Ngumbi v China Communication S Construction Co Limited & 2 others (Civil Appeal E079 of 2021) [2024] KEHC 17209 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KEHC 17209 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL E079 OF 2021

TM MATHEKA, J

JUNE 21, 2024

BETWEEN

JOSHUA MUOKI NGUMBI ..... APPELLANT

AND

CHINA COMMUNICATION S CONSTRUCTION CO LIMITED .... 1ST RESPONDENT

CHINA ROAD AND BRIDGE CORPORATION & ANOTHER & ANOTHER & ANOTHER & ANOTHER & ANOTHER & ANOTHER ..... 2ND RESPONDENT

JUDGMENT

1. This appeal was brought vide the Memorandum of Appeal filed on 4/11/2021 –
2. That the learned trial magistrate erred in law and in fact by upholding the 1st and 2nd defendant's preliminary objection (P.O) and consequently striking out the plaintiff's suit.
3. That the learned trial magistrate erred in law and in fact by holding that, section 10(5) of the Work and Injury Benefit Act (WIBA 2007) applied to the claim and therefore the plaintiff's claim falls under the provisions of Work and Injury Benefit Act (WIBA 2007).
4. The learned trial magistrate erred in law and in fact by holding that the 1st and 2nd defendants had a relationship but failed to show the nature of the relationship and how the said relationship affected and/or applied to the plaintiff's suit.
5. That the learned trial magistrate erred in law and in fact by failing to find that even if the plaintiff was an employee of the 1st defendant, the plaintiff's suit against the 2nd and 3rd defendant could only be determined in court and the claim against the 2nd and 3rd defendant was valid.

6. That the learned trial magistrate erred in law and in fact by striking out the plaintiff's suit while the matter raised issues of negligence as against the 2nd and 3rd defendants which issues could only be determined in a court of law.

7. The learned trial magistrate erred in law and fact by holding that the Work and Injury Benefit Act WIBA applied in the plaintiff's suit while the said Act was not applicable in the circumstances.

8. What happened was that the appellant Joshua Muoki Ngumbi filed a suit for special and general damages for pain, suffering and loss of amenities, for loss of income/earnings vide a plaint dated 6/8/2020 and amended on 17/12/2020.

9. The claim arose out of the Road Traffic Accident that happened on 1/4/2019 at Kima, Salama area along Nairobi-Mombasa road when the plaintiff was travelling as a passenger in the motor vehicle registration number KCL 003Y, Isuzu NQR Isuzu Bus/Coach. It was his position that the bus was driven so negligently by the 3rd defendant – Edward Ndolo Nzive who was the authorized driver servant or agent of the 2nd defendant that it lost control, over turned and rolled several times – causing him injuries, loss and damage. It is the plaintiff's claim that the 1st defendant, who was at all times the beneficial/owner in possession of the bus, and the 2nd defendant who was the registered owner of the bus – were vicariously liable for the negligence of the 3rd defendant.

10. The defendants – (1st and 2nd) through their defence dated 31/5/21 denied the allegation that they were ever in possession/registered owner of the bus or that the 3rd defendant was their driver/agent/or that a road traffic accident happened/and all other allegations and put the plaintiff in strict proof thereof. Particulars of negligence against the plaintiff were also set out.

11. At paragraph 8, 14 and 15 of the defence the 1st and 2nd defendants stated: -

> "In the further alternative and without prejudice to the foregoing the 1st and 2nd defendants aver that the accident occurred when the plaintiff was employed by the 1st and 2nd defendants and that the accident occurred in the course of the said employment ... the jurisdiction of this court is challenged and/denied.
>
> ... The 1st and 2nd defendants aver that the suit is fatally defective and shall raise a point of law at the opportune moment".

1. The 1st and 2nd defendants filed list of documents dated 19/7/221 which included the plaintiff's agreement of employment between plaintiff and 1st defendant, pay slip, plaintiff's signed job card for the day of the road traffic accident, work injury request form.

2. In his witness statement dated 17/12/2020 – the plaintiff described himself thus;

> "I and some other passengers were casual labourers hired by the China Constructions Communications Limited and were travelling from Nairobi to their Emali site area."

