Stecol Corporation v Wanjala (Employment and Labour Relations Appeal E262 of 2024) [2025] KEELRC 863 (KLR) (14 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 863 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E262 OF 2024

JW KELI, J

MARCH 14, 2025

BETWEEN

STECOL CORPORATION ..... APPELLANT

AND

GODFREY SIKUKU WANJALA ..... RESPONDENT

(Being an Appeal from the Judgment of the Honourable I. Orenge (SRM) delivered at Nairobi on the 1st March, 2019 in Nairobi CMCC No. 3182 of 2018)

JUDGMENT

1. The Appellant, dissatisfied with the Judgment and Orders of the Honourable I. Orenge (SRM) delivered at Nairobi on the 1st March 2019 in Nairobi CMCC No. 3182 of 2018 between the parties filed a Memorandum of Appeal dated 21st March, 2019 seeking the following orders:
    i. That the Appeal be allowed with costs
    ii. That the Judgment in the lower court be set aside
    iii. That the Respondent to bear the appellants costs of this appeal

The Grounds Of The Appeal

2. That the Learned trial Magistrate erred in holding the Appellant liable in negligence in the ratio of 100% to the Respondent and awarding damages of Kshs. 650,000/= to the Respondent;
3. That the Learned trial Magistrate erred in law and fact in failing to make a finding that the Appellants Defence raised serious triable issues and the plaintiff suit should have been dismissed as opposed to the awarding general damages.

4. That the Learned trial Magistrate erred in law and fact by finding that the Respondent had proved his case against the Appellant on a balance of probability;

5. That the learned trial Magistrate erred in law and fact by proceeding with the matter despite the court lacking jurisdiction to hear and determine the work injury claim; and

6. That the learned trial Magistrate erred in law and fact and as a result arrived at a wrong decision to the prejudice of the Appellant.

Background To The Appeal

7. The Plaintiff/Appellant filed a claim against the Defendant vide a Plaint dated 27th March 2018 seeking the following orders:-

    a. General damages;

    b. Diminished/loss of earning capacity

    c. Special damages of Kshs. 3,000/=

    d. Cost of this suit;

    e. Interest on (a), (b) and (c) above at present court rates

    f. Any other reliefs this honourable court may deem just and expedient to grant

8. The Plaintiff filed his verifying affidavit, his statement and list of documents all of even date together with the bundle of documents (see pages 7-10 of ROA).

9. The suit was opposed by the Defendant who entered appearance and filed a Statement of Defence dated 2nd May, 2018 (pages 12-13 of ROA).

10. The Plaintiff's case was heard on the 28th January 2019 where the Plaintiff testified in the case, produced his documents, and was cross-examined by counsel for the Defendant Mr. Agunga (page 47 of ROA).

11. The Defendant had no witness and the Defendant's counsel closed their case on even date.

12. The parties took directions on filing of written submissions after the hearing. The parties complied.

13. The Trial Magistrate Court delivered its Judgment on the 1st March 2019 in favour of the Plaintiff awarding him 653,000/= comprising of general damages and special damages together with costs of the suit and interest at Court rates. (Judgment at pages 49-53 of ROA).

Determination

11. The appeal was canvassed by way of written submissions. Both parties complied.

11. This being a first appellate court, it was held in Selle v Associated Motor Boat Co. [1968] EA 123 that:- "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence

or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

11. The court is further guided by the principles on appeal decisions in Mbogo v Shah [1968] EA De Lestang V.P (as he then was) observation at page 94: "I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

Issues for determination

14. The Appellant relying on its submissions filed before the High Court submitted on the grounds of its Appeal.

15. The Respondent relying on its written submissions filed before the High Court submitted on the merits of the Appeal.

16. The court on perusal of the grounds of appeal framed the issues for determination as follows:-

    a. Whether the trial court had jurisdiction to hear and determine the work injury claim.

    b. Whether the trial court erred in fact and law on liability and quantum decision.

    a. whether the trial court had jurisdiction to hear and determine the work injury claim.

