REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 37 OF 2018

MILTON KHAMASI ANORD *ALIAS* MILTON HAMASI.....APPELLANT

VERSUS

CAPITAL REEF (CO) LTD.....RESPONDENT

RULING

[1] The appellant, **Milton Khamasi Anord** alias **Milton Hamasi,** filed **Mombasa CMCC No. 577 of 2015**, contending that that on or about **5th February, 2015**, he was lawfully and carefully in the course of employment with the Respondent as a casual laborer, duly instructed by his supervisor to load 90kg bags of sesame seeds; and that in the process a bag fell off a stack from above him and accidentally landed on his back. That as a direct result of that accident he sustained serious injury, loss and damage.

[2] Both parties herein agree that the cause of action arose from a work-related injury. Accordingly, **Mr. Shikely**, learned counsel for the respondent raised the issue of jurisdiction in his written submissions dated **27th October 2021**. It is therefore imperative that the issue of jurisdiction be determined first; hence this ruling instead of a judgment

on the merits of the appeal.

[3] Mr. Shikely relied on **Section 16 of the Work Injury Benefit Act, No. 13 of 2007** in urging the Court to find that its jurisdiction is expressly ousted thereby in respect of claims arising out of an occupational accident in the course of employment. Counsel also referred to the Supreme Court case of Petition No. 4 of 2019 **Law Society of Kenya v Attorney General & Another** [2019] eKLR to buttress his arguments.

[4] On her part, **Ms. Osino**, learned counsel for the appellant, was of the view that this court is clothed with the requisite jurisdiction to hear and determine this appeal. She relied on the doctrine of legitimate expectation and asserted that the decision of the subordinate court was delivered on **2nd March, 2018** well before the Supreme Court pronounced itself in **Law Society of Kenya (supra);** and therefore this appeal is warranted.

[5] It cannot be gainsaid that there have been conflicting decisions in respect of litigation touching on the interpretation of the **Work Injury Benefit Act No. 13 of 2007**. In such decision, namely, **Law Society Of Kenya v Attorney-General & Another** [2009] eKLR, **Hon. Ojwang, J**, (as he then was) declared **Sections 4; 7(1) and (2); 10(4); 16; 21(1); 23(1); 25(1) and (3); 52(1) and (2); and 58 (2)** of the **Work Injury Benefit Act** to be inconsistent with the provisions of the former Constitution.

[6] On Appeal to the Court of Appeal in **Civil Appeal No. 13 of 2011 (Attorney General v Law Society of Kenya & Another** [2017] eKLR**),** the High Court's decision was overturned. The Court of Appeal took the view that **Sections 4; 16; 21(1); 23(1); 25(1) and (3); 52(1) and (2); and 58 (2)** of the **Work Injury Benefit Act** are not inconsistent with the former **Constitution**. The Court further held that only **Sections 7** (insofar as it provides for the Minister's approval or exemption) and **10(4)** are inconsistent with the former and current **Constitution of Kenya, 2010.**

[7] The Supreme Court, in **Law Society of Kenya v Attorney General & Another** (supra), upheld the decision of the Court of Appeal and held a follows:

> **"…[61] Furthermore, this Court should consider the Constitution 2010's provisions to help deduce whether or not the impugned provisions, when read alongside the purpose of WIBA would assist in bringing clarity and justice to the issues in contest. In doing so, a plain reading of Section 16 of the Act would reveal that its intention is not to limit access to courts but to create a statutory mechanism where any claim by an employee under the Act is subjected, initially, to a process of dispute resolution starting with an investigation and award by the Director aforesaid and thereafter, under Section 52 an appeal**

mechanism to the then Industrial Court…

[63] Having so held, it is evident that by granting the Director authority to make inquiries that are necessary to decide upon any claim or liability in accordance with WIBA, the jurisdiction of the High Court to deal with constitutional questions and violations that may arise from such claims under Article 165 of the Constitution 2010 is not ousted at all. Similarly, the appellate mechanism to the Industrial Court, in the circumstances, cannot be legitimately questioned…

[69] We have stated that Section 16 cannot be read in isolation because if read with Section 23 and 52 of the Act, the Act provides for legal redress to the Industrial Court (now the Employment and Labour Relations Court) and therefore judicial assistance can be sought by aggrieved parties from decisions of the Director and the court can make a determination with respect to all relevant matters arising from those decisions. It cannot, therefore, be the case that section 16 amounts to an ouster clause. It is in fact merely facilitative of what may eventually end up in Court.

