



Makokha v Nzoia Sugar Company Limited (Employment and Labour Relations Appeal E044 of 2022) [2024] KEELRC 670 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 670 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E044 OF 2022**

**JW KELI, J
MARCH 14, 2024**

BETWEEN

KENNEDY WAFULA MAKOKHA APPELLANT

AND

NZOIA SUGAR COMPANY LIMITED RESPONDENT

(Appeal against the Judgment and /or Decision of Hon. Odawo (S.R.M) delivered on 26th September 2022 in Bungoma Civil Case Number 288 of 2018)

JUDGMENT

1. The Appellant being dissatisfied with the Judgment and /or Decision of Hon. Odawo (SRM) delivered on 26th September 2022 in Bungoma Civil Case No. 288 of 2018 between Kennedy Wafula Makokha and Nzoia Sugar Company Limited filed a Memorandum of Appeal dated 17th October 2022 and Record of appeal dated 24th October 2023 received in Court on the 6th November 2023 seeking the following orders:-
 1. The Appeal herein be allowed.
 2. The judgment of the subordinated Court be set aside.
 3. That this Honourable Court re-evaluate and review the evidence on record and make an independent decision and judgment in favour of the Appellant in the interest of justice as prayed in paragraph 10 of his plaint dated 5th June 2018.
 4. The Respondent be condemned to pay the costs of this appeal and the costs of the lower Court.
 5. Any other relief this Honourable Court deems fit and just to grant.
2. The Appeal was premised on the following grounds:-



1. That the Learned trial Magistrate erred in law and fact by making her decision on a complete misapprehension and misinterpretation of applicable case law and statute in the case of *Law Society of Kenya v Attorney General and Another* [2019] eKLR;
 2. That the Learned trial Magistrate erred in law and fact by striking out the Appellant's suit for lack of jurisdiction when the said trial Court had already asserted jurisdiction by allowing interlocutory judgment to be entered against the respondent.
 3. That the Learned trial Magistrate erred in law and fact by failing to consider the doctrine of legitimate expectation.
 4. That the Learned trial Magistrate erred in law and fact by holding that the Court did not have jurisdiction to handle claims relating to the workman-related Injuries Benefits Act yet she had already subjected and submitted herself to hear evidence of the Appellant's suit and adjudicated upon it to its logical conclusion but instead decided to strike the Appellant's suit after the alleged lack of jurisdiction.
 5. That the Learned Magistrate erred in law and fact by finding that she had no jurisdiction to handle and determine the work injury benefit claims by striking out the Appellant's case by relying on the authority of the case of *the Law Society of Kenya v the Attorney General and Another* [2019] eKLR which did not make an express opinion or an order that all matters that were pending in the magistrate's Court should be struck out by trial Magistrate when making decisions on jurisdiction.
 6. That the Learned Magistrate erred on law and fact and was biased by not returning the pleadings to the Appellant as provided for under Section 11(1) of the *Civil Procedure Act*, 2010 of Chapter 21 of the Laws of Kenya for presentation at the Directorate of Occupational Safety and Health Services as provided in the *Work Injury Benefits Act* since his option to institute fresh proceedings at the said institution would be statutory time-barred.
 7. That the Learned Trial Magistrate erred in law and fact by failing to apply the relevant pertinent judicial principles and precedents and trends regarding to cases of this nature.
3. The Appeal was canvassed by way of written submissions. The Appellant's written submissions drawn by Elizabeth Chunge & Company Advocates were dated 27th November 2023. The Respondent's written submissions drawn by Walubengo & Company Advocates were dated 24th January 2024.

Background to the appeal

4. The Appellant filed a suit Bungoma Civil Suit No. 288 of 2018 against the Respondent for compensation for injuries sustained while he was employed by the Respondent as a casual worker, vide a Plaint dated 5th June 2018 and filed on 11th June 2018, seeking the following reliefs: -
 - a. General damages
 - b. Special damages
 - c. Interest at Court rates (a) and (b) above.
5. The Plaint was supported by the Verifying Affidavit of 5th June 2018 and accompanied by the List of Witnesses dated 5th June 2018, a list of Documents of even date; the Appellant's witness statement of even date, his list of Documents and his Bundle of Documents (page 5-25 of the record is the Appellant's case).



