



**Simira v China Overseas Engineering Group Company (Employment and Labour Relations Appeal E041 of 2022) [2024] KEELRC 669 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 669 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E041 OF 2022**

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

**BETWEEN**

**SAMUEL GIMACHECHA SIMIRA ..... APPELLANT**

**AND**

**CHINA OVERSEAS ENGINEERING GROUP COMPANY ..... RESPONDENT**

*(An Appeal from the Ruling and order of the Honourable L. Ambasi Chief Magistrate delivered on the 30/8/2022 arising from the Respondent's preliminary objection dated the 23rd March, 2022 in Busia CMCCC NO. 79 of 2018 which ruling and order was applied to the sister files being Busia CMCCC Nos 76,77,80,81,82,83,86,87,88,89,90 and 91 all of 2018)*

**JUDGMENT**

1. The Appellant, being dissatisfied with the ruling and order of the Honourable Lucy Ambasi, Chief Magistrate, delivered on the 30/8/2022 arising from the Respondent's preliminary objection dated the 23rd March 2022 in Busia CMCC No 79 of 2018 which ruling and order was applied to the sister files being Busia CMCC Nos 76,77,80,81,82,83,86,87,88,89,90 and 91 all of 2018 dated 17<sup>th</sup> October 2022 filed the Memorandum of Appeal dated 27<sup>th</sup> September 2022 and Record of appeal dated 27<sup>th</sup> October 2023 received in Court on the 31<sup>st</sup> October 2023 seeking the following orders:-
  - a. Set aside of the ruling and order of the Honourable Lucy Ambasi, Chief Magistrate, delivered on the 30/8/2022 arising from the Respondent's preliminary objection dated the 23<sup>rd</sup> March 2022 in Busia CMCCC No 79 of 2018 which ruling and order was applied to the sister files being Busia CMCCC Nos 76,77,80,81,82,83,86,87,88,89,90 and 91 all of 2018 and thereafter reinstate the suits and order that the said suits be heard on merit to their logical conclusion.
  - b. Make its own findings and orders as it may deem just in the circumstances.



- c. Provide costs of this Appeal.
2. The Appeal was premised on the following grounds:-
  - i. That the learned Magistrate erred in law and fact in making the aforementioned decision based on a misapprehension of the law.
  - ii. That the learned trial Magistrate erred in law and in fact in holding that the Court did not have jurisdiction to handle claims relating to work related injuries that were filed prior the Supreme Court judgment.
  - iii. That the learned trial magistrate erred in law and in fact in failing to critically analyse the evidence on record, the pleadings, and the Appellant's written submissions in response to the response to the respondent's preliminary objection.
  - iv. That the learned trial Magistrate erred in law and in fact by making the aforesaid decision without addressing herself to the history of the law/statute from which the jurisdiction to handle work injury claims delivered.
  - v. That the trial Magistrate erred in law and fact by sacrificing substantive justice at the altar of expediency.
3. The Appeal was canvassed by way of written submissions. The Appellant's written submissions drawn by Geoffrey O. Okoth & Co. Advocates were dated 20<sup>th</sup> November 2023. The Respondent's written submissions drawn by S.O. Madialo & Company Advocates were dated 25<sup>th</sup> January 2024.

