Ngii v Rowda Mosque & 2 others (Civil Appeal E001 of 2023)
[2025] KEHC 6872 (KLR) (20 March 2025) (Judgment)

Neutral citation: [2025] KEHC 6872 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CIVIL APPEAL E001 OF 2023

JN ONYIEGO, J

MARCH 20, 2025

BETWEEN

MUTEMI MWAROKO NGII ..... APPELLANT

AND

ROWDA MOSQUE & 2 OTHERS ..... RESPONDENT

(Being an appeal from the judgement and decree of Hon. P.W. Wasike, PM delivered on 27.07.2023 in Mandera PMCC No. E003 of 2022)

JUDGMENT

1. The appellant/plaintiff via a plaint dated 11.02.2022 moved Mandera PM'court seeking for the following orders:
    i. General damages.
    ii. Special damages as illustrated in para 9 of the said plaint.
    iii. Costs of the suit.
    iv. Interest from the date of filing the suit.
2. The appellant's claim was to the effect that at all material times, the 1st respondent was a registered religious organization based in Mandera. The 2nd respondent a sheikh was in charge of the 1st respondent while the 3rd respondent was a contractor employed by the 2nd respondent to construct a library for the 1st respondent. That on or about 09.11.2020, the deceased was working as an employee of the 3rd respondent in the said project lawfully and carefully inspecting a newly constructed Rowda Mosque when part of the mosque's wall fell on him leading to his death.
3. Particulars of negligence on the part of the respondents were listed in para 8 of the plaint as follows:

i. Failure to create a safe working condition for employees.

ii. Failure to contract a licensed contractor and or civil engineer.

iii. Failure to get relevant county government approvals to okay the construction of the said library.

iv. Failure to get NEMA approvals to okay the construction of the said library.

4. The 1st, 2nd and 3rd respondents via the firm of Duwane Gisore & Wethow Advocates entered appearance on 13.06.2022. Subsequently, through their new Advocates Wanyanga & Co. Advocates, the 1st and 2nd respondents filed a statement of defence dated 20.06.2022. In the said defence, they denied liability of the claim against them and instead averred that in the alternative and without prejudice, the alleged death did not occur as a result of their negligence but the acts and /omissions of the 3rd respondent and/or agent of the 3rd respondent who was at the material time an independent contractor.

5. The 1st and 2nd respondents averred that if the alleged accident occurred, which was in any event denied, then the deceased plaintiff was negligent and reckless, and the sole author of his misfortune while working as an employee of the 3rd respondent. The particulars of negligence were listed in para 11 of the said statement of defence as inter alia; failing to keep any proper look out or to have any sufficient regard to heed to his own safety while in the construction site, exposing himself to the risk of injury by haphazardly leaning on a wall recently constructed and which was still being cured and failure to take any necessary precautions to ensure his own safety thereby causing the alleged accident/incident.

6. Particulars on the part of the 3rd respondent were listed at para 12 as follows; failing to ensure adequate safety measures at the construction site in order to avoid accident, failing to employ qualified employees with the necessary skills, experience and expertise thus employing an unqualified person thereby contributing to the said accident, failing to provide warning signages at the site to guide his employees and; failing to train his employees on their safety while working at the site. The 1st and 2nd respondents invoked the doctrine of volenti non fit injuria as they vehemently denied being the cause directly and / or vicariously towards the death of the deceased. The court was urged to dismiss the suit with costs.

7. The appellant filed a reply to the 1st and 2nd respondents' statement of defence denying all the allegations raised in the said statement of defence. He urged the court to allow the prayers sought by the appellant.

8. The court upon considering the evidence presented before it delivered its judgment on 27.07.2023 thus dismissing the appellant's case and further, awarding costs to the respondents which costs were to be paid by the counsel for the appellant.