        1. The appellant raised a ground of appeal being:- ''That the learned trial Magistrate erred in law and fact by proceeding with the matter despite the court lacking jurisdiction to hear and determine the work injury claim;''

Appellant's submissions

18. The appellant submitted that the suit before the magistrate court was filed on the 29th March 2018 which was after the Court of Appeal and the Supreme Court had declared section 16 of the WIBA unconstitutional. That the Court of Appeal in Attorney General v Law Society of Kenya and another (2007)e KLR held that only those matters that had been filed prior to commencement of WIBA had legitimate expectation that the claims would be concluded under the judicial process invoked. The WIBA was operation on 2nd June 2008 vide Gazette Notice No. 60 of 2008. The suit was filed on 29th March 2018 and as such the trial court had no jurisdiction. The appellant relied on the decision in Heritage Insurance company limited v David Fikiri Joshua and another (2021 e KLR where the Justice Ongaya observed:- ''The Court finds that the 1st respondent is therefore expected to process his claims in issue in accordance with provisions of WIBA and the material before the trial Court shows that the appellant in fact admits that the Director under WIBA had already assessed the compensation with the appellant raising certain objections or disputes. The 1st respondent's work-place injury in issue is said to have occurred on 23.01.2014, long after WIBA commenced on 02.06.2008 and WIBA applies accordingly.''

19. The respondent did not submit on this issue.

Decision

20. The court perused the statement of defence and did not find challenge of the jurisdiction of the trial court. Jurisdiction was not an issue before the trial court. Nevertheless, the issue of jurisdiction can be raised at any stage and even by the trial court.

21. The WIBA Act came into operation on 2nd June 2008 vide Gazette Notice No. 60 of 2008. The suit dated 27th March 2018 was filed on 29th march 2018. The WIBA is an Act of Parliament to provide for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes. Post operationalisation of WIBA there was protracted litigation by the Law Society of Kenya on the Act. The Supreme Court in Law Society of Kenya v. Attorney General & Another, Petition No. 4 of 2019; [2019] eKLR delivered Judgment of 3rd December 2019 and held as follows on the pending cases post WIBA and before decision of the Court of Appeal (same parties dated 17th November 2017) :-'' 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 and a number of the suits had progressed up to 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 an even more progressive statute, as we have shown above we opine that it is best that all matters are finalized under section 52 aforesaid.'' Post the decision of the Supreme Court many appeals were filed challenging the jurisdiction of the Magistrate Courts over pending cases filed post the Court of Appeal decision like the instant one. The Chief Justice then issued practice directions in Kenya Gazette No. 5476on the 28th April 2023. The directions were issued by the Chief Justice and the President of the Supreme Court of Kenya were under the legal framework of *the Constitution* of Kenya, the *Judicature Act*, the *Judicial Service Act*, the *Employment and Labour Relations Court Act* and the *Work Injury Benefits Act*. The practice directions state as follows:-

> ' Practice Directions Relating To Pending Court Claims Regarding Compensation For Work Related Injuries And Diseases Instituted Prior To The Supreme Court Decision In Law Society Of Kenya Vs. Attorney General And Another, Petition No. 4 Of 2019; (2019) EKLR
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> In Exercise of the powers conferred under Articles 159 (2) and 161 (2) (a) of *the Constitution* of Kenya, section 10 of the *Judicature Act*, and Section 5 (1) and 2 (c) of the *Judicial Service Act*, the Chief Justice issues the following Practice Directions—
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> Citation 1. The Practice Directions may be cited as "Practice Directions relating to pending court claims for compensation for work related injuries and diseases instituted prior to the Supreme Court decision in Law Society of Kenya v. Attorney General & Another, Petition No. 4 of 2019; [2019] eKLR" (hereinafter referred to as the Supreme Court decision) Commencement
>
> 2. These Practice Directions shall come into force upon the date of issue.
>
> Application 3. The Practice Directions shall apply to the Employment and Labour Relations Court and Magistrates appointed and gazzetted by the Chief Justice pursuant to section 29 (3) and (4) of the Employment and *Labour Relations Act*, 2011 to preside over cases involving employment and labour relations.
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> Objectives 4. The Objectives of the Practice Directions are to—

