



**Chenje v Kibo & Allied Industries & another (Employment and Labour Relations Appeal 17 of 2023) [2024] KEELRC 453 (KLR) (29 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 453 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS APPEAL 17 OF 2023**

**JW KELI, J  
JANUARY 29, 2024**

**BETWEEN**

**SIMON CHENJE ..... APPELLANT**

**AND**

**KIBO & ALLIED INDUSTRIES ..... 1<sup>ST</sup> RESPONDENT**

**CHANNAN AGRICULTURAL CONTRACTORS ..... 2<sup>ND</sup> RESPONDENT**

*((Appeal against the Judgment and /or Decree of Hon. H. Wandere delivered on 19<sup>th</sup> October 2022 in Kakamega Civil Suit No. 328 of 2016 between Simon Chenje v Kibos & Allied Industries and another ))*

**JUDGMENT**

CORAM

Before J.W. Keli, J.

C/A Macheso

For Appellant- V.A. Shibanda & Company Advocates

For Respondents- L.G. Menezes & Company Advocates

1. The Appellant being dissatisfied with the Judgment and /or Decree of Hon. H. Wandere delivered on 19<sup>th</sup> October 2022 in Kakamega Civil Suit No. 328 of 2016 between Simon Chenje v Kibos & Allied Industries and another filed Memorandum of Appeal dated 2<sup>nd</sup> December 2022 and record of appeal received in Court on the 31<sup>st</sup> October 2023 seeking the following orders:-
  - a. That this Honorable Court be pleased to set aside the orders issued on the 19/10/2022 dismissing the suit and all consequential orders thereto.



In The Alternative That: -

- b. That this Honorable Court finds that the subordinate Court erred in issuing orders dismissing the suit for want of jurisdiction
  - c. That this Honorable Court do proceed to deliver judgment in Kakamega Civil Suit No. 328 of 2016.
  - d. That the Respondents do pay costs of this appeal
  - e. That such further relief as may appear just to the Honorable Court.
2. The Appeal was premised on the following grounds: -
- i. That the learned Magistrate erred in law and fact in dismissing the suit on the ground that the Court lacked jurisdiction to hear the matter yet the defendant never raised an objection over the same during the trial and till The end of the suit.
  - ii. That the learned Magistrate erred in law and fact in dismissing the suit on the ground that the Court lacked jurisdiction to hear the matter yet the defendant never raised an objection over the same in their defence.
  - iii. That the learned Magistrate erred in law and fact in dismissing the suit based on a ruling delivered by the Supreme Court on or about 3/12/2019 whereby the primary suit was filed on 28/9/2016 before the said ruling was delivered on or about the 3/12/2019.
  - iv. That the learned Magistrate erred in law and fact in dismissing the suit and granting orders to the defendant on the ground that the Court lacked jurisdiction whereby if the Court lacked jurisdiction then it had no locus to hear the a matter to conclusion and dismiss a suit or issue orders that the plaintiff pays costs.
3. The Respondents on receipt of the record, filed a supplementary record of appeal dated 18<sup>th</sup> December 2023. On the 1<sup>st</sup> February 2024, the Respondents filed another supplementary record dated 25<sup>th</sup> January 2024 and sought leave of the Court to substitute the earlier copy. The Court allowed the application and expunged the supplementary record dated 18<sup>th</sup> December 2023. The Court allowed in the record the supplementary record of appeal dated 25<sup>th</sup> January 2024. The supplementary record produced the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' written submissions at the lower Court which had been left out in the record filed by the Appellant.
4. The Court directed that the Appeal be canvassed by way of written submissions. The Appellant's written submissions drawn by V.A. Shibanda & Company Advocates were dated 27<sup>th</sup> November 2023 and received in Court on the 4<sup>th</sup> December 2023. The Respondent's written submissions drawn by L.G. Menezes & Company Advocates were dated 26<sup>th</sup> January 2024 and received in Court on the 30<sup>th</sup> January, 2024.

