



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KOOME, MUSINGA & KIAGE, JJ.A.)

CIVIL APPEAL NO. 119 OF 2017

BETWEEN

PELEZIA BAKARI SALIM.....APPELLANT

AND

SOMOIRE KEEN.....1ST RESPONDENT

J. KEEN TRANSPORTERS.....2ND RESPONDENT

SOMON TRANSPORTERS.....3RD RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Busia (F. Tuiyott, J.) dated 14th July 2016 *in Civil Appeal No. 6 of 2014.*)

JUDGMENT OF MUSINGA, J.A

1. The appellant was the plaintiff in a claim for damages in respect of personal injuries arising out of a road traffic accident that occurred on 7th March 2012. She filed a suit *Civil Suit No. 89 of 2013* in the Chief Magistrates’ Court at Busia. Judgment on liability was entered by consent, apportioned at 80% against the respondents and 20% against the appellant. The trial court was asked to assess the quantum of damages payable.
2. The appellant’s injuries were indicated as trauma to the head with brain concussion and loss of consciousness; laceration with torn muscular tissues on the forehead and both upper lips, blunt soft tissue injuries; traumatic amputation of the right upper limb with loss of the right shoulder joint, and extensive lacerated wound on the right thigh with severe loss of thigh muscle from the hip joint down to the ankle joint.
3. The suit was heard by C.I. Agutu, Resident Magistrate. In a judgment delivered on 19th December 2013, the learned magistrate awarded the appellant general damages of Kshs.2,000,000; Kshs.9,360,000 for loss of future earnings; special damages of Kshs.125,336, total **Kshs.11,485,336** plus costs of the suit and interest.
4. Being aggrieved by the said judgment, the respondents preferred an appeal to the High Court of Kenya at Busia, stating, *inter alia*, that the trial magistrate erred in law in awarding a sum in respect of damages that was so inordinately high that it represented an entirely erroneous assessment of damages; and the learned magistrate erred in law in awarding an amount beyond her pecuniary jurisdiction.
5. The High Court, (*Tuiyott, J.*) held that the pecuniary jurisdiction of the trial court was Kshs.2,000,000 and therefore the learned magistrate erred in law in awarding damages that exceeded her pecuniary jurisdiction. The learned judge added:

“I cap the award of Damages at Ksh.2,000,000/=. But so that the Plaintiff can reap the fullest interest available on the Damages, I would breakdown the award as follows: -

1) SpecialsKsh.125,336/=.

2) **General Damages.....Kshs.1, 874,664/=.**

TOTALKshs.2, 000,000/=.”

The award of the trial court was set aside and substituted as shown here above.

6. Aggrieved by that decision, the appellant preferred an appeal to this Court, stating that the learned judge erred in law; by allowing technicalities to win over substantial justice; by failing to appreciate that even though the trial court lacked pecuniary jurisdiction to make the award of Kshs.11,485,336, the High Court had powers under **order 42 rule 26** of the **Civil Procedure Rules, 2010** to order retrial of the same; that the learned judge erred in law in reducing the award from Kshs.11,485,336 through judicial craft to Kshs.2,000,000, and without considering the appellant’s submissions. The appellant urged the Court to allow the appeal, set aside the High Court judgment and order retrial of the suit before a magistrate with appropriate jurisdiction.

7. When the appeal came up for hearing, both **Mr. Odeny** for the appellant and **Mr. Mshindi** for the respondents opted to rely entirely on their written submissions that are on record.

8. I have considered the record of appeal and the submissions on record. The first ground of appeal is that the learned judge erred in law by elevating legal technicalities over substantive justice in allowing the appeal. This ground is premised on the fact that the learned judge appreciated that the appellant sustained very severe injuries, which may have attracted damages beyond Kshs.2,000,000, yet the suit was heard by a magistrate whose pecuniary jurisdiction was limited to Kshs.2,000,000.

9. In my view, the learned judge did not rely on technicalities, he simply applied the text of the law in upholding the respondents’ contention that the trial magistrate had no pecuniary jurisdiction to award Kshs.11,485,336.