### **Background to the appeal**

4. The Appellant filed a suit Bungoma Civil Suit No 79 of 2018 against the Respondent for compensation for injuries sustained while he was employed by the Respondent as a casual labourer, through the Complaint dated 15<sup>th</sup> March 2018 and filed on 4<sup>th</sup> April, 2018, seeking the following reliefs:-
  - a. General damages
  - b. Costs of this suit
  - c. Interest on a, b, and c above at court rates.
5. The Complaint was supported by the Verifying Affidavit of 15<sup>th</sup> March 2018 and accompanied by the List of Witnesses dated on even date, the updated witness statement of the Appellant, his copies of Documents, and his Bundle of Documents (pages 5-16 of the record is the Appellant's case).
6. The Respondent entered appearance on 12<sup>th</sup> September 2018 and filed the Written Statement of Defence dated 11<sup>th</sup> September 2018 received in court on 12<sup>th</sup> September 2018 (Page. 17-19 of the record is the Defence case.)
7. The Respondent on 9<sup>th</sup> May 2022 filed a Notice of Preliminary Objection on the grounds that:-
  - i. That the Jurisdictional competence to adjudicate this dispute lies with the Director of Labour. This Honourable Court is therefore deficient of the Jurisdiction to entertain this suit.
  - ii. That the pleadings and facts informing the said pleading in this suit as lodged by the Plaintiff disclose a dispute the remedy of which is specially provided for by statute. To that extent, their pleadings are illegal and untenable and this court is a civil court before whom a labour dispute of the nature disclosed by the pleadings ought not be laid. (Page 20)



8. The Appellant filed submissions in the lower Court on the Respondent's Preliminary Objection (pages 21-49 of the record).
9. The trial Court (Hon. L. Ambasi, CM.) delivered its ruling on the Preliminary Objection on 30<sup>th</sup> August 2018, upheld the preliminary Objection, and struck out the Appellant's suit among a series of other Suits (Pg. 50-51 of the record).

## **Determination**

### **Issues for determination.**

10. The Appellant in his written submissions submitted on the merit of the appeal affirming that the trial court had jurisdiction.
11. The Respondent in his submissions identified specific issues for determination in the appeal as follows:
  - a. Did the lower court have the requisite jurisdiction to hear and determine the suit
  - b. Depending on the outcome of (a) above, what orders may this court issue?
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 own 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, 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 appeal is merited

### **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 struck out the claim.

### **The Appellant's submissions**

15. The Appellant submits that the lower court had jurisdiction to determine his case as his accident occurred on 26<sup>th</sup> June 2017 and his suit was filed on 4<sup>th</sup> April 2018.
16. The Appellant submits that the period in which he filed his appeal was when the Supreme Court had stayed the decision of the Court of Appeal of 17<sup>th</sup> November 2017 and thus his case was among the suits falling therein.
17. The Appellant 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 Judge 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 the parties had legitimate expectation that their cases would be heard by the Court; a position the Appellant states was supported in *Mulaku Chekata Luke v Timsales Limited* (2021) eKLR by Hon. Justice Wasilwa.



18. The Appellant submitted that the Supreme Court has issued an advisory to lay rest on the Work Injury cases in the decision of 3<sup>rd</sup> December 2009 where the Court held that: -

“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 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 a legitimate expectation that upon the passage of the Act, the cases would be concluded under the Judicial process which they had invoked ..”

19. The Appellant further referred to the Gazette Notice CXXV-No 99(pg. 1889-1890) by the Honourable Chief Justice on pending claims regarding work-related Injuries stating that: -

“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.”

20. The Appellant submits that his suit having been filed before the decision of the Supreme Court, it was properly before the Trial magistrate and the lower court should have determined it to its logical conclusion failure to which will be in contempt of the directions of the Chief Justice.
21. The Appellant submits that an appeal is a continuation of a matter appealed from and as such the Busia CMCC No 79 of 2018 with its series of sister files in BUSIA CMCC No 76,77,80,81,82,83,86,87,88,89,90 and 91 all of 2018 are still pending before court vide this appeal.
22. The Appellant submits that guided by Article 159 of the Constitution, justice should not be delayed and the matter having been in court for five years, it is prudent the same be concluded in the lower court to accord the appellant his constitutional right to right to access justice.

### **The Respondent's submissions**

23. The Respondents submitted that the jurisdiction of the Work injuries is under the Work Injury Benefits Act (WIBA), 2007, and by dint of Sections 16,21 and 23 of the WIBA Act, resolution of disputes relating to injuries to employees is WIBA. That by virtue of Section 52 of the Work Injury Benefits Act (WIBA), 2007, this Court only has appellate jurisdiction and not original jurisdiction.



