



**Hantex Garments EPZ Limited v Kazungu & another (Civil Appeal
E031 of 2021) [2023] KECA 1287 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1287 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL E031 OF 2021
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
OCTOBER 27, 2023**

BETWEEN

HANTEX GARMENTS EPZ LIMITED APPELLANT

AND

MARSELINA FURAHA KAZUNGU 1ST RESPONDENT

KENYA POWER & LIGHTING CO LTD 2ND RESPONDENT

*(Being an appeal from the Judgment of the High Court at Malindi delivered
by Reuben Nyakundi, J. on 18th December 2020 in H.C. CA No.75 of 2019.)*

JUDGMENT

1. This is a second appeal against the judgment of the High Court (Hon R Nyakundi, J) at Malindi sitting as a first appellate Court against the judgment of the Senior Principal Magistrate's Court at Kaloleni (Hon LN Wasige). Marselina Furaha Kazungu the 1st Respondent herein filed suit against her employer, Hantex Garments EPZ Limited, the Appellant herein and Kenya Power & Lighting Co Ltd, the 2nd Respondent, claiming damages for breach of duty of care and negligence that occurred at the Appellant's premises while the 1st Respondent was on duty. The 1st Respondent's case was that on or about 18th March 2018, while working for the Appellant as a casual laborer and assigned work as a general worker, an explosion occurred at the power main switch. That while escaping the fire she fell on the staircase, and her fellow employees stepped on her, whereby she sustained serious injury to her right hand. In its defence, the Appellant filed a Notice of Claim against the 2nd Respondent for indemnity and/or contribution.
2. After hearing the witnesses and the counsels in their respective submissions, the learned trial Magistrate apportioned liability at 100% against the Appellant, and proceeded to award to the 1st Respondent general damages in the sum of Kshs 150,000/- special damages of Kshs 15,000/- and costs of the suit. On appeal to the High Court, the learned Judge set aside the apportionment of liability by the



trial Magistrate, and apportioned it at the ratio of 80% against the Appellant and 20% against the 1st Respondent.

3. The Appellant was aggrieved by the judgment of the High Court and so filed this appeal before this Court. The Appellant has raised four grounds of appeal in its Memorandum of Appeal dated June 28, 2021 as follows:

1. The 1st Respondent's case was not proved on a balance of probabilities as the evidence on record by the 1st Respondent was contrary to the pleadings.
2. The court determination was based on unpleaded issue of the number and size of the doors and holding that the doors were not sufficient
3. The Learned Judge erred in law in not holding that the Trial Magistrate was bereft of jurisdiction on work injury related disputes contrary to the provision of *Work Injury Benefits Act, 2007*.
4. The Learned Judge and Trial Magistrate failed to hold that the explosion was the proximate cause of the accident which was evidence pleaded and tendered in court as the cause.

4. We heard this appeal through this Court's virtual platform on the March 20, 2023 during which time learned counsel MR Jengo for the Appellant and learned counsel Ms. Kibos for the 1st Respondent was present. There was no appearance for the 2nd Respondent despite service of the hearing notice upon counsel on record for it effected on the March 2, 2023.

5. MR Jengo informed the Court that the 2nd Respondent did not participate in the proceedings. On his part, he relied on the Record of Appeal. He also relied on the written submissions dated July 21, 2022. Counsel highlighted the submissions and urged that the learned trial Magistrate had no jurisdiction to entertain the suit pursuant to the *Work Injury Benefits Act, 2007* [hereinafter WIBA]. Counsel urged that the learned High Court Judge ruled that he had no jurisdiction to hear the appeal, stating that in his view, it was the Employment and Labour Relations Court (ELRC), which had jurisdiction to hear the matter. MR Jengo submitted that despite that ruling, the learned Judge of the High Court proceeded to entertain the appeal, even though the ruling was still on record.

6. Ms. Kibos for the 1st Respondent relied on their written submissions dated May 9, 2022, filed on July 7, 2022, together with the list of authorities. Counsel did not wish to highlight the submissions.

