REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

APPEAL NO. 15 OF 2015

(Formerly Civil Appeal No.48 of 2009 at the High Court at Meru)

Being an Appeal against the Judgment and Decree given on 21.04.2009 by Hon. W.K. Korir, Principal Magistrate in Civil Suit No. 95 of 2007 at Meru

EUROPEAN COMMITTEE FOR AGRICULTURE

TRAINING RURAL DEVELOPMENT (C.E.F.A) KENYA.....APPELLANT

VERSUS

MOSES MURIUKI MATIRI.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 22nd May, 2015)

JUDGMENT

The appellant filed the memorandum of appeal on 21.05.2009 through Kiautha Arithi & Company Advocate. The appellant prayed that the court allows the appeal and dismisses the respondent's suit in the lower court with costs to the appellant; and to award the appellant the costs of the appeal.

On 21.04.2009 the trial court delivered a judgment in favour of the respondent and against the appellant for:

1. Kshs.300,000.00 being general damages for pain, suffering and loss of amenities.
2. Kshs.384,000.00 being compensation for loss of earning capacity.
3. Kshs.3,500.00 being fees for medical report as special damages.
4. Costs of the suit.
5. Interest on the decretal amount at court rates from the date of judgment till payment in full.

The court has considered the grounds of appeal and the submissions made for the parties. The memorandum of appeal set out 9 grounds of appeal which the court has summed up into 3 main issues in dispute for determination in the present appeal. The court makes the following findings on the issues in dispute.

The **1st issue** for determination is whether the respondent's suit was founded in contract or in the civil wrong of tort. It was the appellant's case that the honourable trial court erred in law and fact by finding that the suit was founded in contract and not the tort of negligence and further erred in finding that the suit was not time barred because it was filed within six years and not three years prescribed for the tort of negligence. Thus the suit was time barred because the plaint having been filed on 20.02.2007 and

paragraph 4 of the plaint having stated, and there being no dispute, that it was sometimes in 2003 that the plaintiff, while in the course of duty, contracted multiple health complications due to poor working environment. Further, the respondent had pleaded that the appellant failed, refused, ignored and neglected to adhere to the provisions of basic facilities and was in breach of its statutory duties to its employees and the particulars of the appellant's breach of the duty of care and negligence were set out. The respondent, it was urged for the appellant, never testified about the contract of employment and breach of such contract so that the suit was urged and founded upon the law of torts and not contract.

For the respondent it was submitted that there was no dispute that the parties were in a contract of employment and the appellant's liability arose under that contract of employment. As opposed to contract of employment, it was submitted that a liability in tort arises independent of contract and which was not the case in the present case. It was submitted that workplace injuries manifested two pronged causes of action, one in the civil law of tort and the other in the law of contract and the respondent was entitled to file the suit within 6 years prescribed for contractual liability under section 4 of the Limitation of Actions Act. The respondent referred to **East African Packaging Industries Limited –Versus- Charles Onyango Owuor[2011]eKLR** where the High Court held that the relationship between an employer and the employee in an injury claim was both in contract and tort. Further, in **Central Asbestos Company Limited –Versus- Dodd (1973) EA 518**, it was held the cause of action by an employee for injuries suffered at work started to run from the time the worker became aware of the injury. Again, it was submitted for the respondent that in **Athibeta Minayo Amugoza –Versus- Robers Chelimo and Another[2005]eKLR** it was held that the employer was under a duty of care as to the safety at work of his employee and that duty was contractual.

The court has considered the parties' submissions. It is the opinion of this court that the legislation on prevention of occupational hazards creates the contractual right of employees to proper protection in terms of health and safety at work and therefore also creates the employer's correlating contractual duty to protect employees from risks. Thus, the court holds that the injuries an employee may suffer while at work are a derivative of the identified employee's right and employer's duty founded in the employment relationship. The court holds that as held in the cases cited for the respondent, the employer is under a duty of care as to the safety at work of his employee and that duty is contractual so that the time of limitation applicable to a suit in that regard would be the limitation period prescribed for the suits based on the employment contract running from the time the adverse manifestations related to health and safety at the work place become known to have inflicted the employee.

To answer the 1st issue for determination, the court returns that the respondent's suit was founded on the contract of employment and it was therefore not time barred because it was filed within 6 years prescribed for contracts then applicable to the suits based on the employment contract.