24. The Respondent submits that the instant case having been filed on 15<sup>th</sup> March 2018, the operative Act was the WIBA Act, which came into operation on 2<sup>nd</sup> June 2008. The Respondent submits that the present suit was filed in 2018 way after the WIBA Act came into force.
25. The Respondent submits that by dint of Article 162(2) of the Constitution and Section 4 of the Employment and Labour Relations Court Act, the Court is only mandated to determine employment matters and the magistrate court may only determine employment matters where the gross salary does not exceed 80,000.00 and not injury related claims.
26. The Respondent therefore submits that the magistrate had no power to handle matters that have been dealt with by the Director by law. The respondent submits that the Learned magistrate dealt with the matter keenly and exhaustively and thus reached a sound decision and the appeal should fail. He relied on the decision in Nakuru ELRC No 12 of 2021 – Ronald Litunya Omutiti v Orpower 4 Inc.

### 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] eKLR. The instant dispute was filed in the Magistrate Court 2018 after the decision of the Court of Appeal in 2017.
28. The Appellant challenged the decision of the lower Court on the basis that the magistrate upheld a Preliminary Objection filed by the Respondent stating the Trial Court had no Jurisdiction to entertain the claim(page 51).
29. In the instant appeal the trial Court did not consider the claim at the lower court on merit and dismissed the suit based on a Preliminary Objection raised by the Respondent of 23<sup>rd</sup> March 2022(page 20 of the record).
30. The Preliminary Objection was upheld by the Trial Magistrate and leave was granted to appeal. The Ruling stated “The Defendant’s Preliminary Objection raised herein dated 23/03/2022 is merited thus the same is upheld consequently this suit is stuck out.” (Pages 50- 51 of the Record).
31. The Trial Court stated that orders issued on the Preliminary objection would apply in BUSIA CMCC No 76,77,80,81,82,83,86,87,88,89,90 and 91 all of 2018. (page 50 of the Record).
32. The claim before the trial Court was dated the 15<sup>th</sup> March 2018, having been filed after the Court of Appeal decision in 2017 and before that of the 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.
33. The Chief Justice issued practice directions in Kenya Gazette No 5476 issued on the 28<sup>th</sup> 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)

34. 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.
35. 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 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.
36. 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.”
37. 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.

38. 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 3<sup>rd</sup> December 2019, then the appeal succeeds on the issue of jurisdiction.

#### **b. Whether the Appeal is merited**

39. The lower Court having held it had no jurisdiction, it downed its tools and failed to decide on the issue of liability and quantum in the claim.
40. 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 3<sup>rd</sup> December 2019 when the Supreme Court issued its decision.
41. 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.
42. This Court cannot proceed on the issues of 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 has exercised originally at the 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.)
43. 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 Ruling and order of the Honourable L. Ambasi, Chief Magistrate, delivered on the 30/8/2022 arising from the Respondent's Preliminary objection dated the 23<sup>rd</sup> March, 2022 in Busia CMCCC No 79 of 2018 which ruling and order was applied to the sister files being Busia CMCCC Nos 76,77,80,81,82,83,86,87,88,89,90 and 91 all of 2018 is set aside in its entirety.
44. This Judgement shall consequently, apply in Busia CMCC Nos. 76,77,80,81,82,83,86,87,88,89,90 and 91 all of 2018.



45. 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 in this appeal.

46. It is so ordered.

**DATED, SIGNED & DELIVERED IN OPEN COURT AT KAKAMEGA THIS 14<sup>TH</sup> MARCH 2024.**

**J.W. KELI,**

**JUDGE.**

\*\*In The Presence of: -

Court Assistant: Lucy Macheso

For Appellant: Ms. Awuor

For Respondent: Osala

BUNGOMA APPEAL No E041 OF 2022 Page 9 | 9

