Great Rift Valley Lodge & Resort v Paul (Appeal 44 of 2017) [2024] KEELRC 1666 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1666 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

APPEAL 44 OF 2017

DN NDERITU, J

JUNE 27, 2024

BETWEEN

GREAT RIFT VALLEY LODGE & RESORT .... APPELLANT

AND

PAUL KHALISA MASIKOLO ALIAS PAUL DIEMA .... RESPONDENT

(Being an appeal from the entire judgment and decree of the Resident Magistrate (Hon. Mrs. S. N. Muchungi) delivered on 15th May, 2015, in Naivasha CMCC No. 321 of 2012)

JUDGMENT

I. Introduction

1. The respondent herein (the plaintiff in the lower court) commenced Naivasha CMCC No. 321 of 2012 by way of a plaint dated 2nd November, 2012 filed in court on even date. Subsequently, with the leave of the court, an amended plaint was filed on 20th March, 2014 wherein the following reliefs were sought –

    a. General damages.

    b. Special damages – Kshs.5,000/=.

    c. Cost of this suit and interest on (a) and (b) above.

2. The appellant herein (the defendant in the lower court) defended the suit.

3. In a judgment delivered on 15th May, 2015 and subsequently expressed in a decree issued on 29th May, 2015 the court granted to the respondent the following –

    General damages Kshs.100,000.00

    Interest on above @12% p. (02.11.2015)..Kshs. 28,934.00

Special damages..Kshs. 5,000.00

Decretal amount.......................................Kshs.133,934.00

Certificate of costs....................................Kshs. 44,330.00

Total.......................................Kshs.178,264.00

4. Dissatisfied with the judgment and the decree the appellant filed Nakuru High Court Civil Appeal No. 50 of 2015 raising the following eight grounds of appeal as per the memorandum of appeal dated 11th June, 2015 –

    1. That the learned magistrate erred in law and in fact in failing to hold that the plaintiff's case was fraudulent and dismiss the same in its entirety.
    2. That the learned magistrate erred in law and in fact when she failed to consider that the plaintiff had worked for the Appellant from January 1992 to June 2011 and therefore knew the procedure to be followed in the event of an accident at the workplace.
    3. That the learned magistrate erred in law and in fact when she failed to consider that the plaintiff had failed to report the accident to the defendant yet he had reported other accidents before the Appellant when they occurred.
    4. That the learned magistrate erred in law and in fact when she failed to consider Dr. Nicklin's testimony that he did not have any records showing that the plaintiff was treated at his clinic on 2nd August 2008 or 6th August, 2008;
    5. That the learned magistrate erred in law and fact when she failed to consider the authenticity of the treatment notes produced by the plaintiff.
    6. That the learned magistrate erred in law and fact when she failed to consider that Dr. Kiamba examined the plaintiff four years after the accident and therefore the medical report could not have proved that indeed the plaintiff suffered on the date and place he claimed he did.
    7. That the learned magistrate erred in law and fact when she failed to consider that the plaintiff's pleadings were in variance with his oral testimony.
    8. That the learned magistrate erred in failing to consider the Appellant's Submissions.

5. The appellant is seeking that judgment be entered in its favour in the following terms –

    a. The appeal be allowed and the entire judgment and Decree in Naivasha CMCC No. 321 of 2012 be set aside and the Plaintiff's suit be dismissed.
    b. The plaintiff be condemned to pay the costs of the suit in the lower court and the cost of the Appeal.

6. On 25th July, 2017 the High Court (Meoli J) directed that the appeal be transferred to this court (ELRC) whereby the same was allocated the reference in the header.

7. When the appeal came up in court for directions on 28th February, 2023 the court directed that the appeal be canvassed by way of written submissions. Miss Kariuki for appellant filed her written submissions on 28th April, 2023 while Mr. Owuo for the respondent filed on 26th June, 2023.

8. The lower trial court had issued stay of execution on 10th July, 2015 upon deposit of the decretal sum plus costs in an interest earning account in the joint names of the law-firms representing the parties herein.

