**Magana Flowers Kenya Limited v Achieng (Civil Appeal 20 of 2018)**
**[2023] KEHC 1727 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1727 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KIAMBU**

**CIVIL APPEAL 20 OF 2018**

**LN MUGAMBI, J**

**MARCH 15, 2023**

**BETWEEN**

**MAGANA FLOWERS KENYA LIMITED ..... APPELLANT**

**AND**

**SELLAH ACHIENG ..... RESPONDENT**

***(Being an appeal from the Judgement of the Honourable Resident Magistrate H. I. Mwendwa delivered on the 17th of February, 2017 in Kikuyu PMCC No. 184 of 2013)***

## JUDGMENT

1. The Appellant was granted leave vide Misc Application No. 74 of 2017 to file this appeal out of time. The appeal arises from the judgement of the Honourable H. I. Mwendwa, Resident Magistrate, delivered on the February 17, 2017.

### Summary Pleadings

2. The Respondent, the Plaintiff in the trial court, sued the Appellant, (the Defendant in the trial court) in proceedings commenced by a Plaint dated August 1, 2013 and filed on even date. He prayed for judgement against the Appellant for: general damages, special damages of KShs. 3,500/-, costs of the suit and interests. The Respondent (plaintiff in the lower court) averred that the Appellant was her employer and that due to negligence, it failed to take all reasonable precautions for her safety and exposed her to risk of injury. The particulars of injury were generalised body itchiness, chest pains, cough and difficulties in breathing. She itemised the particulars of negligence and breach of contract against the Appellant as:

    a. Unsafe system of work;

    b. Failure to warn the Plaintiff in time/ at all of the dangers;

c. Failure to provide the Plaintiff with competent colleagues;

d. Failure to ensure the safety of the Plaintiff;

e. Exposing the Plaintiff to danger it knows or ought to have known;

f. Failure to introduce to the Plaintiff to other safe means of performing the said work;

g. In the circumstances failure to provide and maintain a safe system of work;

h. Failure to properly train the Plaintiff on how to carry out the said work effectively.

3. The Appellant (defendant in trial court) in his statement of defence dated November 19, 2013 and filed on even date, denied that there ever existed any contract of employment between it and the Respondent and averred that, if any, it had taken all reasonable precautions to ensure the safety of the Respondent and maintained adequate and suitable plant appliances for the Respondent to enable her carry out her work in a safe and proper system of work and did not expose the Respondent to any risk of possible damages or injuries. The Appellant attributed negligence to the Respondent and itemised the particulars of negligence as follows:

a. Failure to adhere to the safety regulations and/or conditions set out by the Defendant and thus endangering her safety;

b. Failing to wear gloves, gumboots and apparel provided by the Defendant;

c. Failing to take reasonable care and precaution at work;

d. Being careless at the workplace;

e. Failing to exercise duty of care expected of the Plaintiff.

4. The Appellant did not admit jurisdiction of the trial court and stated that he shall seek to have the suit struck out for contravening the provisions of section 87(2) of the *Employment Act , 2007* as well as the provisions of the *Work Injury Benefits Act , 2007*.

5. The matter proceeded for hearing on the September 16, 2016 with the Respondent calling two witnesses, Dr. George Kungu Mwaura testified as PW1 and the Respondent testified as PW2. The defence on the other hand called one witness, Sellah Achieng'. The judgement was delivered by the trial court on the February 17, 2017 in favour of the Respondent in which the following orders were made:

a. General damages Kshs. 250,000/-

b. Special damages- Kshs. 8,000/-

c. Cost of the suit

d. Interest on (a), (b), and (c)above.

