



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO.212 OF 2017

REUBEN CHEGE MARITHA.....APPELLANT

VERSUS

1. DEVKI STEEL MILLS LIMITED

2. V. K. HIRANI SUPPLIERS.....RESPONDENTS

(Being an Appeal from the Judgment of Hon. Mr. H. Nyakweba (PM))

in Mombasa SRMCC No.527 of 2013, delivered on 4/10/2017)

JUDGMENT

1. The Appellant instituted a suit against the Respondents claiming general damages, special damages costs, and interest in **Mombasa SRMCC No.527 of 2013** on 22.3.2013.

2. The Appellant averred that on or about **29.6.2012**, in the course of his employment as a crane operator, and while alighting from the crane after his colleague had taken over, a sludge boat of ½ tonne fell from the tractor and injured his leg. He averred that it was as a result of recklessness and/or negligence, and/or breach of employment contract by his employer, which occasioned him severe injury, upon which a result of which he suffered pain, loss and damages.

3. Upon being served vide an **Amended Statement of Defence** dated **15.6.2015**, admitted the Appellants injuries but denied the particulars of negligence and put the Appellant to strict proof. Further, the Respondent filed a Third Party Notice to claim indemnity or contribution against the Respondent/Third Party, in the event it is held liable to the Appellant.

4. After the case was heard, the learned Magistrate dismissed the Appellant's claim against the Respondent and against the Respondent/Third Party for failing to prove negligence against them

5. On being dissatisfied with the above decision the Appellant lodged the instant Appeal and set out 14 grounds namely:-

a) That the Honourable Magistrate erred in fact and in law in finding that the Respondent did not owe the Appellant any duty of care even though the Appellant was the Respondent's employee and at the Respondent's premises at the time of the incident.

b) That the Honourable Magistrate erred in fact and in law in failing to properly evaluate the weight of the evidence placed before him and the submissions filled.

c) That the Honourable Magistrate erred in fact and in law in finding that the Appellant did not lay any blame on the Respondents.

d) That the Honourable Magistrate erred in fact and in law in finding that the Appellant had completed his day's task and was relieved by the Respondent when the incident occurred.

e) That the Honourable Magistrate erred in fact and in law in finding that the failure of the Appellant to sue the Respondent (Third Party) was fatal to the Plaintiff's claim.

f) That the Honourable Magistrate erred in fact and in law in failing to apportion liability between the Respondents or between

the Appellant and the Respondents.

- g) That the Honourable Magistrate erred in fact and in law in finding that there was no sufficient evidence to find the Respondents liable for the accident.*
- h) That the Honourable Magistrate erred in fact and in law in dismissing the claim against the Respondent/Defendant and the Respondent/Third Party.*
- i) That the Honourable Magistrate erred in fact and in law in awarding costs to the Respondent/Defendant and the Respondent/Third Party.*
- j) That the Honourable Magistrate erred in fact and in law in finding that the evidence produced by the Appellant did not prove that the Respondents' were liable.*
- k) That the Honourable Magistrate erred in fact and in law in assessing the Appellant's claim at Kshs 800,000/= general damages.*
- l) That the Honourable Magistrate erred in fact and in law in stating that he would have awarded Kshs. 800,000/= for that Mal-union fracture of the left tibia and fibula which is manifestly low in the circumstances.*
- m) That the Honourable Magistrate erred in fact and in law in failing to apply the principle of Law on a balance of probabilities that the evidence weighed heavily against the Respondents.*
- n) That the Honourable Magistrate erred in fact and in law in dismissing the Plaintiff's claim with costs.*

6. When the Appeal came up for directions on **26.7.2019**, parties agreed that the same would be dispensed with via written submissions. The Appellants' submissions were filed on **27.8.2019**, the Respondent's submissions were filed on **30.9.2019**, while the Respondent/ Third Party's submissions were filed on **25.9.2019**.

7. According to the pleadings filed and Record of Appeal, it is clear that the appeal is in respect of a dispute relating to a work injury claim as set out at paragraph 3,4,5 & 6 of the **Plaint** dated **15.3.2013**. Before proceeding to determine the issues raised herein, it is imperative that this court determines whether it has jurisdiction to hear and determine the issues raised herein.

Analysis and Determination

8. Jurisdiction is everything. Whether this court has or lacks jurisdiction to entertain the matter is a matter of the law that must be dealt with before all else. In the case of **Owners of the Motor Vessel "Lilian S"...Vs... Caltex Oil (Kenya) Limited [1989] KLR 1, Nyarangi, JA** expressed himself as follows:

"Jurisdiction is everything without which a court of law has no power to make one more step where a court of law 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 the moment it holds the opinion that it is without jurisdiction."

9. In raising this question of jurisdiction, what this court has in mind are the provisions of **Article 162 (2)** of the **Constitution** and **Sections 12 and 87** of the **Employment and Labour Relations Court. Article 162** of the **Constitution** provides as follows;

(2) Parliament shall establish court with the status of the High Court to hear and determine disputes relating to (a) Employment and Labour Relations

10. Pursuant to Article 162 (2) of the Constitution. Parliament enacted the **Employment and Labour Relations Court Act, 2011** which provides at **Section 12 (1)** 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 the Act or any written law which extend 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"

11. Under Article 162(2)(a) of the Constitution as read with Section 12(1) of the Employment and Labour Relations Act, 2011, the ELRC has exclusive jurisdiction to hear Appeals from court and tribunals on Labour and Employment disputes. The issue of jurisdiction of the ELRC vis-à-vis the High Court in relation to disputes between employer and employee was dealt with by the **Supreme Court** in the case of **Republic... Vs...Karisa Chengo & Others, Supreme Court Petition No.5 of 2015 [2017]eKLR**, where it held as follows:

"[52] 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 inferred that the Environment and Land Court and Employment and Labour Relations Court too cannot hear matters reserved to the jurisdiction of the High Court.”

12. From the pleadings and evidence in the Record of Appeal in the instant case, this Court is satisfied that this dispute can be properly dealt with by the ELRC. This Court ought not to readily clothe itself with jurisdiction when other Constitutional organs have been bestowed with the jurisdiction to entertain the same.

13. Accordingly, this Court declines jurisdiction to hear this Appeal and order that the same be transferred to the Employment and Labour Relations Court, Mombasa, for final determination.

14. Costs shall abide the outcome of the Appeal because the issue of jurisdiction has been raised at the instance of the Court.

It is so ordered.

DATED, SIGNED, and DELIVERED at MOMBASA on this 28th day of September, 2020.

D. O CHEPKWONY

JUDGE

28/9/2020

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 Chief Justice on **15th March 2020**, this Judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court.

D. O CHEPKWONY

JUDGE

28/9/2020