Jumbo North (EA) Limited v Omondi (Civil Appeal E17 of 2020) [2024] KEHC 7022 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7022 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E17 OF 2020

RN NYAKUNDI, J

JUNE 13, 2024

BETWEEN

JUMBO NORTH (EA) LIMITED .... APPELLANT

AND

JUMA OMOLO OMONDI .... RESPONDENT

JUDGMENT

Representation:

M/s Nyario & Co. Advocate

M/s G.O Barongo & Company Advocates

1. The appeal herein arises from the ruling of Hon. R. Odenyo in Eldoret CMCC No. 473 of 2018 delivered on 29th October 2020. The respondent instituted a suit in the trial court vide a Plaint dated 26th April 2018 claiming general damages from the appellant for injuries allegedly sustained at the appellants' place of work. The respondent claimed that he sustained injuries on or about 28th April 2016 while working at the appellants' premises which were due to the appellants' negligence. The appellant entered a defence and during the pendency of the suit, the respondent filed a Notice of Preliminary Objection dated 10th February 2020 challenging the jurisdiction of the trial court to hear and determine the matter..

2. The parties prosecuted the objection vide written submissions and the trial court dismissed the preliminary objection on 29th October 2020. Being aggrieved by the ruling, the appellant instituted the present appeal vide w memorandum of appeal dated 3rd November 2020 premised on the following grounds;

    i. That the learned trial magistrate erred in law and in fact in dismissing the appellants' preliminary objection on jurisdiction.

ii. That the learned trial magistrate erred in law and in fact in failing to correctly interpret the provisions of sections 16 and 58 of the *Work Injury benefits Act*, 2007, hence an erroneous decision.

iii. That the learned trial magistrate erred in law and in fact in failing to appreciate, interpret and apply the provisions of sections 16 and 58 of the *Work injury benefits Act* 2007 hence an erroneous decision.

iv. That the learned trial magistrate erred in law and in fact in failing to hold and/or find that the decision of the Court of Appeal in Attorney general v aw Society of Kenya & Another [2017] eKLR delivered on 17th November 2017 was binding and thus could not hold otherwise.

v. That the learned trial magistrate erred in law and in fact in failing to hold that the Supreme Court decision delivered on 3rd December 2019 in petition 4 of 2019 was binding, directive and final with regard to the *Work Injury benefits Act*, 2007.

vi. That the learned trial magistrate erred in law and in fact in failing to consider, appreciate and apply the finding of the Court of Appeal and Supreme Court with regard to jurisdiction hence an erroneous and unfounded decision in law.

vii. That the learned trial magistrate erred in law and in fact in failing to appreciate and interpret the Court of Appeal and Supreme Court decisions correctly hence an erroneous decision.

viii. That the learned trial magistrate erred in law and in fact in failing to hold that the Court lacked jurisdiction to entertain work injury claims and thus an erroneous decision not founded and/or backed in law.

ix. That the learned trial magistrate erred in law and in fact in failing to find and hold that the respondent instituted the suit in the wrong forum and thus the court had no jurisdiction to handle it.

x. That the learned trial magistrate erred in law and in fact in misinterpreting the Supreme Court decision with regard to the legitimate expectation of the respondent taking into account the law in force at the time of institution of the suit.

xi. That the learned trial magistrate erred in law and in fact in failing to consider the Appellants' submissions and the authorities supplied to court hence an erroneous decision.

xii. That the learned trial magistrate erred in law and in fact in misdirecting itself with regard to the Supreme Court decision delivered on 3rd December 2019 hence an erroneous decision in the circumstances.

Appellants' submissions

3. The appellant filed submissions dated 10th January 2024 through the firm of M/S Nyairo & Company Advocates. Counsel submitted that from the onset that the magistrate's courts have no jurisdiction to hear and determine work injury claims and the decision of the trial magistrate to dismiss the Preliminary Objection was to say the least, wrong and ought to be set aside. Counsel cited the case of Owners of Motor vessel "Lillian S v Caltex Oil (Kenya) Limited [1989] eKLR - Civil Appeal No.50 of 1989 in support of this submission, with regards to jurisdiction.

