



**Asuna v Garden Estate Development Limited (Appeal E042 of 2022)
[2024] KEELRC 1580 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1580 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E042 OF 2022
SC RUTTO, J
JUNE 21, 2024**

BETWEEN

DORA ADHIAMBO ASUNA APPELLANT

AND

GARDEN ESTATE DEVELOPMENT LIMITED RESPONDENT

*(Being an Appeal from the Ruling and Order of the Milimani Commercial
Chief Magistrate's Court before Hon. S.A Opande, PM (Mr) delivered on
18th March 2022 in Milimani Commercial CMEL Cause No. E932 OF
2020; Dora Adhiambo Asuna vs Garden Estate Development Limited)*

JUDGMENT

1. The instant Appeal arises out of a Ruling in respect of the Respondent's Preliminary Objection dated 18th August 2021. The crux of the Respondent's Objection was that the trial Court had no jurisdiction to proceed with the case by dint of the Supreme Court decision in *Petition No. 4 of 2019 Law Society of Kenya vs the Attorney General* and another as well as Section 23 of the *Work Injury Benefits Act*.
2. By a Ruling delivered on 18th March 2022, the trial learned Magistrate allowed the Respondent's Preliminary Objection and held that the issue of jurisdiction of work injury benefits was still alive in the Court of Appeal and that proceedings had been stayed in the lower Court. Consequently, the learned trial Magistrate struck out the Statement of Claim with leave to the Appellant to properly move the Court. It is that decision that has triggered the instant Appeal.
3. In her Statement of Claim filed at the Chief Magistrate's Court at Milimani, the Appellant averred that she was employed by the Respondent as a storekeeper on a casual basis from 25th June 2013. She further averred that she worked for the Respondent continuously for 4 years and 8 months without any warning letter or any disciplinary action being taken against her. That on 31st January 2017, she was involved in a workplace accident after the store's ceiling and all the poorly packaged timber collapsed



- when she was inside. She sustained a fracture of the right distal fibula and constant recurring severe headaches and fainting.
4. The Appellant further averred that she resumed work after receiving treatment but the Respondent refused to give her lighter duties. As a result, her injury recurred within two weeks of her resumption and she was readmitted again in hospital.
 5. She averred that she resumed work again in September 2017 but was not given lighter duties. That on 13th February 2018, the Respondent's Manager Mr. Zhou accosted her when she was leaving for home and told her not to report back.
 6. According to the Appellant, she was not given the reason for the sudden termination nor was she paid her dues. It is against this background that the Appellant sought the following reliefs against the Respondent:
 - a. A declaration under Section 37 of the Employment Act that the Claimant was under a monthly contract of Employment and that she was unfairly and unlawfully terminated;
 - b. Kshs. 19,909.45 as one month's salary in lieu of notice;
 - c. Kshs. 46,488.60 as service pay;
 - d. Kshs. 167, 239.38 being pay for unpaid house allowance;
 - e. Kshs. 93,921.64 being pay for unpaid leaved days;
 - f. Kshs. 677,943.00 as unpaid overtime;
 - g. Kshs 232,567.87 as unpaid rest days;
 - h. Kshs. 68,954.40 as unpaid public holidays;
 - i. Kshs. 666,929.20 as salary underpayment;
 - j. Kshs. 59,728.00 as unpaid salary for six months during incapacitation and recuperation;
 - k. Loss of future earnings capacity and or reduced earning capacity as a result of the injury.
 - l. Kshs. 238,913.40 being compensation for wrongful dismissal at the rate of 12 months salary in terms of Section 49(1) (c) of the Employment Act laws of Kenya.
 - m. Costs of the suit and interest.
 7. The Respondent opposed the Claim through its Response which was subsequently amended on 5th March 2021 to include a Counterclaim. Thereafter, the Respondent filed the Preliminary Objection which is now the subject of the instant Appeal.
 8. The Objection was canvassed by way of written submissions with the Court delivering its Ruling on 18th March 2022. Being aggrieved, the Appellant filed the instant Appeal which raises the following 13 grounds of Appeal:
 - a. That the Learned Trial Magistrate erred in law and fact in holding that the Court had no jurisdiction to entertain the Statement of Claim.
 - b. That the Learned Trial Magistrate erred in law and fact in holding that the Statement of Claim was not distinct and specific.



