was therefore by way of oral contract.

6. The second ground of appeal is that the suit was statute barred by virtue of the Limitation of Actions Act. In pursuing this line, Counsel for the Appellant submitted that the cause of action herein arose from tort, rather than contract. Counsel therefore faulted the trial Magistrate for holding that the action arose from contract and that the Appellant owed a duty of care to the Respondent.

7. In response, Counsel for the Respondent submitted that the Appellant indeed owed a duty of care to the Respondent. She added that since the Respondent was injured in the course of his employment, then the cause of action arose from contract rather than tort. Counsel reckoned that the limitation period in the Respondent's case was 6 and not 3 years.

8. The thirdground of appeal is that the accident was not foreseeable in that there was nothing the Appellant could have done to prevent it. Counsel for the Appellant took the view that no protective gear could have prevented the injury to the Respondent. In any event, the issue of

lack of protective gear was not canvassed by the parties in the lower court.

9. On the issue of protective gear, Counsel for the Respondent submitted that due to the nature of work in which the Respondent was employed, the Appellant ought to have provided him with protective gear such as a helmet and goggles.

10. This is a first appeal and as restated by the Court of Appeal in ***Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates[2013] eKLR*** the duty of a first appellate court is to consider and evaluate the evidence on record and draw its own conclusions always bearing in mind that it has neither seen nor heard the witnesses. It is not for the appellate court to introduce extraneous matters that were not canvassed at the trial.

11. In pursuing the ground that there was no employment relationship between the parties, Counsel for the Respondent relied on a '*construction agreement*' between the Appellant and Wambua Kithuku dated 1st September 2003. The Court however noted that in a liability waiver of the same date, Wambua Kithuku is listed as number 1 among the casual workers. No explanation on this discrepancy was offered either to the trial Court or to this Court.

12. Moreover, the responsibility of keeping employment records rests with the employer. The Respondent could not therefore be faulted for failure to produce an employment contract or record of payment of salaries. On this issue therefore, the Court found no reason to disagree with the finding by the learned trial Magistrate that there was an employment relationship between the parties.

13. On the issue of limitation I have this to say; it is evident from the Record of Appeal that the Respondent was injured in the course of his employment. It follows therefore that if the Respondent had not been employed by the Appellant, he would not have met the accident in which he was injured.

14. The dominant cause of action arises from contract and there is no justification to introduce a less limitation period of 3 years. The Court was referred to the decision in ***Athibeta Minayo v Robers Chelimo &another [2005] eKLR*** where it was held that an employer owes a contractual duty of care as to the safety of employees at the work place.

15. This Court therefore agrees with the trial Magistrate that the cause of action arose from contract whose limitation period under Section 4(1) of the Limitation of Actions Act is 6 years.

16. On the question whether the accident was foreseeable, the Court was referred to the following extract from the **Halsbury's Laws of England**, **4th Edition, Vol. 16 para. 562:**

> ***"It is an implied term of the contract of employment at common law that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care; an employee cannot call upon his employer, merely upon the ground of their relation of employer and employee, to compensate him for any injury which he may sustain in the course of his employment in consequence of the dangerous character of the work upon which he isengaged. The employer is not liable to the employee for damage suffered outside the course of his employment. The employer does not warrant the safety of the employee's working condition nor is he an insurer of his employee's safety; the exercise of due care and skill suffices."***

17. From the Record of Appeal, the Respondent worked as a mason and at the time of the accident, he was working with a roll of wire mesh under tension. This is the sort of work for which the Appellant ought to have provided protective gear. In fact the Respondent appears to have been aware of the danger to which the Respondent was exposed as it had made the Respondent and the other workers to execute a liability waiver.

18. The Appellant failed to exercise due care and the trial Magistrate was right in holding it responsible for the Respondent's injuries.

19. On the issue of quantum of damages, I have considered the medical report on which the learned trial Magistrate relied and taking into account that the Respondent completely lost one eye, I have no reason to interfere with the award of Kshs.600,000 in general damages for breach of duty of care resulting in pain, suffering and loss of amenities.

20. In the end, the Appellant's appeal fails and is dismissed with costs to the Respondent in this Court and in the Court below.

21. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 17TH DAY OF DECEMBER 2018

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Aderefor the Appellant

Miss Esami for the Respondent