Hantex Garments EPZ Limited v Kazungu & another (Employment and Labour Relations Appeal E024 of 2024) [2026] KEELRC 186 (KLR) (26 January 2026) (Judgment)

Neutral citation: [2026] KEELRC 186 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E024 OF 2024

K OCHARO, J

JANUARY 26, 2026

BETWEEN

HANTEX GARMENTS EPZ LIMITED .... APPELLANT

AND

MASELINA FURAHA KAZUNGU .... 1ST RESPONDENT

KENYA POWER LIGHTING CO. LIMITED .... 2ND RESPONDENT

(Being an Appeal from the judgment and Decree of Senior Principal Magistrate in Kaloni Honourable L.N. Wasige delivered on 25th September 2019 in the Senior Principal Magistrate Court at Kaloleni Civil Suit No. 26 of 2013)

JUDGMENT

Background

1. Contending that at all material times, she was an employee of the Appellant who suffered workplace injuries on 18th March 2013, the 1st Respondent sued the Appellant and the 2nd Respondent seeking general and special damages for the injuries, in vide the above-stated suit.

2. Upon being served with summons to enter appearance, the Appellant and 2nd Respondents entered appearance, and filed their respective statements of defence, denying the 1st Respondent's cause of action against them, and entitlement to the reliefs sought.

3. After hearing the parties on their respective cases, the learned trial Magistrate found in favour of the 1st Respondent both on liability and quantum, against the Appellant. Aggrieved by the Judgment, the Appellant assails the same on the grounds set out in their Amended Memorandum of Appeal filed herein.

The 1st Respondent's case before the trial Court.

4. It was the 1st Respondent's case that she was at material times employed by the Appellant as a general worker. On 18th March 2013, while in the course of her duties within the Appellant's premises, an electrical switch exploded within the space where she was assigned to work. The Supervisor directed about 300 employees outside, and they returned after calm was restored.

5. Following the return, a second explosion took place, enveloping the area in smoke. As workers hurried to exit for safety reasons, she fell down the stairs and sustained injuries to her right hand and chest due to being stepped on by other workers.

6. She was subsequently rushed to Mariakani Sub-County Hospital, where she was treated for the injuries.

7. She blamed the Appellant, claiming they did not hire someone responsible for managing their electrical system on the premises. She also stated that although there were two exit doors in her section, only one was accessible, as the other was locked.

8. She contended that the 2nd Respondent contributed to the accident as the supplier of electrical power, and that they failed to, from time to time, audit the electrical system within the Appellant's premises.

The Appellant's case before the trial Court.

9. The Appellant presented a single witness, Mr Christopher Njoroge Kinyanjui, who serves as its Assistant Human Resource Manager, to provide testimony on its behalf. The witness indicated that on the 18th of March, there were frequent power outages, and approximately at 2:00 p.m., a minor explosion occurred on the ground floor of the go-down. The explosion was attributable to an electrical fault, as sparks were seen emanating from the distribution board.

10. The witness testified that the area where the explosion occurred was approximately five times the size of a courtroom and housed 150 workers. There were three doors at the go-down: a large one and two small ones, each six metres wide. There were no stairs, only a slope wide enough for the workers to exit.

11. He additionally testified that the Appellant had a fire team at the site that extinguished the fire within two minutes. He confirmed that no injuries resulted from the incident. Furthermore, the 1st Respondent did not report any injuries to the Appellant arising from the incident.

12. Cross-examined by Counsel for the 1st Respondent, he stated that there was no explosion, only sparks. He admitted that workers were injured as they ran out of the go-down. However, the slope was not dangerous, as the exits were wide enough.

13. Cross-examined by Counsel for the 2nd Respondent, the witness testified that a power surge caused the incident. However, he could not certainly state whether the outages were reported on the material day. He reiterated that the 1st Respondent sustained injuries while running from the fire.

The 2nd Respondent's case before the trial Court.

14. The 2nd Respondent called a single witness, Ruth Kasera, one of its Engineers, to testify on its behalf. The witness testified that she went to the Appellant's premises on 13th August 2013 after the 2nd Respondent received a demand letter threatening legal action. She spoke to the 1st Respondent's Human Resources Manager, Julius Yego, who informed her that, on the material day, employees saw sparks from a circuit breaker.

15. It is the 2nd Respondent's policy that all power issues at premises should be reported to the 2nd Respondent's offices immediately. The Appellant didn't report any electrical issue on the date of the incident. When the 2nd Respondent's team went to the ground five months later, they found nothing useful to aid their investigations, as the circuit breaker had been replaced. She prepared a report.

16. Cross-examined by Counsel for the Appellant, the witness stated that she did not conclusively determine the cause of the incident because she visited the Appellant's premises only five months after the incident. Had the investigations revealed that the 2nd Respondent was culpable, it would have assumed responsibility and compensated the affected customer.

The Judgment of the lower Court.

17. After hearing the parties on their respective cases and considering submissions by their Counsel, the learned trial Magistrate found the Appellant 100% liable for the incident and the injuries suffered by the 1st Respondent, and consequently awarded her general damages of KShs. 150,000, special damages of KShs.15, 000, costs and interest.

The Appeal before this Court

18. Aggrieved by the whole of the Judgment of the lower Court, the Appellant filed the instant appeal, setting out the following principal grounds;

    a. That the Learned trial Magistrate erred in law and fact in holding that the 1st respondent had proved her case on breach of duty of care and or negligence against the Appellant to the required standard.

    b. That the Learned trial Magistrate erred in law and fact in failing to hold that the parties are bound by their pleadings and in holding that the 1st Respondent had proved its case on negligence and or breach of duty of care with the evidence that was contrary to the pleadings.

    c. That the Learned trial Magistrate erred and misdirected herself by failing to properly evaluate and analyse the evidence and compare it with the case as pleaded.

    d. The Learned trial Magistrate erred in the law in failing to appreciate that the employer's duty of care isn't absolute but reasonable to be decided from the facts of the case, and approached the case in issue as a strict liability case.

19. It is important to point out that through its application dated 17th December 2024, the Appellant sought leave of this Court to amend the Memorandum of Appeal initially filed to introduce a jurisdictional ground that the trial Magistrate didn't have the requisite jurisdiction to entertain the work injury claim.

20. In its ruling dated 28th April 2025, this Court held;

> " 4. Considering that the application isn't opposed, the jurisdictional ground that the Applicant wants to include in its memorandum of appeal, and that I see no prejudice that the Respondents shall suffer if the orders sought are granted, I have no compelling reason to disallow the Applicant's instant application. I hereby allow the same.
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> 5. The Appellant / Applicant is granted leave to file and serve an amended memorandum of appeal within 14 days of today. ...."

Analysis and Determination

21. The role of a first Appellant Court is to consider the evidence that was placed before the lower court, evaluate it itself and draw its own conclusions, but in so doing it must bear in mind that it neither saw nor heard the witnesses testify, and accordingly make due allowance in that respect. See Selle & Another v Associated Motor Boat Co Ltd & Others [1968] EA 123.

22. I have carefully considered the parties' pleadings and evidence before the trial Court, and the submissions of their Counsel in this appeal, and hold that the appeal turns on two issues: the jurisdiction of the trial Court over the claim that was before it, and the question of liability for the incident and the injuries that were the subject matter of the claim.

23. Counsel for the Appellant submits that the 1st Respondent's claim before the trial Court was a workplace injury claim, and that the cause of action was undoubtedly alleged to have arisen on 18th March 2013. As such, the provisions of the *Work Injury Benefits Act*, 2007, were applicable to the claim.

24. Section 16, as read together with section 23 of the Act, clearly ousts the jurisdiction of the magistrate's court to adjudicate over work injury disputes and vests it in the office of the Director for Occupational Safety and Health Services. To support this submission, Counsel for the Appellant has placed reliance on the Supreme Court decision in the Law Society of Kenya v The Attorney General and Central Organisation of Trade Unions [2019] KSEC16[KLR].

25. It is further submitted that, by dint of the provisions above stated, provisions of the law, the trial Court didn't have jurisdiction to entertain the claim, the proceedings before it and the judgment that flowed therefrom were a nullity abinitio. To buttress this Submission, reliance has been placed on the case of Law Society of Kenya v the Attorney General & Another [2017] eKLR, where the Court stated;

> "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 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."

26. Counsel further submitted that the issue of jurisdiction can be raised at any time, including even at the appellate stage. To support this, Counsel relies on the case of Kenya Ports Authority v Modern Holdings [E.A] Limited [2017] eKLR.

27. In response, Counsel for the 1st Respondent submits that during the trial of the matter in the lower court, the issue of the jurisdiction of the Magistrate's Court was not raised. This Court shouldn't be persuaded to consider this issue that has been belatedly raised on appeal.

28. This Court is urged to consider that the subject matter of this appeal was a test suit, and that the decision therein has been adopted in many other decisions filed in different courts within the Country.

29. Inarguably, the *Work Injury Benefits Act* 2007 ousted the original jurisdiction to entertain work injury claims under section 16 thereof. The section provides;

> " No action shall lie by an employee or any dependent of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death."

30. To fully understand the ouster effect of the above stated provision, one needs to read the provision with the stipulations of section 23 of the Act, which reads;

> " [1]. After having received notice of an accident or having learned that an employee has been injured in an accident, the Director shall make such inquiries as are necessary to decide upon any claim or liability in accordance with this Act."

31. In Law Society of Kenya and The Attorney General and Another [2019] KESC 16[eKLR, the Supreme Court of Kenya stated;

> " Furthermore, this Court should consider *the Constitution* of 2010's provisions to help deduce whether or not the impugned provisions, when read alongside the purpose of WIBA, would assist in bringing clarity and justice to the issue in contest. In doing so, a plain reading of section 16 of the Act would reveal that its intention is not to limit access to courts but to create a statutory mechanism where any claim by an employee under the Act is subject, initially, to a process of dispute resolution starting with investigations and award by the Director aforesaid and thereafter, under Section 52 an appeal mechanism to the Industrial Court. As we previously stated in Petition No. 33 of 2018, Sammy Ndungu Waity v I.E.B.C and 3 others [2019] eKLR,
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> > ‘’ Where *the Constitution* or any other law establishes an organ, with a clear mandate for the resolution of a given genre of disputes, no other body can lawfully usurp such power, nor can it append such organ from the pedestal of execution of its mandate. To hold otherwise would be to render the constitutional provision inoperable, a territory into which no judicial tribunal, however daring, would dare fly"
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> > 62. We reiterate the above holding, and in the present context, therefore, we further find that Section 16 cannot be read in isolation so as to create an impression that it curtails the right to immediately access the courts, because looking at the intention of Section 16, the purpose it fulfils is apparent. That purpose is revealed in Section 23, which calls for initial resolution of dispute via the Director and that this can be deemed as an alternative dispute resolution mechanism. But what if one is still aggrieved by the decision of the Director? The answer to that question lies in Section 52 of the Act, which allows aggrieved parties to seek redress in the court process. In the circumstances, access to justice cannot be said to have been denied."

32. This Court recalls that, despite the comprehensive Judgment by the Supreme Court, confusion continued. The lingering question was how to manage cases that were ongoing in court, either before the *Work Injury Benefits Act* came into force or prior to the judgment.

33. As correctly noted by Aboudha J, in the case of Techno-Plast Limited v. Christorper Barasa Wafula [2025] KEELRC 2767 (KLR), the Supreme Court did not issue directives regarding cases filed between the High Court's decision and its subsequent judgment. Aboudha J, neatly captured it, thus;

> " This court notes that the Supreme Court did not give directions on cases that were filed between the decision of the High Court and when it made its decision. The two superior courts directed on matters that had been filed prior to the coming into operation of WIBA in June 2008 and directed that such matters should proceed on merits to the logical conclusion. This was the same observation in the case of Omutiti v Orpower 4 Inc [2003] KEERC 1974, where it was stated;
>
> > The following dates are very important to this appeal and any other matters relating to the issues herein. The date of commencement of the WIBA is June 2, 2008, as per Legal Notice [LN] No. 60 of May 23, 2008. The judgment of the High Court was delivered on March 4, 2009, and that of the Court of Appeal was delivered on November 17, 2017. The judgment of the Supreme Court was delivered on December 3, 2019."

34. The case in the lower court was initiated by the 1st Respondent on 16th April 2013. There are two significant aspects concerning this date. Firstly, the case was commenced after the enactment of the *Work Injury Benefits Act*. Secondly, the High Court had declared various provisions of the Act, including Section 16, to be unconstitutional. Additionally, both the Court of Appeal and the Supreme Court had yet to adjudicate the respective appeals filed therein as of the date of the case filing.

