



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 137 OF 2017

RUTH NALIKA SHIKAMI.....APPELLANT

-VERSUS

ICG MALTAURO.....RESPONDENT

(Being an appeal from the judgment in Eldoret CMCC No. 48 of 2016

delivered by Resident Magistrate Honorable N. Moseti on 10th October, 2017).

JUDGMENT

This appeal arises from the judgment and decree of Hon. N. MOSETI (Resident Magistrate) in Eldoret, delivered on 10/ 10/2017 in Eldoret croc No. 48 of 2016.

In the lower court the Appellant vide plaint dated 26/01/2016 and filed in court on 27/ 1/2016 brought a suit for negligence against the Respondent herein seeking for general and special damages, costs and interest.

He alleged that on or about 12/9/2015, while on duty as an employee for the Appellant, he was crushed by a machine as a result of which he sustained serious injuries leading to loss and damage for which he holds the Respondent responsible for allegedly failing to provide a safe working environment.

The matter proceeded to full hearing and on 10/ 10/2017 the trial court delivered its judgment whereby the respondent herein was awarded Kshs.250,000/= as general damages, Kshs.5,500/= as special damages as well as costs and interest of the suit.

The court also in its judgment apportioned liability in the ratio of 50%:50% between the parties herein.

Being dissatisfied with the trial court's judgment in its entirety the Appellant has filed the instant appeal challenging both liability and quantum via his memorandum of appeal dated 1/11/2017 citing ten (10) grounds of appeal as stipulated on the face of the Memorandum of appeal filed in court on 2/ 11/2017.

When the matter came up for mention for directions on how the appeal will proceed, it was agreed that the appeal be canvassed by way of written submissions, and both the Appellant and Respondent filed their respective submissions.

ISSUE FOR DETERMINATION

Whether the court has jurisdiction to entertain this matter in view of the Work Injury Benefits Act of 2007 and the Supreme Court's Judgment delivered on 3rd December, 2019.

ANALYSIS AND DETERMINATION

This being a first appeal, this court is obliged by the stipulation in *Section 78 of the Civil Procedure Act*, to re-assess and reevaluate the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that unlike the trial court, it neither saw nor heard the witnesses as they testified. This legal principal was pronounced in the case of; -

Siaya Civil Appeal No. 5 of 2017, Francis Ndahebwa Twala vs Ben Nganyi, where **R. E. ABURILI J.** stated as follows;

This being a first appeal, this Court is mandated by Section 78 of the Civil Procedure Act and as was espoused in the case of Kenya Ports Authority Vs Kushon (K) Ltd (2009) 2 EA, 212 wherein the Court of Appeal stated; inter alia: -

"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its OWN conclusion though it should always bear in mind that it has neither heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. "

I have carefully considered the appeal, the pleadings and evidence adduced before the trial court, the exhibits produced therein, the submissions in support of this appeal and the authorities relied on by the counsels on record for parties herein.

On, jurisdiction, upon perusal of the lower court proceedings, I have noted that the plaint in the primary suit is dated 26/01/2016 and the same was filed in court on 27/1/2016.

The *Work Injury Benefits Act (WIBA), 2007* came into operation on 2nd June 2008 via Gazette Notice No. 60 of 23rd May, 2008.

Section 16 of the Act ousts the jurisdiction of the Courts in claims arising from an occupational accident or disease-causing disablement or death in the course of work. The section thus provides;

"No action shall lie by an employee or a dependent of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death

Under the framework established under the Act, work injury related claims are to be referred to the Director of Occupational Safety and Health.

The Law Society of Kenya on 14th April, 2008 moved to court to challenge this provision and other provisions of the Act citing that it was inconsistent with Section 60 of the repealed Constitution, via ***Law Society of Kenya v Hon. Attorney General & anor. Nairobi Petition Mo. 185 of 2008*** and on 4 March 2009, the High Court issued a declaration that Section 16 of the Act (amongst other sections were inconsistent with the Constitution and therefore null and devoid of the status of law.

The Honourable Attorney General aggrieved with the High Court's declarations, appealed to the Court of Appeal in ***Attorney General VS Law Society of KENYA & Anor [2017] eKLR***, and the Court of Appeal rendered itself on 17th November 2017 whereby it set aside the High Court's declaration that Section 16 of the Act was inconsistent with the Constitution.

Dissatisfied with the said decision, the Law Society of Kenya appealed to the Supreme Court via ***Law Society of Kenya v Attorney General & Anor [2019] eKLR***.

The Supreme Court dismissed the petition on 3 December, 2019 and at Paragraph 85 it rendered itself as follows:-

. 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 a 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 even more progressive statute, as we have shown above, we opine that it is best that all matters are finalized under Section 52 aforesaid.

I therefore find that Section 16 of the *Work Injury Benefits Act* became operational and applicable from 2.6.2008 when the Act came into force. According to the supreme court's decision at Paragraph 85 above, only those matters that were filed in court before the enactment of the *Work Injury Benefits Act (WIBA)* should be heard and concluded by the courts. However, matters that were instituted in court after 2.6.2008 when the Act came into operation should be handled by the Director of Occupational Safety and Health.

In this instant case, it is alleged at Paragraph 5 of the plaint on Page 3 of the Record of appeal, that the cause of action occurred on 12/9/2015, after the enactment of the Act.

It is therefore evident that when the Respondent herein moved the trial Court, the Courts had no jurisdiction to entertain work injury related claims as stipulated under the *Work Injury Benefits Act (WIBA)*.

According to the Court of Appeal's judgment in ***Attorney-General v Law Society of Kenya & Anor [2017] eKLR***, it was held that all cases

filed in Court after 2nd June 2008 could only continue and be sustained before the Director of Occupational Safety and Health as per the provisions of the Act.

From the foregoing considerations, it is clear that this court lacks

jurisdiction to hear and determine this matter by dint of *Section 16* of the *Work Benefits Injury Act*, which requires that from 2nd June 2008, no employee should approach the Courts with claims seeking damages for action in respect of occupational accident or disease resulting in disablement or death of an employee against the employer.

It is notable that the trial court as well as the parties herein did not notice or point out the issue of jurisdiction of the court during the trial.

In fact, the defendant at paragraph 11 of its statement of defence on page 45 of the record of appeal admitted that the court has jurisdiction. It thus stated; "***the jurisdiction of this honourable court is admitted.***"

In that regard therefore even without dwelling on the issues of quantum and liability as raised by the appellant in its appeal, it was imperative upon this court to deal with the issue of Jurisdiction.

It is trite law that jurisdiction is everything without which the court downs its tools.

This legal principle was established in the *locus classicus* case of ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1*** where Justice Nyarangi of the Court of Appeal held as follows;

"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 a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.
"

It is clear that the trial court's judgment that led to this appeal was delivered by a court which had no jurisdiction and is therefore a nullity. The appeal therefore fails.

COSTS

Costs are in the discretion of the court under *Section 27* of the *Civil Procedure Act*. As the plaintiff filed his suit in honest pursuit of his claim for compensation for personal injury, which has not been determined on its merits for want of jurisdiction of the Court, the order on costs that commends itself to this Court is that each party bears its own costs both in the trial Court and in this Court.

ORDERS

Accordingly, for the reasons set out above, the appeal is dismissed, the decree and judgment of the trial court are vacated with no order as to costs.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 26TH DAY OF MAY, 2021.

In the presence of:-

Mr. Rutto for the Respondent.

Mr. Okara for the appellant

Gladys - Court Assistant