



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO 11 OF 2018

ONESMUS NJENGA GACHIE.....APPELLANT

VERSUS

HYDERY (P) LIMITED.....RESPONDENT

J U D G M E N T

1. The Appellant ONESMUS NJENGA GACHIE, was the plaintiff in civil suit No. 581 of 2016 at Mombasa where he instituted a suit against the Respondent (Defendant) vide a plaint filed on 22nd March, 2016 claiming general damages, special damages, costs and interest on account of injuries he alleged to have sustained in the course of employment by the defendant as a loader, on 9th February, 2016.

2. The appellant averred that it was the respondent's duty to take all reasonable precautions for his safety while engaged in the said employment and not to have exposed him to a 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 carry sacks weighing 50 Kgs of manure/fertilizer from the go-down to a waiting lorry when a colleague threw a 50 Kgs sack on him as he also carried a 50 Kgs sack on his back, a result of which he fell down due to the impact and sustained serious injuries.

4. The Appellant particularized the particulars of negligence/breach of contract as follows'

- (i) Failing to take any or any reasonable care to see that the plaintiff would be reasonably safe while he was engaged upon his work.**
- (ii) Exposing the plaintiff to risk of damages or injury which they knew or ought to have known.**
- (iii) Failing to provide the plaintiff with safety clothes and or gloves.**
- (iv) Failing to provide any or any sufficient supervision.**
- (v) Having an inherently dangerous system of work.**

5. The Respondent filed a written statement of defence dated 19th April, 2016 in which he denied the allegations by the appellant that he was injured while on duty and denied the particulars of negligence on its part.

6. The Respondent averred that if at all the appellant got injured, then it was due to his own negligence or that he contributed to it. The Respondent also particularized the particulars of negligence on the part of the appellant as follows;

- (a) Failing to work in a careful manner and wrong in a careless manner;**
- (b) Failing to take heed or sufficient heed for his own safety;**
- (c) Failing to take and/or to follow instructions on safe working practice;**
- (d) Failing to wear the safety gear provided.**

The Respondent urged the court to dismiss the Appellant's suit with costs.

7. After hearing the evidence that was adduced by the Appellant and Respondent, the trial magistrate found that the Appellant had failed to link the respondent to the accident in which he alleged he had sustained injuries and went on to dismiss his claim with costs.

8. Being dissatisfied with the said decision, the Appellant has moved this court through a memorandum of appeal dated 9th February, 2018 and filed in court on 13th February, 2018 wherein he raised six grounds of appeal as follows;

(1) That the learned magistrate erred in fact and in law in failing to find that an accident occurred when the appellant was in the course of his employment with the Respondent.

(2) That the learned magistrate erred in law and fact failing to attribute negligence on the part of Respondent and analyse the evidence on the particulars of negligence.

(3) That the learned magistrate erred in law and fact in failing to analyse the evidence adduced by the Respondent's witness as well as the Appellant's evidence.

(4) That the learned magistrate erred in law and fact in failing to find that the respondent is not vicariously liable for the accident that occurred on 9.2.2016.

(5) That the learned magistrate erred in fact and in law in failing to consider that the Respondent corroborated the evidence of the Appellant in toto

(6) That the learned magistrate erred in both law and fact by failing to appreciate the appellant's written submissions.

9. The parties were directed to dispose of the appeal by way of written submissions on 2nd October, 2018 which were confirmed as sufficient on 5th February, 2019.

10. This court is alive of its duty as the first appellate court, which duty was restated in the case of **JOSEPH MUNGA'THIA VRS COUNTY COUNCIL OF MERU AND ANOTHER C A CIVIL APPEAL NO 146 OF 2002 (NYERI)** (unreported) at page 11 of the judgment, the court had this to say;

“In law, this matter coming as a first appeal, we have a duty to consider both matters of fact and of the law. On facts, we are duty bound on first appeal to analyse the evidence afresh, evaluate it, and arrive at our own independent conclusion, but always bearing in mind that the trial court had the advantage of seeing the witnesses and seeing their demeanor and making allowance for the same”

(See also Selle and Another vrs Associated Motor Boast Company Ltd & others (1968) E A 123 -126 (CA-2) and Williamson Diamonds Ltd Vrs Brown 1970 E.A 1,12 C A – T).

11. In the instant appeal, I have carefully considered the grounds of appeal raised by the appellant, the submissions by both parties, pleadings and the evidence that was adduced before the trial court. I find that in the interest of justice, this court needs to establish whether this appeal is properly before it, before going into the merits and demerits of it.

12. Looking at the plaint dated and filed on the 22nd March, 2016 in the subordinate court, it is averred at paragraph 3 of it that the plaintiff was employed by the defendant as a loader and on page 65 of the Record of Appeal dated 22nd February, 2018; the defendant's DW1, Mr KIBANDA BENCHI MUGO, confirms in his testimony that the plaintiff was a casual labourer and he was injured in the course of employment.

13. From the court's observation that there is an employer- employee relationship between the Respondent and the Appellant herein, a result of which the court clothed with the jurisdiction to determine an appeal where there exists an employer –employee relationship between the parties would be the Employment and Labour Relations Court.

14. Jurisdiction is the very basis on which any Tribunal or court tries a case, it is the lifeline of all trials. A trial without jurisdiction is a nullity. The importance of jurisdiction is the reason why it can be raised at any stage of a case, be it at the trial, or appeal to court of Appeal or to this court afortiori the court can suo moto raise it. It is in the interest of justice for this court to then raise the issue of jurisdiction so as to save time and costs, and to avoid a trial in nullity.

15. The “locus classicus” on jurisdiction is the celebrated case of **THE OWNERS OF THE MOTOR VESSEL “LILLIAN'S VRS CALTEY OIL KENYA LTD (1989) KLR 1**, where Nyarangi, J A held;

“ 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”

16. In the case of **SAMUEL KAMAU MACHARIA VRS KCB AND OTHERS (2012) e KLR**, the Supreme Court held that;

“ A court’s jurisdiction flows from either the Constitution or legislation or both. Thus a court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.....the court must operate within the constitutional limits. It cannot expand jurisdiction through judicial craft or innovation”

17. 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

18. 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”

Section 87 (1) and (a) of the Employment Act provides;

(1 Subject to the provision of this Act whenever;

(a) and employer or employee neglects or refuses to fulfill a contract of service or

(b) any question, difference or dispute arises as to the rights of liabilities of either party;

Or touching any misconduct, reflect or ill treatment of either party or any injury to the person or property of either, under any contract of service, the aggrieved party may complaint to the labour office or lodge a complaint or suit in the industrial court.

(2) No court other than the Industrial court shall determine any complainant 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 emphasized by the Supreme Court in the case of **REPUBLIC VRS KARISA CHENGO & OTHERS, SUPREME COURT PETITION NO. 5 OF 2015 (2017) e KLR** 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”.

20. From the pleadings and evidence in the instant case, it is clear that the appellant’s claim arose out of a work place injury based on employment relationship between the Appellant and Respondent.

21. From the foregoing, this court declines jurisdiction to hear this Appeal and transfer the same to the Employment and Labour Relations Court, Mombasa for hearing and determination (see the case of **DANIEL N MUGENDI VRS KENYATTA UNIVERSITY AND 3 OTHERS, NRB C. A NO. 6 OF 2012 (2013) e KLR**)

Costs shall be in cause.

Dated and delivered at Mombasa this 27th day of March, 2019.

LADY JUSTICE D. O. CHEPKWONY