**The Appeal**

6. Being dissatisfied with the decision of the trial Court, the Appellant lodged the Memorandum of Appeal dated February 12, 2018 on the February 13, 2018 and set out the following grounds of appeal:

a. The Learned Resident Magistrate erred in law and in fact in finding that he had jurisdiction to hear and determine the suit;

b. The Learned Resident Magistrate erred in law and in fact in finding the Appellant 100% liable when there was evidence tendered by the defence witness on the Appellant's compliance with the law on providing the Plaintiff with protective equipment;

c. The Learned Resident Magistrate erred and misdirected himself in not considering the evidence of the Appellant's witness who testified at length on the Respondent's substantial negligence when she exposed herself to danger by not using protective equipment provided to her by the Appellant;

d. The Learned Resident Magistrate erred in law and fact in finding that the evidence of the Appellant was hearsay notwithstanding the evidence was adduced by an official of the Appellant;

e. The Learned Resident Magistrate erred and misdirected himself in failing to consider and give due attention to the Appellant's evidence and submissions;

f. The Learned Resident Magistrate erred and misdirected himself in failing to consider that comparable injuries ought to attract comparable awards;

g. The Learned Resident Magistrate erred and misdirected himself in law as the assessment of general damages was not justified;

h. The Learned Resident Magistrate erred and misdirected himself in finding dismissing the evidence of the Appellant and the Appellant was wholly to blame contrary to the evidence adduced;

i. The Learned Resident Magistrate erred and misdirected himself in failing to consider the evidence of Appellant its submissions that no future disability was anticipated;

j. The Learned Resident Magistrate erred and misdirected himself in finding that the Respondent was entitled to the damages so awarded.

7. The Appellant urged this Court to find merit in his appeal and allow the appeal and make orders that:

a. Judgement and all consequential orders made on the February 17, 2017 be set aside;

b. The High Court do re-evaluate the evidence and declare that the negligence on the part of the Appellant was not proved and or in the alternative apportion liability to the Respondent;

c. The award of quantum be reviewed, dismissed and/or set aside;

d. In the alternative, the High Court do order that the matter be heard de novo for determination of all the issues;

e. Costs of the appeal be awarded to the Appellant in any event;

f. The Court does order any other relief as it may deem fit or necessary to grant.

8. On the May 5, 2022 the appeal was admitted to hearing and the Court directed that the Record of Appeal be filed within 14 days and that the appeal be canvassed by way of written submissions. The Record of Appeal was filed on the August 23, 2019.

**Appellant's Submissions**

9. The Appellant filed his submissions on the September 9, 2020. The Appellant restated the facts of the case during trial and urged this Court being an appellate court in the first instance to re-evaluate and

re-appraise the evidence in order to arrive at its own conclusion. It sought to rely on the case of PNN vs. ZWN (2017) eKLR.

10. The Appellant submitted on the grounds listed in its memorandum of appeal with regard to the first ground of appeal, the Appellant listed several issues that were not in dispute including the following:

    a. That the matter arises out of work injury related claim;

    b. That the Respondent was an employee of the Appellant at the time of the accident;

    c. The suit was filed on the August 1, 2013;

    d. The *Work Injury Benefits Act* No. 13 of 2007 was operationalised on June 2, 2008 by Gazette Notice No. 60 of May 23, 2008.

11. The Appellant quoted Section 16, 23 (1) and 51 (1)of the Work Injury Benefit Act No. 13 of 2007 and submitted that there is a mandatory and lawful procedure that a party aggrieved under the Act must follow which the Respondent failed to exhaust hence the suit before the trial court was prematurely filed. That the existence of an alternative remedy provided by the Act to the Appellant took away the jurisdiction from the lower court to hear the matter. The Appellant relied on the following cases:

    a. Attorney General vs. Law Society of Kenya & Another (2017) eKLR where the Court held that:

       Section 16 as read with section 23(1) confers powers of adjudication of any claim for compensation arising from injury or death in the work place upon the Director and expressly bars institution of court proceedings by the aggrieved employee.

