



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO 218 OF 2017

VICTOR OMONDI AYUNGA.....APPELLANT

VERSUS

CAPITAL REEF KENYA LIMITED.....RESPONDENT

J U D G M E N T

1. The Appellant **Victor Omondi Ayunga**, was the Plaintiff in **Civil Suit No.621 of 2016** at Mombasa where he instituted a suit against the Respondent (Defendant) vide a **Plaint** filed on **30th March, 2016** claiming for general damages, special damages, costs and interest on account of injuries he alleged to have sustained in the course of employment by the Defendant as a loader/casual worker, on **1st February, 2016**.

2. The Appellant averred that it was the Respondent's duty to take all reasonable precautions for his safety while engaged in the said employment and not to have exposed him to a risk of injury and to have provided a safe and proper system of working environment.

3. The Appellant averred that on the alleged date, he was lawfully and carefully in the course of his employment whereof he had been instructed to offload Motor Vehicle Registration No.**KBQ 881 R ZD 7685 BACHU**, which was within the Respondent's premises situated at Sports Area in Changamwe area. While removing spilled cereals one of the subject motor vehicle's tyre burst thus occasioning him severe injuries

4. The Appellant particularized the particulars of negligence/breach of contract as follows'

- i. Failing to take any or any adequate precaution for the safety of the Plaintiff.*
- ii. Failing to provide suitable plant, tackle and appliances to the Plaintiff to enable him carry out work in safety.*
- iii. Failing to ascertain and/or supervise the environment in which the Plaintiff was working in as a loader/casual.*
- iv. Failing to provide adequate and suitable training, instruction, and supervision to the Plaintiff.*
- v. Failing to provide the Plaintiff with safe and suitable working equitable protective apparel.*
- vi. Failing to provide and maintain a safe and proper system of work.*

5. The Respondent filed a written statement of defence dated **21st April, 2016** in which it denied the allegations by the Appellant that he was injured while on duty and denied the particulars of negligence on its part.

6. The Respondent averred that if at all the Appellant was injured, then it was due to his own negligence or that he contributed to it. The Respondent also particularized the particulars of negligence on the part of the Appellant as follows:

- a) Failing to observe and follow instruction given to him;*
- b) Exposing himself to a risk of damage or injury of which he knew or ought to have known;*
- c) Carrying out his duty without a proper look out;*

d) *Failing to take any or any adequate precaution for his own safety whilst engaged upon the said work;*

e) *Carrying out his duty without due care and attention;*

7. The Respondent urged the court to dismiss the Appellant's suit with costs.

8. After hearing the evidence that was adduced by the Appellant and Respondent, the trial Magistrate found that the Respondent was wrongly sued.

9. Being dissatisfied with the said decision, the Appellant has moved this Court through a **Memorandum of Appeal** dated **12th October, 2017** and filed in court on **16th October, 2017** wherein he raised **four Grounds of Appeal** as follows;

1) The Learned Trial Magistrate erred in law and fact by failing to consider the submission placed before him by the Appellant thereby arriving at a decision that the Appellant failed to prove his case which decision was manifestly wrong.

2) The learned Trial Magistrate misdirected himself by finding that the Appellant ought to have sued the owner of the Motor Vehicle whose tyre caused the accident instead of the Defendant and not considering the fact that the Appellant was working under the instructions of the Respondent and was injured while at work at the Respondent's premises and thereby arriving at the wrong decision.

3) The Learned Trial Magistrate erred in Law and fact by placing the burden of proof on a higher standard of beyond reason doubt than on the balance of probabilities and thereby arriving at an erroneous decision.

4) The trial magistrate erred in law and in fact by awarding the Appellant Kshs.100,000/= which was manifestly low in the circumstances.

10. This Appeal was argued by way of written Submissions. In further exposition of the Appeal, both parties cited various authorities.

Determination

11. This Court is alive of its duty as the first Appellate Court, which duty was restated in the case of **Joseph Munga'thia –vrs- County Council of Meru & Another, Civil Appeal No.146 of 2002 (Nyeri (unreported))**. At page 11 of the Judgment, the court had this to say;

“In law, this matter coming as a first appeal, we have a duty to consider both matters of fact and of the law. On facts, we are duty bound on first appeal to analyse the evidence afresh, evaluate it, and arrive at our own independent conclusion, but always bearing in mind that the trial court had the advantage of seeing the witnesses and seeing their demeanor and making allowance for the same”

(See also Selle & Another –vrs- Associated Motor Boast Company Ltd & Others (1968) EA 123-126 (CA-2) and Williamson Diamonds Ltd –vrs- Brown 1970 E.A 1, 12 C A – T).