### **Background to the appeal**

5. The Appellant filed a suit Kakamega CMCC CASE NO. 328 OF 2016 against the Respondents for injuries alleged to have been suffered at the workplace vide a Complaint dated 8<sup>th</sup> August 2016 seeking the following reliefs:-
  - a. General damages
  - b. Special damages of Kshs. 15,500/-.



- c. Costs of this suit
  - d. Interest on (a) and (b) above at Court rates
  - e. Any other or further relief that this Honourable Court may deem fit and just to grant. (pages 3 & 26 of the record are all pleadings by the plaintiff before the lower Court)
6. The Respondents entered appearance and filed defence and all their pleadings and documents (pages 27-32, 36-37 is the defence case).
  7. The Appellant filed reply to defence (page 35).
  8. The Trial Court proceeded with the hearing on merit. On the 15<sup>th</sup> June 2017 the Plaintiff's case proceeded before B. S . Khapoya , SRM(PAGE 45). The Court(H. Wandere, SPM) noted that the defence case was closed without calling a witness(page 51 unmarked).
  9. The parties filed submissions in the lower Court after closure of defence.The Plaintiff's submissions (page 38-40). The Defendants' written submissions are as produced in the supplementary record of appeal dated 25<sup>th</sup> January 2024 and filed in Court on the 1<sup>st</sup> February 2024.
  10. The trial Court (H. Wandere SPM)delivered its judgment on the 19<sup>th</sup> October 2022 (PAGE 53). The decision of the Court was that it lacked jurisdiction to determine the matter and dismissed the case with costs. The decision was hinged on the Supreme Court decision and cited S .C. Petition No. 4 of 2019 Law Society of Kenya v Attorney general and another where the Court held:- " all work injury related claims arising after the enactment of the Work Injury Benefit Act(WIBA) in 2007 were to be processed within the procedure set out in the Act thus the original jurisdiction of this Court was ousted. It is therefore a requirement that all work related injury claims is vested in the Director of Occupational Safety and Health Services . That the Director is required to make inquiries that are necessary upon any claim or liability in accordance with WIBA. "

### **Determination**

Issues for determination.

11. The Appellant in their written submissions identified the following issues for determination: -
  - a. Whether the trial Court erred in law in holding it had no jurisdiction to entertain the suit.
  - b. Liability and quantum.
12. The Respondents in their written submissions took same path as the Appellant.
13. The Court will consider issues raised by the parties. The Court sitting on appeal from trial Court is guided by the settled law that it must reconsider the evidence, re-evaluate the evidence itself and draw its own conclusions bearing in mind it has neither seen or heard the witnesses and should make allowance for that fact. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1948)EA123. In the instant appeal, the impugned ruling is on matters of law so the Court will re-evaluate the law and authorities relied on by the parties in determining the appeal.
  - a. Whether the trial Court erred in law in holding it had no jurisdiction to entertain the suit.
    1. The decision of the trial Court was that it lacked jurisdiction to determine the matter and dismissed the case with costs. The Court did not consider the merits of the case.



## The Appellant's submissions

15. The Appellant submits that the Respondents in their defence admitted the jurisdiction of the Court (page 31) as did the plaintiff in their claim (page 4). That both parties admitted jurisdiction of the Court. The Appellant relied on the decision of Justice Radido in *Kisumu ELRC Appeal No. 4 of 2019 West Kenya Sugar Ltd V Tiyto Lucheli Tangale* held that the cases filed between May 2008 and 3<sup>rd</sup> December 2019 were based on valid law as declared by the High Court and had legitimate expectation that their cases would be heard by the Court. The appellant further relied on the decision by Rika J in *Saidi Mohammed v Diamond Industries Limited (2018) e KLR* where the judge declined to strike out the suit filed in 2017 on ground that the law then in place allowed the claimant to file the suit in Court by dint of judgment of the High Court in *Petition No. 15 of 2008*. The Appellant further relied on the Chief Justice Directions on the 27<sup>th</sup> March 2023 before the issuance of the practice directions in *Kenya Gazette No. 5476* issued on the 28<sup>th</sup> April 2023 '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*, and urged the Court to find the trial Court had jurisdiction.

