



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO 598 OF 2015**

**DANIEL MURATHA KINUTHIA.....APPELLANT**

**VERSUS**

**A TO Z TRANSPORTERS LIMITED.....RESPONDENT**

**(Being an appeal from the Judgment of the Principal Magistrate M. Obura in CMCC No 1038 of 2010 on 25<sup>th</sup> November 2015)**

**JUDGMENT**

**INTRODUCTION**

1. In his Judgment that was delivered on 25<sup>th</sup> November 2015, the Learned Trial Magistrate, M. Obura, Principal Magistrate (PM) dismissed the Appellant's suit with costs to the Respondent on the ground that the court did not have jurisdiction to hear and determine the matter as the claim did not arise out of the Respondent's negligence and that in fact the Appellant had been compensated for the injuries he sustained in road traffic accident by way of general damages.
2. Being dissatisfied with the said decision, the Appellant filed his Memorandum of Appeal dated 7<sup>th</sup> December 2016 on 8<sup>th</sup> December 2016. He relied on eight (8) Grounds of Appeal.
3. His Written Submissions were dated 20<sup>th</sup> June 2019 and filed on 1<sup>st</sup> July 2019 while those of the Respondent were dated and filed on 22<sup>nd</sup> July 2019.
4. The parties asked this court to render its decision based on their respective Written Submissions which they were relying upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

**THE APPELLANT'S CASE**

5. The Appellant submitted that he was employed as a driver by the Respondent when on 6<sup>th</sup> September 2007, while driving the Respondent's Motor Vehicle Registration Number KAS 019A (hereinafter referred to as "the subject Motor Vehicle"), he collided with another motor vehicle as a result of which he sustained injuries. He stated that he was dismissed from employment soon thereafter and was not paid compensation under the Workmen's Compensation Act Cap 236 (Laws of Kenya).
6. He was emphatic that the Learned Magistrate erred when he dismissed his case on the ground that he did not have jurisdiction to hear and determine the same. He contended that in its Statement of Defence, the Respondent had admitted jurisdiction of the lower court to hear and determine the said case. He argued that it did not object to the court's jurisdiction as was required under Order 7 of the Civil Procedure Rules, 2010 and hence the Learned Magistrate considered extraneous matters.
7. He added that the accident arose before the operation of the Civil Procedure Rules in 2010 and hence the Workmen's Compensation Act was in operation and covered his claim. He pointed out that he adduced in evidence all the relevant documentation to wit LD Form 102 and LD 108 showing that the Respondent was required to pay him a sum of Kshs 270,000/= and Kshs 720,000/= respectively giving a total sum of Kshs 990,000/=.
8. He further submitted that under Section 5 of the Law Reform Act Cap 26 (Laws of Kenya), it was provided how the Workmen's Compensation Act and Common Law or damages recovered out of the injuries were to be apportioned. It was therefore his submission that he was entitled to his dues, temporary incapacity, earnings between the time of the accident and subsequent to the accident and consequently, the judgment of the Learned Magistrate ought to be set aside and substituted with an award of Kshs 990,000/= plus interest and costs.

## THE RESPONDENT'S CASE

9. On its part, the Respondent was categorical that there was no basis for the Appellant to have sued it because he was the one who was in control of the subject Motor Vehicle at the time it was involved in an accident. It added that the court had no jurisdiction to enforce a decision by the District Labour Officer and the Medical Board that it compensate him under the Workmen's Compensation Act.

10. It argued that it could not have raised the issue of jurisdiction at the first instance due to the ambiguity of his claim and that he ought to have applied to transfer the matter to the Employment and Labour Relations Court which was created under Article 162 of the Constitution of Kenya, 2010 and empowered under Section 165 of the Constitution of Kenya to deal with matters relating to employment and labour relations. It also contended that it had no obligation to prompt him to transfer the case to the court that had the proper jurisdiction but nonetheless raised the issue in its Written Submissions at the conclusion of the case.

11. It therefore agreed with the finding of the Learned Magistrate that the lower court had no jurisdiction to hear and determine the case and that it was irrelevant that it had admitted the jurisdiction of the said court in hearing and determining the said matter.

12. It relied on the case of **Owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Limited (1989) KLR** where it was held that:-

**"...A court of law downs its tools in respect to the matter before it before it holds the opinion that it is without jurisdiction."**

## LEGAL ANALYSIS

13. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

14. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

**"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."**

15. Right at the outset, this court wishes to point out that the appeal before it was not under Common Law. It was filed pursuant to a claim for compensation of the Appellant under the Workmen's Compensation Act (now repealed). This was replaced by the Work Injury Benefits Act No 13 of 2007.

