REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NUMBER 86 OF 2017

JUMBO NORTH (E.A.) LIMITED...APPELLANT

VERSUS

WILDER WANGIRA.. RESPONDENT

(Being an appeal from the Judgment and Decree of Honourable Charles Obulutsa Chief Magistrate delivered on 16th June, 2017 in Eldoret Chief Magistrate's Court Case Number 328 of 2016)

J U D G M E N T

1. The plaintiff/respondent, **Wilder Wangira**, sued the defendant/appellant **Jumbo North (E.A) Limited** seeking general and special damages for injuries sustained while working for the defendant. He testified that he was working as a general worker, a mill fitter. On 25th April, 2014 he was working on a machine which injured his right hand. He blamed the defendant for the injuring asserting that it had occurred because the defendant had not supplied him with protective gloves. After the accident he was taken for treatment at Chepkanga Dispensary,and relied on the treatment notes. He was later examined by Doctor Sokobe who prepared and presented a medical report.

2. The case for the defendant was presented by a supervisor at the defendant company **one** Lawrence Osoro. He confirmed that the plaintiff was working as a mill fitter. He averred that plaintiff was however in control of the machine he was working and was injured due to his own negligence. Lawrence testified that he was the one who administered first aid to the plaintiff and took him to Chepkanga Dispensary for treatment.

3. The trial court framed the issues for determination as whether;

1. **The plaintiff was working for the defendant and was injured on duty.**

2. **The plaintiff suffered loss and was entitled to compensation.**

3. **The defendant was liable to pay damages and costs.**

In determining the issues the learned trail magistrate considered the submissions filed by the firm of Andambi and Company Advocates urging that the plaintiff had proved negligence on the part of the defendant for failing to provide a safe working environment and that the defendant was fully liable for the plaintiff's injuries.

They proposed general damages of Kshs. 250,000/= relying on the case of **Simba Posho Mills Ltd vs Fred Michira Onguti CA 65 of 2012.**

For the defendant the firm of Nyairo and Company Advocates also filed written submissions. It was their submission that the plaintiff never reported any defect on the machine for which it was in his control and that he was the one at fault. They made reference to the case of **Gedion K. Kemboi vs Nyayo Tea Zones Development Corporation (2015) eKLR,** but made no proposal on the quantum no of general damages

The learned trial magistrate found that there was no dispute that the plaintiff was working for the defendant as a mill fitter and that he was injured on duty. That the treatment notes and medical report by Doctor Sokobe showed that plaintiff sustained cut wounds on the posterior aspect of both hands, which became septic. That the defendant failed to show that they supplied the plaintiff with safety gear like gloves. He found that on a balance of probability the plaintiff had proved liability in full against the defendant.

He made an award in favour of the plaintiff of Kshs. 250,000/= general damages and special damages of Kshs. 7,300 plus costs of the suit

and interest.

4. The appellant was aggrieved and filed this Memorandum of Appeal;

> 1. *THAT the learned trial magistrate erred in law and fact in holding the Appellant herein 100% liable in negligence without considering the evidence tendered.*
>
> *2. THAT the learned trial magistrate erred in law and fact in failing to take into account the fact that the Respondent did not prove negligence on the part of the Appellant.*
>
> *3. THAT the learned trial magistrate erred in law and in fact in failing to evaluate, consider and determine the evidence of Plaintiff especially as to who was in control of the machine at the time of the accident hence an erroneous judgment.*
>
> *4. THAT the learned trial magistrate erred in law and in fact in failing to find the evidence adduced as to the circumstances leading to the alleged accident did not conform to the facts laid out in the Plaint.*
>
> *5. THAT the learned trial magistrate erred in law and in fact in holding the appellant wholly liable for the Respondent's injuries when no initial treatment notes were produced in proof of the injuries allegedly sustained by the Respondent.*
>
> *6. THAT the learned trial magistrate erred in failing to consider and/or take into account the submissions failed by the Appellant hence an erroneous judgment.*
>
> *7. THAT the learned trial magistrate erred in law and in fact in applying the wrong principles of law in assessment of damages hence an erroneous award.*
>
> *8. THAT the learned trial magistrate erred in law and in fact by proceeding to assess damages in the sum of Kshs. 257,300/= in favour of the Respondent which quantum was excessive in the circumstances and not supported by law or evidence as the Respondent has sustained minor soft tissue injuries from which he had recovered.*
>
> *9. THAT the learned trial magistrate erred in law and in fact in failing to consider the provisions of Order 21 rule 4 of the Civil Procedure Rules*
>
> *10. THAT the learned trial magistrate erred in law and in fact in failing to consider and apply the provisions of the Evidence Act, Cap 80 and in particular Section 107, 108 and 109 thereof.*
>
> *11. THAT the learned trial magistrate erred in law and in fact in failing to hold that the Respondent had not proved his case on a balance of probability as expected by law.*