9. The appellant being dissatisfied with the judgment and decree of the trial court filed a memorandum of appeal dated 18.08.2023 citing the following grounds:

i. That the learned trial magistrate erred in law and fact by failing to realize that one cannot benefit from an illegality.

ii. That the learned magistrate erred in law and fact in failing to realize that contractual agreements cannot arise from an illegality.

iii. That the learned magistrate erred in law and fact in failing to consider that the court cannot determine the issue of jurisdiction suo moto in the absence of all litigants.

iv. The learned magistrate erred in law and fact in failing to realize that documents never supplied at the pre – trial case conference cannot be adduced as part of a party's documents.

v. The learned magistrate generally erred in law and fact in giving a decision that was not supported by the law and the facts.

10. The appellant prayed that the appeal be allowed. He also sought the following:

a. That the judgment delivered on 27.07.2023 in *Mandera CMCC No. E003 of 2022* be set aside and the same be substituted with a judgment of this court.

b. The appellant be awarded the cost of appeal.

11. The appeal was canvassed by way of written submissions.

12. The appellant via submissions dated 28.06.2024 submitted that during the trial process, the 2nd respondent confirmed that he was the person in charge of the 1st respondent. That the said Mohammed Sheikh did confirm that indeed there was a construction of the Library for the 1st respondent and that the deceased died due to the collapsing of the wall of the 1st respondent.

13. That for any construction to be undertaken in Kenya, a party has to procure the following licenses: the NEMA license, the National Construction Authority License and County Approvals Licenses. That at the time of cross examination, the 2nd respondent confirmed that indeed, none of the foregoing licenses had been procured by the respondents before undertaking to construct the wall of the 1st respondent. Thus it was urged that due to the fact that due procedure was not followed by the respondents while constructing the library, the entire project was founded on illegalities. Thus the trial court erred greatly by assuming an Employment Contract from the illegal acts of the respondents thus terming the suit as a *WIBA* matter. To that end, reliance was placed on the case of *Samwel Ariga Bosire v Abagusii Otenyo Self Help Group* [2021] eKLR where the court held that a party cannot benefit from an illegality upon a contract.

14. On the second issue, it was contended that in addition to lack of qualifications of the 3rd respondent, the construction of the wall of the 1st respondent did not follow any due procedure/statutory approvals. In summary, learned counsel opined that construction process was based on unethical, unprocedural and illegal activities hence no binding contract could arise from these illegalities. The trial court was faulted for holding that the only contractual agreement was between the 3rd respondent and the deceased person. That the correct position was that all the respondents participated in an illegality and as such, the trial court could not simply single out one transaction and peg the entire suit on the same.

15. On the third ground, counsel submitted that the trial court suo moto reached a determination that the plaintiff's suit was one of work injury. That, the trial magistrate erred by indicating in his judgment that he did not have the requisite jurisdiction to hear the matter yet, he proceeded to determine the same hence contradicting himself. That the trial court erred gravely in determining the issue on jurisdiction of the suit without informing the litigants and allowing litigants to be heard on the issue of jurisdiction.

16. On the fourth ground, it was urged that Order 11 of the *Civil Procedure Rules* provides for the provision of pre-trial where parties are to exchange documentation before the hearing of the suit. That by the close of pre-trial, the respondents had only served the appellant with the notice of appointment and the statement of defence. It was counsel's contention that during the hearing, the respondents provided additional evidence which the appellant objected to but apparently, in the judgment, the trial court indicated that the respondents filed before the court the registration documents for the 1st respondent yet the same was not served upon the appellant.

17. The appellant submitted that the decision by the trial court was not supported by either law nor facts. That grave errors could be pinpointed from the trial court's judgment. This court was therefore urged to allow the appeal as prayed.

18. In opposing the appeal, the 1st and 2nd respondents filed written submissions dated 02.07.2024 citing the following issues:

    i. Was the deceased an employee of the 1st and 2nd respondents or at all.

    ii. Did the 1st and 2nd respondents engage the services of a qualified person for purposes of construction of the said library.

    iii. Was there a contract of service between the 1st and 2nd respondents and the 3rd respondent and what was its import in regard to the duties and obligations of the 3rd respondent?

    iv. Did the appellant prove the particulars of loss of expectation and/or evidence that the deceased earned Kes. 30,000/-?