12. This fact (of the employment of the appellant by the 1st respondent) was confirmed by the statement of Elizabeth Wambua – the Human Resource Assistant for the 1st defendant dated 20/7/2021. She stated that the 1st defendant was a subsidiary of the 2nd defendant – and that indeed it was true that a

road traffic accident involving their bus and employees had occurred and the plaintiff and others were injured. That the plaintiff and those others were on board the said motor vehicle KCL 003Y –

> " By virtue of their employment contract with the company and were injured while in the course of their employment"

13. The 1st and 2nd defendants filed a Notice of Preliminary Objection dated 19/7/2021 seeking that the suit against them be dismissed/struck out on the grounds that – the cause of action was a Work Injury claim that arose in the 1/4/2019, and pursuant to the provision of section 16 of the WIBA, 2007 as read with section 23, the court lacked jurisdiction to hear the matter/have the matter pending before it; that the suit/ matter should not have been instituted in court in the 1st instance.

14. After considering submissions from both counsel – the learned magistrate vide a ruling dated 7/10/021 found the P.O merited, and struck out the suit, in its entirety – on account of the provisions of WIBA, the Court of Appeal and Supreme Court directions on the procedure with respect of WIBA cases in the 1st instance.

15. Parties filed written submissions.

16. For the appellant it is submitted that in the 1st instance there was interlocutory judgment against the defendants /respondents however the 1st and 2nd defendants moved the court and had the interlocutory judgment against them set aside – but the interlocutory judgment against the 3rd defendant remained in force.

17. It was further submitted that the WIBA does not apply to this case for the following reasons:

18. The appellant was employed by the 1st respondent only and there was no evidence that he was an employee of the 2nd respondent. That these two are different registered legal entities and no relationship was established in their pleadings to warrant the conclusion drawn by the learned trial magistrate that they were related.

19. That the parties are bound by their pleadings – the 1st respondent by denying any relationship with the motor vehicle was a denial of any relationship between 1st respondent and the 2nd respondent see Peter Onjala Nyandare v South Nyanza Sugar Company Ltd [2018] eKLR.

    That in the circumstances section 10(5) WIBA only applies to 1st respondent only.

20. That with respect to 2nd and 3rd respondent the trial court had jurisdiction as it is a case of negligence – involving a road traffic accident involving the police, a traffic charge against the 3rd respondent.

21. That the circumstances of this case do not rise to the definition of a P.O in Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Limited.

22. For the 1st and 2nd respondents it is submitted that:

23. The PO passed the test set in Mukisa Biscuit as seen in Caltex Oil (Kenya) Ltd v Rono Ltd (2016) eKLR – that a PO consists of a point of law, or arises by clear implication of the pleadings and which upon argument may dispose of the suit. A PO would be on jurisdiction, or limitation.

24. That the only reason the applicant was on the bus that day was due to his employment and sustained injuries in the course of his employment. That this kind of accident is provided for in the WIBA as set out in section 10(5) of the WIBA.

25. That the appellant has a cause against the 3rd defendant/respondent as provided for by section 17 of the WIBA.

26. That vide the Court of Appeal and the Supreme Court: - in Law Society of Kenya v AG and Another [2019] eKLR, Sammy Ndungu Waity v IEBC &3 Others [2019] eKLR

> " Where *the Constitution* or any other law establishes an organ with a clear mandate for the resolution of a given genre of disputes, no other body can lawfully usurp such power, nor can it append such organ from the pedestal of execution of its mandate. To hold otherwise would be to render the constitutional provision inoperable, a tendency into which no judicial tribunal however daring would dare to fly.

27. That the Supreme Court went to demonstrate the different levels of access to justice for an employee via the WIBA. The respondents rely on – Paul Kipkoech v Skyline Sacco Society Ltd & Another [2017] e KLR, Manuchar Kenya Ltd vs Dennis Odhiambo Olwete [2020] eKLR to the effect that the jurisdiction of the court was ousted by statute in the 1st instance.

28. That the then Hon Chief Justice through Kenya Gazette Vol.99 of 28/4/2023 had given clear directions on the application of WIBA to matters pre and post the Supreme Court decision on jurisdiction –the gazette notice states:

> " ...As such, litigants cannot be penalized for relying on the declaration of nullity, as appreciated by the Supreme Court in Attorney-General and 2 Others v Ndii and 79 Others; Prof. Rosalid 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,
>
> 1. 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 and Labour Relations Courts or the magistrates' courts shall proceed until conclusion before the said courts.
>
> 2. All pending judgments and rulings relating to compensation for work related injuries and diseases before the Employment and Labour Relations Court and the magistrates' courts shall be delivered by the same court.
>
> Claims filed after the Supreme Court Decision
>
> 8(a) All claims with respect to compensation for work related injuries and diseases shall commence before the Director of Occupational Safety and Health Services.
>
> b. All appeals emanating from the decision of the Director of Occupational Safety and Health Services shall lie before the Employment and Labour Relations Court.
>
> Such appeal shall be heard and determined through the appropriate appellate mechanism within the judicial hierarchy.

