



**Safari v China Henan International Cooperation Group Co Ltd (Civil Appeal
E135 of 2022) [2024] KEHC 2843 (KLR) (13 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2843 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E135 OF 2022
SM GITHINJI, J
MARCH 13, 2024**

BETWEEN

BERNARD MWANYULE SAFARI APPELLANT

AND

**CHINA HENAN INTERNATIONAL COOPERATION GROUP CO
LTD RESPONDENT**

*(Being an Appeal from the decision of Hon I.Thamara delivered
on 5th December, 2022 in Malindi Case No.247 of 2019)*

JUDGMENT

1. This appeal arises from a judgment delivered by Hon. I. Thamara (RM) on 5th December 2022 in Malindi CMCC No. 247 of 2019. In that suit, the Appellant had sued the Respondent vide a plaint dated 22nd October 2019, for special and general damages for pain and suffering as a result of injuries allegedly sustained in the course of employment. The Appellant averred that he was employed by the Respondent as a foreman at Mambrui Pipeline, when certain walls of a trench he was digging collapsed causing him to sustain multiple abrasions on the head and left lower limb.
2. In the course of the proceedings before the subordinate court, the Respondent raised the issue of jurisdiction on two occasions. First before the then Chief Magistrate Hon. Dr. Julie Oseko who determined that the case was covered by the holding of the Court of Appeal and Supreme Court. The Respondent raised the issue again when the matter was taken over by Hon. Thamara. Upon consideration of the pleadings, evidence and submission, the learned magistrate dismissed the suit on grounds of jurisdiction. The learned magistrate held: -

“It is therefore evident that the Plaintiff was to first exhaust the mechanisms provided under statute prior to filing this claim. Consequently, having considered the above decisions and



that the instant suit was filed after the enactment of the Work Injury and Benefits Act, I find that this court has no jurisdiction to determine the matter...”

3. Dissatisfied with the above decision, the Appellant filed a memorandum of appeal dated 6th December 2022 premised on the following grounds: -
 1. That the learned trial magistrate erred in law and in fact in finding that the court lacked jurisdiction to hear and determine the suit.
 2. That the learned trial magistrate erred in law and in fact in determining the issue of jurisdiction when the same issue had already been determined to finality by a court of competent jurisdiction hence res judicata.
 3. That the learned trial magistrate erred in law and in fact in failing to take into account authorities cited by the Appellant.
 4. That the learned trial magistrate erred in law and in fact in failing to consider or have any sufficient regard to the submissions filed on behalf of the respondent.
 5. That the learned trial magistrate erred relied (sic) on the wrong principle in arriving at the judgment.
 6. That in all the circumstances of the case, the learned trial magistrate failed to do justice.
4. The Appellant prayed for orders: -
 1. This appeal is allowed and the judgment dismissing the suit is set aside and substituting therefore with orders granting the prayers as sought in the plaint.
 2. The costs of this appeal and in the magistrate’s, court be borne by the Respondent.
 3. Any other relief this honourable court may deem fit to grant.
5. The appeal was canvassed by way of written submissions.

Appellant’s Submissions

6. Counsel for the Appellant relied on Gazette Notice No. 5476 of 2023 on practice directions relating to pending court claims regarding compensation for work related injuries and diseases instituted prior to the supreme court decision *LSK v AG & Another* Petition No. 4 of 2019 [2019] eKLR; and *Timothy Kinyua Nyaga v Langfield Systems Limited & Another* [2021] eKLR. He argued that since the subject suit was filed in the intervening period before determination of the appeal before the supreme court and for the reason that section 9 (b) of the *Work Injury and Benefits Act* (WIBA) gave the magistrates’ court’s jurisdiction to hear and determine claims relating to Employment and Labour Relations, the learned trial magistrate in this case erred in her determination on jurisdiction.
7. Counsel further submitted that the trial magistrate erred in considering the issue of jurisdiction yet the same had been raised in a preliminary objection dated 10th December 2020, and determined by a court of competent jurisdiction on 3rd March 2022. To counsel, the issue of jurisdiction was res judicata and the trial magistrate had no business entertaining it at that point. He relied on the cases of *IEBC v Maina Kai & 5 Others* [2017] eKLR; *Owners of the Motor Vessel ‘Lilian S’ v Caltex Oil (Kenya) Ltd* [1989] KLR 1.
8. To counsel, that the Respondent had submitted itself to the trial court’s jurisdiction and that the matter had proceeded to a full hearing, it was not proper to raise the same issue at the judgment stage.



