



**Ndoro v Elegant Holdings Limited (Civil Appeal 125 of 2016)
[2022] KEHC 10833 (KLR) (22 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 10833 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 125 OF 2016**

MN MWANGI, J

APRIL 22, 2022

BETWEEN

CHARO CHAI NDORO APPELLANT

AND

ELEGANT HOLDINGS LIMITED RESPONDENT

JUDGMENT

1. The appellant Charo Chai Ndoro, the respondent's employee, was the plaintiff in Civil Suit No.116 of 2014 at Kwale, where he instituted a suit against the defendant (respondent) through a plaint filed on 28th May, 2014 where he claimed general damages for pain, suffering, loss of earnings, cost of future medical expenses, special damages of Kshs. 2,000/=, costs and interest on account of injuries he alleged to have sustained on 10th October, 2012, in the course of his employment as a carpenter.
2. The appellant averred that it was the respondent's express and implied duty to take all reasonable precautions for his safety while engaged in the said employment and not to have exposed him to the risk of injury and to have provided a safe and proper system of working environment.
3. The appellant averred that on the alleged date, he was lawfully and carefully in the course of his employment whereof he had been instructed to drill and cut timber in the respondent's premises at Ukunda. That while in the process of so doing, the timber forcefully slid thereby pushing his left hand into the electric power saw where he lost his two middle fingers as a result of which he suffered severe injuries.
4. The appellant particularized the particulars of negligence/breach of contract as follows:
 - (i) Failing to take reasonable precautions for the safety of the plaintiff while he was engaged on his work;



- (ii) Exposing the plaintiff to a risk of damage or injury of which the defendant knew or ought to have known;
 - (iii) Failing to assign the plaintiff proper and safe duties and instruct him on how to safely handle the same; and
 - (iv) Failing to provide the plaintiff with safety devices.
5. The appellant's suit was undefended. After formal proof hearing, the Trial Magistrate found that the respondent was 100% liable for the accident. The appellant was awarded:
- (i) Kshs. 150,000.00.....general damages
 - (ii) Kshs. 2000.00special damages
 - (iii) Costs and interest.
6. Being dissatisfied with the said decision, the appellant has moved this Court through a Memorandum of Appeal dated 15th September, 2016 and filed in Court on 22nd September, 2016 wherein he raised the following grounds of appeal-
- (i) That the Trial Magistrate erred in law and fact and misdirected herself as to the exact nature of the appellant's injuries and therefore erred in law in his assessment of the damages awarded to the appellant which award is so inordinately low that it must be a wholly erroneous estimate of damages; and
 - (ii) That Trial Magistrate erred in law in failing to appreciate the principles applicable in award of damages.
7. This appeal was undefended. The appellant's submissions were filed on February 17, 2022 by the law firm of Madzayo Mrima & Jadi Advocates.
8. After carefully considering the Record of Appeal and in the interest of justice, this Court needs to establish whether the instant appeal is properly before it, before going into its merits and demerits.
9. Having looked at the plaint dated and filed on May 28, 2014 in the lower Court, at paragraph 3 thereof, it discloses that the appellant was employed by the respondent as a carpenter on a casual basis. At page 35 of the Record of Appeal dated August 28, 2018, the appellant testified that he worked for the respondent as a carpenter and that he was injured while working at the respondent's premises on October 10, 2012.
10. From this court's observation, there was an employer-employee relationship between the respondent and the appellant herein, as result of which the court clothed with the jurisdiction to determine an appeal of this nature is the Employment and Labour Relations Court.
11. Jurisdiction is the very basis upon which any Tribunal or Court tries a case. It is the lifeline of all trials. A trial by a Court without jurisdiction is a nullity. It is in the interest of justice for this Court to raise the issue of jurisdiction suo motu to save time and costs, rather than delve into details in a matter whose jurisdiction lies elsewhere. The issue of jurisdiction was addressed in the case of the *Owners of the Motor Vessel "Lillian's vs Caltex Oil Kenya Ltd* (1989) KLR 1, where Nyarangi, JA pronounced himself as follows-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized by the matter is then obliged to decide the issue



right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction”

12. In addressing the matter at hand, this Court has in its mind the provisions of articles 162(2) and 165(5) of *the Constitution*, sections 4 and 12 of the Employment & *Labour Relations Act*, and section 87 of the *Employment Act*.
13. *The Constitution* of Kenya, 2010 establishes the ELRC in articles 162(2) of *the Constitution* which reads as follows-

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations.”
14. Article 165(5) of *the Constitution* of Kenya, 2010 provides that the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the Courts contemplated in article 162(2) of the said Constitution.
15. Section 4 of the ELRC Act states thus:

“In pursuant to article 162(2) of *the Constitution*, there is established the Industrial Court for the purpose of settling employment and industrial relations disputes, and the furtherance, securing and maintenance of good employment and labour relations in Kenya.”
16. Section 12(1) (a) of the *ELRC* Act defines the jurisdiction of the ELRC. It stipulates as follows-

“The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of the Act or any written law which extends jurisdiction to the court relating to employment and labour relations including;

 - (a) Disputes relating to or arising out of employment between an employer and employee”
17. Section 87(1) of the *Employment Act* outlines what constitutes a labour dispute in the following terms-

“(1) Subject to the provisions of this Act whenever;

 - (a) an employer or employee neglects to fulfil a contract of service; or
 - (b) any question, difference or dispute arises as to the rights or liabilities of either party; or,
 - (c) touching on 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.”
18. For the avoidance of doubt and to lay emphasis on the jurisdiction of the *ELRC*, section 87(2) of the said Act states that-

“No other Court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1).”



19. The exclusivity of the jurisdiction of the Employment and labour Relations Court vis a vis the High Court in relation to such disputes was clarified by the Supreme Court in the case of Republic v Karisa Chengo & others, [2017] eKLR, where it held as follows-

“From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of courts, with sui generis jurisdiction, is provided for. We therefore entirely concur with the court of Appeal’s decision that such parity of hierarchical stature does not imply that either Environment and Land Court or Employment and Labour Relations Court is the High court or vice versa. The three are different and autonomous courts and exercise different and distinct jurisdictions. As Article 165 (5) precludes the High court from entertaining matters reserved to the Environment and Land Court and Employment and Labour Relations Court, it should, by the same token, be informed that the Environment and Land Court and Employment and Labour Relations Court too cannot hear matters reserved to the jurisdiction of the High court.” (emphasis added).

20. From the pleadings and evidence on the Record of Appeal herein, it is clear that the appellant’s claim arose out of a work place injury based on an employment relationship between the appellant and the respondent. This Court therefore has no jurisdiction to determine the subject matter of the appeal.
21. Having concluded that this is not the proper forum, I need not go into the merits or otherwise of the appeal, which is for the ELRC to determine. As a result, the appeal herein is hereby struck out. The appellant may seek redress in the appropriate forum. Costs would have been awarded to the respondent as this appeal was filed in the wrong forum by the appellant. The respondent did not defend this appeal, as such, there shall be no order as to costs.

It is hereby so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 22ND DAY OF APRIL, 2022.

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the then Chief Justice on the 17th April, 2020 and subsequent directions, the Judgment herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

No appearance for the appellant

No appearance for the respondent

Mr. Oliver Musundi – Court Assistant.