6. The Respondent did not enter appearance and a Default/Interlocutory judgment was entered on 25th March 2022 in favour of the Appellant. (pg. 2 of Proceedings) The Suit proceeded to a formal proof hearing on 5th September 2022. (page 2 of Proceedings).
7. The Appellant filed submissions in the lower Court after the closure of the Formal proof hearing (pages 31-47 of the record).
8. The trial Court (Hon. Odawo, SRM.) delivered its judgment on the 26th of September 2022 (unnumbered) dismissing the claim for lack of jurisdiction.
9. The trial Court (Hon. Odawo SRM) delivered its judgment on the 26th of September 2022 (unnumbered). The trial Court decided that it lacked jurisdiction to determine the matter as it fell within the ambit of the Work Injury Benefits Act and struck out the case with no costs. The decision of the Trial Court was hinged on the fact that the Jurisdiction to handle Work Injury matters was dealt with in the Law Society of Kenya v Attorney General and another[2019] eKLR.

Determination

Issues for determination.

10. The Appellant in his written submissions identified specific issues for determination in the appeal as follows: -
 - a. Whether the Honourable trial Court and the trial Magistrate had jurisdiction to hear this suit.
 - b. Whether the defendant would suffer any prejudice, loss, and damage if this matter was finally determined on merit by the subordinate Court.
 - c. Whether this Honourable trial Court can re-evaluate and review the evidence on record and make an independent decision and judgment in favour of the Appellant in the interest of justice this appeal being the first appeal.
 - d. Who pays the costs of this appeal and those of the subordinate Court.
11. The Respondent in his submissions identified specific issues for determination in the appeal as follows: -
 - a. Whether the trial Court had jurisdiction to hear and determine the claim brought under the Work Injury and Benefits Act.
 - b. Whether the Work Injury Benefits Act is retrospective in its application.
 - c. Whether the Appellant is entitled to any reliefs sought.
 - d. Who pays the costs of the appeal and that of the Subordinate Court.
12. 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 conclusions bearing in mind it has neither seen nor 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.
13. The Court guided by *Selle's* decision, that the Court sitting at first appeal has to re-evaluate the facts and evidence before the trial Court while making allowance of not having seen the witnesses to reach their own conclusion, finds the issues for determination in the appeal are as follows: -



- i. Whether the trial Court erred in law in holding it had no jurisdiction to entertain the suit.
- ii. Whether the Court may make an independent decision on Quantum and Liability

Issue 1. Whether the trial Court erred in law in holding it had no jurisdiction to entertain the suit.

14. The trial Court decided that it lacked jurisdiction to determine the matter and dismissed the case.

The Appellant's submissions

15. The Appellant submits that the trial Magistrate Court had jurisdiction to determine his case and relied on the decision of Justice Radido in Kisumu ELRC Appeal No. 4 of 2019 West Kenya Sugar Ltd V Tito Lucheli Tangale where the Court held that the cases filed between May 2008 and 3rd December 2019 were based on valid law as declared by the High Court and that the parties had legitimate expectation that their cases would be heard by the Court.
16. The Appellant submitted that though served the Respondent failed to enter an appearance and did not raise any issue on the jurisdiction of the Court thus it had admitted the Court's jurisdiction.
17. The Appellant submitted that the Supreme Court has issued an advisory to lay rest on the Work Injury cases in the decision of 3rd December 2019 where the Court held that: -

“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 Wok injuries had gone on and a number of suits had progressed up to the decree stage, some of which were still being heard while others were still at the preliminary stage, all such matters were being dealt under the then existing and completely in different regimes of law. We thus agreed with the appellate Court that claimants in those preliminary cases have legitimate expectation that upon the passage of the Act then cases would be concluded under the Judicial process which they had invoked. however, were it 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.”

