



Ngugi v Gathu (Civil Appeal E050 of 2023) [2024] KEHC 9442 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9442 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E050 OF 2023**

JM OMIDO, J

JULY 31, 2024

BETWEEN

DAVID GATHU NGUGI APPELLANT

AND

JOSPHAT NGUGI GATHU RESPONDENT

*(Being an Appeal from the Judgement and Decree of Hon. S. Mwayuli,
SRM delivered on 19th January, 2023 in Kikuyu CMCC No. E315 of 2021)*

JUDGMENT

1. The appeal herein was dismissed on 6th June, 2024 for want of prosecution. This court then directed that the cross appeal proceeds by way of written submissions. In compliance with the directions, the Respondent filed his submissions.
2. The Respondent presented the following grounds of appeal vide his Memorandum of Cross-Appeal dated 28th November, 2019:
 1. That the learned Magistrate erred in law and in fact in finding that the Respondent/Cross-Appellant was partially liable and apportioned liability on 50%/50% yet it was a self-involving accident.
 2. That the learned Magistrate erred in law and in fact by failing to appreciate the fact that the Respondent/Cross-Appellant proved that the Appellant was 100% liable for the occurrence of the accident and burden of proof shifted to the Appellant who failed to call any witnesses to controvert the Respondent/Cross-Appellant's case hence not discharging his burden of proof.
3. The Respondent prayed in the Memorandum of Appeal that this appeal be allowed and there be an order substituting the decree of the lower court with an order that the Appellant was 100% liable for the occurrence of the accident and proceed to award the Respondent the amount of Ksh.1,000,000/- as general damages and that the Respondent be awarded the costs of the Cross-Appeal.



4. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of *Sielle v Associated Motor Boat Co. Ltd* [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.
5. In *Sielle*, Sir Clement De Lestang observed that:

“This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
6. Going to the evidence before the trial court, the Appellant testified as PW1 and told the court that on 18th August, 2021, he was lawfully driving his employer's (the Appellant's) vehicle in the course of his employment when the same, due to its un-roadworthiness, veered off the road, lost control and rolled severally as a result of which the Respondent sustained serious bodily injuries.
7. Upon being cross examined, the Respondent told the trial court that the Appellant was his father and employer at the time of the occurrence of the accident. He further stated that his father had taken out an insurance cover for the said vehicle.
8. The Respondent called Police Constable Somo Abdullahi who testified before the lower court as PW2 and told the court that the accident was self-involving and that the Respondent, who was the driver, sustained serious injuries. The witness produced as an exhibit the police abstract that was issued when the accident was reported.
9. The Appellant, who was the Defendant in the lower court case, did not call any witness.
10. This court directed that the Cross-Appeal proceeds by way of written submissions and the Respondent filed his submissions, in compliance with the court's directions.
11. From the submissions filed, I note that the Respondent drastically departed from the grounds in his Memorandum of Cross-Appeal (see paragraph 2 above) and the prayers in the Cross-Appeal (see paragraph 3 above).
12. Whereas his grounds of appeal generally concerned the issue of liability, whereby he sought that the court allows the Cross-Appeal and sets aside the trial court's finding that the Respondent and the Appellant were equally to blame for the accident, and substitutes the same with a finding that the Appellant was 100% to blame, the Respondent introduced new and extraneous matters in his submissions, as we shall shortly see. In fact, the Respondent did not address the issues raised in the Cross-Appeal, at all. I will nevertheless proceed to address the issues raised in the submissions.
13. The Respondent states in his submissions that he sustained injuries in the course of his employment as the Appellant's driver and that he is therefore entitled to be compensated by the Appellant for the injuries, by virtue of his employment. This issue was not raised in the submissions.
14. The Respondent further states that he is entitled to be fully compensated for the injuries by his employer's insurance under Section 5(b)(ii) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405, Laws of Kenya. This issue was also not raised in the Cross-Appeal. Moreover, I note that the



insurance company that he refers to was not a party in the suit before the lower court and even this appeal.

15. Although this court is not obliged to address the two extraneous issues raised in the submissions, I will proceed to determine them. I therefore discern the matters to be addressed by this court as follows:
 - a. Whether this court has jurisdiction to entertain the instant cross appeal (raised sua sponte).
 - b. Whether the Respondent is entitled to full compensation by the Appellant and the Appellant's insurers for injuries that he sustained in the course of his employment under Section 5(b)(ii) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 Laws of Kenya.
16. In respect of the first issue, as the Respondent claims that he sought compensation following injuries that he sustained in the course of his employment with his employer (the Appellant), it then follows that his appeal is based on the position that the matter herein comprises a work injury claim.
17. The Respondent pleaded under paragraph 2 of the Plea that he was under the instructions of the Appellant as his employer when he sustained injuries. In his evidence upon being cross-examined, he reiterated to the trial court that the Appellant was his employer.
18. Under paragraph 4 and 5 of the Plea, the Respondent pleaded that the injuries that he sustained were occasioned by the Appellant's negligence. He particularized the acts and/or omissions that he claimed amounted to the negligence of the Appellant.
19. As a result of the injuries that the Respondent sustained he sought that the Appellant be held liable and prayed for the following reliefs against his said erstwhile employer:
 - i. General damages for pain, suffering, diminished earning capacity and loss of amenities.
 - ii. Future medical expenses amounting to Ksh.80,000/-.
 - iii. Special damages in the sum of Ksh.124,950/-.
 - iv. Costs and interest of the suit.
20. From the above, it is instructive that the Respondent claimed before the trial court that he was injured while working as the Appellant's employee (driver) and in the course of his employment. The Appellant, as stated above sought damages and/or compensation for those injuries. Is this appeal tenable before this court?
21. It is trite law, jurisdiction is everything as it denotes the authority or power to hear and determine judicial disputes. It was the finding of the court in the case of *R v Karisa Chengo* [2017] eKLR, that jurisdiction is that which grants a court authority to decide matters by holding;