4. It is the appellants' case that it is not in dispute that the Respondent's claim is a Work Injury claim as can be discerned from the pleadings filed. Therefore, it naturally follows that the Respondent's claim

is governed by the Work Injury Benefits Act, 2007. The claim in the Subordinate Court was instituted on 30th April 2018 vide a Plaint dated 26th April, 2016 after the Work Injury Benefits Act, 2007 came into force. The said Act provides for a structure and/or framework on how to seek redress for work injury claims. Counsel cited Sections 22 and 23 of the Work Injury Benefits Act, 2007 which explicitly provide the forum for litigating work injury claims. The said sections confer power upon the Director of Occupational Safety and Health Services to handle such claims. Counsel cited Section 58 of the said Act and urged that the statute has established a forum and frame work for litigating work injury related claims and therefore sustaining a work injury claim in the Subordinate Court will not only be irregular but in breach of the law.

5. It is the appellants' case that the trial court erred in law in dismissing the Preliminary Objection since the Work Injury Benefit Act 2007 is clear on the matter. This position was supported by the Supreme Court in Petition No. 4 of 2019 which dealt with this issue exhaustively in paragraph 85 and 88 of its judgment which the appellant cited.

6. Counsel reiterated that the legal regime subsisting at the time of the institution of the suit was the Work Injury Benefits Act, 2007 and therefore goes without saying that a claim for injury at the work place had to be brought within the existing regime of law. Further, that the Plaintiff having elected to ignore the law cannot turn around to seek refuge from the same law under the disguised imagination of legitimate expectation.

7. Counsel submitted that in the case of Attorney General v Law Society of Kenya and another CA [2017] eKLR (Waki. Makhandia and Ouko JJA) and which decision was upheld by the Supreme Court, the Work Injury Benefits Act, 2007 was declared as constitutional. Additionally, that it is instructive to point out the fact that the Court of Appeal decision is by law binding upon the courts under it and the trial magistrate having failed to abide by the said decision, erred in law and the decision thereof ought to be set aside as a matter of law. He urged that the trial magistrate even after being alerted of the express provisions in the said statute and the decisions of the Supreme Court and the Court of Appeal went ahead and delivered its ruling on 29th October, 2020 purporting to confer jurisdiction onto himself in total contravention of the law, the Supreme Court and the Court of Appeal judgment.

8. Counsel urged that the Supreme Court further made it clear with regards to the confusion caused by the High Court Judge in Mombasa in John Nyamawi Ndunso & 4 others v Attorney General & Mombasa Law Society Constitutional -Petition No.196 of 2018 and stressed as follows

> The present appeal was straight forward and we have settled the questions placed before us for determination. However, before we conclude we must take note of a matter that was brought to our attention at the hearing of this appeal. While this matter was before us awaiting determination, E.K. Ogola J, on 10th June, 2019 in the High Court of Kenya at Mombasa, rendered a decision in the case of Juma Mwamawi Ndungo & 5 others vs. Attorney General, Mombasa Law Society (Interested Party), Constitutional Petition No.196 of2018 (2019) eKLR. Broadly, some of the issues for determination in that matter included whether the WIBA was unconstitutional in light of the Constitution 2010. We are greatly dismayed that the learned Judge did not take judicial notice of the pendency of this appeal although he was aware of it. As a matter of fact, he stated so in his judgment that an appeal had been preferred to us against the decision of the Court of Appeal to the apex court on matters whose determination may well have been binding on him The learned Judge ought to have held his horses and acknowledge the hierarchy of the courts and await for this court to pronounce itself before rendering himself, if at all. As we perceive it. his judgment has created unnecessary confusion in the application of WIBA and cannot be

allowed to stand as it may (may or is) also be contrary to this judgment. The findings and orders expressed in that judgment must therefore be read in context of the decision of the Court of Appeal and our finding and orders in this appeal. That is all there is to say on that matter. ”

9. The appellant reiterated that the decision of the magistrates Court ought to be bound by the decision of the superior courts. He referred to Article 163 (7) of *the Constitution* of Kenya 2010 and cited the case of The Supreme Court in Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 others (2013) in support of this submission.