5. Parties agreed to proceed by way of written submissions; Nyairo and Co Advocates for the appellant and Mukabane and Kagunza Advocates for the respondent.

6. In the further submissions, counsel for the appellant raised the issue of jurisdiction, contending that the learned trial magistrate did not have jurisdiction to hear the matter in the first place.

7. From the submissions by both counsel, the issue of whether the trial court had jurisdiction to hear and determine this matter has taken center stage. I must therefore give it the priority it deserves.

8. It is not in dispute that the respondent's claim is a work injury claim, which falls under the jurisdiction of **Workman Injury Benefit Act 2007 (WIBA)**. The Act provides for the manner in which such claims ought to be dealt with, and in particular, confers jurisdiction on the Director**, defined as** the Director of Occupational Safety and Health Services.

9. It is the respondent's contention that, even though the matter fell within the jurisdiction of the Director, as at the time this suit was filed in the Magistrate's court in 2016, certain provisions of the **WIBA Act 2007** had been declared unconstitutional in **Constitutional Petition Number 185 of 2008 Law Society of Kenya vs Attorney General & Another** **[2009] eKLR.** That these were the provisions that conferred jurisdiction upon the Director, and made it mandatory for all claims in respect of an accident or disease occurring before the commencement of the Act to be deemed to have been lodged under the WIBA.

10. The respondent submitted further that by the time the said judgment was overturned by the Court of Appeal on 17th November 2017, in **AG & Another vs Law Society of Kenya** [2017] eKLR this matter was already pending trial in the Chief Magistrate's court. That this decision of Court of Appeal was upheld by the Supreme Court, and some confusion ensued with regard to the matters pending before the courts. That to deal with the subsequent confusion with regard to pending matters, the Hon. Chief Justice issued the following circular dated 15th September 2020.

> "*Circular to:*
>
> *All Judges of the High Court*

All Judges of the ELRC and

All Magistrates

Ref: *Work Injury Claims*

Complaints have been made to me that there is confusion in the handling of ***pending Work Injury Claims filed before the enactment and coming into effect of the Work Injury Benefits Act, 2007.*** *It is alleged that after the Supreme Court decision of 3rd December 2019 on the matter, some courts have struck out some of such cases, while others have and are hearing them.*

I wish to bring to your attention the fact that in dismissing the appeal before it, the Supreme Court ordered that "For the avoidance of doubt the determination in Civil Appeal No. 133 of 2011 (Waki, Makhandia, Ouko JJ. A) is hereby upheld."

The Court of Appeal had itself, inter alia, held that "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.

Please be guided accordingly.

HON. JUSTICE D. K. MARAGA, EGH

CHIEF JUSTICE & PRESIDENT OF

THE SUPREME COURT OF KENYA

15th September, 2020."

11. It is the position of the Counsel for the respondent that the respondent's case is covered by the cited holding of the Court of Appeal, and the Supreme Court, a position he submits is reinforced by the Hon CJ's circular.

12. It is further argued for the respondent that the appellant is estopped from raising the issue of jurisdiction at this juncture, having not raised it during the trial or as ground of appeal in the Appeal. In support of this argument counsel cited Section 16 of the **Civil Procedure Act** which states;

"S. 16. Objections to jurisdiction

No objection as to the place of suing shall be allowed on appeal unless such objection was taken in the court of first instance and there has been a consequent failure of justice."

13. For the appellant it was argued that it is trite that the issue of jurisdiction could be raised at any stage, and even *viva voce* on the strength of **Kenya Ports Authority vs Modern Holding [EA] Limited [2017] eKLR,** where the Court of Appeal held;

"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 motu parties are to be accorded the opportunity to be heard." (emphasis mine)

14. The question that first begs is whether the appellant is in order to raise the question of jurisdiction at this stage of the proceedings. The answer it begets is in the affirmative. That, even though it would have been tidy to raise the issue earlier, the appellant is still fine to raise the issue at this stage.

15. To my mind, the reason for this is without dispute. Without jurisdiction, what a court does amounts to nothing, a nullity. The power of a court to determine any issue before it is not self-arrogated but is donated. The Court of Appeal in **AG & Another vs LSK** *(above)* made this clear*;*

It is now well settled on the authority of the Supreme Court in the decision **of Samuel Kamau Macharia & Another V. Kenya Commercial Bank Limited & 2 others, S.C. Civil Application No. 2 of 2011***, and in a long line of others****, that a court's jurisdiction flows from either, the Constitution or legislation or both; that it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law; and that jurisdiction goes to the very heart of the dispute…***

16. I am therefore satisfied that the appellant is in order to raise the question at this stage.

17. The next question is whether the appellant is estopped from raising the issue of jurisdiction. The respondent's position is that having

submitted to the jurisdiction of the Magistrate's Court, the appellant cannot now be heard to say otherwise. It is argued that this is the import of **Section 16 of the Civil Procedure Act.**

18. I have considered the provisions of **Section 16**. They clearly address jurisdiction with respect to the place of suing. **Section 16** must be read together with the preceding **Section 15**, which clearly demonstrates what is meant by jurisdiction in that context. For avoidance of doubt, I find it necessary to reproduce it here. It states;

*15. **Other suits to be instituted where defendant resides or cause of action arises***

*Subject to the limitations aforesaid, every suit shall be instituted in a court within the **local limits** of whose jurisdiction—*

*(a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily **resides or carries on business**, or personally works for gain; or*

*(b) any of the defendant,s (where there are more than one) at the time of the commencement of the suit, actually and voluntarily **resides or carries on business**, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or*

*(c) the cause of action, wholly or in part, arises. Explanation.(1)—Where a person has a **permanent dwelling** at one place and also a **temporary residence** at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.*

*Explanation.(2)—A corporation shall be deemed to carry on business at its sole or principal office in Kenya, or, in respect of any cause of action arising at any place where it has also a subordinate office, at **such place**. Explanation.(3)—In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following **places**, namely—*

*(i) **the place** where the contract was made;*

*(ii) **the place** where the contract was to be performed or the performance thereof completed;*

*(iii) **the place** where in performance of the contract any money to which the suit relates was expressly or impliedly payable.*

Illustration.—(a) A is a tradesman in Nairobi. B carries on business in Mombasa. B by his agent at Nairobi buys goods of A and requests A to deliver them to Mombasa by rail. A may sue B for the price of the goods either in Nairobi, where the cause of action has arisen, or in Mombasa, where B carries on business.

Illustration.—(b) A resides at Kisumu, B at Nairobi, and C at Mombasa. A, B, and C being together at Nakuru, B and C make a joint promissory note payable on demand and deliver it to A. A may sue B and C at Nakuru, where the cause of action arose. He may also sue them at Nairobi, where B resides, or at Mombasa, where C resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the court. (all emphasis mine)

19. A reading of this section confirmation that it is about territorial jurisdiction of a case with respect to the place where the cause of action arose vis a vis the place where the matter was filed. It is with reference to the parties' places of residence or business as the case may be. This must be distinguished from the jurisdiction that is the power of the court to hear and determine the issues in the case before it.

20. The power of a court to determine an issue or a case is different. This, as was stated by the Supreme Court in **<u>In the Matter of Interim Independent Electoral Commission</u> [2011] eKLR**

Assumption of jurisdiction by Court in Kenya is a subject regulated by the Constitution, Statute Law and by principles laid out in judicial precedent.

The classic decision in this regard is the Court of Appeal decision in **<u>Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1</u>**, *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."

21. Further in **<u>Kenya Ports Authority versus Modern Holding [EA] Limited</u>** (Supra) where the Court of Appeal cited its position in **<u>Adero & Another v Ulinzi Sacco Society Limited</u> [2002 1 KLR 577**, where it quite sufficiently summarized the law on jurisdiction, inter alia, as follows*;*

1…………………………………

2. The jurisdiction either exists or does not ab initio and the non constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.