a. consolidate and standardize practice and procedure in the Employment and Labour Relations Court and the Magistrates Courts in relation to claims for compensation for work related

injuries and diseases instituted prior to the Supreme Court decision dated 3rd December, 2019, which are pending in courts;

b. enhance access to justice;

c. facilitate timely and efficient disposal of cases that were filed prior to the Supreme Court decision; and

d. ensure uniformity in court experience.

Judgment of the Supreme Court 5.

The Supreme Court vide a judgment rendered on 3rd December, 2019, determined that sections 16, 23 (1), 25 (1) and (3), 52 (1) and (2) as well as section 58 (2) of the *Work Injury Benefits Act* (WIBA) are consistent with the former Constitution and *the Constitution* 2010, specifically;

a. Section 16 as read with sections 23 and 52 of the WIBA does not limit access to courts but creates a statutory mechanism where any claim by an employee under the Act is subjected, initially, to a process of alternative dispute resolution mechanism starting with an investigation and award by the Director of Occupational Safety and Health Services and thereafter, under section 52 an appeal mechanism to the Employment and Labour Relations Court (formerly the Industrial Court).

b. Retrospective operation of statutes is not per se illegal or in contravention of *the Constitution* and section 58 (2) clearly expresses the intention that the Act shall apply retrospectively. Consequently, section 58 (2) of the Act does not take away the right to legal process, or extinguish access to the courts or to take away property rights without due process.

c. Be that as it may, claimants with pending cases have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process invoked (d) Also noting that many claims have not been finalized and due to passage of time, it has not been feasible to withdraw them and follow the alternative dispute resolution route. Further, considering the resolution passed by the Law Society of Kenya's meeting held on 21st March, 2023 urging that practice directions be issued for all pending claims be finalized in the respective courts.

Consequently, 6. (a) All claims with respect to compensation for work related injuries and diseases filed in various courts before the commencement of WIBA shall proceed to conclusion under the Workmen's Compensation Act, Cap 236 (repealed).

b. All judgments and rulings relating to work related injuries claims pending before the Employment and Labour Relations Court and the Magistrates Court shall be delivered by the same court.

Claims Filed after Commencement of WIBA but before the Supreme Court decision 7. Taking into account that 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 penalized for relying on the declaration of nullity, as appreciated by the Supreme Court in 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, (a) 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 until conclusion before the said courts. (b) All pending judgments and rulings relating to compensation for work related injuries and diseases before the Employment and Labour Relations Court and the Magistrates' Courts shall be delivered by the same court.

Claims Filed after the Supreme Court Decision 8. (a) All claims with respect to compensation for work related injuries and diseases shall commence before the Director of Occupational Safety and Health Services. (b) All appeals emanating from the decision of the Director of Occupational Safety and Health Services shall lie before the Employment and Labour Relations Court. (c) Such appeal shall be heard and determined through the appropriate appellate mechanism within the judicial hierarchy.

Sanctions for Non-Compliance 9. Non-compliance with these Directions shall result in such penalty as the Courts may order.

Miscellaneous 10. The Chief Justice may amend these Practice Directions from time to time.

Dated the 24th April, 2023.