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”



22. I also take cognizance of the finding of the Supreme Court in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR where it was held that:

“A court jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

23. The issue of jurisdiction can be raised by a party or by the court sua sponte, at any stage of the proceedings or even on appeal (see Constantine Joseph Advocates LLP v Attorney General [2022] eKLR). It can be raised by a party in the pleadings through a preliminary objection or even in the submissions.

24. Once a court’s jurisdiction is challenged, the issue must be determined first before the court takes further proceedings or considering other issues (see *National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others (Civil Appeal 656 of 2022)* [2023] KECA 80 (KLR) (3 February 2023) (Judgment).

25. The Employment and Labour Relations Court is created under *the Constitution*. *The Constitution* provides as follows at Article 162 (2) and (3).

162

- (2). Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –
 - (a) employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land.
- (3). Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

26. The jurisdiction of this court (the High Court) is provided for under Article 165(3), (4), (5), (6) and (7) of *the Constitution*, which states as follows:

165

- (3) Subject to clause (5), the High Court shall have –
 - a. unlimited original jurisdiction in criminal and civil matters;
 - b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;



- c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of –
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.
- (4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.
- (5) The High Court shall not have jurisdiction in respect of matters –
 - (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).
- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

(Underlined emphasis mine).

- 27. It is clear from that, under Article 165(5)b of *the Constitution*, the High Court does not have power to determine matters that fall within the ambit and/or jurisdiction of the Employment and Labour Relations Court. The High Court does not also have the corresponding appellate jurisdiction to determine the matters falling within the realm of the Employment and Labour Relations Court.
- 28. Having determined that I do not have jurisdiction to entertain the appeal herein, I am guided by the Court of Appeal in the case of Owners of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) Limited [1989] KLR 1, that “Jurisdiction is everything. Without it, the court must lay down its tools”.



29. The other issue is whether the Respondent is entitled to full compensation by the Appellant and the insurers of the Appellant for injuries that he sustained in the course of his employment under Section 5(b)(ii) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 Laws of Kenya.

5. Requirements in respect of insurance policies

In order to comply with the requirements of Section 4, the policy of insurance must be a policy which –

- a. is issued by a company which is required under the *Insurance Act*, 1984 (Cap. 487) to carry on motor vehicle insurance business; and
- b. insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:

Provided that a policy in terms of this section shall not be required to cover —

- i. liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or
- ii. except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or
- iii. any contractual liability;
- iv. liability of any sum in excess of three million shillings, arising out of a claim by one person.

30. The law provides that under Section 5(b)(i) of Cap 405, that liability in respect of the death arising out of and in the course of employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment.

31. Under Section 5(b)(ii) of Cap 405, the law provides that compulsory insurance is not required in respect of risk to passengers who are not carried for hire or reward. (See *Maria Ciabaitaru M’Mairanyi & Others vs Blue Shield Insurance Co. Ltd* (C. A. 101 of 2000).

32. Under the above provisions, the Respondent, having been a driver and/or employee of the Appellant, is not a third party within the meaning of the Insurance (Motor Vehicle Third Party Risks) Act and cannot recover from the insurers of the Appellant.

33. Moreover, as I have stated above, the insurers are not parties to this appeal, neither were they parties to the matter before the trial court. It would not have been within the powers of the trial court and even this court to condemn a party that is not enjoined in the proceedings without hearing that party by ordering that it compensates the Respondent. In any event, the said insurers are not named and/or identified.

34. In the result, as I am not seized of jurisdiction to consider this Cross-Appeal, the same having been filed before the wrong court, and as the grounds addressed in the submissions were not raised in the Cross-



Appeal, coupled with the fact that Respondent has pursued prayers in respect of issues that were not addressed before the trial court, I proceed to strike it out. I make no orders as to costs as the Appellant did not participate in the appeal.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 31ST DAY OF JULY, 2024

JOE M. OMIDO

JUDGE

For The Appellant: Ms. Wamaitha.

For The 1st And 2Nd Respondents: No Appearance.

Court Assistant: Ms. Njoroge.