- c. That the Learned Trial Magistrate erred in law and fact in holding that Claim embarrassed and prejudiced the Respondent and failing to uphold the Claimant's right to hearing and access to justice.
- d. That the Learned Trial Magistrate erred in law and fact in striking out the entire statement of Claim without any reasonable explanation.
- e. That the Learned Trial Magistrate erred in law and fact in directing the Appellant to properly move the Court after the Statement of Claim was struck out.
- f. That the Learned Trial Magistrate erred in law and fact in striking out the Statement of Claim based on a legal technicality and failing to give life to the Oxygen Principle and the Constitution of Kenya of 2010.
- g. That the Learned Trial Magistrate erred in law and fact in failing to direct the Claimant to Amend her Statement of Claim.
- h. That the Learned Trial Magistrate erred in law and fact in failing to appreciate that the Cause of action was already time barred and a fresh claim could not be filed.
- i. That the Learned Trial Magistrate erred in law and fact in failing to appreciate that the Preliminary Objection raised could not dispose of the prayers for unfair dismissal and unpaid overtimes.
- j. That the Learned Trial Magistrate erred in both law and fact in failing to take into account the Appellant's pleadings and submissions as a whole.
- k. That the Learned Trial Magistrate erred in law and in fact in failing to render a detailed ruling and reasoning for the decision reached.
- l. That the Learned Trial Magistrate erred in law and in fact in failing to hold that the preliminary objection did not raise a pure point of law and the issues raised would require hearing of the main suit.
- m. That the Learned Trial Magistrate erred in law and in fact in taking into account irrelevant issues and arriving at the wrong conclusion.

The Submissions

9. The Appeal was canvassed by way of written submissions pursuant to the Court's directions issued on 13th February 2024. It was the Appellant's submission that the fact that the Respondent argued that the claim was a work injury claim while she maintained it was an employment claim meant that the facts were disputed. In the same vein, the Appellant contended that the learned trial Magistrate did not address himself to the issue of whether the Preliminary Objection raised a pure point of law or whether it was a matter of the Court's discretion.
10. The Appellant further submitted that if her claim was for WIBA, she would have pleaded negligence and particularised the same. It was her position that she did not seek General Damages for pain and suffering but for reliefs as per the Employment Act.
11. The Appellant urged that it would be in the interest of justice that she be given a chance to be heard on merit. In her view, the issue of whether the Claim was a work injury or not could at best be an issue for determination to be handled in the hearing of the main suit and submissions. She contended that



locking her out in the preliminary stage is akin to violation of her constitutional right to be heard and access to justice.

12. On the Respondent's part, it was submitted that the Claim is defective in terms of both substance and jurisdiction and the damages sought therein. In support of its argument, the Respondent sought to rely on the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR.
13. It was the Respondent's further submission that the Preliminary Objection raises pure points of law as was held in the case of *Mukisa Biscuits Manufacturing Company Limited vs Westend Distributors Limited* (1969) EA 696.

Analysis and Determination

14. Being a first appeal, this Court has the duty to re-evaluate the evidence before the trial Court as well as the Judgment and draw its own independent conclusion. In so doing, the Court is cognizant that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was reaffirmed in *Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

15. Being mindful of the role of the Court at this juncture and having considered the Memorandum of Appeal, the entire Record and the rival submissions, I find the singular issue for determination as being whether the trial Court properly applied itself on the issue of jurisdiction.
16. It is evident from the record that the sole ground on which the learned trial Magistrate upheld the Respondent's Preliminary Objection was that the issue of jurisdiction of work injury benefits was still alive in the Court of Appeal and proceedings had been stayed in the lower court. The learned trial Magistrate proceeded to reckon that if the Appellant wanted a claim under the *Employment Act*, then the same should be distinct and specific.
17. Revisiting the record, it is clear that in as much as the Appellant alluded to the injuries she allegedly sustained at the workplace and sought for loss of future earning capacity and or reduced earning capacity as a result of the injury, the dispute majorly revolves around unfair termination of the Appellant's employment as well as payments that ordinarily accrue in an employment relationship.
18. As a matter of fact, it is notable that the Appellant did not seek any relief with respect to compensation under the *Work Injury Benefits Act* on account of the injuries she allegedly sustained.
19. In light of the foregoing, it is this Court's finding that the learned trial Magistrate fell into error when he struck out the Appellant's Statement of Claim on the basis of jurisdiction with respect to work injury benefits.
20. In any event, it is clear that at the time the trial Court delivered the Ruling on 18th March 2022, the Supreme Court had long concluded the matter with respect to the *Work Injury Benefits Act*, having delivered its Judgement on 3rd December 2019. This being the case, the trial Court had no basis to strike out the Appellant's suit on the basis that the issue of work injury benefits was still alive at the Court of Appeal.



Orders

21. In the circumstances, the Court finds that the Appeal is meritorious and the same is hereby allowed.
22. The Ruling of the trial Court in Milimani CMEL No. E932 of 2020 delivered on the 18th March 2022 is hereby set aside.
23. The Preliminary Objection dated 18th August 2021 is overruled and the Appellant's Statement of Claim dated 1st October 2020 is hereby reinstated.
24. There will be no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JUNE 2024.

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STELLA RUTTO

JUDGE

In the presence of:

For the Appellant Mr. Ngige

For the Respondent No Appearance

Court Assistant Millicent Kibet

ORDER

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent direction of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