35. To clear the confusion, the Chief Justice gave practice directions on the *Work Injury Benefits Act* matters through the Kenya Gazette No. 5477 of 28th April 2023, which provided as follows;

> " Claims filed after commencement of WIBA, but before the Supreme Court decision.
>
> 7. Taking into account that the High Court vide its judgment dated 4th March 2009 in Law Society of Kenya v Attorney General & Another [2009] eKLR declared some of the provisions in WIBA, including Sections 16, 23[1] and 52, which prescribe the procedure for lodging claims under the Act, unconstitutional. Consequently, the said declaration of nullity created a legitimate expectation that claimants could directly lodge claims for compensation for work related injuries and diseases in court. As such, litigants cannot be penalised for relying on the declaration of nullity, as appreciated by the Supreme Court in the Attorney-General and 2 others v Ndii and 79 Others, Prof. Rosalind Dixon and 7 Others [Amicus Curiae] [Petition 12, 11, and 13 of 2021 [Consolidated] [2022] KESC 8 [KLR] to lodge their claims in court.

Therefore.

> I. All claims with respect to compensation for work related injuries and diseases filed after the commencement of WIBA and before the Supreme Court decision at the Employment and Labour Relations Courts or the Magistrates' Courts shall proceed before the said courts."

36. This means that when the 1st Respondent filed her case at the lower court in 2013, the WIBA was already in effect, and this was before the 2019 Supreme Court decision. Specifically, the timeline falls between 2009 and 2019, which aligns with the period the Chief Justice addressed.

37. The Supreme Court in the above-stated decision quoted with approval the dictum of the Court of Appeal in the Law Society Matter [Supra], thus;

> " With respect, we agree with the claimants in those pending case have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process which they had involved."

38. The Supreme Court went on to state as follows;

> " In agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of the Act, litigation relating to work-injuries had gone on had gone on and a number of the suits had progressed up to the decree stage, some of which were still being heard; while others were still at the preliminary stage. All such matters were being dealt with under the then existing and completely different regimes of law. We thus agree with the Appellate Court that Claimants in those pending cases have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked. However, were it not for such legitimate expectation, WIBA, not being unconstitutional and even more progressive statute, as we have shown above, we opine that it is best that all matters are finalised under Section 52 aforesaid."

39. With the High Court's declaration that Sections 16, 23[1] and 52 were unconstitutional, the 1st Respondent could legitimately believe that the Magistrates' Court was the right forum to adjudicate her claim and legitimately expect a judicial determination from the court. This Court is therefore unpersuaded by the Appellant's contention and submissions that the lower court lacked jurisdiction to entertain the claim.

40. Counsel for the Appellant submitted that the 1st Respondent pleaded negligence and particularised it in her Amended Plaint. He contends that careful consideration would, and ought to have, revealed to the Learned trial Magistrate that the averments in paragraphs 5 and 6 [a] to [f] of the pleading did not at all blame the Appellant for the incident but the 2nd Respondent. As such, the Learned trial Magistrate erred in law by holding that the Appellant was negligent, a finding that had no basis in the 1st Respondent's pleadings.

41. Clearly, the 1st Respondent didn't address this point raised by the Appellant. However, that doesn't obviate this Court's duty to consider the factual and legal soundness of the point. In an adversarial legal system such as ours, it is a trite legal proposition that parties are bound by their pleadings and that a civil case is decided on issues arising out of the pleadings.

42. The Supreme Court of Kenya, in its ruling in the case of Raila Amolo Odinga &Another vs IEBC & 2 others [2017] eKLR, found and held as follows in respect of the essence of pleadings:

> "In absence of pleadings, evidence, if any, produced by the parties cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings, and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised, and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings................"

43. In the case of Galaxy Paint Co. Limited Vs Falcon Guards Ltd, [2000] eKLR, cited by Counsel for the Appellant, the Court of Appeal held;

> "It is trite law, and the provisions of O.XIV of the Civil Procedure Rules are clear that issues for determination in a suit generally flow from pleadings, unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of O. XX rule 4 of the aforesaid Rules, may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for court's determination."

44. In Gandy v Caspair [1956] EACA 139, it was held that unless the pleadings are amended, parties must be confined to their pleadings. Otherwise, to decide against a party on matters which do not come within the issues arising from the disputes as pleaded clearly amounts to error on the face of the record.

45. In Fernandes v People Newspaper Ltd [1972] EA 63, Law Ag V.P said;

> "A civil case is decided on issues arising out of the pleadings. No allegation of negligence against the appellant has even been made, and it was not open to the court to find negligence of his part."