10. Counsel submitted that the trial court misdirected itself in rendering a wrong interpretation as to legitimate expectation. He maintained that the correct position is that those litigants who instituted suits before the Work Injuries Benefits Act, 2007, under the repealed statute (Workmen Compensation Act) had legitimate expectation to have their matters concluded under that regime before the *Work Injury Benefits Act*, 2007 came into force. Additionally, he cited the case of *Shree Ganesh Enterprises and another Vs Boniface Mung'aya (Bungoma ELRC Appeal No. E018 of 2021*) in support of this submission. Counsel urged the court to allow the appeal as prayed.

Analysis & Determination

11. This being a first appeal, this Court has the duty to analyze and re-examine the evidence adduced in the lower Court and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify and make allowance for the said fact. In Selle v Associated Motor Boat Co. [1968] EA 123 the court held as follows:

> “ The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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 the 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

12. In that regard, an appellate Court will only interfere with the judgment of the lower Court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

> “ A Court on appeal will not normally interfere with the finding of fact by a trial Court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

13. Upon consideration of the record of appeal and submissions thereto, the following issue arises for determination;

    i. Whether the trial court had jurisdiction to hear the matter

Whether the trial court had jurisdiction to hear the matter**

14. The Notice of Preliminary Objection dated 10/02/2020 was premised on the grounds that the suit contravened the provisions of Section 16 and 58 of the *Work Injury Benefits Act*, 2007. Jurisdiction

is everything and without which a Court must down its tools has held in the well celebrated case of Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd (Supra) the Court held as follows;

> " 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 a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction"

15. Upon considering the Plaint, it is evident that the suit related to compensation for injuries at the workplace an area of law dealt with by the *Work Injury Benefits Act*, 2007 which came into force on 2/6/2008.

16. Section 16 of the Act provides that;

> No action shall lie by an employee or and dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death."

17. Section 21 of the Act provides that:

> " Written or verbal notice of any accident provided for in Section 22 which occurs during employment shall be given by or on behalf of the employee concerned to the employer and a copy of the written notice or notice of the verbal notice shall be sent to the Director within twenty-four hours of its occurrence in the case of a fatal accident.

18. Section 58 of the Act provides that:

    1. Any regulation or other instrument made or issued under the Workmen's Compensation Act and having effect before the commencement of this Act shall continue to have effect as if such regulation or other instrument were made or issued under this Act.

    2. Any claim in respect of an accident or disease occurring before the commencement of this Act shall be deemed to have been lodged under this Act.

19. In the case of Law Society of Kenya v Attorney General & Another, Petition 185 of 2008 at Mombasa [2009] eKLR, Justice J.B Ojwang (as he then was) found the provisions of Section 4; 7(1) and (2); 10(4); 16; 33(1); 25(1) and (3); 52(1); and 58(2) of WIBA inconsistent with *the Constitution* and thus null and void. The Attorney General appealed against the decision vide Appeal No. 133 of 2011 where the Court of Appeal found the foregoing provisions of WIBA consistent with *the Constitution* other than Section 7 and 10(4), in its judgement delivered on 17th November, 2017. With reference to Section 16 of WIBA, 2007, the Court of Appeal held that;

> " The section is to the effect that no employee or his dependants can institute a Court action against the employer to claim damages in respect of work-related accident or disease resulting in the disablement or death of such employee. The recourse provided for such an employee or his dependant is to notify the Director . . .Section 16 as read with Section 23(1) confer powers of adjudication of any claim for compensation arising from injury or death in the workplace upon the Director and expressly bars institution of Court proceedings by the aggrieved employee."

