



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KERICHO**

**HIGH COURT CIVIL APPEAL NO.35 OF 2018**

**MAMUL TEA FACTORY CO. LIMITED.....APPELLANT**

**VERSUS**

**JANET CHEBET ORERO.....RESPONDENT**

*(Being an Appeal from the Judgment of Hon. S.M. Mokua*

*(CM) in Kericho CMCC. No.129 of 2016 delivered on 30/10/2018)*

**J U D G M E N T**

1. The Appellant in this case, **MOMUL TEA FACTORY LIMITED** has appealed against the Judgment and decree of the Trial Court delivered in favour of the Respondent against the Appellant **JANET CHEBET ORERO** in the sum of kshs.707,000/=

2. The award was in respect of injuries sustained by the Respondent on 9/12/2012 in the course of her Employment with the Appellant.

3. The Respondent was working with the Appellant when she sustained the injuries. The Respondent said in her evidence that she was cleaning a machine in the tea processing section when she sustained a deep cut wound associated with muscle loss and tendon severing.

4. The Respondent had no gloves and she had not been told that the machine she was cleaning was defective. The machine injured her on the right hand when she inserted into it resulting in nerve injury.

5. The Appellant filed a defense denying the Respondent's claim and pleaded that the court lacked jurisdiction to entertain the claim.

6. The Trial Court heard the evidence and found that the accident occurred on 9/12/2012 and the suit was filed on 19/4/2016 which was 3 years and four months after the cause of action arose. There was evidence that the Respondent filed the DOSH 1 form on 7/11/2014 and according to her, the Appellant conducted itself in a manner suggestive that it was willing to settle the claim.

7. The Appellant sustained the following injuries:-

*(a) Facial Injuries*

*(b) Injury to the chest*

*(c) Injury to the right leg-cut wounds*

8. The Trial Court awarded damages as follows: -

General damages - Kshs.700,000/=.

Special damages - Kshs. 7,000/=.

TOTAL - Kshs.707,000/=

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9. The Appellant is dissatisfied with both the finding on liability and the award of damages of Kshs.707,000/= and has appealed to this court

on the followings grounds:-

- (i) THAT the Trial Court had no jurisdiction to hear the suit under the Employment and Work Injury Benefits Act,(WIBA) 2007.*
- (ii) THAT the Trial Court decided the case on the basis of unpleaded issues and took into consideration extraneous matters and suppositions.*
- (iii) THAT the Trial Court ignored the submissions by the Appellant.*
- (iv) THAT the award of damage was inordinately high erroneous, oppressive and punitive and it amounts to miscarriage of justice and that the Trial Court applied wrong principles in assessing damages.*

10. The parties filed written submissions in the appeal which I have duly considered. The issues for determination in the appeal are as follows;

- (a) Whether the trial court had the jurisdiction to hear and determine the suit.*
- (b) Whether the suit by the Appellant was time barred.*
- (c) Whether the trial court considered matters that were not pleaded and*
- (d) Whether the trial court applied wrong principles in coming to its decision on the quantum awarded to the respondent.*

11. In the plaint filed at the trial court, the respondent/ plaintiff made averments to the effect that she had been employed by the appellant/ defendant as a general laborer. It is therefore clear that the parties to the suit were in an employer-employee relationship and the accident occurred within the confines of that relationship.

12. On the issue of Jurisdiction of the trial court, it is important to look into the subsisting law at the time when this matter was first filed in court. Although Section 16 of Work Injury Benefits Act bestowed on the Director of Occupational Safety and Health Services jurisdiction to determine claims on work related injuries, this suit was filed in April of 2016 after the High Court in Nairobi **High Court Petition no. 185 of 2008** declared section 16 amongst other provisions of the Work Injury Benefits Act unconstitutional.

13. The **Attorney General in civil application no. 144 of 2009 (UR 97/2009)**, sought to have the order of the high court stayed by the court of appeal, however, the court of appeal in dismissing this application stated as follows: *“The orders made by Ojwang’ J, merely nullified certain sections of the Act. Those orders do not require the applicant to do or refrain from doing anything. We cannot in a motion for stay of execution, restore into operation the nullified sections; the effect of that would be to reverse the decisions of the trial Judge on a motion for stay. That is not permissible.”*

14. The effect of dismissal of the application for stay meant that the orders made by Justice Ojwang’ were still applicable and as such section 16 was still null and void pending the hearing and determination of the appeal by the Attorney General at the court of appeal.

15. However, the court of appeal in **Attorney General versus Law Society of Kenya & Another (2017) eKLR** on the 17th of November 2017 set aside the order of the high court declaring section 16 amongst other provisions of the Work Injury Benefits Act unconstitutional, and stated that only those matters that had been filed prior to the commencement of the work injury benefits act, had the legitimate expectations that their claims shall be concluded under the judicial process which they had invoked. It stated as follows:

**“With respect, we agree that claimants in those pending case have legitimate expectations that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked.”**

16. I find that this case was filed in the year 2016 when the High Court had declared sections of **WIBA** unconstitutional and therefore the Trial court had jurisdiction to hear it .Although the judgment was delivered in the year 2018,the claimant had a legitimate expectation that the case would be concluded under the judicial process which they had invoked going by the above stated case of **Attorney General versus Law Society of Kenya & Another** (supra)

17. However, with regard to this appeal, **Article 162 (2)** of the **Constitution of Kenya 2010**, established a specialized court to deal with Employment and Labor relations matters and it states as follows: *“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to (a)employment and labour relations;”*

18. Further section 12 of the Employment and Labour Relations Court Act, bestows upon the Employment and Labour Relations court exclusive original and appellate jurisdiction touching on employment and labour relations matters one of which includes disputes relating to or arising out of employment between an employer and an employee. It states 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 this Act or any other 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 an employee;”*

19. **Article 165 5(b)**of the Constitution on the other hand, divests the high court of the jurisdiction to hear and determine matters falling within the jurisdiction of the specialized courts. It states as follows: *“The high court shall not have jurisdiction, in respect of matters, falling within the jurisdiction of the courts contemplated in Article 162 (2).”*

16. From the above Articles of the Constitution and provisions of the law, it is clear that the High Court lacks the jurisdiction to determine this appeal. Jurisdiction is everything, and where a court lacks jurisdiction, it must down its tools.

20. The Court of Appeal in *Owners of the Motor vessel "Lillian S" versus Caltex Oil (Kenya) Ltd (1989) eKLR*, stated as follows as regards the issue of jurisdiction of a court: ***"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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

21. Given that this appeal was filed at the high court and not the Employment and Labour relations court, I have no jurisdiction to determine the same.

22. I accordingly transfer this matter to the Employment and Labour Relations Court for hearing and determination of the appeal.

**DELIVERED, DATED AND SIGNED AT KERICHO THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**A.N. ONGERI**

**JUDGE**