## Respondents' submissions

16. The Respondents relied on the definition of the term jurisdiction in Daniel Greenberg, Stroud's judicial Dictionary of Words and Phrases, Sweet and Maxwell (2006) definition of jurisdiction is that, "it is the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference to the subject matter of the issue or to the persons between whom the issue is joined or to the kind of relief sought or to any of the combination of these factors."
17. The Respondents further relied on the definition of the term jurisdiction by Nyarangi JA in the case on Owners of 'the Motor Vessel 'Lillian S'' v Caltex Oil (Kenya) Limited (1989) KLR1 where he stated:- "Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:-

"By jurisdiction is meant the authority which a Court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the Court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior Court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the Court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the Court or tribunal has been given power to determine conclusively whether the facts exist. Where a Court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"

18. The Respondents further relied on the decision of the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR* where the Court opined that jurisdiction flows from *the Constitution* or the law and the Court cannot arrogate itself jurisdiction



beyond what is conferred by the law. That the Court without jurisdiction cannot entertain proceedings and must down its tools.

19. The Respondents urge the Court to be guided by decision in Saidi Muhammed v Diamond Industries Limited (2018) e KLR where the Court guided by decision of the Court of Appeal in Attorney General v Law Society of Kenya held the Court lacked original jurisdiction in work injury claims.
20. The Respondent contend that the decision by my brother Radido J Kisumu ELRC Appeal No. 4 of 2029 West Kenya Sugar Ltd V Tito Lucheli Tangale appeared to override the decision of the Supreme Court which had stated that the work injury claims filed after 2007 were to be heard in conformity with WIBA.

## Decision

21. This Court has pronounced itself in numerous decisions on the jurisdiction over WIBA matters and most important upheld the decision of the Supreme Court in Supreme Court decision in Law Society of Kenya v. Attorney General & Another, Petition No. 4 of 2019; [2019] e KLR. The instant dispute was filed in the Magistrate court 2016 before decision of the Court of Appeal in 2017 and later 2019 of the Supreme Court. I do find then the decision cited by the Respondents of Rika J Saidi Muhammed v Diamond Industries Limited (2018) e KLR not relevant as it relied on the Court of Appeal decision rendered in 2017 when the case appealed against was pending before the trial court.
22. The Appellant challenged the decision of the lower Court on basis that both parties had accepted jurisdiction in their pleadings. On this issue I return that the parties cannot confer jurisdiction on the Court by acceptance or even by conduct as jurisdiction flows from either *the Constitution* or written law or both as held by the Supreme Court in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR . Further I return that the Court on its own motion can decide on the question of jurisdiction. I am guided by the decision of Nyarangi JA in the case on Owners of ‘the Motor Vessel ‘ Lillian S’ v Caltex Oil (Kneya) Limited (1989) KLR1 where the Judge stated:- “It is for that reason that a question of jurisdiction once raised by a party or by a Court on its own motion must be decided forthwith on the evidence before the Court.”
23. In the instant appeal the trial Court heard the matter on merit only to decide in judgment it had no jurisdiction. It was untidy but not an illegality. Ideally the question of jurisdiction should be addressed first. I have addressed the first limb of the challenge by holding that the Court on its own motion can address issue of jurisdiction and that the parties cannot by concurrence confer jurisdiction where the same does not exist in the law.
24. Secondly the claim before the trial Court having been filed before the Court of Appeal decision in 2017 and that of Supreme Court in 2019 then the doctrine of legitimate expectation as stated by Radido J could have applied. Nevertheless, that is now water under the bridge the Chief Justice having issued practice directions on the Supreme Court decision in Petition No. 4 of 2019 which decision was that all work injury matters filed after 2007 were to be determined by the Director of Occupational Safety and Health Services.
25. The Chief Justice issued practice directions in Kenya Gazette No. 5476 issued on the 28<sup>th</sup> April 2023. The directions were issued by the Chief Justice and the President of the Supreme Court of Kenya 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

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—

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 gazetted 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.

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 Ndi 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 mine)

26. The Court appreciates 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 before the pronouncement of the Court of Appeal and the Supreme Court on WIBA jurisdiction.