20. The Court found no justification why Section 16 had been declared to be inconsistent with *the Constitution* and further, it set aside the High Court's holding that Sections 4, 16, 21(1), 23(1), 25(1) (3), 52(1) (2) and 58(2) were inconsistent with the former Constitution. As regards Section 16 of the WIBA, 2007, the Court stated

> "In doing so, a plain reading of Section 16 of the Act would reveal that its intention is not to limit access to Courts but to create a statutory mechanism where any claim by an employee under the Act is subjected initially, to a process of dispute resolution starting with an investigation and award by the Director aforesaid and thereafter, under Section 52 an appeal to the then Industrial Court . . ."

21. The Court further held as follows:

> That Section 16 cannot be read in isolation so as to create the impression that it curtails the right to immediately access the Court because by looking at the intention of Section 16, the purpose it fulfils is apparent. That the purpose is related in Section 23 which calls for initial resolution of dispute via the Director and this can be deemed as an alternative dispute resolution mechanism. But what if one is still aggrieved by the decision of the Director. The answer to that question lies in Section 52 of the Act which allows aggrieved parties to seek redress in a Court process . . ."

22. The Court of Appeal upheld the constitutionality of sections 4, 16, 21(1), 23(1), 25 (1) (3), 52 (1) (2) and 58 of the *Work Injury Benefits Act*, 2007 (WIBA). The provisions under WIBA require injuries under the WIBA to be adjudicated upon by the Director of Occupational Safety and Health Services (the Director) and expressly bars institution of Court proceedings by an aggrieved employee save under the provisions of the Act. The right to approach the Courts as of first instance is curtailed and the Employment and Labour Relations Court is designated as an Appellate Court from the decision of the Director per section 52 (2) of WIBA. The Supreme Court delivered its judgment in Law Society of Keny v Attorney General & Another [2019]eKLR (Maraga CJ & P, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ) on 03.12.2019 in which it dismissed the appeal and upheld the decision by the Court of Appeal.

23. At the time the Court of Appeal and the Supreme Court delivered their respective judgments finding and upholding the constitutionality of Sections of the *Work injury Benefits Act*, as constitutional, the suit subject of the present appeal had been instituted. Regarding legitimate expectation by parties already before Court both the Court of Appeal and the Supreme Court addressed the issue of legitimate expectation. The Court of Appeal expressed itself as follows;

> "With respect, we agree that Claimant's in those pending case have legitimate expectations that upon the passage of the Act, their cases would be concluded under the judicial process which they had invoked. Indeed, as a result of this concern, the learned judge in a ruling on an interlocutory application directed that . . . The legislative practice where a new judicial forum is created to replace an existing system is to finalize all proceedings pending in the previous system before that forum where they are commenced. For instance, upon the establishment of the Employment and Labour Relations Court, Section 33 of the *Employment and Labour Relations Court Act* provided for what would happen to pending claims . . .

24. The Supreme Court addressed the issue of legitimate expectation in paragraph 85 of its judgment initially citing the sentiments of Court of Appeal above.

> "In agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of the Act, litigation relating to work-injuries had gone on and a number of the suits had progressed to the decree stage; some of which were still being heard; while others were still at the preliminary stage. All such matters were being dealt with under the then existing and completely different regimes of law. We thus agree with the Appellate Court that Claimants in those pending case have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process which they invoked. However, were it not for such legitimate expectation, WIBA, not being unconstitutional, and an even more progressive statute, as we have shown above we opine that it is best that all matters are finalized under Section 52 aforesaid. The above proposition would be the most prudent way for a judicial system to operate."

25. From the foregoing it is clear that the legitimate expectation alluded to by the Court of Appeal and upheld by the Supreme Court in *Law Society of Kenya v Attorney General & another [2019] eKLR vide Petition No. 4 of 2019*, was with respect to pending litigation as stated by the Justice Ojwang sitting at the High Court while granting interim orders as follows:-

> "On the foregoing grounds, I will order that, pending the hearing and determination of the main cause, all pending litigation which had been commenced on the basis of either the Workmen's Compensation Act .... or of the common law, or of a combination of both regimes of law, shall continue to be prosecuted and, in a proper case, finalized on the basis of the operative law prior to the entry into force of the *Work Injury Benefits Act*, 2007...."