46. In her Amended Plaint, the 1st Respondent averred;

> "5. On or about 18th March, 2023, the plaintiff was lawfully in the course of her employment with the 1st Defendant as a Casual Labourer, where she was assigned work as a general worker, when suddenly an explosion occurred at the power main switch and while escaping from the building, she fell on the staircase and was stepped on by other employees escaping the premises whereof she sustained serious injuries to her right hand which the defendants are liable and or vicariously liable." [emphasis mine].
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> 6. As a result of said accident, the plaintiff avers and maintains that she suffered loss and damage as a result of negligence and or breach of duty of the Defendants, abs or their servants and/or agents for whom the Defendants are liable and or vicariously liable. ....

47. The Court notes that after averring as set out hereinabove, the 1st Respondent went ahead under paragraph 6, to particularise particulars of negligence and breach of contract of employment, and negligence against the Appellant and 2nd Respondent respectively.

48. In view of the foregoing, it is unfathomable what informs the Appellant's submissions that negligence wasn't pleaded against the Appellant. I find these submissions unreasonable and misleading.

49. In negligence and breach of duty claims, the burden of proof always lies on the party asserting that they suffered injury and or loss as a result of the other party's negligence and or breach of contract. In Halsbury's Laws of England 4th Edition at paragraph 662 page 476, it is stated;

> "The burden of proof in an action for damages for negligence rests particularly on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and injury to the plaintiff, between which and the breach of duty a causal connection must be established."

50. There is no doubt that the tone of the 1st Respondent's pleadings and evidence before the trial court was a result of the Appellant's negligence and breach of duty of care. The Appellant, as her employer, failed to provide a safe working environment. It cannot be disputed that, under both common law and statute, the employer bears a responsibility to ensure a safe working environment.

51. In Van Daventer v Workmen's Compensation Commissioner [1962] 4 SA G cited in the case of Pembe Flour Mills Limited v Ali Omar Swaleh [2019] eKLR, cited by the 1st Respondent's Counsel, it was stated;

> "An employer owes a common law duty to a workman to take reasonable care for his safety. The question arises in each particular case as to what reasonable care is required. This is a question of fact and depends upon the circumstances in each particular case. A master is, in the first place, under a duty to see that his servants do not suffer through his personal negligence, such as failure to provide a safe system of working and a failure to provide proper and suitable plant."

52. In Makala Mailu Mumennde V Nyali Golf County Club [1991] KLR 13, the Court stated;

> "No employer in the position of the defendant would warrant continuous security of an employee engaged in the kind of work the plaintiff was engaged in, but inherently, dangerous. An employer is expected to reasonably take steps in respect of the employment to lessen danger or injury to the employee. It is the employer's responsibility to ensure a safe working place for its employees."

53. Section 6 of the *Occupational Safety and Health Act* places a statutory obligation on every occupier to ensure the safety, health and welfare of the persons working in his workplace.

54. By reason of the foregoing, I have no doubt that the Appellant owed the 1st Respondent as its employee, both a common law and statutory duty of reasonable care.

55. I have carefully considered the 1st Respondent's evidence before the trial Court, that during the material time, there were 300 employees in a working space which had only two exit doors, but one was locked, and the Appellant's contention that the work area had, at the material time, six doors and 150 workers. The trial Magistrate had to believe the evidence of either the 1st Respondent or the Appellant's witness. She believed the former, in my view, correctly so.

56. Instead of presenting tangible evidence to rebut the 1st Respondent's evidence, the Appellant's witness embarked on and dwelt on presenting evidence that was substantially contradictory. His evidence

under cross-examination was a radical departure from that in chief, in most vital aspects. In his evidence in chief, he asserted that there was no fire from the explosion, only to turn around and make admissions under cross-examination that there was fire and that the 1st Respondent was injured. In my view, this spoke to an uncandid witness.

57. The 1st Respondent's evidence regarding the number of doors and how many were open at the time of the incident was vital. In my view, the Appellant did not, as would reasonably be expected of a reasonable employer, present sufficient evidence, including photos, architectural plans, and any eyewitness, to discount the 1st Respondent's evidence. No employee register was produced to disprove her assertion about the number of workers at that workplace at the material time.

58. I observe that the 1st Respondent's testimony remained consistent throughout and was not challenged during cross-examination. She successfully demonstrated that the Appellant had failed to provide a safe working environment, particularly in emergency situations.

59. In the upshot, I am not persuaded to disturb the learned trial Magistrate's finding on liability.

60. In the upshot, I find no merit in the Appellant's appeal. It is hereby dismissed with costs.

READ SIGNED AND DELIVERED THIS 26TH DAY OF JANUARY 2026.

OCHARO KEBIRA

JUDGE