7. We have carefully considered the submissions by the respective counsel, both written and oral. We have also considered the cases and the law relied upon. This is a second appeal and we are thus restricted to determining points of law and not of fact. We identify ourselves with this Court's decision in the case of *Stanley N. Muriithi & another vs. Bernard Munene Ithiga* [2016] eKLR where the Court (Waki, Karanja & Kiage JJA.) stated as follows:

“...In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

We hasten to observe, however, that failure on the part of the first appellate court to re-evaluate the evidence tendered before the trial court and as a result, arriving at the wrong conclusion is a point of law.”



8. We propose to deal with the issue of jurisdiction, which has been raised by the Appellant. Even though ground 3 of the memorandum of appeal raised issue with the lack of jurisdiction of the Magistrates Court to entertain the suit in the first instance, MR Jengo pointed out more. Counsel urged that the learned Judge of the High Court made a ruling declaring that he had no jurisdiction to entertain the appeal. However, he proceeded to hear the appeal to finality. We propose to handle that aspect of the appeal as it has the potential to dispose of the appeal.
9. MR Jengo relied on several decisions of various courts to urge that jurisdiction is important; that jurisdiction should flow from either the Constitution or legislation or both; and that a court or body cannot arrogate jurisdiction exceeding that which is conferred upon it by law. For that proposition counsel relied on the Supreme Court decision of S. K. Macharia & Another vs. Kenya Commercial Bank & 2 others [2012] eKLR
10. Counsel urged that a contest on jurisdiction could be raised at the stage of the case, including the appellate stage, as seen in the case of Kenya Ports Authority vs. Modern Holdings (E.A) Limited [2017] eKLR
11. MR Kibos for the 1st Respondent made submissions in regard to the issue of jurisdiction of the magistrate court pleaded as ground 3 of the memorandum of appeal. It was counsel's observation that this issue was not raised before the Magistrate Court and 'by extension before the High Court'. That in the circumstances, the courts below could not have made any determination on that point. For that proposition, counsel relied on the case of Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates vs. Salama Beach Hotel Ltd & 3 others [2017] eKLR and the case of Mary Kitsao Ngowa & 36 others vs. Krystalline Ltd [2015] eKLR
12. We do appreciate the submissions by Ms. Kibos for the 1st Respondent, regarding the grounds raised in this appeal, that the issue of jurisdiction pleaded was in regard to the Magistrates court and not the High Court. There is however a ruling by the learned Judge of the High Court who heard this appeal, expressing doubt whether he had jurisdiction to hear and determine the appeal. It is for that reason that we shall consider that issue.
13. On February 6, 2020, the High Court Judge (Nyakundi, J) directed that the appeal, being premised on a work injury claim, be transferred to the Employment and Labour Relations Court in Mombasa for hearing and disposal. We note from the Record of Appeal that even after making that order, the learned Judge continued to mention the case several times and after that, he heard and eventually rendered his judgment, the subject matter of this appeal. The ruling that the Court had no jurisdiction in the matter had the effect of disqualifying the Judge from proceeding with the matter. The only exemption would have been if, the ruling was set aside by a higher court, or reviewed by that court.
14. We shall now determine whether the Court had jurisdiction to entertain the appeal, or whether it ought to have been heard by the ELRC as the learned Judge of the High Court had directed.
15. The Supreme Court in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 others [2012] eKLR expressed itself as follows:

“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter,



for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

16. The above decision of the Supreme Courts sets out the fundamental principle of law that jurisdiction is conferred by the Constitution or by legislation, and that once such jurisdiction is so determined, a court or tribunal or body upon which jurisdiction is donated cannot go outside the limits or scope of that jurisdiction. The question before us is which court has the jurisdiction to entertain appeals from Magistrates’ courts arising out of employment related cases, in particular, injury in the workplace.