<u>II. Submissions by counsel</u>

9. On the one hand, counsel for the appellant submitted that there is no evidence on record that the respondent made a report to his supervisor of an accident or injury on 2nd August, 2008. It is submitted that the evidence on record demonstrates that the respondent was well aware of the procedure to be followed in case of an accident or injury at work. In that regard counsel cited Kakuzi Limited V Lucy Wanjiru Kigoro (2011) eKLR to the effect that an employee who fails to at the earliest opportunity report an accident attracts doubts as to whether an accident and injury actually occurred and becomes amenable not to be awarded any compensation. It is submitted that while the respondent claimed that some people witnessed the accident no such eye witnesses were called in support of his case. Further, it is submitted that the evidence on record confirms that the respondent continued to work for the appellant until 2011 without ever making a report on the alleged accident only to raise the issue after he was terminated.

10. It is submitted that the reason why the respondent did not report the alleged accident is because no such accident even occurred. It is submitted that in the circumstances, if the respondent was ever injured as alleged, which is however vehemently denied, he was not injured at work or in service of the appellant. The court is invited to follow the reasoning in Nandi Tea Estates Ltd V Eunice Jackson Were (2006) eKLR to find and hold that the respondent failed to prove his case on a balance of probabilities.

11. On medical records, it is submitted that the respondent did not identify the medical officer who allegedly attended to him at Dr. Nicklin's hospital and further that the records for the respondent's attendance at Naivasha District hospital including x-ray reports were not availed in court. Further, it is submitted that the medical report by Dr. Kiamba that the trial court relied on in assessing the general damages was prepared well over three years after the alleged accident and injury.

12. The court is urged to be persuaded by the reasoning in Timsales Limited V Wilson Libuywa (2006) eKLR and George Dolla & Gilbert Babu Ndeta V GI (2021) eKLR and find that the respondent failed to prove that the alleged accident occurred and, that if at all it did that it occurred in the course of employment of the respondent by the appellant and or when he was on duty as such.

13. Further, it is submitted that the respondent departed from his pleadings in his testimony in court. It is submitted that while the amended plaint alleged that the ladder which the respondent was using slid and he fell, as per his filed statement, his testimony in court was that the ladder broke down and he fell. It is submitted that in his filed statement the respondent alleged that he was on sick leave for five months following the alleged accident but in his evidence in court he stated that he resumed duty after four days following the accident. It is submitted that the evidence on record as availed by the appellant as per the muster-roll is that the respondent was on duty from 2nd to 6th August, 2008.

14. The court is urged to follow the reasoning in the Independent Electoral & Boundaries Commission & Another V Stephen Mutinda Mule & 3 Others (2014) eKLR to find and hold that the respondent was not truthful in his evidence as evidenced by the departure alluded to above and to further find and hold that he failed to prove his case on a balance of probabilities.

15. It is further submitted that even if the court was to find that the alleged accident occurred and that the respondent was injured as alleged, which is however vehemently denied, the court is urged to find and hold that an employer does not owe an employee an absolute duty of care and that the alleged accident, which is however denied, occurred under unforeseeable circumstances which the respondent ought to have prevented and or avoided by taking reasonable precaution. The court is urged to follow the reasoning in Abdallah Baya Mwanyule V Said t/a Jomvu Total Service Station (2004) eKLR and Dwa Estate Limited V Daniel Ariyo Osieko (2014) eKLR and find that the appellant is not liable to compensate the respondent as found and ordered by the trial court.

16. In the circumstances, it is urged that the judgment of the trial court is devoid of merits and the award is grossly high and not supported by evidence. The court is urged to set the entire judgment aside and allow the appeal with costs.

17. On the other hand, counsel for the respondent submitted that as a first appellate court this court has a duty to re-evaluate the evidence on record and make its own conclusions based on the principles set out in Selle V Associated Motor Boat Co. Ltd (1968) E.A 123.

