G4S Kenya Limited v Omboga alias Funk Kibewa Omboga (Civil Appeal 28 of 2019) [2025] KEHC 9608 (KLR) (3 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9608 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL 28 OF 2019

JK NG'ARNG'AR, J

JULY 3, 2025

BETWEEN

G4S KENYA LIMITED ..... APPELLANT

AND

FRANK KIBEGWA OMBOGA ALIAS FUNK KIBEWA OMBOGA ..... RESPONDENT

(Being an appeal against the order of Honourable S.M.S Soita Chief Magistrate in Kerugoya CMCC 67 of 2016 dated w April 2019)

JUDGMENT

1. The appellant being dissatisfied with ruling and order of Hon. S.M Soita Chief Magistrate Court at Kerugoya in civil suit number 67 of 2016 made on 24th April 2019 set out the following grounds of appeal:-

    1. The Learned Magistrate erred in law and in fact in failing to consider the Appellant application on its merits

    2. The Learned Magistrate erred in law in finding that the magistrate's court had jurisdiction to entertain the 1st respondent suit on the basis the issue of jurisdiction was not raised during the hearing of matter.

    3. The Learned Magistrate failed to find that the court did not have jurisdiction by reason of the provisions of section 16 of the Work Injury Benefit Act and the decision of the court of Appeal in *Nairobi Civil Appeal No. 133 of 2011 Attorney General v Law Society of Kenya & Another.*

    4. The Learned Magistrate erred in law and in fact in failing to find that the conservatory orders issued by the High Court in *Mombasa Constitution Petition No. 196 of 2018* had no legal consequence in the matter. In particular, the learned magistrate failed to consider that:-

i. The conservatory orders were issued on 24th July 2018 after the Chief Magistrate's Court had delivered its judgment.

ii. The conservatory orders offend the doctrine of precedence in so far as they purport to stay the judgment of the Court of Appeal.

2. The Learned Magistrate erred in law and in fact in failing to find that jurisdiction is at the root of all proceedings and that it was not necessary to plead it in the first instance.

3. The Learned Magistrate erred in law in failing to consider that the respondent had already received compensation under WIBA upon assessment by the directorate of Occupational Safety and Health Services thereby extinguishing his claim for work place related injuries and that the judgment of the court amounted to unjust enrichment.

4. They claim that the Learned Magistrate should have found that:-

a. The magistrate did not have jurisdiction ab initio to entertain the 1st respondent's suit and that the entire proceedings were a nullity.

b. The application for review was merited and ought to have been allowed.

c. The judgment of the court of 23rd March 2018 ought to have been set aside.

6. The first ground of appeal was that the learned magistrate erred in law and fact in failing to consider application on its merit. The application upon which this appeal is based is for review dated 6th July 2018. The respondent filed submissions dated 29 May 2024 in which he has raised various arguments which are alleged to be contradictory or premised on a misapprehension of the law. He argues mainly that he urges that there were no grounds for the application for review and that the appellant ought to have pursued an appeal.

7. It is claimed that the respondent has not addressed the fact that he submitted a claim for compensation to the Director of Occupational Safety and Health and that the claim was processed and payment made. The Appellant claims that there is an admission that the provisions of that Act applied to the claim for injuries he sustained in the course of employment. They aver that it is the same Act that stripped the lower Court of jurisdiction, which was the main issue in the application for review, in the lower court.

8. They aver that the respondent has gone to great lengths to submit that the appellant has not shown that there was an error on the face of the record. They avow that the submissions were unnecessary because the application was not based on an error apparent on the face of the record.

9. They contend that the only and singular issue in the appeal is one of jurisdiction and that the appellant's basis for review was based on the fact that there was a new and important matter which after the exercise of due diligence could not be produced at the time when the decree was passed or order made and that the respondent had already been compensated for the same claim by the Director of Occupational Safety and Health this is deduced from page 29 to 30 of the Record of appeal.

10. It is not in dispute that the judgment was delivered on 23rd March 2018. At the time, the Court of Appeal had determined the issue of courts' jurisdiction to handle work injury claims. It is also important to note that the reason why the court dismissed the appellant's application for review was because the respondent relied on Mombasa Constitutional Petition No. 106 of 2018 which stayed certain provisions of the *Work Injury Benefits Act* (WIBA) (page 241 of the record). The said decision relied on by the learned Magistrate was made on 24th July 2108, being 4 months after the trial court's

decision. It cannot have had any bearing on his decision to entertain a claim over which he had no jurisdiction.

11. The decision in *Julius Ochieng 0100 & another v Lilian Wanjiku Gitonga* (2019) eKLR which the respondent refers to at paragraph 14 of his submissions to argue that an issue of jurisdiction cannot be the subject of review, js distinguishable from the present case in that the cited authority dealt with reinstatement of a suit dismissed for want of prosecution and had no bearing on jurisdiction.