26. The Court of Appeal position on the legitimate expectation was in tandem with the High Court interlocutory order by Justice Ojwang (as he then was) above. The Court of Appeal position on the legitimate expectation was limited to pending cases at whatever stage filed under the legal regime prior to enactment of WIBA. This Court of Appeal position was upheld by the Supreme Court *Law Society of Kenya v Attorney General & another [2019] eKLR vide Petition No. 4 of 2019* which held as follows:-

> "In agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of the Act, litigation relating to work-injuries had gone on and a number of the suits had progressed up to decree stage; some of which were still being heard; while others were still at the preliminary stage. All such matters were being dealt with under the then existing and completely different regimes of law. We thus agree with the Appellate Court that claimants in those pending cases have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked. However, were it not for such legitimate expectation, WIBA, not being unconstitutional and an even more progressive statute, as we have shown above we opine that it is best that all matters are finalized under Section 52 aforesaid."

27. In my view, the import of the Supreme Court's judgment in *Law Society of Kenya V. Attorney General & others [2019] eKLR via Petition No. 4 of 2019*, is that all work injury-related claims after WIBA's entry into force rest with the Director, with the only exception made on the grounds of legitimate expectations in relation to litigation that was pending before the law's entry into force on 2/6/2008. Therefore, there is no question that this instant appeal was filed on 3/11/2020, which was after the Supreme Court had rendered its judgment on 3/12/2019 in Petition No. 4 of 2019 (Supra). As such,

it is subject to the Practice Directions issued by The Honourable Chief Justice, Martha K. Koome, on 28/4/2023 vide Kenya Gazette Vol. CXXV-No.99.

.Under claims filed after commencement of WIBA but before the Supreme Court decision Rule 7 of the said Practice Directions provides as follows:

"Taking into account that the High Court vide its judgment dated 4th March, 2009 in Law Society of Kenya v Attorney General & Another [2009] eKLR declared some of the provisions of WIBA including Section 16, 23(1) and 52, which prescribe the procedure for lodging claims under the Act unconstitutional. Consequently, the said declaration of nullity created a legitimate expectation that claimants could directly lodge claims for compensation for work related injuries and diseases in Court. As such, litigants cannot be penalized for relying on the declaration of a nullity, as appreciated by the Supreme Court in Attorney general and 2 others v Ndii and 79 Others; Prof, Rosalind Dixon and 7 Others (Amicus Curiae) Petition 12, 11 and 13 of 2021 (consolidated) [2022] KESC 8 (KLR) to lodge their claims in Court. Therefore,

(a) All claims with respect to compensation for work related injuries and diseases filed after the commencement of WIBA and before the Supreme Court decision at the Employment Labour Relations Court or the Magistrates' Courts shall proceed until conclusion before the said Courts.

(b) All pending judgments and rulings relating to compensation for work related injuries and diseases before the Employment and Labour Relations Court and Magistrates' Court shall be delivered by the same Court.

28. In view of the foregoing, I am in agreement with the Appellant's position that the first port of call when it comes to work related injuries and diseases should be the Director of Occupational Safety and Health Services and not the Court. However, in view of Rule 7 of the Practice Directions relating to pending Court claims regarding compensation for work related injuries and diseases instituted prior to the Supreme Court's decision issued by the Honourable Chief Justice, the trial Court in this instance has jurisdiction to hear and determine to the work injury claim currently before it and as such shall continue the suit before it.

29. In the premises, the appeal is dismissed in its entirety.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 13TH DAY OF JUNE 2024

In the Presence of

Mr. Sibika Advocate for Nyairo

....

R. NYAKUNDI

JUDGE