12. In the instant Appeal, I have carefully considered the **Grounds of Appeal** raised by the Appellant, the submissions by both parties, pleadings and the evidence that was adduced before the trial court. I find that in the interest of justice, this court needs to establish whether this Appeal is properly before it, before going into the merits and demerits of it.

13. Looking at the **Plaint** dated and filed on **30th March, 2016** in the subordinate court, it is averred at paragraph 3 thereof that the Plaintiff was employed by the Defendant as a loader/ casual worker and on page 65 of the **Record of Appeal** dated **1st August, 2019**; the Defendant's **DW1, Mr Ali Salom**, in his testimony confirms that the Plaintiff was a casual labourer whose services were retained by the Respondent.

14. From the court's observation, there is an employer-employee relationship between the Respondent and the Appellant herein, a result of which the court clothed with the jurisdiction to determine an Appeal where there exists an employer-employee relationship between the parties would be the Employment and Labour Relations Court.

15. Jurisdiction is the very basis upon which any tribunal or court tries a case; it is the lifeline of all trials. A trial without jurisdiction is a nullity. The importance of jurisdiction is the reason why it can be raised at any stage of a case, be it at the trial, or Appeal to Court of Appeal or to this Court *a fortiori*, the court can *suo moto* raise it. It is in the interest of justice for this Court to then raise the issue of jurisdiction to save time and costs, and to avoid a trial in nullity.

16. The "*locus classicus*" on jurisdiction is the celebrated case of **The Owners of the Motor Vessel "Lillian's –vrs- Caltex Oil Kenya Ltd (1989) KLR 1**, where Nyarangi, J A held;

“ I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized by 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 continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is

without jurisdiction”

17. In the case of **Samuel Kamau Macharia –vrs- KCB & Others (2012)eKLR**, the Supreme Court held 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”

18. In raising this question of jurisdiction, what this Court has in mind are the provisions of **Article 162(2)** of the **Constitution** and **Sections 12 and 87**, both of the **Employment and Labour Relations Court. Article 162** of the **Constitution** provides as follows:

(2) Parliament shall establish court with the status of the High Court to hear and determine disputes relating to

(a) Employment and Labour Relations

19. Pursuant to **Article 162(2)** of the **Constitution**, Parliament enacted the **Employment and Labour Relations Court Act, 2011** which provides at **Section 12 (1)** that;

“The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of the Act or any written law which extend jurisdiction to the court relating to employment and labour relations including;

(a) Disputes relating to or arising out of employment between an employer and employee”

Section 87 (1) and (a) of the Employment Act provides;

(1) Subject to the provision of this Act whenever;

(a) and employer or employee neglects or refuses to fulfill a contract of service or

(b) any question, difference or dispute arises as to the rights of liabilities of either party;

Or touching any misconduct, reflect or ill treatment of either party or any injury to the person or property of either, under any contract of service, the aggrieved party may complain to the labour office or lodge a complaint or suit in the industrial court.

(2) No court other than the Industrial court shall determine any complainant or suit referred to in subsection (1).

20. The exclusivity of the jurisdiction of the **Employment and labour Relations Court** vis a vis the **High Court** in relation to such disputes was emphasized by the Supreme Court in the case of **Republic –vrs- Karisa Chengo & Others, Supreme Court Petition No.5 of 2015 [2017]eKLR**, where it held as follows;

“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 informed that the Environment and Land Court and Employment and Labour Relations Court too cannot hear matters reserved to the jurisdiction of the High court.”

21. From the pleadings and evidence in the instant case, it is clear that the Appellant’s claim arose out of a work place injury based on employment relationship between the Appellant and Respondent.

22. In the end, this court declines jurisdiction to hear this Appeal and transfer the same to the **Employment and Labour Relations Court, Mombasa** for hearing and determination (see the case of **Daniel N Mugendi –vrs- Kenyatta University & 3 Others, Nrb C.A No.6 of 2012 [2013]eKLR**).

Costs shall be in cause.

It is hereby so ordered.

DELIVERED, DATED and SIGNED VIRTUALLY at MOMBASA this 11th day of May, 2021.

D. O. CHEPKWONY

JUDGE