3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.

4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.

5. Where a cause is filed in court without jurisdiction, there is no power on that court to transfer it to a court of competent jurisdiction.

6. ……………………………..

7. ……………………………..

22. It is not in dispute that the WIBA 2007 specifically provides for who has jurisdiction to deal with work injury claims. **In the Matter of Interim Independent Electoral Commission** the court stated that;

***….* 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".*

23. I am in agreement with the submission that the Magistrate's court had no jurisdiction in view of the fact that there is a law governing work injury claims in force and with its express provisions on how the procedure to be followed. According to the holding above*, that procedure in WIBA should be strictly followed".*

24. The final question is whether the respondent's case falls among the *pending cases* with *legitimate expectation* to warrant conclusion under *the judicial process which they had invoked.*

25. It appears to me that here reference was being made to cases that were filed during the pendency of the old regime preceding the WIBA. *But,* the Supreme Court was of the opinion that even those could still be concluded under WIBA. The distinction about the respondent's case herein is that his suit was filed during the existence of the **WIBA 2007 but at a time** when the provisions of the **WIBA** had been suspended, having been declared unconstitutional. That was the case but according to the Supreme Court the fact that there was a pending appeal in a Superior Court ought to have been sufficient reason for the trial magistrate not to proceed with the matter. In a similar situation where the High Court proceeded with a matter **Juma Nyamawi Ndungo & 5 others vs Attorney General; Mombasa Law Society (Interested Party), Constitutional petition No. 196 of 2018 [2019] eKLR** while the appeal was pending before the Supreme Court, the Supreme Court had this to say:

> *The present Appeal was straight-forward and we have settled the questions placed before us for determination. However, before we conclude we must take note of a matter that was brought to our attention at the hearing of this Appeal. While this matter was before us awaiting determination, E.K. Ogola J, on 10th June 2019, in the* High Court of Kenya at Mombasa, rendered a decision in the case of **Juma Nyamawi Ndungo & 5 others vs Attorney General; Mombasa Law Society (Interested Party), Constitutional Petition No. 196 of 2018 [2019] eKLR.** *Broadly, some of the issues for determination in that matter included whether the WIBA was unconstitutional in light of the Constitution 2010.*
>
> *We are greatly dismayed that the learned Judge did not take judicial notice of the pendency of this Appeal although he was aware of it. As a matter of fact, he stated so in his judgment that an appeal had been preferred to us against the decision of the Court of Appeal to the apex court on matters whose determination may well have been binding on him. The learned judge ought to have held his horses, acknowledge the hierarchy of the courts, and await for this court to pronounce itself before rendering himself, if at all. As we perceive it, his judgment has created unnecessary confusion in the application of WIBA and cannot be allowed to stand as it may [may or is]? also be contrary to this Judgement. The findings and Orders expressed in that judgment must therefore be read in the context of the decision of the Court of Appeal and our finding and Orders in this appeal. That is all there is to say on that matter.*

26. This means that the learned trial Magistrate ought to have taken judicial notice of the pendency of an appeal in the Court of Appeal and held his horses before determining the matter. His judgment must be looked at in the light of the Court of Appeal and Supreme Court's decision.

27. The upshot of this is that the matter was filed before a court whose Jurisdiction was in question, and which court ought to have waited for that issue to be determined. Having failed to do so, the determination of the matter rendered by the trial court without jurisdiction was a nullity *ab initio.*

28. What reliefs then?

29. The appeal succeeds. Having found that the trial court had no jurisdiction to deal with the matter in the first place, I do not think it would be proper to render myself on the other issues on liability and quantum of damages, as my determination means that that decision is a nullity.

30. The respondent is at liberty to have his matter determined under the provisions of WIBA.

31. On costs, considering the appellant could have raised this issue at the earliest, in 2016; it is my considered view that each party bears its own costs of this appeal.

32. Right of Appeal 30 days.

Dated and delivered virtually this 7th December 2020.

Mumbua T. Matheka

Judge

In the presence of:

CA Edna

For the Appellant: Ms Odwa

For the Respondent: Mr. Kagunza