29. From the foregoing, the issue for determination is whether the PO on jurisdiction is merited.

30. I need not repeat here the definition of a P.O – it is well sated in Mukisa Biscuit above.

31. It is not in dispute that an accident happened on the 1/4/2019 when the appellant was riding in a bus registered in the name of the 2nd respondent, and possessed by the 1st respondent – those facts though denied in the statement of defence are admitted in the witness statement of the HR assistant of the 1st respondent – on behalf of both respondents. It is also not in dispute that the appellant was travelling in the course of his employment as an employee of the 1st respondent. The respondents deny that the driver was their servant/agent and have left him to the appellant to sue as he wishes for the alleged negligence.

32. From the foregoing authorities, it is evident that the question that begs is whether those circumstances fit in the circumstances envisaged by the statute.

33. It has been argued for the respondent that the statute does not oust the jurisdiction of the court – because this is a case of negligence.

34. I have read the words of the Supreme Court with respect to jurisdiction and there is no doubt that if indeed it is established that the applicant sustained injuries in the cause of his employment – the matter would have to follow the procedure in WIBA.

35. It has been argued that the trial magistrate put a lot of weather on the ownership of the motor vehicle instead of the issue of negligence. In my view the issue is about the claimant, and his claim. Where should the claimant place his claim? The rest becomes evidence to support his claim.

36. Further, the argument that the issue of jurisdiction would have to be settled through a full hearing is untenable. This is because the PO can be raised for the mere fact that it is imminent from the pleadings what the cause of action is. The pleadings by themselves reveal what the cause of action is, and definitely which forum has the jurisdiction to deal with the issue.

37. Turning to the law, Section 10(5) of the WIBA states-

> " For the purpose of this Act the conveyance of an employee to or from the employee's place of employment for the purpose of the employee's employment by means of a vehicle provided for the purpose of conveying employees is deemed to be in the course of the employee's employment."

38. A reading of this provision of the law vis –a- vis the facts of the case reveals that it is not even about who owns the motor vehicle, who the driver was or their relatives – it is about the employee and the employer. If the employer was hired a bus to ferry the employee from point A to B for purposes of work – that fact alone makes that movement to be in the course of employment and the jurisdiction of the WIBA falls in place – room is not given to start denying who owned the motor vehicle or whether it was registered in the name of the employer – the fact is that the employer provided transport to ferry the employee for work from point A to point B.

39. In my view to that extent the learned trial magistrate was right.

40. What about the claim against the driver or any other 3rd party? I agree with the submissions that that issue is covered under section 17 of the WIBA – where it is provided that if the occupational accident is such that 3rd party becomes liable for damages - then the employee is entitled to seek compensation under WIBA, and also seek for damages in a court with jurisdiction. This entitlement also applies to the employer who can sue the 3rd party to recover any damages paid in compensation to the employees.

41. In this case – the appellant's claim was one claim against the respondents. It is tied together – that the 1st and 2nd respondents and the 3rd respondent were all responsible for the accident – hence the prayer

at paragraph *10* "judgment against the defendants jointly and severally for ..." the argument that the learned trial court could have severed the claim against the 2nd and 3rd respondent or the 3rd respondent is untenable for this reason.

42. It was not the responsibility of the trial court to determine which claim to save and which one to throw out. The claimant is the one granted the choice by the statute. To identify who to sue in the civil court as the 3rd party in their claim for compensation. In this case the plaintiff filed for judgment jointly and severally against the defendants. It means to him all the defendants were responsible for the accident, his injuries, loss and damage.

43. This plaint herein is dated 6/8/2020, amended on 17/12/2020; the Supreme Court judgment is dated 3/12/2019, according to the Chief Justice's directions as gazetted – the suit should never have been filed in the magistrate's court - as it is falls squarely under WIBA and section 23 is applicable.

44. The upshot of this is that the Preliminary Objection was merited. The matter ought to be dealt with in accordance with section 23 of the WIBA and if the appellant so wishes - section 17 of the WIBA is available to him.

45. Otherwise, the appeal is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON 21/6/2024 MUMBUA T MATHEKA.

JUDGE.

Present: Ms. Wambui for the 1st and 2nd respondents Mr. Muia for the appellant

Ms. Elizabeth Court Assistant

NB: paragraphing distorted by the system

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2024-06-22 12:49:16

The Judiciary of Kenya