The **2nd issue** for determination is whether the honourable trial court erred in law and fact by failing to make a finding of whether the claimant had contributed to his health failure and the extent or decree of that contribution. It was submitted for the appellant that the doctor's evidence was that the respondent complained of loss of hearing capacity, poor eyesight and bilateral limb weakness since 2003, the same year he had been employed. It was therefore submitted that the respondent had failed to establish the appellant's liability. It was further submitted for the appellant that the respondent had testified that he was allergic to dust and cold environment so that the respondent had not shown how the appellant was responsible for the allergy that afflicted the respondent. It was submitted for the appellant that the defence of **volenti non fit injuria** applied because the respondent was not forced into employment or to continue in employment as he was at liberty to resign.

The appellant cited the opinion in **Japheth Natse Ifedha –Versus- Collindale Security Company Limited [2014]eKLR** where the Court of Appeal cited **Halsbury's Laws of England 4th Edition, Vol.16 Par. 562** thus, **" 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 consequences of dangerous character of the work**

upon which he is engaged. 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 employee's safety; the exercise of due care and skill suffices." Thus, the appellant submitted that as it was held in **Mwanyule –Versus- Said t/a Jomvu Total Service Station [2004]1 KLR 47**, the employer owes no absolute duty to the employee and the only duty owed is that of reasonable care against risk of injury caused by events reasonably foreseeable or which would be prevented by taking reasonable precaution.

The court has revisited the record of the honourable trial court. It is clear from the respondent's evidence that the respondent did not provide all the protective gear and the respondent had to buy socks and head caps for himself. That in itself, in the opinion of the court, shows that the respondent significantly failed to protect the respondent from the harsh cold and dusty environment. As submitted for the respondent, the court finds that the allergies as suffered by the respondent were a consequence of the deployment without sufficient protective gear in the cold forest and then the dusty work of a mason.

For the appellant it was submitted that the respondent suffered allergies not as a consequence of the harsh cold and dusty environment. However, DW1 clearly testified that the respondent joined the employment of the appellant in very good health in 1996. The court finds that the allergies were diagnosed in 2003, the respondent having been exposed to harsh environment in the previous several years of service when he was deployed as a plumber, mason and watchman. The doctor's evidence was clear that the respondent was a middle aged male person who developed hearing, sight and joint complications as a result of exposure to dust and cold in his workplace and he was using spectacles and crutches. The doctor was elaborate that loss of hearing and the cataracts on the respondent's both eyes were due to the long exposure to dust and that all other possible causes of such health complications had been ruled out taking into account the respondent's history. The weak lower limbs were attributable to failing muscles due to spinal damage the doctor associated with the respondent's long service as a mason.

The evidence shows that the appellant failed to supply sufficient protective gear so that the appellant was constraint to mitigate by buying some of such protective clothing. DW2 was not sure whether protective gear had been issued for use in the forest and he failed to produce the record maintained for issuance of the protective gears

To answer the 2nd issue for determination the court finds that the respondent did not contribute to his ill health and the ill health was due to the appellant's failure to provide sufficient protective gear. The court finds that the risks of the harsh environment namely dust and cold environment was foreseeable by the appellant in the deployment of the respondent as a forest watchman and mason.

The **3rd issue** for determination is whether the honourable trial court erred in the awards made in favour of the respondent. The court makes findings as follows.

The appellant has submitted that general damages of Kshs. 300,000.00 and Kshs.384,000.00 for loss of earning capacity were excessive. The learned trial magistrate while taking into account the authorities cited awarded the plaintiff Kshs.300,000.00 for pain, suffering and loss of amenities. The appellant has not showed in what respect that award was excessive and the court finds that it was just. The learned trial magistrate awarded the plaintiff Kshs.384,000.00 damages for loss of earning capacity and future medical care. In making the award the learned trial magistrate considered the doctor's evidence that the respondent's condition was permanent so that the respondent would not be able to engage in future gainful employment. The trial court considered that the respondent was 44 years, he would have worked up to 55 years of age and that the multiplier of 8 years at the last monthly pay of Kshs. 6,000.00 as submitted by the respondent's counsel was reasonable in the circumstances. The court finds that the trial court's award was just as it was reasonable.

To answer the **3rd issue** for determination the court returns that the honourable trial court did not make a mistake in the awards made in favour of the respondent.

In conclusion, judgment is entered for the respondent against the appellant for:

1. Dismissal of the appeal and the appellant to pay the respondent's costs of the appeal proceedings; and
2. The trial court's judgment and decree is hereby upheld.

Signed, dated and delivered in court at Nyeri this Friday, 22nd May, 2015.

BYRAM ONGAYA

JUDGE