



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Alpine Coolers Limited v Miheso (Civil Appeal 152 of 2017)  
[2023] KEHC 1877 (KLR) (Civ) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1877 (KLR)

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

**CIVIL**

**CIVIL APPEAL 152 OF 2017**

**AA VISRAM, J**

**MARCH 9, 2023**

**BETWEEN**

**ALPINE COOLERS LIMITED ..... APPELLANT**

**AND**

**ALFRED AVUKWI MIHESO ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Resident  
Magistrate's Court at Milimani, Nairobi by Hon. Ms. G. A Mmasi  
delivered on the 6th March, 2017 in Nairobi CMCC No. 845 of 2012))*

**JUDGMENT**

**Introduction**

1. The respondent (Plaintiff in the lower court) filed this suit in the lower court *vide* a plaint dated December 5, 2014. He alleged that he was employed by the appellant (Defendant in the lower court) as a loading crew worker.
2. The respondent alleged that on or about October 16, 2009, during the course of his employment he injured his left hand. In particular, he suffered a fracture to the 4<sup>th</sup> metacarpal bone of his left hand; a cut or wound to the same hand; and suffered blood loss.
3. The respondent blamed the appellant for his injuries. He stated that the appellant had failed to take reasonable precautions to ensure his safety. In particular, the appellant had not provided him with gloves or other protective gear for his use while on duty.
4. As a result of his injury, the respondent sought general damages; special damages in the sum of Kshs. 8,596/-; interest at court rates; and costs of the suit in the lower court.



5. The appellant opposed the suit *vide* its Defence dated February 5, 2015, in which it denied the above allegations. The matter went for a full trial and on March 6, 2017 the lower court entered judgment in favour of the respondent.
6. The lower court found the appellant 100% liable and ordered it to pay general damages in the sum of Kshs. 200,000/-; special damages in the sum of Kshs. 13,596/-; costs of the suit; and interest at court rates.
7. Aggrieved by the said judgment, the appellant has filed this appeal dated April 4, 2017 on the following grounds:
  1. The Learned Magistrate erred in law and in fact in failing to find that the respondent's suit was time barred.
  2. The Learned Magistrate erred in law and in fact by not taking into account the defendant/appellant's submissions on liability, thereby erroneously finding the appellant 100% liable in spite of the fact that the respondent had not established a casual link between his injury and any negligence on the appellant's part.
  3. The Learned Magistrate erred in law and in fact in finding that there was nothing the respondent could have done to prevent the accident.
  4. The Learned Magistrate erred in law and in fact in finding that the plaintiff was not acting on a frolic of his own.
  5. The Learned Magistrate erred in law and in fact by disregarding evidence of the appellant as to how the accident occurred and therefore arrived at a wrong decision in law.
  6. The Learned Trial Magistrate erred in law and in fact when he found that the evidence of the respondent was sufficient to prove negligence on the part of the appellant when no evidence of an eye witness was called by the respondent to corroborate his evidence.
  7. The Learned Magistrate erred in law and in fact by failing to take into account the appellant's submission on quantum thereby erroneously awarding the respondent damages which were inordinately high and excessive given the nature of the injuries sustained by the respondent.
8. The parties agreed to dispose this appeal by way of written submissions and accordingly filed and served their respective submissions dated November 10, 2022 and January 18, 2023.

### **Appellant's Submissions**

9. The thrust of the appellant's submission was that the respondent's suit was time barred from the outset. Counsel cited Section 27 (1) of the *Work Injuries Benefit Act* (Act No 13 of 2007) (hereinafter referred to as "WIBA"), which states that a right to benefit in accordance with the Act shall lapse if the accident is not reported to the employer within 12 months after the date of such accident.
10. The respondent submitted that based on the record, the suit had been filed on December 15, 2014 and the alleged accident took place on October 16, 2009. This was over five years after the accident had occurred. Accordingly, the suit was time barred.
11. Counsel submitted that the appellant's 1<sup>st</sup> witness had testified that the alleged accident was never reported within the appropriate time frame and the appellant was not even aware of the accident in question. This testimony was corroborated by the testimony of the appellant's 2<sup>nd</sup> witness.



12. The appellant further submitted that the respondent had not been allocated duties which required him to instruct or direct drivers on the date of the accident in the first place.
13. The appellant relied on the decision of the Court of Appeal in [\*Attorney General v Law Society of Kenya & Central Organization of trade Unions Civil Appeal No 133 of 2011 \[2017\] eKLR\*](#) where the court stated:
 

“The section (Section 16) is to the effect that no employee or his dependents 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 dependent is to notify the Director, who under section 23(1) of the Act shall upon receipt of the notice of the accident...make such inquiries as are necessary to decide upon any claim or liability in accordance with this Act.”
14. The appellants argued that work injury accidents fall under the purview of the Director under the [\*WIBA\*](#), and ought to have been reported within 12 months of the occurrence of the accident.
15. On the issue of its liability as an employer, the appellant referred to text of Winfield and Jolowicz on tort by W V H Rodgers, 14<sup>th</sup> Edition at page 213, which states as follows:
 

“If a worker is injured just because no one had taken the trouble to provide him with an obviously necessary safety device, it is sufficient and in general satisfactory, to say that the employer has not fulfilled his duty.”
16. The appellant further cited the authority of [\*James Finlaly \(K\) Ltd v Benard Kipsang Koechi \[2021\] eKLR\*](#), in which the court set aside the apportionment of liability by the trial court and reapportioned the same to 70% and 30% on the basis that a duty of care is not absolute, and does not absolve the employee of his duty to exercise due care to avoid exposing himself to foreseeable risks.
17. The appellant submitted that it is trite law that he who alleges must prove, and there was no evidence in the lower court to show that it had acted in a negligent manner.
18. On the issue of quantum, the appellant submitted that the damages awarded in the lower court were inordinately high. It cited the decision of the High Court in [\*Edward Mutevu Maithya & Another v Edwin Nyamweya \[2022\] eKLR\*](#) and [\*FM \(Minor Suing through mother and next friend MWM\) v JNW & Another\*](#) in support of its submission that comparable damages should attract comparable awards.