       The Court also relied on the case of Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others, S.C Civil Application No. 2 of 2011 where the Court noted that a Court's jurisdiction flows from either the *Constitution* or legislation or both; that it cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law and that jurisdiction goes to the very heart of the dispute and that it is equally accepted that:

       > "....where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed."

    b. The Owners of Motor Vessel "Lillian" vs. Caltex Oil Kenya Limited (1989) KLR 1 where the Court held thus

       > "Jurisdiction is everything. Without it the Court has no power to make one step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and 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."

    c. Amy Kagendo Mate vs. Prime Bank Limited Credit Reference Bureau & Another (2013) eKLR where Justice Mumbi Ngugi noted Justice Majanja's observations in the case of Kennedy Nyagndi vs. Central Bank & others:

       > "The provisions I have cited above clearly show that the Regulations provide for relief to any customer who is aggrieved by wrong and erroneous information. The

petitioner's grievances are fully within these provisions and he is entitled to invoke the statutory procedure provided."

d. Eusebio Isaac Wachira Munene vs. NIC Bank Limited (2020) eKLR where Justice Thuranira J. struck out the suit on finding that the Plaintiff had by-passed the procedure provided.

12. The Appellant urged this Court to find that the trial court did not have jurisdiction to hear and determine the matter in the lower court and proceed to set aside the judgement.

13. While submitting on grounds 2, 3, 4, 5 and 8, the Appellant submitted that the trial magistrate failed to consider that it had proved its case to the required standard and that the Respondent had grossly contributed to the accident and hence her injuries. That the Appellant denied all the particulars of negligence in the defence. It insisted that the Respondent neither denied being issued the protective apparel in cross-examination nor re-examination. That based on this, the trial court ought to have found the Respondent wholly liable for the accident and for her illness or apportion blame equally or substantially to the Respondent. It relied on the following cases:

(a). Statpack Industries vs. James Mbithi Munyao (2005) eKLR where the Court held that:

> " An employer has a duty to take all reasonable steps to ensure the employee's safety but he cannot babysit an employee. He is not expected to watch the employee constantly. The employer has no obligation to follow the activities of the employee, even where the employee has decided to go outside the scope of his employment."

(b). Mwanyule vs. Said T/A Jomvu Total Petrol Station (2004) eKLR where the Court of Appeal noted that:

> "It is an implied term of the contract of employment at common law that an employee takes upon himself the risks necessarily incidental to his employment. An employer owes no absolute duty to the employee and the only duty owed is that of reasonable care against risk of injury caused by events reasonably foreseeable or which could be prevented by taking reasonable precaution."

14. The Appellant contends that in the event that this Court finds that it contributed to the accident then this Court should find that it did not contribute to more than 50% liability and that the said liability be apportioned between the Appellant and the Respondent. They relied on the case of Nairobi HCCC No. 858 of 1988: Lucy Muthoni Munene vs. Kenneth Muchange & Kenya Bus Services Ltd where the Court while being guided by the authority of Lakhamshi vs. Attorney General (1971) EA 118 held that:

> " The case is authority for the proposition that where the court is faced with conflict, as opposed to lack of evidence, it would be permissible to hold both parties equally on causation."

15. On grounds number 6, 7, 9 and 10 the Appellant submitted that notwithstanding the judgement delivered by the trial court, the general damages awarded for the injuries were manifestly excessive and were not commensurate with the injuries of similar nature. It urged this Court to find the said award was excessive and relied on the following cases:

(a). Muthamiah Isaac vs. Leah Wangui Kanyingi (2016) eKLR;

(b). Simon Taveta vs. Mercy Njeru Civil Appeal No. 26 of 2013 (2014) eKLR where the Court held that:

> " The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of the injuries and comparable awards made in the past."

16. The Appellant urged this Court to review the award issued by the trial court downwards to K.Shs. 50,000/- and relied on the case of PF (suing as next friend and father of SK (minor)) vs. Victor O. Kamadi & Another (2018) eKLR where the appellant had suffered similar injuries to those of the Respondent herein and the High Court set aside the trial court's award of K.Shs. 100,000 and revised it to K.Shs. 50,000/-.

**The Respondent's Submissions**

17. The Respondent filed her submissions on the September 12, 2022. She submitted that there was no dispute that she was the Appellant's employee and that she sustained injuries while at work. She submitted on the following issues for determination:

    a. Jurisdiction;

    b. Liability; and

    c. Quantum.

18. On the issue of jurisdiction, the Respondent submitted that the trial Court had jurisdiction to hear and determine the suit. That the case the Appellant sought to rely on, Mumias Sugar Company Ltd vs. William Okumu and another (2015) eKLR is not related to the present case because the cause of action arose in 2013 while the authorities cited are of 2015. She submitted that the law does not apply retrospectively and relied on the case of Francis Karioko Muruatetu vs. Republic Petition No. 15 of 2015. That at the time the cause of action arose, the trial court had jurisdiction to entertain the suit and that it correctly found on the said issue that:

> I do find that indeed this matter relates to a work injury claim and it's before a Resident Magistrate. It designates special court of magistrate with the rank of Senior Resident Magistrate and above to the subsidiary legislation. I do therefore find that this Court had jurisdiction to hear and dispose this matter (page 94 of the Record of Appeal).

19. On the issue of liability, the Respondent submitted that the Trial Court found the Appellant 100% liable for the injuries she suffered. Rebutting, the Appellants contention that they had provided Respondent with PPEs, the Respondent stated that she worked at the fridge department of the Appellant and that she was never issued with any PPEs as alleged. That the inventory produced during trial did not state under which department the PPEs were issued. That the testimony of the Appellant's human resource manager to the effect that only 12 employees out of the 330 staff were issued with PPEs raises the possibility of the Respondent being among the staff that were never issued with the PPEs. She submitted that employers owe a duty of care to their employees and proceeded to rely on the case of Boniface Muthama Kavita v Carton Manufacturers Limited [2015] eKLR where Onyancha J. held that:

> " The relationship between the Appellant and the Respondent as employer and employee creates a duty of care. The employer is required to take all reasonable precautions for the

safety of the employee to provide an appropriate and safe system of work which does not expose the employee to unreasonable risk."

20. The Respondent reiterated that she was working in the refrigeration department and that the PPEs issued by the Appellant would not fit the role for she was majorly exposed to; the cold and chemical fumes which resulted to her developing chest complications. That this would have required protective masks to shield her from the chemical fumes and merely providing PPEs did not safeguard her from the danger she was exposed to. That this was established in the case of Faith Mutindi Kasyoka vs. Safe Park Limited where Hon. Musyoka held thus:

> " The work mostly consisted of spraying air crafts in a closed hangar in order to guard against polluting the environment as of which the Plaintiff developed chest problems due to a lack of safe working environment."

21. That the Appellant as an employer did not demonstrate to have availed the Respondent a safe system of work and thus this Court should find the Appellant 100% taking into consideration the expert opinion of Doctor Mwaura.

22. On the issue of quantum, the Respondent relied on the principles outlined by the Court in the case of Butt vs. Khan (1977) 1KAR where the Court stated thus:

> " An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was inordinately high or low."

23. She further relied on the case of P.J Dave Flowers Ltd vs. David Simiyu Wamalwa (2018) eKLR where the Court rendered itself on the matter of quantum as below:

> " ...It is generally accepted from the laid down legal principles on assessment of quantum that personal injuries are difficult to access with precision and accuracy so as to satisfy the claimant. The court discretion has been left to individual judges to exercise judiciously in respect of the circumstances of each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages. The trial court will also be expected to apply the principles in various case law and authorities decided by the superior courts on the matter."

24. The Respondent submitted that it was not in contention that she sustained injuries namely: general body itchiness, chest pains, cough and difficulties in breathing, according to the treatment notes and discharge summary from PCEA Kikuyu Hospital and Kinoo Medical Clinic by Doctor George Mwaura. That according to the Doctor, the Respondent developed allergic reactions to chemicals at her work place and that the said condition would not go away but can only be controlled. That meant that she will be on continous medications and doctor's visit. That the trial court took into account the severity of the injuries sustained by the Respondent and justifiably awarded her Kshs. 250,000/- as damages. She urged the Court to uphold the decision of the trial court and relied on the cases of:

    a. Civil Appeal No. 3 of 2019 Osman Mohammed & Anor vs. Saluro Bundet Mohammed where the Court held that damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford.

b. Faith Mutinda Kasyoka (supra) where the Hon. Kariuki substituted the award of K.Shs. 225,000 with K.Shs 300,000/- where the plaintiff developed chest complication due to continous inhalation of toxic fumes.