16. Section 3 of WIBA provides as follows:-

**"This Act shall apply to all employees, including employees employed by the Government, other than the armed forces, in the same way and to the same extent as if the Government were a private employer."**

17. Under Section 4 (1) of the Work Injuries Benefits Act, it is stipulated that:-

**"In this Act, "employer" means any person who employs an employee..."**

18. Section 5(1) of the Work Injuries Benefits Act states that:-

**"In this Act, "employee" means a person who has been employed for wages or a salary under a contract of service and includes an apprentice or indentured learner."**

19. Under Section 2 of the Work Injuries Benefits Act:-

**"compensation" means compensation as provided for under this Act and includes medical aid and any benefit of any nature to which an employee or his dependants may be entitled to under this Act;**

20. Section 2 of the Employment and Labour Relations Act No 20 of 2011 stipulated that:-

**"employee" means a person employed for wages or a salary and includes an apprentice and indentured learner;**

21. **"employer" means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;"**

22. Without any stretch of imagination, the Appellant's claim was one that arose out of an employee- employer relationship. This was clearly outside the jurisdiction of this court as has been provided for in Article 165 (5)of the Constitution of Kenya that states that:-

**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).**

23. Article 162( 2) of the Constitution of Kenya states that:-

**“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.”**

24. Section 12(1) (a) of the Employment and Labour Relations Court further provides that:-

**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 disputes relating to or arising out of employment between an employer and an employee;”**

25. Going further, Section 29 (3) and (4) of the Employment and Labour Relations Court Act further stipulates that:-

**3. The Chief Justice may, by notice in the *Gazette*, appoint certain magistrates to preside over cases involving employment and labour relations in respect of any area of the country.**

**4. Subject to Article 169(2)(a) of the Constitution, the magistrates appointed under subsection (3) shall have jurisdiction and powers to handle—**

- a. disputes relating to offences defined in any Act of Parliament dealing with employment and labour relations;**
- b. any other dispute as may be designated in a *Gazette* notice by the Chief Justice on the advice of the Principal Judge.**

26. In view of the aforesaid, it was clear that the proper court to have heard and determined the dispute relating to issue of compensation of Kshs 990,000/= was the Employment and Labour Relations Court which has appellate powers from the magistrates’ court.

27. Having said so, it did appear to this court that from the reliefs that had been sought in the *Plaint*, the Appellant was not claiming the sum of Kshs 990,000/=. He had sought the following reliefs:-

- a. Kshs 30,000/= special damages together with interest thereon at 20 % per cent with effect from 6/9/2007 until payment in full.**
- b. General damages.**
- c. Costs of this suit.**

28. Since there was no claim for Workmen’s Compensation in the *Plaint*, this court determined that it had jurisdiction to hear and determine the Appeal herein, In his evidence, the Appellant averred that the Respondent took him to Kenyatta National Hospital (KNH) and may have paid his initial medication. He put his claim for medical expenses at Kshs 30,000/=. He did not, however, adduce evidence to support the said sum. He had only attached receipts in the sum of Kshs 1,700/=.

29. Bearing in mind that he had been awarded under the Common law sum of Kshs 311,000/= after successfully suing the driver of Motor Vehicle Registration Number KAP 161K (hereinafter referred to as “the third party motor vehicle) for the sum of Kshs 311,000/=: he did not justify why the Respondent should have paid for the medical expenses in the sum of Kshs 30,000/= when it ought to have been paid at the time he was compensated. Any medical expenses that he incurred to seek treatment were directly attributable to the negligence of the driver of the third party motor vehicle.

30. Going further, in view of the fact that general damages are awarded when there is a breach of duty of care, the Appellant did not demonstrate which duty of care he was owed by the Respondent herein at the material time of the accident. He did not demonstrate how the Respondent was negligent or the cause of his injuries when he collided with the third party motor vehicle. Had he shown that the Respondent had not maintained the subject motor vehicle in a proper manner and the same had caused him to be involved in the accident, then the court could have looked at his claim differently.

31. This was, however, not the case because from the Police Abstract Report that he adduced in evidence during the trial, it was clearly stated that the driver of the third party motor vehicle was blamed for the material accident therein.

## **DISPOSITION**

32. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was dated and filed on 8<sup>th</sup> August 2015 was not merited and the same is hereby dismissed with costs to the Respondent herein.

33. It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this **30<sup>th</sup>** day of **January** 2020

**J. KAMAU**

**JUDGE**