18. It is submitted that although the appellant alleged that the medical documentation availed in court by the respondent was forged, the appellant failed to prove that allegation. Further, it is submitted that on a balance of probabilities the respondent proved his case and that the trial court arrived at the right decision. The court is urged to dismiss the appeal with costs.

III. Issues for Determination

19. The court has carefully gone through the entire record of appeal including the memorandum of appeal and the written submissions by counsel for both parties. The appellant is seeking to overturn the judgment of the lower court on two main grounds – Firstly, that the judgment was granted in favour of the respondent against the weight of the evidence that was adduced, which according to the appellant failed to prove the respondent’s case. Secondly, the appellant argues that the quantum of general damages awarded was excessive in the circumstances of the case.

20. Besides the two grounds raised by the appellant as stated above, this court is of the view that there is the issue of jurisdiction of the trial lower court that ought to be interrogated. This issue was not raised by either party during the trial or the appeal but the same is a germane and fundamental issue that this court must deal with to arrive at the right conclusion of this appeal. Further, there is the issue as to whether the claim by the respondent was filed within the time limited in law. Both these issues are matters of the law that this court has jurisdiction to pronounce itself on notwithstanding that both were not raised or argued by counsel for the parties.

21. In the circumstances, therefore, the following issues commend themselves to this court for determination –

    a. Did the trial court (lower court) have the requisite jurisdiction to hear and determine the suit?

    b. Was the claim by the respondent time-barred?

    c. Did the respondent prove his case during the trial?

    d. Was the award made by the trial court excessive and should this court interfere with the same?

e. Costs

22. It is important to note that the first issue on jurisdiction was not canvassed during the trial and the court has raised the issue suo motto as the same is purely a matter of the law.

23. Noticeably, the outcome on this first issue shall determine the entire appeal as jurisdiction is everything – See the sentiments of Nyarangi J in The Owners of Motor Vessel Lilian 'S' V Caltex Oil (K) LTD (1989) KLR 1.

24. The fact that the issue of jurisdiction was not raised or pleaded in pleadings before the trial court does not render the same a non-issue. In my view the court has the liberty to raise and deal with the issue suo motto. The issue is whether the trial court and indeed any other court, including this court (ELRC), has the jurisdiction to hear and determine a case arising from work injury benefits and compensation thereof.

25. In Law Society of Kenya V Attorney General & Another (2009) eKLR in a judgment delivered on 4th March, 2009 Ojwang J (as he then was) declared various sections of WIBA to be in conflict and inconsistent with the then constitution of Kenya (old constitution) and hence declared the said sections null and devoid of the status of law. The said sections that were declared null and void are – Sections 4, 7(1) & (2), 10(4), 16, 21(1), 23(1), 25(1) & (3), 51(1) & (2), and 58(2).

26. Of particular relevance in this appeal are Sections 16 and 23(1) of the WIBA. In summary, Section 16 provides that no legal action for compensation shall be filed in court by an employee who alleges injury of any sort sustained at work place may it be from occupational accident or disease. Section 23(1) provides that it is the Director who shall make inquiries into such injuries and circumstances thereof and determine liability thereof and make an award, or as the case may be. Section 52 provides for remedy for a party aggrieved by the decision of the Director and the manner of finally approaching this court for adoption and enforcement of the award or otherwise.

27. The Attorney General was dissatisfied with the above judgment and approached the Court of Appeal vide Civil Appeal No. 133 of 2011. In a judgment delivered on 17th November, 2017 in Attorney General V Law Society of Kenya (2017) eKLR the Court of Appeal set aside the judgment of the High Court above and declared that all the above sections of WIBA except Sections 7 and 10(4) were constitutional and hence had status of good law.

28. The matter did not rest there as the Law Society of Kenya was dissatisfied and hence approached the Supreme Court vide Petition No. 4 of 2019 – Law Society of Kenya V Attorney General & Another (2019) eKLR. In a judgment delivered on 3rd December, 2019 the Supreme Court upheld the decision of the Court of Appeal.