Martha K. Koome, Chief Justice and President of the Supreme Court."(Emphasis given)

22. The court appreciated that the Chief Justice has authority to issue practice directions under Section 27 of the Employment and *Labour Relations Act* which reads:- ''27. Rules and Regulations (1) The Chief Justice, make rules for regulating the practice and procedure of the Court. (2) Without prejudice to the generality of subsection (1), such rules may provide for— (a) regulating the sittings of the Court and the selection of Judges for any purpose; (b) prescribing forms and fees in respect of proceedings in the Court and regulating the costs of and incidental to any such proceedings; (c) prescribing the time within which any requirement of the rules is to be complied with; (ca) delegating judicial, quasi-judicial and non-judicial duties to the Registrar; and (d) any other matter required under this Act or any other written law." The court finds that practice directions became necessary as this court took different positions on the interpretation of legitimate expectation of parties with cases before the magistrate courts at the pronouncement of the Court of Appeal on WIBA jurisdiction. The Practice Directions address the fate of cases filed and pending in court post WIBA and before the Supreme court decision delivered on 3rd December 2019. The instant case was covered by the practice directions. The trial court was clothed with jurisdiction pursuant to the said practice directions.

a. Whether the trial court erred in fact and law on liability and quantum decision.

1. The grounds of appeals under the issue were as follows:-

a. That the Learned trial Magistrate erred in holding the Appellant liable in negligence in the ratio of 100% to the Respondent and awarding damages of Kshs. 650,000/= to the Respondent;

b. That the Learned trial Magistrate erred in law and fact in failing to make a finding that the Appellants Defence raised serious triable issues and the plaintiff suit should have been dismissed as opposed to the awarding general damages.

c. That the Learned trial Magistrate erred in law and fact by finding that the Respondent had proved his case against the Appellant on a balance of probability;

d. That the learned trial Magistrate erred in law and fact and as a result arrived at a wrong decision to the prejudice of the Appellant.

24. The trial court on the liability observed:- ‘’the plaintiff was working with the defendant company when he was involved in an accident. The plaintiff blamed the defendant for being negligent it failed to provide a safe working environment by failing to provide protective gears and allowing the plaintiff to.. unsafe environment and exposed the plaintiff to the accident. The defendant did not call any evidence to counter that offered by the plaintiff. The court finds that the plaintiff's evidence was not challenged, there was no evidence that was provided by the defense to show that any of the safety devices was provided. The upshot is that I find that the defendant 100% to blame for the accident (pages 50-51 of ROA).

25. In the statement of defence it was stated that the claimant caused or substantially contributed to the accident by negligence of exposing himself to the risk of the accident knowingly, not wearing the protective gears required, failing to have regard to his safety, willingly exposing himself to anger, and causing the accident. (pages 12 and 13 ROA). The defence on liability was denied in reply to defence (page 14 of ROA).

26. During cross-examination the claimant told the court he slid and was injured while removing pipes as assigned by the respondent. In examination in chief the Claimant had stated he was not provided with boots or gloves and was not cross-examined on this. The defence did not call any witness. The claimant produced medial report by Dr. Okere (page 21 of ROA) which the court finds was consistent with the claimant's testimony.

27. It was the duty of the appellant to ensure a safe working environment for the respondent as stated in section 6 of the *Occupational Safety and Health Act* to wit:-‘’(1) Every occupier shall ensure the safety, health and welfare at work of all persons working in his workplace.’’ Section 13 of the Act further provides for the duties of the employee to wit:-‘’Every employee shall, while at the workplace — (a) ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace; (b) co-operate with his employer or any other person in the discharge of any duty or requirement imposed on the employer or that other person by this Act or any regulation made hereunder; (c) at all times wear or use any protective equipment or clothing provided by the employer for the purpose of preventing risks to his safety and health; (d) comply with the safety and health procedures, requirements and instructions given by a person having authority over him for his own or any other person's safety; (e) report to the supervisor, any situation which he has reason to believe would present a hazard and which he cannot correct; (f) report to his supervisor any accident or injury that arises in the course of or in connection with his work; and (g) with regard to any duty or requirement imposed on his employer or any other person by or under any other relevant statutory provision, co-operate with the employer or other person to enable that duty or requirement to be performed or complied with.’’(emphasis given) The claimant stated he was not provided safety gear like boots and gloves and this was not controverted. The Employee ought to be provided with a safe working environment before the employee duty under section 13 (supra) arises. The Appellant did not call a witness to produce evidence to controvert the claim of having failed to provide safe working environment and safety gear to the respondent. The court found no basis to disturb the finding the trial court on 100% liability against the appellant for the accident.