[70] Flowing from the above analysis, it is apparent that in considering the nature and extent of the limitation placed under Section 16 of the Act, it becomes clear that it does not permanently limit the right to access courts by an aggrieved party. It is only the initial point of call for decisions in workers' compensation. When read in whole with Section 23 and 52 of the Act, therefore, a party is not left without access to justice nor do employees or employers have to result to self-help mechanisms. What the section does, is that it allows the use of alternative dispute resolution mechanisms to be invoked before one can approach a court…"

[8] It is therefore clear from the decision of the Supreme Court that the jurisdiction of the High Court to deal with constitutional questions and violations that may arise from the **Work Injury Benefit Act** is not ousted, but reinforced. Likewise, the appellate jurisdiction of the Employment and Labour Relations Court cannot be questioned.

[9] While it is understandable that the case herein was filed in **2015**, it is important to note that it was concluded on **2nd March, 2018** after the Court of Appeal had delivered its decision and overturned the High Court decision. Subsequently, the Supreme Court upheld the decision of the Court of Appeal, and held in **Law Society of Kenya v Attorney General & Another (supra)** that: -

[85] **In agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of the Act, litigation relating to work-injuries had gone on and a number of the suits had progressed up to decree stage; some of which were still being heard; while others were still at the preliminary stage. All such matters were being dealt with under the then existing and completely different regimes of law. We thus agree with the Appellate Court that claimants in those pending cases have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked. However, were it not for such legitimate expectation, WIBA, not being unconstitutional and an even more progressive statute, as we have shown above we opine that it is best that all matters are finalized under Section 52 aforesaid…."**

[10] It is instructive that **Section 52** of the **Work Injuries Benefit Act** provides: -

(1) The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.

(2) An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such decision.

[11] It is, consequently, evident from **Section 52** of the **Act**, that appeals under the **Work Injury Benefit Act** lie to the Industrial Court (now the Employment and Labour Relations Court) established under **Article 162 (2) (a) of the Constitution of Kenya, 2010;** whose jurisdiction is provided for under **Section 12** of the **Employment & Labour Relations Court No. 12 of 2011. Section 12** provides: -

(1) the court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to in accordance with Article 162(2) of the constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including; -

***(a) d*isputes relating to or arising out of employment between an employer and an employee;**

(b) disputes between an employer and a trade union;

(c) disputes between an employers' organization and a trade union's organization;

(d) disputes between trade unions;

(e) disputes between employer organizations;

(f) disputes between an employers' organization and a trade union;

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer's organization or a federation and a member thereof;

(i) disputes concerning the registration and election of trade union officials; and

(j) disputes relating to the registration and enforcement of collective agreements.

[12] Further, the **Employment Act No. 11 of 2007** under **Section 87** provides as follows**: -**

(1) Subject to the provisions of this Act whenever –

(a) an employer or employee neglects or refuses to fulfill a contract of service; or

(b) any question, difference or dispute arises as to the rights or liabilities of either party; or

(c) touching any misconduct, neglect or ill-treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.

(2) No court other than the Industrial court shall determine any complaint or suit referred to in subsection (1).

(3) This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute.

[13] Needless to say that jurisdiction is everything; and it is trite that the same can be raised at any time, even on appeal. The Court of Appeal made this restatement in **Kenya Ports Authority v Modern Holdings [E.A] Limited** [2017] eKLR thus: -

We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:

"….at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself

- provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard."

(See All Progressive Grand Alliance (APGA) v. Senator Christiana N.D. Anyanwu & 2 others, LER [2014] SC. 20/2013 Supreme Court of Nigeria). We agree with these authorities and, hold that the question of jurisdiction was properly raised before this Court because, as they say in Latin, ex nihilo nihil fit (out of nothing comes nothing).

[14] Hence, this being an appeal arising from a work injury, is a dispute between an employer and employee. Accordingly, it is my finding that the Court with jurisdiction to hear and determine this appeal is the Employment and Labour Relations Court. In the premises, it is hereby ordered, in the larger interests of justice, that this appeal be transferred to the Employment and Labour Relations Court, Mombasa, for hearing and determination.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF FEBRUARY, 2022

OLGA SEWE

JUDGE