To buttress this point, counsel cited the cases of *Mary Wamuyu Mwangi v Joseph Kabara Thinwa* [2015] eKLR; and *Wainaina Kimani v Land Dispute Tribunal Gatanga & Another* [2009] eKLR.

9. Ultimately, counsel addressed the issue of liability and quantum as should have been addressed by the trial court. He submitted that since the Respondent failed to prove its allegation that the Appellant had all the requisite protective gear, as was required of it under section 107, 109 and 112 of the *Evidence Act*, the court should find that the Appellant has proved his case on a balance of probabilities and the Respondent be held 100% liable for the accident.
10. On general damages for pain and suffering, counsel relied on the treatment notes and medical report filed by the Appellant. He submitted that since the said documents were not challenged and in respect of the injuries suffered, a sum of Kshs. 1,500,000/- would adequately compensate the Appellant. Counsel relied on the case of *Hezron Waitbaka Ndarwa & Another v Ezekiel Rubeni Maina* [2019] eKLR where the Respondent was awarded general damages Kshs. 1,200,000/- for multiple rib fractures.
11. Counsel further submitted that special damages as pleaded had been proved by production of receipts attached at page 14 of the record of appeal.
12. Counsel urged the court to allow the appeal as prayed together with interest on damages from the date of filing the primary suit until payment in full.

Respondent's Submissions

13. Citing the same supreme court decision, Petition No.4 of 2019 *LSK v AG & another*, where the apex court confirmed that the courts never had jurisdiction to handle work injuries related matters in claims filed after the commencement of WIBA on 2nd June 2008. Such jurisdiction was donated to the director of occupational safety and health services by the said Act.
14. Counsel explained that only matters that were filed and pending in court before the said commencement date were to be continued and concluded in those courts. He argued that parties' participation in a trial could not confer jurisdiction on a trial court and that a court's jurisdiction only flows from statute or constitution. Counsel relied on the cases of *Heritage Insurance Company Limited v David Fikiri Joshua & another* [2021] eKLR; *Peter Gichuki King'ara v IEBC & 2 Others* [2013] eKLR; *Samuel Kamau Macharia & Another v KCB Limited & 2 Others* [2012] eKLR; and *Owners of Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Limited* [1989] eKLR.
15. Further, counsel submitted that this court is empowered to put the record straight by upholding the decision of the trial court. To buttress this point, counsel relied on the case of *Chumo Arap Songok v David Kibiego Rotich* [2006] eKLR.
16. Counsel argued that this court does not have jurisdiction to dive at some length into the factual details of the case or revisit the facts as presented before the trial court, as such the only remedy was to dismiss the appeal with costs.
17. Having considered the memorandum of appeal, arguments advanced by both parties, authorities presented and the record of appeal filed, I find that the significant issues for determination is: -

Whether this Court itself have jurisdiction to hear the appeal.

18. There is no doubt and it is conceded by both parties that dispute herein is employment related. There is established a special court for such matters. Article 162 (2) of the *Constitution* of Kenya, 2010 as read with section 12 of the *Employment and Labour Relations Act*, 2011 provide for establishment



and jurisdiction of the Employment and Labour Relations Court. Further, Article 165(5) (b) of the *Constitution* of Kenya, 2010 ousts this court's jurisdiction in respect of matters falling within the jurisdiction of the courts established under Article 162(2). Having considered so I find that this court lacks jurisdiction to determine this appeal and it's therefore dismissed with costs the respondents. The appeal should have been filed in Employment and Labour Relations Court.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 13TH DAY OF MARCH, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Mayieka for the Respondent
2. Nyambuto for the Appellant

