



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 116 OF 2014

ALPHAS ALEX JOY SHAPAYA.....APPELLANT

VERSUS

ALBA PETROLEUM LTD.....RESPONDENT

(Being an Appeal from the Judgment/Decree of Hon. G.O Kimanga (RM), in Mombasa RMCC No.2077 of 2012, delivered on 27.8.2014.)

JUDGMENT

1. The Appellant instituted a suit against the Respondent claiming for general damages, special damages costs and interest vide **Mombasa RMCC No.2077/2012**.

2. The Appellant had claimed that on or about **18.8.2010**, some foreign particles entered into his right ear while he was assembling a boats exhaust system in the course of his employment with the Respondent. The Appellant blamed the accident on the breach of the Respondent's statutory duty of care by the Respondent, its servants or agents. The particulars of the alleged negligence are pleaded in paragraph 5 of the Plaintiff as follows:-

- a) Failing to take any or adequate precaution for the safety of the Plaintiff while he was engaged upon the said work.*
- b) Exposing the plaintiff to a risk of injury or danger, which they knew or ought to have known.*
- c) Failing to provide a safe and proper system of working.*
- d) Failing to provide proper co-ordination and supervision of its employees.*
- e) Failing to provide protective clothes and apparel.*
- f) Failing to ensure the safety of the workers.*

3. In its **Statement of Defence** dated **23.10.2012**, the Respondent denied the Appellant's claims in their entirety and put him to strict proof thereof. In the alternative, the Respondent contended that if the accident occurred as alleged, which was denied, the same was wholly or substantially contributed to by the Appellant. The particulars of the Plaintiff's alleged negligence were also pleaded at paragraph 9 of the Statement of Defence.

4. After the case was heard, the Learned Magistrate in a **Judgment** delivered on **27.8.2014**, dismissed the Appellant's suit with costs to the Respondent. This was after making a finding that the Appellant had failed to prove his case against the Respondent to the required legal standard.

5. Being dissatisfied with the above decision, the Appellant lodged the instant Appeal in which he set out **five (5) grounds** namely:-

- i. That the Learned trial Magistrate erred in law and in fact in holding that the Plaintiff had not proved his case on a balance of probabilities against the weight of evidence on record.*
- ii. That the Learned trial Magistrate erred in law and in fact in holding that the Plaintiff was not injured in the course of his employment with the Defendant.*

iii. *That the Learned trial Magistrate erred in law and in fact in failing to address the material inconsistencies in the Defence evidence and failing to consider the Plaintiff's submissions in the case.*

iv. *That the Learned trial Magistrate erred in law and in fact in imposing a higher standard of proof beyond a balance of probabilities in holding that for the injuries to be proved the fine articles that entered the ear must be seen.*

v. *That the Learned trial Magistrate erred in law and in fact in failing to assess quantum of damages in any event.*

6. The Appeal was prosecuted by way of written submissions. The Appellant filed his submissions on **25.6.2019**, whilst the Respondent filed its submissions on **16.8.2019**. I will consider the respective submissions as below;

Submissions

7. **Mr. Nyabena**, Learned Counsel for the Appellant submitted that the fact that the Appellant was on duty on the material day of the accident is not in dispute and the same was confirmed by the evidence of **DW1** and **DW2**.

8. Counsel submitted that contrary to the allegations by **DW1** and **DW2**, that the Appellant did not sustain any injury and that he only complained of body aches and a flu. It is a fact that the Appellant was injured at his workplace and on the directions of **Mr. Da Gama**, he was issued with a sick sheet and saw **Dr. Varya** who later recommended him to have an audiogram at the Coast Provincial General Hospital, which audiogram confirmed that the Appellant had sustained an ear injury.

9. **Mr. Nyabena** further submitted that from the evidence on record, the Appellant proved his case on a balance of probability and the Respondent's employees being **Dan Ombura**, **Hassan** and **Jose Dagama** never testified in order to challenge the Appellant's evidence.

10. **Mr. Anangwe**, Learned Counsel for the Respondent submitted that Appellant failed to prove that he was injured at his work place as he did not call the two independent eyewitnesses who witnessed the accident. He also averred that the advice by **PW2** for a second audiogram to be conducted was also not adhered to by the Appellant and consequently, the burden of proof was not discharged by the Appellant.

Analysis and Determination

11. This is a first Appeal to the High Court. As such, it is an Appeal on both facts and the law. I am aware of the duty of the first Appellate Court, which is to reconsider and re-evaluate the evidence tendered before the trial court so as to draw my own independent conclusions while bearing in mind that I did not see or hear the witnesses. (See the cases of **Peters...Vs...Sunday Post Ltd 1958 E.A 424** and **Selle..Vs.. Associated Motor Boat Company Ltd (1968) EA 123.**)

12. I have considered the rounds of Appeal, the pleadings and the evidence tendered before the trial court, the impugned Judgment and the rival submissions filed by both parties together with the law and authorities cited. Having done so, I find that from the pleadings filed and Record of Appeal, it is clear that the cause of action subject to Appeal is in respect of a dispute relating to a work injury claim as set out at **paragraphs 3, 4, & 5** of the **Plaint** dated **6.8.2012**. It is therefore imperative that before proceeding to determine the issues raised herein, the court determines whether or not it has jurisdiction to hear and determine this Appeal

13. Jurisdiction is everything and whether this court has or lacks jurisdiction to entertain the matter is a matter of the law that must be dealt with before all else. In the case of **Owners of the Motor Vessel "Lilian S"...Vs...Caltex Oil (Kenya) Ltd[1989] KLR 1, Nyarangi, JA** expressed himself as follows:

“Jurisdiction is everything without which a court of law has

no power to make one more step where a court of law has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter the moment it holds the opinion that it is without jurisdiction.”

14. 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** of the **Employment & 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

15. 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”

16. Under **Article 162(2)(a)** of the **Constitution as read with Section 12(1) of the Employment and Labour Relations Act, 2011**, the ELRC has exclusive jurisdiction to hear Appeals from Court and Tribunals on Labour and Employment disputes. The issue of jurisdiction of the ELRC vis-à-vis the High Court in relation to disputes between employer and employee was dealt with by the **Supreme Court in Republic...Vs...Karisa Chengo & Others, Supreme Court Petition No.5 of 2015 [2017]eKLR**, where it held as 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.”

17. According to the pleadings and evidence tendered before the trial court, as per the Record of Appeal, the Appellant sustained injuries in the course of his employment with the Respondent. In view of this, the Court is satisfied that this Appeal ought to have been filed before the **Employment and Labour Relations Court(ELRC)**. This Court cannot clothe itself with jurisdiction of other Constitutional organs that have been bestowed with the jurisdiction to entertain the same. Accordingly, this Court declines jurisdiction to hear this Appeal and orders that the same be transferred to the **Employment and Labour Relations Court, Mombasa1751**.

17. Costs shall abide the outcome of the Appeal because the issue of jurisdiction has been raised at the instance of the Court.

It is so ordered.

DATED, SIGNED, and DELIVERED at MOMBASA on this 1st day of October, 2020.

D. O CHEPKWONY

JUDGE

1/10/2020

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules, which requires that all Judgments and Rulings be pronounced in open Court.

D. O CHEPKWONY

JUDGE

1/10/2010