



**Katana v Tarmal Wire Products Limited (Appeal 20 of 2020)
[2024] KEELRC 1196 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1196 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL 20 OF 2020**

**M MBARŪ, J
MAY 9, 2024**

BETWEEN

BEJA M'MBETSA KATANA APPELLANT

AND

TARMAL WIRE PRODUCTS LIMITED RESPONDENT

*(Appeal from the judgment of Hon. Nabibya in Mombasa
CMCC No.1677 of 2014 delivered on 6 August 2020)*

JUDGMENT

1. The appeal herein arises from the judgment in Mombasa CMCC No.1677 of 2014 delivered on 6 August 2020. The background of the appeal is a claim filed by the appellant on the grounds that he was employed by the respondent as a casual employee. While at work, the respondent failed to take reasonable precautions for safety leading to work injury. The respondent ought to have provided and maintained adequate and suitable machines and apparel to enable the appellant to carry out his duties in safety. The claim was that on 14 April 2014, the appellant was instructed by his supervisor to load a bundle of wire rod type y8 from the go-down onto the trucks. Suddenly, a fellow workmate assisting him fell and the bundle of wires scratched the appellant's left arm where he sustained injury, loss, and damage. He claimed special damages of Ksh.2, 000 and general damages with costs.
2. In reply, the respondent denied all the claims made by the appellant and that there was no employment as claimed. There is no contract of employment produced and hence the respondent had no duty of care for any work injury as alleged. There was no work accident reported on 14 April 2014. If the appellant sustained any injury the same arose out of his negligence and recklessness and there is no liability on the part of the respondent. The claim should be dismissed.
3. In judgment, the trial court applied the provisions of the *Work Injury Benefits Act, 2007* (WIBA) and that Section 16 of the Act only permitted a complaint with regard to work injury to be reported to

the Director. The Supreme Court in the case of *Law Society of Kenya v Attorney General & Another* [2019] eKLR held that Section 16 of WIBA requires work injury to be reported to the Director. On this basis, the trial court held it had no jurisdiction to hear and determine the claim of work injury based on WIBA.

4. Aggrieved by the judgment, the appellant filed this appeal on ten (10) grounds. The appellant challenged the judgment of the trial court on the grounds that his case was struck out without being allowed to make his submissions and before considering the doctrine of legitimate expectation. The trial court erred in failing to consider that Section 16 of WIBA had been declared unconstitutional and the claim was properly before the court. There ought to have been a decision on liability and assessment of damages and for these reasons, the appeal should be allowed and there be judgment in favour of the appellant and the matter be taken back to the trial court for a fresh assessment and judgment.
5. Both parties attended and agreed to address the appeal by way of written submissions.
6. The appellant submitted that the trial court declined jurisdiction by error. The application of Section 16 of WIBA has since been addressed by the Supreme Court as being lawful and while the matter challenging the application of WIBA was challenged at the High Court, there was an appeal to the Court of Appeal and eventually on 4 December 2019 the Supreme Court rendered itself on the subject and directed that all pending cases arising from WIBA to be heard before the court where they were filed. The appellant had a legitimate expectation to be heard on the merits.
7. In the case of *Phoenix EA Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR the court addressed the provisions of Articles 27, 47, and 50 of *the Constitution* and that everyone has a right to a fair hearing and equality before the law. The trial court by declining jurisdiction to hear the matter denied the appellant the right to equality before the law.
8. The appellant submitted that by failing to make a finding on liability, assess damages, and award of costs, the trial court erred and went contrary to the judgment in *Law Society of Kenya v Attorney General & Another* [2019] eKLR. Parties are to be heard where the case was filed pending the Supreme Court judgment. In *Awili Nelson v Purity Achieng Ochieng* [2021] eKLR the court resubmitted the matter to the trial court for judgment and finding on liability and assessment of quantum and damages. The appellant is seeking for the matter to be resubmitted to the trial court.
9. The respondent submitted that the findings by the trial court are proper and should be confirmed. Concerning jurisdiction, before December 2007, all work injury claims were determined by courts under the Workman's Compensation Act. After December 2007, WIBA required the director to address work injury in terms of Section 16 of WIBA.
10. The respondent submitted that in High Court Petition No.185 of 2008, WIBA provisions were challenged with a finding that Section 16 was unconstitutional. The matter went to the Court of Appeal, Appeal No.133 of 2017 and the High Court judgment was overturned leading to Supreme Court Petition No.4 of 2019. The Supreme Court agreed with the Court of Appeal to the extent that under WIBA that became operational in June 2008, courts do not have original jurisdiction to hear work injury claims. It was therefore proper for the trial court to find it had no jurisdiction. The work injury arose on 26 August 2014 within the operation of WIBA and the appellant ought to have lodged a claim with the director. That was the proper forum to urge his claim.
11. The respondent submitted that in the case of *West Kenya Sugar Co Ltd v Shirandula ELRCA No. E005 of 2021* the court held that all claims filed suits from 22 May 2008 to 3rd December 2019 when the law had been declared unconstitutional cannot legitimately be entitled to claim that they should be heard before the courts without such power. Once a law is declared unconstitutional, such operates