12. The respondent has referred to the decision in *Mwambu v Twiga Food Ltd* (Petition E003 of 2023) [20241 KEHC 1622 (KLR) but has not availed it. Be that as it may, the decision does not aid the respondent. The question of jurisdiction in the present case was by express provision of the law and was not a matter of interpretation of any set of facts.

13. At the time of the trial court's decision, the conservatory orders made by the High Court were not in force and the governing law at the time was a stated by the decision of the Court of Appeal in *Nairobi Civil Appeal No. 133 of 2011*, which was that the Magistrates' court did not have originat jurisdiction to deal with work injury claims.

14. The absence of jurisdiction is not an error of judgment as submitted by the respondent. The issue of jurisdiction is not one of discretion. The court either has it or it does not and that must be with reference to statute.

15. In response to paragraphs 18 and 19 of the respondent's submissions, the appellant submits that at no point has it sought to challenge the determination made by Directorate of Occupational Safety & Health Services. They claim that the appellant has only sought to bring to the court's attention the plaintiffs attempt at unjust enrichment. The appellant reiterates paragraphs 21 to 26 of its submissions and further submits that the essence of the review was to bring light to the plaintiffs claim before Directorate of Occupational Safety & Health Services together with proof of payments.

16. It is not in dispute that the respondent was employed by the appellant at the time of the accident which would bring the claim within the confines of *WIBA*. A compensation package was paid out by DOSH and payment received by the respondent with respect to that award (page 36 of the record).

17. They claim that the trial court was wrong to ignore proof of payments made to the respondent under the *WIBA*. It is an abuse of court process and inimical to justice for the respondent to profit from two processes. The *Work Injury Benefits Act* is clear as to who has mandate to assess compensation.

18. The respondent's assertion at paragraph 23 of his submissions that the claim before the trial court was one founded on negligence and not strict liability has no basis in law. Section 16 of *WIBA* took away the dichotomy between tort and contractual liability.

19. They claim that there has been no suggestion that the *Work Injury Benefits Act* that the claim was a labour dispute. They aver that Paragraph 23 of the submissions is irrelevant. They claim that the respondent then contradicts himself at paragraphs 25 and 27 of his submissions by trying to justify filing his claim in the Chief Magistrate's Court pursuant to Gazette Notice No, 9243 which delegated jurisdiction to magistrates to handle Work Injury Benefits claims.

20. The jurisdiction vested in the labour courts referred to by the respondent at paragraph 25 of his submissions is donated by the *Work Injury Benefits Act* and does not extend to entertaining claims for general damages.

21. The fact that the respondent had been compensated for the injuries he sustained in a vehicle accident while in the course of employment was another sufficient reason to require the court to review its orders.

22. The respondent was aware of the payment he had received as well as proceedings before DOSH and by remaining silent on the issue imputes bad faith on his part thus disentitling him from benefitting from the discretion exercised by the trial court including the awards set out at paragraph 13 of the judgment. Had the court been made aware of the alleged compensation, that would have had an impact on the outcome.

Determination

23. I have gone through the rival pleadings and submissions of the parties and from my deduction it is common ground that the main issue for determination is whether appeal has merit.

24. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses. In *Selle v Associated Motor Boat Co.* [1968] EA 123 it was held in the following terms: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

25. The burden of proof in civil cases on the balance of probability is that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable to absorb liability.

26. Under Order 45 rule 1 this court notes that the appellant was not able to obtain a copy of the judgment until after the decision by the trial court was rendered because the Court of Appeal's judgment only became available in the law reports after the suit was heard. The said judgment could not be placed before the court even with exercise of due diligence contrary to the respondent's assertion in his submissions.

27. As has been stated in multiple times, Jurisdiction is everything. A court without jurisdiction acts in vain and the fact that it hears and determines a matter does not cloak that decision with genuine and proper legitimacy. Parties also should not confer jurisdiction and it does not matter that a party does not raise the issue in the course of the proceedings. That is the case here. The lower court did not have jurisdiction to hear and determine a work injury claim given the provisions of section 16 and 52(2) of the *Work Injury Benefits Act*.

28. I further find that a matter was discovered with reference to the judgment of the Court of Appeal in *Nairobi Civil Appeal No. 133 of 2011* which most definitely had adequately compensated the Respondent.

29. I find that this appeal is merited and is allowed with costs to the Appellant.

It is so ordered

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF JULY, 2025

In The Presence Of;

Mwendwa for the Appellants

Muchiri for the Respondents

Siele/Mark (Count Assistants)

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J. NG'ARNG'AR

JUDGE