17. The jurisdiction of the High Court and Courts of equal status is prescribed in the Constitution and legislation. Article 165(3) of the Constitution provides as follows:

- “(3) Subject to clause (5), the High Court shall have—
- (a) unlimited original jurisdiction in criminal and civil matters;
.....
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.”

18. Article 165 (5) (6) and (7) thereof on the other hand provides:

- “(5) The High Court shall not have jurisdiction in respect of matters—
- a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - b. falling within the jurisdiction of the courts contemplated in Article 162 (2).
6. The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
7. For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

19. Article 162(2) provides for systems of courts, creating superior courts, which include courts with the status of the High Court thus:

- “162. System of courts
- 1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).



2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - a. employment and labour relations; and
 - b. the environment and the use and occupation of, and title to, land.
3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”

20. Pursuant to Article 162 Parliament has power to enact laws providing for the jurisdiction of the High Court and courts of equal status. In exercise of that power, Parliament enacted the [Employment & Labour Relations Court Act](#) (hereinafter ELRC) No 20 of 2011 that provides under Section 12(1) as follows:

- “(1) the court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to in accordance with Article 162(2) of the [Constitution](#) and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including; -
- a. disputes relating to or arising out of employment between an employer and an employee;
 - b. disputes between an employer and a trade union;
 - c. disputes between an employers’ organization and a trade union’s organization;
 - d. disputes between trade unions;
 - e. disputes between employer organizations;
 - f. disputes between an employers’ organization and a trade union;
 - g. disputes between a trade union and a member thereof;
 - h. disputes between an employer’s organization or a federation and a member thereof;
 - i. disputes concerning the registration and election of trade union officials; and
 - J disputes relating to the registration and enforcement of collective agreements.” [Emphasis added].

21. Apart from that, Section 87 of the [Employment Act](#) No 11 of 2007 provides as follows: -

1. Subject to the provisions of this Act whenever –
 - a. an employer or employee neglects or refuses to fulfill a contract of service; or
 - b. any question, difference or dispute arises as to the rights or liabilities of either party; or



- c. touching any misconduct, neglect or ill- treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.
 2. No court other than the Industrial court shall determine any complaint or suit referred to in subsection (1).” (Emphasis added)
22. Going by the ELRC Act, the ELRC has exclusive original and appellate jurisdiction to hear and determine all disputes referred to in accordance with Article 162(2), which are disputes relating to employees and employers, including matters of injury at the work place. At the same time, under Article 165(5)(b) of the *Constitution* the High Court has no power to determine issues which fall within the jurisdiction of the ELRC.
 23. Having considered the *Constitution* and the relevant law, it is quite clear that the court with jurisdiction to hear the first appeal in this matter was the ELRC, and not the High Court. In addition to the law, we have quite a few cases that have interpreted these provisions and brought clarity to the fact that the ELRC is the court clothed with the jurisdiction to hear disputes relating to or arising from the employment relationship between an employee and an employer, including appeals arising therefrom. See *Elizabeth Njeri Nderi & Another vs. Highway Carriers Limited* [2019] eKLR and *Saidi Mobammed vs. Diamond Industries Ltd* (2018) eKLR
 24. We have said enough to demonstrate that the instant appeal should have been heard and determined by the ELRC. The High Court had no jurisdiction to entertain the appeal. We are satisfied, therefore, that the learned Judge misdirected himself for finding he had jurisdiction to entertain the appeal. Rule 33 of the *Court of Appeal Rules* empowers this Court to remit the proceedings to the lower court with such directions as may be appropriate and to make any necessary incidental or consequential orders. The order that commends itself to us is as follows:
 1. The judgment of the High Court (R Nyakundi, J) delivered on the December 18, 2020 is hereby set aside.
 2. Pursuant to Rule 33 of this Court’s *Rules*, we remit these proceedings back to the ELRC for hearing and determination.
 3. The Deputy Registrar of this Court will to facilitate the remittance of the proceedings to that Court under 2) above.
 4. As the appeal succeeded in part, let each party meet their own costs of this appeal.
 25. These are our orders.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF OCTOBER, 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA



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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