28. On the appeal on quantum, the court was guided by the principles on appeal decisions in Mbogo v Shah [1968] EA De Lestang V.P (as he then was) observation at page 94: "I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion." The principle of comparable awards also prevailed.

29. The trial court relied on the medical report of Dr. Okere being the injuries were a fracture of the right distal radius, and were classified as grievous. The injuries had healed leaving a permanent incapacity of 15%. Relying on authorities by the plaintiff (in Nakuru HCC 109 of 2022 Stephen Kihara Gikonyo Githinji V peter Kirimi Kingori and Patrick Githinji where the injuries of dislocation of right hip, head injury , cerebral concussion and shortened leg were classified as grievous with 35% permanent disability the claimant was award Kshs. 800000 and in Florence Njoki Mwangi v Chege Mbitiru 2014 e KLR on appeal the court allowed Kshs. 700000 general damages for fracture of femurs bilaterally , 2 degloving injuries of the right knee and right ankle noting the injury will require money to remove K-nails and screwsor). The Learned Trial Magistrate noting the severity of the injury, lapse of time and inflationary tendencies awarded Kshs. 650000 as general damages and special damages of Kshs. 3000 for cost of the medical report.

30. The appellant submitted that the trial court ought to have awarded Kshs. 280000 as per comparable awards submitted by defence at trial.

31. The test as to when an appellate court may interfere with an award of damages is as stated by Law J. A. in Butt –vs- Khan (1977)1 KAR 1 as follows:- "An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent and entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low." The appellant submitted that in the assessment of GENERAL damages the general approach should be of comparable damages in similar cases as stated by Lord Morris in H. West and Son Ltd v Shepherd (1964)AC 326-... ''but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional ..."

32. At the trial court, the appellant submitted that taking into account the injuries, the award of general damages of Kshs. 280000 was sufficient and cited award in Telkom (K) limited v Stephen Ndolo Owango 2012 e KLR. the injuries in the case were stated as :- ''From the said accident, he sustained the following injuries:-

    i. Longitudinal fracture of the distal phalanx of the left thumb leading to an amputation of the said thumb.

    ii. Massive loss of blood.

    iii. Contusion of the left hand" In that case there were 2 medical reports one stating disability at 10% and another at 2%. On appeal, the court(in 2012) upheld the award of Kshs. 280000 issued by lower court in 2007 and dismissed the appeal.

33. In the instant case the injury was to the right hand and classified as grievous harm with permanent disability of 15%. In comparison with the injuries In Telkom case the instant injuries were more severe and taking into account the decision of the learned magistrate was issued 1st March 2019 , approximately 12 years post the magistrate decision in Telkom (K) limited v Stephen Ndolo Owango 2012 e KLR I , the court on first appeal found that the decision of the trial court was proper of award of general damages of Kshs. 650000. The Respondent may never be able to lift heavy material as he used to. The court finds no basis to disturb the award of the lower court as guided by Butt –vs- Khan (1977)1 KAR 1 as follows:- "An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent and entirely erroneous estimate."

34. The Court held that the award by the Trial Court of Kshs. 650000 for the grievous harm injuries on the right hand with permanent disability of 15% was not an entirely erroneous estimate. The court found no basis to disturb the award of the general damages by the trial court. The Judgment of the Honourable Orenge (SRM) delivered at Nairobi on the 1st March 2019 in Nairobi CMCC No. 3182 of 2018 is upheld.

35. The appeal is dismissed with costs to the Respondent .

36. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF MARCH , 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant – absent

Respondent- Okao