27. The Practice Directions address the fate of cases filed and pending in Court post WIBA and before the Supreme Court decision delivered on 3<sup>rd</sup> December 2019 like the instant case. The Court further observes there was a resolution passed by the Law Society of Kenya’s meeting held on 21st March, 2023 as stated in the directions, urging that practice directions be issued for all pending claims be finalized in the respective Courts. The Court finds that the foregoing Practice Directions would give life to the cases like the instant one.
28. The Court is required to promote access to justice under Article 48 of *the Constitution* which reads:- “The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”
29. The Court in exercise of its judicial power in the matter then finds the question would be whether the appellant would suffer any prejudice pursuant to the Practice Directions. Article 159 (2)(d) provides that justice shall be administered without undue regard to procedural technicalities and that means the Court should focus on substantive justice. There is no tangible prejudice to be suffered by the appellant in the instant case.
30. The Court finds by doctrine of necessity the WIBA practice directions as gazetted by the Chief Justice pass muster in the eyes of the Court so as to promote access to justice to litigants who are caught up with WIBA cases filed in Court in the period between Justice Ojwang’s decision and the Court of Appeal 2017 and Supreme Court 2019 decisions. In the upshot the practice directions having expressly granted jurisdiction to the magistrates to handle WIBA matters filed in Court before the delivery of the Supreme Court decision of 3<sup>rd</sup> December 2019 , then the appeal succeeds on the issue of jurisdiction.
  - b. Liability and quantum
31. The parties proceeded to address the issue of liability and quantum and relied on their submissions before the lower Court. The lower Court having held it had no jurisdiction, after the trial, downed its tools and failed to decide on the issue of liability and quantum.
32. I do hold that this Court lacks original jurisdiction over work injury claims even under the practice directions. Under the Chief Justice Practice Directions only the magistrates have original jurisdictions over matters like the instant one pending before Court as at 3<sup>rd</sup> December 2019 when the Supreme Court issued its decision.
33. The Court is persuaded by decision by Rika J in *Saidi Mohammed v Diamond Industries Ltd (2018)e KLR* to effect that this Court only has appellate jurisdictions in work injury claims. Assessment of damages in work injury claims is the role of the Magistrates, the position prevailing before WIBA, and now permissible under the Chief Justice practice Directions(supra). This case falls under the practice Directions hence the jurisdiction to decide on liability and assessment of damages lies with the Magistrate Court.



34. This Court cannot proceed on the two issues namely:- liability and quantum, without a decision of the Magistrate Court which has the original jurisdiction as stated in the Practice Directions. It is an appellate court. I am guided in my decision by the Supreme Court which while overturning decision of the Court of Appeal which it has exercised original at appeal held:-

“[93] In view of our opinion as expressed in the paragraph above, it is our holding that where the Court of Appeal determines that a trial Court has acted without jurisdiction in determining a matter,

it cannot assume original jurisdiction over the same. Having so found, the Appellate Court has to remit the case to the Court that is clothed with jurisdiction to dispose of the same without going into the merits of the dispute, for doing so may prejudice the fair determination of the case by the Court with jurisdiction.”(emphasis given.)

35. Consequently, the appeal is upheld on the issue of jurisdiction. The court holds that the Magistrates court has jurisdiction in the instant case. The suit is returned to the Magistrate Court for disposal on merit on the issue of liability and quantum. The Judgment and /or Decree of Hon. H. Wandere delivered on 19<sup>th</sup> October 2022 in Kakamega Civil Suit No. 328 of 2016 between Simon Chenje v Kibos & Allied Industries and another is set aside in its entirety.

36. Taking into account the developments in the case law and practice in WIBA cases since 2008, I exercise my discretion on the issue of costs and order no costs in the appeal.

37. It is so ordered.

**DATED, SIGNED & DELIVERED IN OPEN COURT AT KAKAMEGA THIS 29<sup>TH</sup> JANUARY 2024.**

**J.W. KELI,**

**JUDGE.**

**In The Presence Of:-**

Court Assistant : Lucy Macheso

For Appellant : Shibanda

For Respondent:- Otieno –Njoga