10. The learned judge considered the provisions of the **Statute Law (Miscellaneous Amendments Act No. 12 of 2012)** that amended **section 5** of the **Magistrate’s Court Act** that increased the pecuniary jurisdiction of a Resident Magistrates’ Court to Kshs.2,000,000.

11. The appellant’s contention was that at the time of filing the suit, the **Statute Law (Miscellaneous Amendment) Act, 2012** had enhanced the pecuniary jurisdiction of a Chief Magistrate to Kshs.7,000,000; as at the date of delivery of the High Court judgment, 14th July 2016, the pecuniary jurisdiction of a Chief Magistrate had been enhanced to Kshs.20,000,000; that the appellant had instituted her suit before the Chief Magistrates’ Court; that the allocation of files to magistrates in a station is an administrative function and the appellant could not be faulted for the fact that her matter was allocated to a Resident Magistrate instead of a Chief Magistrate.

12. I do not agree. As rightly pointed out by the learned judge, a court must have jurisdiction at the commencement of a hearing. Even if the matter was allocated to the Resident Magistrate administratively, the act of hearing, is a judicial function and every court must first ascertain whether it has jurisdiction before embarking on hearing a suit. The appellant appreciated that the learned magistrate who heard the suit had no jurisdiction to award damages in excess of Kshs.2,000,000, yet accuses the learned judge of employing a legal technicality in reducing the judgment sum to Kshs.2,000,000.

13. No matter how serious the appellant’s injuries were, the trial magistrate ought to have been alive to the basic law that she could not award any shilling beyond her pecuniary jurisdiction as a Resident Magistrate, even if the suit had been filed in a Chief Magistrates’ Court.

14. Jurisdiction is not a procedural or legal technicality, it is a substantial issue that goes to the very heart of a matter that is before a court, and without jurisdiction a court acts in vain. The words of **Nyarangi, JA**. In **The Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Limited [1989] KLR 1** bear repetition:-

“By jurisdiction is meant the authority which a court has to decide matters that are before it or to take cognisance of matters presented in a formal way for its decision... Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing.”

15. Similarly, in **Samuel Kamau Macharia v Kenya Commercial Bank & 2 Others, Civil Application No. 2 of 2011**, the Supreme Court held, *inter alia*:-

“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.”

16. For the reasons aforesaid, I dismiss the first ground of the appeal.

17. I now turn to consider whether the learned judge erred in law by failing to order a retrial in exercise of his powers under **Order 42 rule 26** of the **Civil Procedure Rules** which states:-

“If upon the hearing of an appeal it shall appear to the Court to which the appeal is preferred that a new trial ought to be had, it shall be lawful for the said Court, if it shall think fit, to order that the judgment and decree shall be set aside, and that a new trial shall be had.”

18. **Section 78** of the *Civil Procedure Act* sets out the powers of an appellate court as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power-

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

19. At the date of filing the suit, the pecuniary jurisdiction of a Chief Magistrate was up to Kshs.7,000,000. Although the suit was filed in a Chief Magistrates’ Court, the appellant’s advocate did not raise any objection when the suit was assigned to a Resident Magistrate, whose pecuniary jurisdiction was up to Kshs.2,000,000.

20. In his submissions before the trial magistrate, the appellant’s advocate urged the trial court to award general damages of Kshs.2,000,000; Kshs.15,600,000 as loss of future earnings, and special damages of Kshs.125,336. On the other hand, the respondent submitted that an all-inclusive award of Kshs.500,000 would be reasonable.

21. The learned judge was alive to the provisions of **section 78** of the *Civil Procedure Act* and **Order 42 rule 26** of the *Civil Procedure Rules*. He therefore proceeded to do his own assessment of the damages *“but subject to the maximum of Kshs.2,000,000 which the plaintiff has placed on herself by having her matter heard and finalized by a Resident Magistrate.”*

22. Having exercised his discretion to determine the case, the learned judge analysed the claim for loss of earnings and concluded as follows:

“19. When all the aspects of the claim for Loss of Earnings are considered together, the inevitable and unfortunate conclusion is that the Plaintiff did not provide sufficient material upon which the Court would assess her claim. Unlike, the trial court I would find that Loss of Earnings was not proved.”