until a higher court overturns the decision as held in *Perfect Scan Limited v Harrison Kahindi Said* [2021] eKLR. In this case, once Section 16 of WIBA was declared unconstitutional by the High Court in Petition No. 185 of 2008 it remained so until the same was overturned. The trial court made a proper finding and the appeal should be dismissed with costs.

Determination

12. This is a first appeal. The court is required to re-evaluate the evidence before the trial court as well as the judgment and arrive at its independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and make conclusions about it. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd & others* [1968] EA.
13. In a ruling herein delivered on 19 December 2023, the court rendered itself with regard to the objections by the respondent that the court lacked jurisdiction to determine this appeal by virtue of the WIBA and on account of Chief Justice Practice Directions issued through Gazette Notice No.5476 of 28 April 2023. The contents of this ruling are reiterated in this judgment.
14. The appellant's case is that he was injured while at work with the respondent on 26 August 2014. The WIBA was in operation. However, the background of High Court Petition 185 of 2008 and Civil Appeal No.133 of 2017 are all given context under Supreme Court Petition No. 4 of 2019. All claims filed in the respective court pending the highest court judgment, should and ought to be heard before these courts.
15. The trial court judgment and subject of this appeal was delivered on 6 August 2020. This was several months post the Supreme Court judgment in Petition No. 4 of 2019 delivered on 3 December 2019. The learned magistrate well made reference to this judgment but proceeded to misapply the same by finding that the court had no jurisdiction.
16. As correctly addressed by the Court of Appeal in the case of *Attorney General v Juma Nyamawi Ndungo & Others Civil Appeal No.158 of 2019* (Mombasa), the judgment of the Supreme Court, being a judgment in rem is binding and dispositive of this matter. To adjudge otherwise would only create confusion and a failure to acknowledge the hierarchy of the court which is the foundation of our judicial system. For these reasons, the Chief Justice through Gazette Notice No.5476 of 28 April 2023 issued practice directions as a further step in addressing judgment in *Law Society of Kenya v Attorney General & Another* [2019] eKLR.
17. The trial court, having been moved by the appellant through a claim dated 25 August 2014 had the proper standing to hear and determine the claim on the merits. To decline jurisdiction on the grounds that the Supreme Court in *Law Society of Kenya v Attorney General & Another* [2019] eKLR declared Section 16 of WIBA unconstitutional was in error. There is no assessment of what quantum that would have applied had the trial court heard the matter. It is only fair that the matter be heard and concluded before the lower court.
18. On costs, the appeal herein resulted from the trial court's judgment in misreading the law. The appeal is with merit, the matter shall be reverted to the lower court to address the same on the merits. In the circumstances, justice demands that there should be no penalty in costs.
19. Accordingly, the appeal is with merit and is hereby allowed. The file is hereby returned to the Mombasa Chief Magistrate's Court for hearing and determination. Taking into account the age of the file going back to the year 2014, mention before the Chief Magistrate on 16 May 2024 for hearing directions. Each party bears the costs of this appeal.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 9 DAY OF MAY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet