



**Jiwani Impex Limited v Ndoro (Appeal E089 of 2023)
[2024] KEELRC 1366 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1366 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E089 OF 2023**

M MBARÚ, J

JUNE 6, 2024

BETWEEN

JIWANI IMPEX LIMITED APPELLANT

AND

SWALLEH NDORO RESPONDENT

JUDGMENT

1. The appeal arises from the ruling delivered on 17 August 2023 in Mombasa CMELRC No. 116 of 207. The appellant is seeking that the subject ruling be set aside and the same be submitted with orders upholding the Preliminary Objection dated 29 March 2022 with costs. An order be issued dismissing and striking out the respondent's suit as against the appellant being Mombasa CMCC No.2342 of 2025 *Swaleh Ndoro v Jiwani Impex Limited* with costs.
2. The appeal is that by a claim dated 1st December 2015, the respondent alleged that on 5 July 2024 while at work the appellant was injured. He filed an amended claim dated 12 February 2016 on the grounds that the appellant was negligent and hence claimed general damages for pain and suffering, special damages, damages for future earning capacity, and costs.
3. The appellant filed a respondent and Notice of preliminary objections dated 29 March 2022 seeking the claim be struck out *in limine* on the grounds that the court lacks jurisdiction to hear and determine the claims by reason of the provisions of the *Work Injury Benefits Act, 2007 (WIBA)*.
4. The objections were urged through written submissions and the learned magistrate in the ruling dismissed the same citing guidelines issued by the Chief Justice on 28 April 2023.
5. Aggrieved, the appellant filed this appeal on the grounds that;



1. The learned magistrate reached a decision that was against the *Constitution*, the *Work Injury Benefits Act*, the *Employment and Labour Relations Court Act*, the Magistrates Court Act, and the *Judicature Act*.
2. The learned magistrate improperly exercised her discretion and or duty by taking into account matters which she ought not to have taken into account and failing to take into account matters she should have taken into account.
3. The learned magistrate erred in fact and law in dismissing the Preliminary Objection raised by the appellant in the primary suit.
4. The learned magistrate erred in law and fact in her interpretation and adoption of Directions published under Gazette Notice No.5476 in the Kenya Gazette Issue of 28 April 2023 as a basis to override clear, unambiguous, unequivocal and explicit statutory legislative enactments and the binding decisions, precedents and or interpretations the superior court have adopted to the aforesaid statutory provisions.
6. Both parties attended and agreed to address the appeal by way of written submissions.
7. The appellant submitted that through Gazette Notice No.5476 dated 28 April 2023, Practice Directions issued regarding *WIBA* claims following the Supreme Court judgment in *Law Society of Kenya v The Attorney General & Another* Petition No. 4 of 2019 where the Chief Justice directed that all pending work injury claims instituted before the judgment should be heard before the court under which they were filed. However, the judgment and Practice Directions did not confer jurisdiction upon the Magistrates Court to hear work injury claims.
8. The remedies sought in the claim are unavailable common law remedies. The work injuries to the respondent arose when *WIBA* had been enacted and should be compensated under *WIBA*. Section 16 of *WIBA* restricts compensation for work injury to the mechanisms under the Act and the compensation the respondent is entitled to is strictly under *WIBA*, Section 28 to 37 and only the Director who has jurisdiction to investigate, calculate and make an award. Section 16 of *WIBA* excluded the common law remedies sought by the respondent in his claim.
9. Before the enactment of *WIBA*, work injury claims were founded on the Workman's Compensation *Act*, now repealed. Under Section 24 of the *Act*, the awards assessed were in addition to any other claims due to the employee under any other law as held in *Securicor Security Services Ltd v Joyce Kwamboka Ong'ong'a suing as the personal and legal representative of Francis Ong'ong'a Mogire (deceased)* [2011] eKLR. The court then had the power to assess common law remedies which is not available under *WIBA*.
10. The appellant submitted that the legislative authority to determine work injury claims vests under *WIBA*. Under Section 16 of *WIBA*, the only remedies available are as assessed by the Director who is given exclusive jurisdiction to investigate and award compensation. Where the employer has objections to raise them and if dissatisfied file an appeal to this court. Hence the magistrates court has no jurisdiction to determine work injury claims without jurisdiction as held in the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR. Parliament having repealed the Workman's Injury Act, jurisdiction to award common law remedies by the magistrate court was removed.
11. In considering the objections made by the appellant, the learned magistrate failed to consider these facts and hence arrived at an erroneous ruling. The Practice Directions issued on 28 April 2023 were meant to clarify valid claims lodged under *WIBA* and not to override the legislative mandate. The impugned



ruling effectively expanded the jurisdiction of the trial court contrary to the law and constitution as conferred under Article 169(1) (d) of the *Constitution*. Practice Directions in their nature cannot stand against and in conflict with a statutory provision as held in *University of Lagos & Another v M. I. Aigoro* [SC32/1984]. Upon the enactment of *WIBA*, the Workman’s Compensation Act was repealed. The Supreme Court judgment in *Law Society of Kenya v The Attorney General & Another* case has been adopted by the superior court as applied the findings that under *WIBA*, all claims for work injury should be addressed. The appellant relied on the following cases, *West Kenya Sugar Co. Ltd v Libuyi* Appeal No. E013 of 2021; *Perfect Scan Limited v Harrison Kabindi Said* [2021] eKLR, *Bloomingtondale Roses v David Fikiri Joshua & Another* [2021] eKLR.

12. The Supreme Court judgment was *n rem* which means it binds all persons as affirmed by the Court of Appeal in *Attorney General V Juma Nyawawi Ndungo, Patrick Lungwe Shaluy, Patrick Kisali Odanga, and John Osoro Omayo & Sadiki Ramdhan Mchechemo* Civil Appeal No.158 of 2019. The objections seeking to strike out the suit should be allowed and the claim before the trial court dismissed for want of jurisdiction.
13. The respondent submitted that Sections 16 and 23 of *WIBA* were already in force but only suspended by an order of the court. Despite the appellant being aware of the provisions of Sections 16, 23 and 52 of *WIBA*, they admitted to the jurisdiction of the trial court. These proceedings form part of the Record of Appeal.
14. The appellant is in essence challenging the validity of Gazette Notice No.5476 which conferred jurisdiction upon the courts to conclude all pending *WIBA* matters. The Gazette Notice is still in force. The case of *Law Society of Kenya v Attorney General & Another* resulted in judge-made law and the Supreme Court appreciated that litigants who had filed their claims pending the judgment had a legitimate expectation to access justice. The learned magistrate properly expressed herself and dismissed the objections and this appeal should be dismissed with costs.
15. This is a first appeal which mandates the court to re-evaluate the lower court record, re-assess and make conclusions.
16. The record herein is mixed up with Mombasa CMELRC No.116 of 2017 with regard to the judgment delivered on 3 February 2021 by Hon. E. K. Makori and CMELRC No.2342 of 2015 relating to the ruling delivered on 17 August 2023 by Hon. Nabibya. The record is not tidy at all.
17. Through notice of Preliminary Objections dated 29 March 2022 filed under Mombasa CMELRC No. 2342 of 2015, the appellant challenged the jurisdiction of the trial court on the basis that under *WIBA* the claim filed should be struck out.
18. The issue related to Mombasa CMELRC No.2342 of 2015 and not Mombasa CMELRC No. 11 of 2017.
19. The learned magistrate heard the parties and, in the ruling, delivered on 17 August 2023 made a finding that;

The P.O, dated 3/11/2020 filed on grounds that the court lacks jurisdiction to entertain this suit on grounds that it is founded that the *Work Injury Benefits Act* 2007 is hereby dismissed subject to the guidelines issued on the subject matter which provide that the case filed on or before 3/12/2019 (notice dated 28/4/2023) shall be determined by the court. This is one such matter.

20. The learned magistrate addressed a notice dated 3 November 2020 and not 29 March 2022.



21. This appeal relates to different sets of facts.
22. As noted, the Record of Appeal is not tidy.
23. The appellant raises very fundamental questions of law but the court will lose sight in addressing the same in light of the Record before it. Parties to revert to the lower court and have the objections dated 29 March 2022 addressed on the merits. It would suffice to have a different Magistrate to hear and determine the same Hon. Nabibya having expressed herself concerning P.O. dated 3/11/2020.
24. Before this court can express itself on the matter, the trial court must be moved as appropriate. Separate the record from Mombasa CMELRC 116 of 2017 and 2342 of 2015.
25. Accordingly, the file shall be placed before the Chief Magistrate, Mombasa for allocating and taking hearing directions. Mention on 17 June 2024.
26. Delivered in open court at Mombasa this 6 day of June 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