18. The Appellant submitted that the Learned Magistrate erred by assuming jurisdiction by entering interlocutory judgment which meant that she could determine the suit to its meritorious and logical conclusion, and even heard the matter by way of formal proof hearing only to hold it had no jurisdiction.
19. The Appellant submitted that his suit having been filed in the Magistrate Court before the decision of the Supreme Court, it was properly before the Trial Magistrate and the Court could not strike out his suit other than returning all his pleadings or in the alternative refer him to the Director of Occupational Safety and Health.
20. The Appellant submitted that no prejudice will be suffered by the Respondents as the Respondent did not file any response to the Appellant 's suit.

Respondents' submissions

21. The Respondents submitted that the jurisdiction on work injuries is by the Director of Occupational Safety and Health Services and under Section 53 of the *Work Injury Benefits Act* (WIBA), 2007, only the Director can investigate and determine liability and make decisions as per the provisions under WIBA.



22. It states that as per Section 58(2) of WIBA claims instituted prior to the commencement of the Act are deemed to have been lodged under the Act and relied on the decision in Said Mohamed v Dimond Industries Ltd [2018] eKLR to hold that the Employment and Labour relations Court’s jurisdiction is secondary and the Magistrates Court have no jurisdiction relating to work-related injuries. He buttressed this position by relying on the decision in Lameck Nyakundi v Kenya Construction Company Limited [2021] Eklr.
23. The Respondent submitted that though Section 58(2) of WIBA states that the Act should apply retrospectively, the right to legal process is not curtailed, save that all matters that were pending resolution under the previous legal regime were to be continued under WIBA Act and submits that the retrospective application of laws is not illegal and relied on the decision of Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others.
24. 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 and without it this Court should down its tools forthwith.”
25. The Respondent submits that the present suit was filed in 2018 way after the WIBA Act came in force.
26. The Respondent submitted that the Trial Court lacked jurisdiction and the Appellant’s appeal should not be allowed

Decision

27. 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 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 2018 after the decision of the Court of Appeal in 2017 and later 2019 of the Supreme Court.
28. The Appellant challenged the decision of the lower Court on the basis that the Magistrate had assumed jurisdiction and the Respondent having not entered appearance had acquiesced to the jurisdiction of the Court to determine the claim. 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 (Kenya) 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.”
29. In the instant appeal the trial Court heard the matter on merit through a formal proof hearing 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 the issue of jurisdiction and that the parties cannot by concurrence confer jurisdiction where the same does not exist in the law.
30. Secondly, the claim before the trial Court having been filed before the issuance of the Supreme Court decision in 2019, then the doctrine of legitimate expectation as stated by Radido J (supra) 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.



31. The Chief Justice issued practice directions in Kenya Gazette No. 5476 issued on the 28th of 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 v 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)

32. The Court appreciates that the Chief Justice has the 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, makes 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.
33. 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 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 to be finalized in the respective Courts. The Court finds that the foregoing Practice Directions would give life to the cases like the instant one.
34. 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.”
35. 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.
36. The Court finds by the doctrine of necessity that the WIBA practice directions as gazetted by the Chief Justice pass muster in the eyes of the Court 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 3rd December 2019, then the appeal succeeds on the issue of jurisdiction.
 - b. Whether the Court may make an independent decision on Quantum and Liability



37. The Appellant proceeded to address the issue of liability and quantum and relied on his 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.
38. 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 jurisdiction over matters like the instant one pending before the Court as of 3rd December 2019 when the Supreme Court issued its decision.
39. The Court is persuaded by the decision in *Saidi Mohammed v Diamond Industries Ltd* [2018] eKLR 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.
40. 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 the decision of the Court of Appeal which it has exercised original jurisdiction 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.)
41. 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 Magistrates Court at Bungoma for disposal on merit on the issue of liability and quantum. The Judgment and /or Decision of Hon. A. Odawo delivered on 29th September 2022 in Bungoma Civil Case Number 288 of 2018) between Kennedy Wafula Makokha and Nzoia Sugar Company Limited is set aside in its entirety.
42. 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 each party to bear own costs.
43. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT KAKAMEGA THIS 14TH MARCH 2024.

J.W. KELI,

JUDGE.

In The Presence Of: -

Court Assistant: Lucy Macheso

For Appellant: Elizabeth Chunge

For Respondent: - Ms. Buyengo