29. In their respective decisions, the Court of Appeal and the Supreme Court directed that for those matters that had been filed before WIBA came into operation such cases, based on the doctrine of legitimate expectation, were to proceed to logical conclusion in the court where they had been instituted. That was a logical and a rather straight forward matter and one would be forgiven for assuming that that was the end of the topic.

30. The following dates are very important to this appeal and any other matter relating to the issues herein. The date of commencement of the WIBA is 2nd June, 2008 as per Legal Notice (LN) No. 60 of 23rd May, 2008. The judgment of the High Court was delivered on 4th March, 2009 and that of the Court of Appeal was delivered on 17th November, 2017. The judgment of the Supreme Court was delivered on 3rd December, 2019.

31. The case in the lower court by the respondent in this appeal was filed on 2nd November, 2012. There are two very important aspects of this date. The first one is that the case by the respondent was filed after the WIBA had commenced operation. Secondly, the High Court had declared various sections of the Act unconstitutional, as alluded to above, before the case was filed. The third angle is that the Court of Appeal and the Supreme Court had not dealt with the respective appeals filed therein as alluded to above as at the date of filing of the case.

32. What has probably caused the confusion that has been witnessed in matters raising the same or similar issues as arising in this appeal is that the Court of Appeal and the Supreme Court did not comment on or give directions on cases that were filed between the decision of the High Court and that of the Court of Appeal. The two superior courts directed on matters that had been filed prior to coming into operation of WIBA on 2nd June, 2008 and directed that such matters should proceed on merits to logical conclusion based on the doctrine of legitimate expectation.

33. This court takes the considered view that a declaration by a court of law on the constitutionality or otherwise of a law is simply a declaration with the effect that upon exhaustion of the appeal process, as it happened in the matter between the Law Society of Kenya V Attorney General above, the Supreme Court declared that the various sections of the WIBA were constitutional, except those mentioned, and they were so ab initio.

34. In other words, Sections 16 and 23 of the Act were always constitutional and hence the jurisdiction of courts on matters concerning compensation on injuries at work was ousted upon the Act coming into operation on 2nd June, 2008. However, based on the doctrine of legitimate expectation as enunciated by the Supreme Court, it would be grossly unfair to dismiss this matter on the basis of lack of jurisdiction as the same was filed at a time when the High Court had declared the material sections of the Act unconstitutional.

35. For the foregoing reasons, the court finds and holds that the lower trial court had the jurisdiction to entertain, hear, and determine the matter.

36. The second issue for determination is whether the claim was filed within time in the lower trial court. The *Employment Act* came into force on 2nd June, 2008, the same date that the respondent is alleged to have been injured at the workplace while on duty. Section 90 thereof provides as follows –

    90. Notwithstanding the provisions of section 4 (1) of the *Limitation of Actions Act*, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

37. However, the respondent did not file his claim in court until 2nd November, 2012 which is way outside the three years period provided for above. Clearly and evidently, the respondent filed his claim in the lower court well outside the limitation period of three years and as such the lower court ought to have struck out the same for having been filed out of time. It is therefore the finding and holding of this court that the judgment of the lower court is a nullity and the appeal ought to be allowed on that ground and the judgment and the consequent orders are hereby set aside.

38. Having held as above the court need not consider the other grounds of appeal raised in the memorandum of appeal.

39. For the foregoing reason, the appeal is allowed.

IV. Costs

40. The court orders that each party shall meet own costs both in the lower court and for this appeal

V. Orders

41. The court issues the following orders-

a. This appeal is allowed and the plaint in the lower court is struck out for having been filed out of time.

b. Each party shall meet own costs for the trial in the lower court and for this appeal.

c. Consequently, the money deposited in the joint names of the law-firms representing the parties herein shall be released to the appellant's counsel forthwith.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 27TH DAY OF JUNE, 2024.

…………………….

DAVID NDERITU

JUDGE

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