19. On the first issue, the 1st and 2nd respondents conteded that the deceased was not their employee and therefore, they cannot be found vicariously liable for the death herein. That the 1st and 2nd respondents entered into a service contract whose terms were explicitly provided for at the hearing. Additionally, that the appellant through his own exhibit witness statement of the 3rd respondent outlined the qualifications of the 3rd respondent and therefore he is estopped from alleging that the 1st and 2nd respondents are vicariously liable on account of having engaged the services of unqualified person or personnel. It was opined that it was incumbent upon the appellant to prove his case as required by the law.

20. It was submitted that the appellant's own evidence supports the fact that the 1st and 2nd respondents engaged the services of a qualified contractor and therefore, the liability accruing out of employees of the 3rd respondent were vested on the 3rd respondent.

21. That during the hearing, it became clear that no evidence was tendered to support the claim under special damages for the Kes. 41, 010/-. That special damages must not only be specifically pleaded but also strictly proved. To that end, reliance was placed on the case of *Hahn v Singh* Civil Appeal No. 42 of 1983 (185) eKLR 716 where the court held that special damages must not only be specifically claimed (pleaded) but also strictly proved.

22. This being the first appellate court, it is thus bound to reconsider, re- evaluate and re-assess the evidence tendered before the trial court together with the assessors' opinions and arrive at an independent determination and or conclusion without losing sight of the fact that the trial court had the advantage of seeing and listening to the witnesses to be able to assess their demeanour. [See *Selle and another v Associated Motor Boat Co. Ltd and others* (1968) EA 123 and *Peters v Sunday post limited* (1958) EA 424].

23. PW1, Mutemi Mwaroko Ngii, the father of the deceased adopted his witness statement dated 11.02.2022. Briefly, he stated that his son died after being hit on the head by a falling wall of the aforesaid mosque. He produced his list of documents as evidence in the case and further sought for compensation and costs for the expenses that he incurred in the whole process. On cross examination, he stated that his son was working at the mosque having been employed by Engineer Anthony in as much the mosque was owned by Rowda mosque.

24. PW2, Evustud Nyamati, a police officer testified in support of the appellant's case that the deceased was his friend and a village mate. He proceeded to adopt his statement dated 09.11.2020 as evidence in

chief. On cross examination, he testified that he knew the employer of the deceased as Anthony who had equally been employed by Rowda mosque.

25. The his part, Mohamed Sheikh Osman on behalf of the 1st and 2nd respondent testified that, he was the manager of the Rowda mosque. He adopted his statement as evidence in chief and consequently produced his list of documents. He stated that he contracted Anthony to build the mosque and in the process, he died. On cross examination, he stated that indeed, the deceased passed on at the mosque and that there were no NEMA and NCA clearance certificates produced in court. He stated that they had tasked engineer Anthony to build the mosque.

26. I have considered the record of appeal, grounds of appeal and parties' submissions. From the pleadings and parties' submissions, the key issue for determination is whether the trial court had jurisdiction to hear the suit before it. If the court finds that it had no jurisdiction, then, it would be futile to address the rest of the issues.

27. It is trite that jurisdiction is what confers court the power to hear a dispute and is given by statute or the constitution. The Supreme Court in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others (2012) eKLR while discussing the issue of jurisdiction rendered itself as follows:

> "(68)A Court's jurisdiction flows from either the constitution or legislation or both. Thus, a Court of law 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 issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings..."

28. In as much as the appellant decried that the trial court proceeded to determine the issue of jurisdiction suo moto, the Supreme Court in the case of *Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 Others* Supreme Court Petition No. 19 of 2018, stressed the fact that jurisdiction is everything and that a court may even raise a jurisdictional issue *suo motu*. Therefore, the trial court was not at fault when it picked up the issue of jurisdiction and dealt with the same without giving the litigants an opportunity to address the same.

29. In this case, the determination by the trial court was that it had no jurisdiction to entertain the suit herein. The trial court noted at para 10 of the plaint that the appellant listed and particularized 'what he referred to as particulars pursuant to *WIBA*' and thereafter listed PW1, the deceased's father. That noting that the plaintiff's suit was filed on 06.04.2022 for a cause of action which occurred on 09.11.2020 and in recognition of the judgment delivered by the Supreme Court on 03.12.2019, section 16 of *Work Injury Benefits Act*, 2007 was found not to be unconstitutional. That the Supreme Court's decision was made on 03.12.2019 which became the cutoff date hence any claim thereafter associated with WIBA must be adjudicated upon by the Director of Occupational Safety and Health Services (The Director). See Sections 16 and 17 of the *work injury benefits Act* which bestows jurisdiction to the aforesaid director and not the court at the first instance

30. A perusal of the record shows that the appellant filed a plaint dated 11.02.2022 seeking for the prayers as listed in the plaint. The claim was based on the negligence allegedly occasioned by the respondents as particularized in para 8 to wit: failure to create a safe working condition for employees, failure to contract a licensed contractor and/or civil engineer. My further reading of the claim reveals that the same is hinged on the fact that the deceased died while inspecting a newly constructed wall of the Rowda mosque. Similar averments were listed in para 10 of the plaint where the appellant

particularized that pursuant to the *Work Injury Benefits Act*, the deceased was the sole bread winner to his father, PW1.

31. It is clear that the manner in which the suit was structured coupled with the fact that the same was hinged on a tort of negligence as evidenced in para 10 of the plaint, it is clear that the same evoked a death that was occasioned due to negligence associated with work. The Supreme Court of Kenya in its ruling in the case of *Raila Amolo Odinga & Another v IEBC & 2 others* (2017) eKLR found and held in respect to the essence of pleadings in an election petition as follows: -"...It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them...'

32. It is trite that the *Work Injury Benefits Act*, 2007 more particularly Section 16 and 17 provides for compensation to employees for work related injuries and/or diseases contracted in the course of employment. The Act applies to all employees, including government employees, except those in the defence forces, in the same way and to the same extent as if the government were a private employer.

33. This Court is also alive to the commencement date for *WIBA* as 02.06.2008 as per Legal Notice No. 60 of May 23, 2008. The judgment of the High Court by Ojwang J. was delivered on March 4, 2009 and that of the Court of Appeal on November 17, 2017. Consequently, the judgment of the Supreme Court was delivered on 03.12.2019 upholding the finding of the Court of Appeal.

34. In the instant case, the appellant's case was filed on 11.02.2022 obviously after the decision by the Supreme Court. Legally, it was not very helpful for the appellant to file the matter before the normal ordinary court. I say so for the reason that the tenor of the Supreme Court's holding had the effect that *WIBA* was not unconstitutional, save for such legitimate expectation with respect to matters filed prior to its enactment. Consequently, the findings by the Court of Appeal and Supreme Court which are binding on this court, on all other litigation on work injury claims post entry into force of *WIBA* are to proceed before the Director *WIBA* as provided for under the *WIBA*. As such, the trial court cannot be faulted that it declined to handle the matter for want of jurisdiction.

35. On the issue that despite the trial court establishing that it had no jurisdiction but still went ahead to determine the matter, I have already stated in this judgment that jurisdiction is everything and when a court finds that it lacks the same, then the most prudent thing to do is for it to down its tools. I am in agreement with the appellant that it was not necessary for the trial court to proceed to deal with the substance of the case after having clearly elaborated the issue on jurisdiction and finding that it lacked the requisite jurisdiction to entertain the matter. To that extent, any other finding other than the issue of jurisdiction is set aside as the court had no jurisdiction to pronounce itself on the substance of the matter.

36. In the case of *"Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited* (1989) IKLR dealt with a court, jurisdiction thus:-

> "Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion 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".

37. Guided by the foregoing, any further discussion of the substance of the matter in my view remained a nullity. Having held as above, it is my finding that the appeal has no merit hence the same is dismissed

38. In view of the fact that the court also contributed to the unnecessary filing of this appeal, I will order that each party bears own costs only in respect of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF MARCH 2025

J.N.ONYIEGO

JUDGE