### **Respondent’s submission**

19. The respondent submitted that the appellant had misconstrued the provisions of Section 27 [\*WIBA\*](#), which provides;

#### Lapse of right to benefits

1. A right to benefits in accordance with this Act shall lapse if the accident is not reported to the employer within 12 months after the date of such accident.
2. Notwithstanding the provisions of subsection (1), the failure to report an accident to an employer as required in subsection (1) is not a bar to compensation if it is proved that the employer had knowledge of the accident from any other source.



20. The respondent submitted that the appellant was aware of the accident within the meaning of Section 27 (2) WIBA. In particular, DW1, the appellant's Human Resource Manager, knew about the accident and he had not denied this fact.
21. Further, the appellant's witness had confirmed that the respondent was injured during the course of employment, and within his ordinary working hours, on the appellant's premises.
22. On the issue of liability, the respondent submitted that the appellant had a duty to ensure that the parking space on its premises was large enough for vehicles to safely park, and without causing injury to persons directing the vehicles.
23. Finally, the respondent submitted that the appellant had not demonstrated how he had contributed to his negligence.

### **Analysis and determination**

24. I have carefully reviewed the contents of the record of appeal, the rival written submissions filed by the parties, and perused the record in its entirety. The present matter arises out of a WIBA related injury. As such, I must first address the question of whether this court has jurisdiction to determine this appeal.
25. The starting point is that jurisdiction is everything and without it, a court has no power to take any further step. This principle was stated in the classic case of The Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1 Where Nyarangi J A held as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

26. Further to the above, the Supreme Court in the cases of In Re The Matter of the Interim Independent Electoral Commission, SC, Constitutional Application No 2 of 2011; [2011] eKLR, and in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others, S C Application No 2 of 2012; [2012] eKLR, held that the assumption of jurisdiction by Courts in Kenya, is a subject regulated by the Constitution, statute law, and judicial precedent. It was stated:

“A Court's jurisdiction flows from either the Constitution or legislation or both. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.”

27. Article 162 of the Constitution of Kenya states as follows:
  2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-
    - a. Employment and labour relations; and
    - b. The environment and the use and occupation of, and title to, land.
  3. Parliament shall determine the jurisdiction of and function of the courts contemplated in clause (2).



28. The *Employment & Labour Relations Court (ELRC) Act* No 20 of 2011 provides as follows at Section 12 (1):

12. Jurisdiction of the court

- (1) the court shall have exclusive, original and appellate jurisdiction to hear and determine all disputes referred to in accordance with Article 162(2) of the *Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including:-
  - (a) disputes relating to or arising out of employment between an employer and an employee;
  - (b) disputes between an employer and a trade union;
  - (c) disputes between an employer's organization and a trade union's organization;
  - (d) disputes between trade unions;
  - (e) disputes between employer organizations;
  - (f) disputes between an employer's organization and a trade union;
  - (g) disputes between a trade union and a member thereof;
  - (h) disputes between an employer's organization or a federation and a member thereof;
  - (i) disputes concerning the registration and election of trade union officials; and
  - (j) disputes relating to the registration and enforcement of collective agreements.

29. Further to the above, The *Employment Act* No 11 of 2007 at section 87 provides as follows: -

87. Complaint and jurisdiction in cases of dispute between employers and employees;

- (1) Subject to the provisions of this Act whenever –
  - (a) an employer or employee neglects or refuses 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 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.
- (2) No court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1).
- (3) This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute.

30. A further review of the case law in this area, relating to appeals from the lower courts, confirms that the *ELRC* is the proper forum to hear and determine appeals arising from *WIBA* related disputes.



31. In *Milton Khamasi Anord v Capital Reef (Co) Ltd [2022] eKLR* it was held that;
- “Hence, this being an appeal arising from a work injury, is a dispute between an employer and employee. Accordingly, it is my finding that the Court with jurisdiction to hear and determine this appeal is the Employment and Labour Relations Court.”
32. In *Saidi Mohammed v Diamond Industries Ltd (2018) eKLR* the court observed that the *ELRC* has appellate jurisdiction in disputes relating to work injury. The consequence thereof, is that appeals in relation to work injuries ought to be heard and determined by the *ELRC* and not this court.
33. Based on the foregoing, and for the reasons stated above, I find and hold that this court lacks jurisdiction to hear this appeal.
34. The appeal before me is incompetent and is struck out with costs to the respondent.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 9<sup>TH</sup> DAY OF MARCH 2023**

**ALEEM VISRAM**

**JUDGE**

**In the presence of;**

..... for the Appellant

..... for the Respondent