25. The Respondent urged this Court to dismiss the appeal with costs as the same lacks merit.

**Determination**

26. From the pleadings and submissions, the following issues arise for determination:

a. Whether the trial court had jurisdiction to handle the matter;

b. Whether the appeal is merited;

c. Who pays for the costs of the appeal?

27. The first issue that should automatically be canvassed is whether the trial court had jurisdiction to handle the matter before it. The Appellant in their defence did not admit to the jurisdiction of the Court, was not hesitant to raise the same in their submissions and listed it as one of the grounds for appeal in their memorandum of appeal. The Respondent rebutted the said allegations and submitted that the trial court was versed with jurisdiction given to it under the Magistrate Court Act, 2015.

28. Without jurisdiction, a court is forced to down its tools because jurisdiction is everything. This was stated in the classic case of The Owners of the Motor Vessel "Lillian S" Vs 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.'

29. Likewise, the Supreme Court of Kenya in the case of Samuel Kamau Macharia Vs KCB & 2 Others, Civil Application No. 2 of 2011 stated thus:

> " A Court's jurisdiction flows from either *the Constitution* or Legislation or both. Thus, a Court of Law 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"

30. At the time of filing the present case, that is, the 1st of August, 2013, the trial court derived its jurisdiction from the Magistrate Courts Act, 2012; The *Employment Act*, 2007, the *Labour Institutions Act*, 2007; the Occupational and Safety *Health Act*, 2007; and, the *Work Injury Benefits Act* had prior to the promulgation of *the Constitution of Kenya 2010* conferred jurisdiction of cases under this Act in the magistrates' court if the same were within the court's respective pecuniary limits.

However with the commencement of the Industrial Court Act, that entire jurisdiction was brought under the Industrial Court with section 12 (1) of the Act giving the Court both original and appellate jurisdiction. Section 16(2) of the *Labour Institutions Act*, 2007 empowered the Chief Justice to gazette and designate Magistrate Courts to hear and determine matters relating to labour laws hence the

Gazette Notice no. 9243 dated July 27, 2011 by the then Chief Justice Willy Mutunga. The gazette notice provided thus:

> "In Exercise of the powers conferred by section 16(2) of the *Labour Institutions Act* and in consultation with the Minister and the Principal Judge, the Chief Justice designates all Courts in the 47 counties presided over by magistrates of the rank of Senior Resident Magistrate and above as special courts to hear and determine employment and labour relations cases within their respective jurisdiction.

The matters relate to the following specific areas:

1. Work injury related matters;
2. Offences under the *Labour Institutions Act*, 2007;
3. Offences under the *Employment Act*, 2007;
4. Offences under *Occupational Safety and Health Act*, 2007;
5. Offences under the *Labour Relations Act*, 2007."

Dated the July 27, 2011

Willy Mutunga

Chief Justice/President of the Supreme Court of Kenya

31. The issue of whether the aforementioned Legal Notice was inconsistent with the *Constitution* was discussed in the case of Abyssina Iron & Steel Ltd vs. Douglas Momanyi Ondara [2016] eKLR where Lady Justice Maureen Onyango held thus:

> "...I therefore find that the magistrates' courts have jurisdiction subject to their specific pecuniary and territorial limits, to hear claims under the *Work Injury Benefits Act* as provided both in the Act and under Section 29(3) (4) of the Industrial Court Act. I further find that Gazette Notice No. 9243 of 2011 is not inconsistent with the *constitution*."