23. The appellant now argues that *“a retrial before a subordinate court with the correct pecuniary jurisdiction would have been the ideal scenario...”* This argument springs from counsel’s belief that since the pecuniary jurisdiction of a Chief Magistrate is now up to Kshs.20,000,000, a retrial would most likely enable the appellant get more or less the amount that had been awarded by the trial court.

24. That is not the correct position in law. In ***Joseph Muthee Kamau & Another v David Mwangi Gichure & Another [2013] eKLR***, this Court held: -

“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being the case of *Kagenyi v Musirambo [1968] EA 43*. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court’s pecuniary jurisdiction.

We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.”

25. Neither a Resident magistrate nor a Chief magistrate then had jurisdiction to award the amount of damages that was prayed for by the appellant. The case was simply filed before a court that had no jurisdiction to award the kind of damages that were sought. The second ground is therefore without merit and must fail. The same applies to the third ground of appeal that faults the learned judge for reducing the award of Kshs.11,485,336 to Kshs.2,000,000. The basis for the reduction was well explained.

26. The final ground of the appeal is that the learned judge did not consider the appellant’s submissions. No material was provided in support of that ground. My own evaluation of the proceedings and the impugned judgment reveals that the learned judge took into consideration all the material that was availed before him.

27. All in all, I find this appeal bereft of merit and dismiss it in its entirety. The appellant shall bear the costs of the appeal.

Dated and delivered at Nairobi this 9th day of October, 2020.

D. K. MUSINGA

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KOOME, MUSINGA & KIAGE, J.J.A.)

CIVIL APPEAL NO. 119 OF 2017

BETWEEN

PELEZIA BAKARI SALIM.....APPELLANT

AND

SOMOIRE KEEN.....1ST RESPONDENT

J. KEEN TRANSPORTERS.....2ND RESPONDENT

SOMON TRANSPORTERS.....3RD RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Busia (F. Tuiyott,J.) dated 14th July 2016 *in Civil Appeal No. 6 of 2014.*)

JUDGMENT OF KOOME, J.A

I have had an opportunity to read in draft the opinions by my learned brother Musinga, and Kiage JJA., and I entirely agree with reasoning postulated by Musinga JA. I only wish to emphasize that the judgment that was appealed against as per the decree issued by the Resident Magistrate who tried the matter was for a sum of Ksh 11,485,339.

1. It is common ground that the jurisdiction of the said magistrate did not exceed 2 million. The fact that the suit was filed before the Chief Magistrate's Court whose jurisdiction was 7 million at the time could not help the appellant's case as the judgment and decree issued was beyond the jurisdiction of both the trial court and the chief magistrate. The argument that the matter should have been referred to the Chief Magistrate whose jurisdiction was at least 7 million is to me an afterthought and farfetched. It is the appellant who filed the suit before a court without jurisdiction while knowing the kind of damages that were anticipated.

I therefore agree with Musinga, JA that the appeal is for dismissal as per his judgment.

Dated and delivered at Nairobi this 9th day of October, 2020.

M.K. KOOME

JUDGE OF APPEAL

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MUSINGA & KIAGE, J.J.A.)

KISUMU CIVIL APPEAL NO. 119 OF 2017

BETWEEN

PELEZIA BAKARI SALIM.....APPELLANT

AND

SOMOIRE KEEN.....1STRESPONDENT

J. KEEN TRANSPORTERS.....2ND RESPONDENT

SOMON TRANSPORTERS.....3RD RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Busia (F. Tuiyott,J.) dated 14th July 2016 in Civil Appeal No. 6 of 2014)

JUDGMENT OF KIAGE, J.A

I have had the advantage of reading in draft the judgment of my learned brother Musinga J.A.

On the question of the pecuniary jurisdiction of the trial court, I find myself to be of a different persuasion. The record shows that the case was heard by C.I. Agutu, who was a Resident Magistrate.

