



Mugatsia v Protective Custody Services (Employment and Labour Relations Appeal 6 of 2021) [2024] KEELRC 41 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELRC 41 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL 6 OF 2021
MA ONYANGO, J
JANUARY 25, 2024**

BETWEEN

LEONARD AMBANI MUGATSIA APPELLANT

AND

PROTECTIVE CUSTODY SERVICES RESPONDENT

(Being an appeal from the Ruling of the Honourable Senior Principal Magistrate R. Odenyo delivered on 17th June 2021 in Eldoret CMCC No. 473 of 2017)

JUDGMENT

1. The Appellant filed Eldoret CMCC No. 473 of 2017 against the Respondent, seeking compensation for injuries he sustained while within the scope of his employment with the Respondent vide a Plaint dated 8th May 2017.
2. The Respondent entered appearance and filed a Defence denying the claim. While the suit was still pending, the Respondent filed an application dated 16th September 2020 seeking orders that the Plaint be struck out as the trial court did not have jurisdiction to hear and determine the suit.
3. The application was canvassed by way of written submissions and on 17th June 2021, the trial court in its ruling allowed the application and struck out the suit on grounds that it was filed long after the coming into effect of the *Work Injury Benefits Act* (WIBA), which donated jurisdiction on claims arising out of the Act to the Director of Occupational Health.
4. The Appellant being dissatisfied with the ruling of the Trial Magistrate seeks to set it aside on the following grounds as raised in its Memorandum of Appeal:
 - i. That the learned magistrate erred in law and fact and misdirected himself in holding that the court lacked jurisdiction to hear this case.



- ii. That the learned magistrate erred in law and fact by allowing the Respondent's Preliminary objection by disregarding the submission by the Appellant.
 - iii. That the learned magistrate erred in law and fact by overly relying on the submissions by the Respondents.
 - iv. That the learned magistrate erred in law and fact by failing to give due regard to the Authorities by the Appellant.
 - v. That the learned magistrate erred in law and fact by failing to give reasons for his findings and ruling.
 - vi. That the learned magistrate erred in law and fact by allowing the Respondent's preliminary while disregarding the weight of the Appellant's submission.
5. The Appellant prayed that the appeal be allowed with costs, the ruling and order issued on the 17th June 2021 be set aside and the Appellant's suit be reinstated for hearing on its merit.
 6. When the Appeal came up for hearing, the court directed the parties to dispose of the Appeal by way of written submissions. The Appellant filed his submissions on 20th September 2023. The Respondent filed its submissions on 18th September 2023. The submissions are dated 8th September, 2023.

Appellant's Submissions

7. In his submissions, the Appellant identified the only issue for determination to be whether the trial court had jurisdiction to entertain this suit.
8. The Appellant submitted that at the time of filing the suit, the provisions of *WIBA* that ousted the jurisdiction of the courts to hear and determine claims relating to work injuries were not operational as they had been declared null and void by the judgment of the court in the case of *Law Society of Kenya v Attorney General* (2009) eKLR and thus the only recourse for the Appellant was to file his claim before the court.
9. It is submitted that a declaration of invalidity by the High Court was valid until when the same was reversed by the Court of Appeal on the 17th November 2017 which declaration according to the Appellant was law, as a Precedent thus Common Law which is recognized as a source of law by dint of Section 3 of the *Judicature Act*. To buttress this point, the Appellant cited the decision in *West Kenya Sugar Co. Ltd v Tito Lucheli Tangale* (2021)eKLR.
10. The Appellant also raised the issue of legitimate expectation and submitted that the legal regime that existed before *WIBA* and after its provisions were declared unconstitutional by the High Court in 2007 up to 2017 when the Court of Appeal reversed the decision and that as such, the magistrates court and the Employment and Labour Relations court were deemed to have jurisdiction to adjudicate disputes of injuries at place of work both under the statute and common law. It was his submission that having filed the court action while relying on the declaration of invalidity by the High Court, he had a valid claim for legitimate expectation in having the same concluded by the court.
11. Lastly, the Appellant submitted that vide Gazette Notice No. 5476 of 28th April 2023, the Chief Justice through the practice directions gave 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.
12. In the end, the court was urged to allow the appeal with costs.