32. Mrima J. in the case of Mumias Sugar Company Limited (supra) held thus:

> "Going by the Respondent's pleadings and the foregoing analysis, the Respondent contends that he was in employment of Mumias Sugar Company Limited where he was involved in an accident and sustained injuries hence he is entitled to compensation. He therefore sustained the alleged injuries while at work and such injuries are the ones specifically stated in the gazette notice as:-
>
> a. Work injury related matters.
>
> This Court therefore finds that the cause of action as pleaded falls within those matters relating to work injury in view of the relationship between the Respondent and Mumias Sugar Company Limited. The alleged relationship between the Appellants herein does not in any way oust the matter from being a 'work injury related matter'. The suit therefore falls within the confines of the matters contemplated under the gazette notice 9243 of July 27, 2011."

33. The pertinent question to be answered therefore is whether the trial court had jurisdiction when the suit was instituted in the year 2013. The trial court addressed the issue of its jurisdiction in its judgement and stated that:

> " I have considered the submissions by the Defendant on the issue of jurisdiction. I do find that indeed this matter relates to a work injury claim and is before a Resident Magistrate. I do also find that the Gazette Notice No. 9243 by the Chief Justice that designates special court of Magistrates with the rank of Senior Resident Magistrates and above to be subsidiary legislation.
>
> I do however note that at the time the decision in Mumias Sugar Company Limited vs. William Okumu and Another (2015) eKLR was made, the Magistrate Court Act no. 26 of 2015 was not in force. The Magistrate Act came into force on the 2/1/2016, section 9(b) of the said Act confer jurisdiction on the Magistrate Court to determine disputes under the Industrial Court Act, 2011 subject to pecuniary limits.
>
> Under Section 7(1) of the Magistrates Court Act, the pecuniary limits of a resident magistrate is sealed at Kenya Shillings five million (Kshs. 5,000,000). Likewise the Court in the case of Maendeleo ya Wanawake Organisation vs. Hilda Makone and Another 2014 eKLR, made the decision before the current Magistrate Act Laws came into force.
>
> I do therefore find that this Court has jurisdiction to hear and dispose this matter."

34. The trial court maintained the view that it was seized with jurisdiction based on the Magistrate Court Act, 2015 which commenced when the suit was already before it. Jurisdiction being integral in any litigation should be brought up as early as possible during trial to be dispensed with in the first instance. This was discussed by the Supreme Court In the Matter of Interim Independent Electoral Commission [2011] eKLR as follows:

> " Assumption of jurisdiction by Courts in Kenya is a subject regulated by the *Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):
>
> "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."
>
> The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the *Constitution*."

35. The trial court correctly stated that it was aware of the gazette notice. That the matter at hand was a work-related injury and that it was before a Resident Magistrate Court. He nevertheless did not factor in that in 2013, jurisdiction for such matters was given to Magistrate Courts presided by Magistrates of the rank of Senior Resident Magistrates and above.

36. In holding that the 2015 Act gave Resident Magistrate jurisdiction, the trial court implied that the Magistrate Court Act, 2015 operated retrospectively. The Black's Law Dictionary (6th Edition) defines what a retrospective law is:

> "...A law which looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. One that relates back to a previous transaction and, gives it a different legal effect from that which it had under the new law when it occurred."

37. The Black's Law Dictionary (11th Edition) gives retrospective law, the same definition as retroactive law. It defines it as:

> "A legislative act that looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect."

38. The Supreme Court in the case Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR, held as follows on retrospective application of the law.

> "As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature."

39. Section 23(3) of the *Interpretation and General Provisions Act*, (CAP 2) provides a useful guide on interpretation of the repealed or amended law vis-à-vis the repealing or the amending law. It provides: -

> "3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not
>
> a. revive anything not in force or existing at the time at which the repeal takes effect; or
>
> b. affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or
>
> c. affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or.....

40. Section 28 of CAP 2 provides for the retrospective operation of subsidiary legislation. It provides that:

> "Subsidiary legislation may be made to operate retrospectively to any date, not being a date earlier than the commencement of the written law under which the subsidiary legislation is made, but no person shall be made or become liable to any penalty whatsoever in respect of an act committed or of the failure to do anything before the day on which that subsidiary legislation is published in the Gazette."