His pecuniary jurisdiction was **Kshs. 2,000,000** at the time but he made the following awards;

- (a) General damages
- (b) Loss of future earnings
- (c) Special damages

Kshs. 2,000,000

Kshs. 9,360,000

Kshs. 125,336

TOTAL

Kshs.11,485,339

When the aggrieved defendants appealed against that judgment to the High Court at Busia, Tuiyott, J. set aside, the bulk of that award under the head of loss of future earnings on the basis that the plaintiff in the suit had not provided sufficient material to justify any award thereunder. Like Musinga, JA, I agree with the learned Judge's said conclusion arrived at after a full re-evaluation of the evidence.

What causes me disquiet is the manner in which the learned Judge dealt with the rest of the award. Because the pecuniary jurisdiction of the trial magistrate was **Kshs. 2,000,000**, and in order to keep the proven award within that limit, the learned Judge tinkered with the general damages by reducing the sum to **Ksh. 1,874.664** so that, together with the proved special damages, the award came to **Kshs. 2,000,000**, within the trial magistrate's jurisdiction.

Now, it is not in dispute that by dint of **STATUTE LAW (MISCELLANEOUS AMENDMENT) ACT 2012**, the pecuniary jurisdiction of a Chief Magistrate was **Kshs. 7,000,000**. It is also not contested that as at the time of filing suit there was stationed at Busia a Chief Magistrate of that jurisdiction, and, presumably, Magistrates of ranks higher than Resident Magistrate, whose pecuniary jurisdiction was thus higher than **Kshs. 2,000,000**.

The vexing question then is this; did the appellant herein, in filing suit before the Chief Magistrate's Court at Busia do so before a court bereft of the requisite pecuniary jurisdiction? I am fully cognizant of the centrality of jurisdiction, its absence being fatal to any judicial determination. I am, however, unconvinced that the case at bar was filed before a court without jurisdiction. I am unable, with great respect, to agree with the learned Judge's reasoning that the plaintiff placed on herself a maximum of **Kshs. 2,000,000** in damages "by having her matter heard and finalized by a resident magistrate."

From my perspective, it is enough that the plaint as framed sought damages that were, from the nature of general damages, at large. True it may be that in urging a sum larger than **Kshs. 2,000,000** the appellant was asking for that which the particular magistrate could not award,

but, ultimately, the choice of the particular magistrate to hear the case was not in the hands of the litigants. The trial magistrate ought to have referred the file to a magistrate of a rank empowered to award general damages higher than **Kshs. 2,000,000**. If any blame is to be apportioned for that unfortunate turn of events, it should be borne more by that court itself.

I do not think that the appellant's suit was filed or commenced before a court without jurisdiction, as the Chief Magistrate's Court at Busia did have magistrates with the requisite jurisdiction. My reading of **JOSEPH MUTHEE KAMAU & ANOTHER vs. DAVID MWANGI GITHURE & ANOTHER [2013] eKLR** is in line with my thinking;

“Where a suit has been filed without jurisdiction, it is a nullity. Many cases have established that: the most famous being the case of Kagenyi v Musirambo [1968]EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceed the court's pecuniary jurisdiction.”(Emphasis mine)

That case is no authority for the proposition that in the present case the filing was before a court without jurisdiction. The **Kshs.2,000,000** was not claimed as a liquidated sum, but was the award upon assessment by the trial magistrate. It is instructive that the learned Judge did not hold the entire claim to have been filed in a court without jurisdiction, which would have rendered the entire award a nullity not open to the adjustment he effected.

My view, therefore, is that the appellant's suit was not dead on arrival, and was not a nullity. It was filed before a court of proper jurisdiction, only that it was allocated to a magistrate who, upon assessment of damages, exceeded her own pecuniary jurisdiction instead of forwarding the file to a senior Magistrate. That was a problem of case management blamable on the court, not the appellant.

Given the powers available to the learned Judge under **section 78** of the **Civil Prosecution Act**, I think he ought to have left the award of general damages undisturbed or, at the very least, remitted the file to the Chief Magistrate's Court for re-assessment of general damages.

I would therefore grant the appeal against the reduction of the general damages only, and also grant the costs of the appeal to the appellant.

As the majority are of a contrary view, however, the final orders of the Court are as proposed by Musinga, JA.

Dated and delivered at Nairobi this 9th day of October, 2020.

P.O. KIAGE

JUDGE OF APPEAL