



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenya Red Cross Society v Bende (Civil Appeal E662 of 2021)  
[2023] KEHC 59 (KLR) (Civ) (17 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 59 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E662 OF 2021**

**DAS MAJANJA, J**

**JANUARY 17, 2023**

**BETWEEN**

**KENYA RED CROSS SOCIETY ..... APPELLANT**

**AND**

**KENNEDY AJAMI BENDE ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. D. O. Mbeja, SRM dated 8th September 2021 in Milimani Magistrates Court Civil Case No. 5036 of 2013)*

**RULING**

1. This appeal is against the Judgment of the Subordinate Court awarding the Respondent Kshs. 1,000,000.00 and Kshs. 3,000.00 as general and special damages respectively following an injury sustained by the Respondent on 20<sup>th</sup> January 2013 while on duty in the employment of the Appellant at its premises at Industrial Area, Nairobi.
2. In the Plaintiff dated 26<sup>th</sup> July 2013, the Respondent claimed that he was an employee of the Appellant. While the Appellant denied that the Respondent was its employee in its Statement of Defence dated 1<sup>st</sup> October 2013, it admitted that the Plaintiff was a volunteer worker at its premises on the date of the accident. He was paid an allowance of Kshs. 300.00 per day. Whatever label that was put on the relationship, it was a contract of service within the meaning of the *Employment Act*, 2007. The relationship between the parties is important because it brings to fore the issue of jurisdiction which the parties did not address.
3. Given that the claim before the Subordinate Court arose from an employer-employee relationship, I concur with the decision of Mabeya J., in *Francis Mutunga Musau v Devki Steel Mills Limited* NRB HC Misc. Appl. No. 91 of 2015 [2015] eKLR where he observed that, "An employment dispute in my view may be defined as a controversy between an employer and employee relating to each other's



rights and obligations arising out of the contract of employment between them which includes the conditions of employment.”

4. Where the jurisdiction is predicated on the employer and employee relationship, the High Court lacks authority to entertain this appeal because Article 169(2) of the Constitution as read with section 12(1) of the Employment and Labour Relations Act, 2011, grants the Employment and Labour Relation Court (“the ELRC”) exclusive jurisdiction to hear appeals from courts and tribunals on labour and employment disputes. In addition, the Employment Act, 2007 at section 87(1) provides as follows:

87. Subject to the provisions of this Act, whenever –

- (a) an employer or employee neglects to fulfill a contract of service; or
- (b) any question, difference or dispute arises as to the rights or liabilities of either party; or,
- (c) touching on any misconduct, neglect or ill treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.  
[Emphasis mine]

Section 87(2) goes further to buttress the exclusive jurisdiction by stating that, “No other Court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1).” Although the Industrial Court was abolished by the coming into force of the Employment and Labour Relations Act, 2011, by virtue of section 7 of the Sixth Schedule of the Constitution, the Employment Act, 2007 being a pre-2010 statute must be read with necessary modifications hence the court referred to is the ELRC.

5. The exclusivity of the jurisdiction of the ELRC vis-à-vis the High Court in relation to disputes between employer and employee was underlined by the Supreme Court in Republic v Karisa Chengo & Others, SCK Petition No. 5 of 2015 [2017] eKLR where it held follows:

[52] From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of courts, with *sui generis* jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either Environment and Land Court or Employment and Labour Relations Court is the High Court or vice versa. The three are different and autonomous courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the Environment and Land Court and Employment and Labour Relations Court, it should, by the same token, be inferred that the Environment and Land Court and Employment and Labour Relations Court too cannot hear matters reserved to the jurisdiction of the High Court.

6. From the aforesaid provisions, it is clear that this appeal ought to have been filed in the ELRC. In the absence of jurisdiction, the court must now down tools in the line with the well-known principle stated in Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1 and affirmed by the Supreme Court in Samuel Kamau Macharia v Kenya Commercial Bank and Others SCK Application No. 2 of 2011 [2012] eKLR that:

A Court’s jurisdiction flows from either the Constitution or Legislation or both. Thus a Court 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 Court must operate within the constitutional limits. It cannot expand jurisdiction through judicial craft or innovation.

7. I have considered whether to transfer this appeal to the ELRC. This issue was dealt with by the Court of Appeal in *Phoenix of EA Assurance Company Limited v SM Thiga t/a Newspaper Service* NRB Civil Appeal No. 244 of 2010 [2019] eKLR where it held as follows:

Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If the suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. without jurisdiction, the Court cannot confer jurisdiction upon itself...

8. Since this Appeal was filed in a court without jurisdiction, it cannot be saved by transfer to the ELRC. It can only be struck out. The appeal is accordingly struck out with costs to the Respondent.
9. The costs of the appeal are assessed at KES. 15,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF JANUARY 2023.**

**D. S. MAJANJA**

**JUDGE**

Mr Nura instructed by Garane and Somane Advocates for the Appellant.

Mr Okao instructed by Okao and Company Advocates for the Respondent.