41. The present suit was filed on the 1st of August, 2013 when the gazette notice no. 9243 was operational. The trial court was not a Senior Resident Magistrate Court at the time. It therefore goes without saying that the said Court was not seized with jurisdiction to deal with the matter. The matter should have

been heard by a Senior Resident Magistrate as directed by the Gazette Notice. In the case of Kenya Ports Authority vs. Modern Holding [EA] Limited [2017] eKLR, the Court of Appeal held that:

> " We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the court itself provided that where the court raises it suo moto parties are to be accorded the opportunity to be heard."

42. The Court of Appeal and the Supreme Court agreed on the disposal of work injury cases already filed in Court in the case of Nairobi Civil Appeal No. 133 of 2011 – Attorney General –Versus- Law Society of Kenya & Another [2017] eKLR, and Law Society of Kenya –Versus- Attorney General & Another [2019] eKLR respectively. While discussing the issue of legitimate expectation, the Court of Appeal stated thus

> " We find, from the submissions of the respondents that at the commencement date of the Act there were before the Courts, pending determination, several work-related accident claims brought under the repealed Workmen's Compensation Act (Cap 236) or the common law. With respect, we agree that claimants in those pending cases have legitimate expectations that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked."

43. The Supreme Court while discussing the said issue stated thus:

> " In agreeing with the Court of Appeal, we note that is not in dispute that prior to the enactment of the Act, litigation relating to work-injuries had gone on and a number of 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 a 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."

44. Further when the present case was initiated there was in force the Work Injury Benefit Act No. 13 of 2007 which had been in force from June 2, 2008 and which at section 16 of the Act required that any claim for recovery of damages in respect of any occupational accident or disease resulting in disablement or death of an employee against an employer be pursued through the Director who at section 23 (1) was empowered to inquire into the claim and decide on liability in accordance with the Act. The Respondent did not follow that procedure before instituting the suit. The Court of Appeal in Geoffrey Muthinja Kabiru & 2 Others Vs. Samuel Munga Henry & 1756 Others (2015) eKLR explained:

> " ...It is imperative where a dispute resolution mechanism exists outside the courts, the same be exhausted before the jurisdiction of the Court is invoked. Courts ought to be for last resort and not the first port of call the moment the storm blew...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial

consideration of matters to ensure that a party is first of all diligent in protection of his interest within the mechanisms in place for resolution outside the courts…"

45. This Court therefore finds that the trial court was not seized with jurisdiction to try the matter from the analysis above.

46. Apart from the fact that the trial court lacked jurisdiction, I am also of the view that this being a labour related dispute, this Appeal should as well have been filed before the Employment and Labour Relations Court which has exclusive original and appellate jurisdiction over those matters defined in section 12 of the ELRC Act and which extends to among others, disputes relating to or arising out of employment between an employer and an employee. That Statutory mandate is anchored in Articles 162 (2)(a) and 165 (5) of *the Constitution* of Kenya 2010 which expressly outs the jurisdiction of the High Court in matters that are set aside for the ELRC or ELC court.

47. In view of the foregoing reasons, I find that this Court is also unable to move forward on the other issues raised in this appeal.

48. In light of the above, this Court finds that this appeal succeeds on the sole question of jurisdiction and makes the following orders:

    a. The proceedings and the judgment by Hon. H. I Mwendwa Resident Magistrate in Kikuyu PMCC No. 184 of 2013 be and are hereby set aside for want of jurisdiction;

    b. Given that the Appellants did not raise the issue of jurisdiction at the earliest possible opportunity each party shall bear its own costs for the trial as well as in this appeal.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 15TH DAY of MARCH 2023.**

**L.N MUGAMBI**

**JUDGE**

**In presence of:**

Appellant- absent

Respondent- absent

Advocate for Appellant- absent

Advocate for Respondent- absent

Court Assistant- Brian

**Court**

This Judgement be transmitted digitally by the Deputy Registrar to the Advocates for the Parties on Record through their respective email addresses.

**L.N. MUGAMBI**

**JUDGE.**