Respondents submissions

13. The Respondent filed submissions dated 8th September, 2023 in which it submits that the decision of the Supreme Court and the Court of Appeal on the subject matter of *WIBA* have been withheld and applied by the High Court where preliminary objections were filed. The Respondent relied on the decision in Mombasa ELRC Civil Appeal No. 21 of 2019 *Heritage Insurance Company v David Fikiri Joshua and another* where the High Court upheld the Appellant's preliminary objection and held that the magistrates court had no jurisdiction relying on the Supreme Court decision in Petition No. 4 of 2019 *Law Society Of Kenya v Attorney General and another* and Court of Appeal Nairobi Civil Appeal No. 133 of 2011 *Law Society of Kenya v Attorney General and* (2017)eKLR.
14. The Respondent further relied on the decision in *Nandi Tea Estates Limited v John Mabialo Onyango* [2021] eKLR where it was held that the trial court was well guided and did not misdirect himself in holding that it did not have jurisdiction.
15. On the issue whether the Trial Court erred in law by allowing the preliminary objection the Respondent submitted that a suit filed bereft of jurisdiction suffers one fate only, that is, being struck off as was held in *Mini Bakeries (NRB) Limited v Levi Karuz Omedo*[2002] eKLR where the court held:

“A suit or appeal filed before the court which has no jurisdiction is incompetent and is not available for transfer to the court with jurisdiction. The fate that such suit or appeal should suffer is that of being struck out.”
16. The Respondent submitted that the suit having been filed long after the coming into effect of the *Work Injury Benefits Act* which donated jurisdiction to the Director of Occupational Safety and Health, was correctly struck out.it urged the court to dismiss the appeal with costs to the Respondent.

Determination

17. The Court having read the impugned ruling and the Memorandum of Appeal, and having considered the submissions on record, finds that the only issue for determination is whether the trial court erred in law and fact in striking out the Appellant's suit.
18. The issue of the jurisdiction of the Magistrate's courts to hear and determine *WIBA* arose following the decision of the Court of Appeal in Court of Appeal Nairobi Civil Appeal No. 133 of 2011 *Law Society of Kenya v Attorney General and* (2017) eKLR. The decision was confirmed by the Supreme Court in Supreme Court Petition No. 4 of 2019 *Law Society Of Kenya v Attorney General and another*.
19. The appeals to both the Court of Appeal and the Supreme Court were against the decision of the High Court of 4th March 2009 in *Law Society of Kenya v Attorney General & another* in Petition No. 185 of 2008 in which the court declared sections 4,7(1) & (2), 10(4), 16(1) & (2), 23(1), 25(1), (3), 52(1) & (2), and 58(2) of *WIBA* unconstitutional. Section 16 of the *WIBA* provides that:
 16. Substitution of compensation for other legal remedies

No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall



arise save under the provisions of this Act in respect of such disablement or death.

20. In effect, section 16 ousted the jurisdiction of courts to hear cases of compensation against injuries, occupational diseases and death arising in the course of employment. The Act provides that such accidents are to be reported to the Director for assessment of compensation. See section 26 and 41 of the Act. Appeals against the decision of the Director are to be filed in the Employment and Labour Relations Court. See section 51 and 52 of the Act.
21. Following the High Court decision declaring sections 16 and 52 unconstitutional, all WIBA claims found their way back into the courts with the bulk of them being filed in the Magistrates courts because of their pecuniary jurisdiction. A few were filed in the Employment and Labour Relations Court. The decision of the Court of Appeal which was confirmed by the Supreme Court reinstated sections 16 and 52 of the Act among others. The superior courts however did not address the issue of cases filed after commencement of the Act that were pending before the Employment and Labour Relations Court and the Magistrates' courts.
22. There emerged two schools of thought; one was of the view that the decision of the High Court having been set aside, all cases filed in the Magistrates courts after the date of commencement of the Act were filed without jurisdiction and were for striking out. The other school of thought was of the view that there being a presumption that the decisions of the courts are valid until and or unless they are set aside by a Court of superior jurisdiction, the cases filed between the dates of the two decisions were properly before the courts and should be concluded in the courts in which they were filed. This explains the contradictory decisions cited by the parties.
23. Fortunately, the position has now been clarified by the Chief Justice in the Practice Directions issued through Gazette Notice No. 5476 dated 24th April 2023. According to the Practice Directions, 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 Court or the Magistrates' Courts shall proceed until conclusion before the said courts. The practice Directions read in part:

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.

24. The instant suit was filed on the 9th May 2017. The Court of Appeal decision which overturned the decision of the High court which Supreme Court decision was delivered on 3rd December 2019. Based on the above practice directions, the instant case which was filed before the Supreme Court decision is to proceed until conclusion before the trial court.
25. Consequently, I allow the Appeal, set aside the orders issued by the trial court on the 17th June 2021 and order the reinstatement of the Appellant's suit for hearing before the trial court.
26. The Appellant is awarded costs of this Appeal.
27. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 25TH DAY OF JANUARY 2024

MAUREEN ONYANGO

JUDGE

