



**Alpine Coolers Limited v Miheso (Appeal E240 of 2023)
[2024] KEELRC 2386 (KLR) (27 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2386 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E240 OF 2023
NJ ABUODHA, J
SEPTEMBER 27, 2024**

BETWEEN

ALPINE COOLERS LIMITED APPELLANT

AND

ALFRED AVUKWI MIHESO RESPONDENT

(Being an appeal from the judgment and decree of Hon. Ms G.A Mmasi issued in Milimani Commercial Courts Court Civil Case No. 7557 of 2014 delivered on 6th March, 2017)

JUDGMENT

1. Through the Memorandum of Appeal dated 20th November, 2023, the Appellant appealed against the whole of the Judgment of Hon. G.A Mmasi (R.M) delivered on 6th March, 2017 in Milimani Chief Magistrates Court Civil Case No. 7557 of 2014.
2. The Appeal was based on the grounds that:
 - i. The Learned Magistrate erred in law in failing to find that the Respondent's suit was time barred.
 - ii. The Learned Magistrate erred in law and in fact by not taking in to account the Defendant/Appellant's submissions on liability, thereby erroneously finding the Appellant 100% liable in spite of the fact that the Respondent had not established a causal link between his injuries and the negligence on the Appellant's part.
 - iii. The Learned Magistrate erred in law and in fact in finding that there was nothing the Respondent could have done to prevent the accident.
 - iv. The Learned Magistrate erred in law and in fact in finding that the Plaintiff was not acting on a frolic of his own.



- v. The Learned Magistrate erred in law and in fact by disregarding the evidence of the Appellant as to how the accident occurred and therefore arrived at a wrong decision in law.
 - vi. The Learned Magistrate erred in law and in fact when he found that the evidence of the Respondent was sufficient to prove negligence on the part of the Appellant when no evidence of an eye witness was called by the Respondent to corroborate his evidence.
 - vii. The Learned Magistrate erred in law and in fact by failing to consider the Appellant's written submissions on quantum thereby erroneously awarding the Respondent damages which are inordinately high and excessive given the nature of the injuries sustained by the Respondent.
3. The Appellant prayed that the appeal be allowed and the Judgment of the Subordinate court of 15th December, 2017 be set aside entirely and the suit be dismissed with costs to the Appellant.
 4. The Appeal was disposed of by written submissions.

Appellants' Submissions

5. The Appellant filed written submissions dated 22nd February, 2024 and on the issue of the Respondent's suit at the lower court being time barred counsel submitted that the suit at lower court filed on 15th December, 2014 when the accident occurred on 16th October, 2009 five years after the same was time barred.
6. The Appellant relied on section 27(1) of the *Work Injury Benefits Act* to submit that the Respondent ought to report the accident within 12 months after the accident. That the said accident was never reported neither was the Appellant aware of the accident.
7. The Appellant submitted that the Respondent even though was its employee he was not injured in their premise. That he was not allocated duties of instructing or directing drivers on that fateful day.
8. The Appellant relied on among other cases the case of *Longonot Horticulture Limited v James Wakaba Maina* (2019) eKLR on the court lacking jurisdiction to order compensation if accident is not reported within the 12 months. That work injury accidents were within the purview of the Director under *WIBA* which ought to be reported within 12 months.
9. The Appellant submitted that the suit was therefore time barred and ought not to have been entertained.
10. The Appellants on the issue of trial court not taking in to account their submissions on liability thereby erroneously finding the Appellant 100% liable in spite of the fact that the Respondent had not established a causal link between his injury and any negligence on the Appellant's part counsel submitted that the learned Magistrate erred in finding that there was nothing the Respondent could have done to prevent the Accident. That it was an error to find that the Respondent was not acting on a frolic of his own.
11. The Appellant submitted that no eye witness was called by the Respondent to corroborate his evidence as to how the accident occurred hence the trial court erred in holding that the Respondent's evidence was sufficient to prove negligence on the part of Appellant.
12. The Appellant submitted that it had a duty of care to the Respondent but the Respondent ought not be negligent on his part. Counsel relied on among others the case of *James Finlay Kenya Limited V Benard Kipsang Koech* (2021) eKLR while submitting that the Respondent had a duty of care to prevent the accident he had power to control and ought not to have exposed himself to foreseeable risks. That an employer could not be punished for recklessness and carelessness of an employee.



13. The Appellant submitted that if the space for parking was small as the person directing the driver the Respondent ought to have told the driver to stop when he got near him. That no witness was called to corroborate his evidence hence he was to be blamed for the accident.
14. The Appellant relied on section 107 of the *Evidence Act* requiring the Respondent to prove his case. That no evidence was provided in the trial court to show that the Appellant was negligent in exercising its duty of care as the employer of the Respondent as far as the accident was concerned.
15. On the issue of the lower court not taking in to account the Appellant's submissions on quantum hence erroneously awarding the Respondent damages which were inordinately high and excessive as per injuries sustained counsel submitted that as per the medical report of 13th November, 2014 which was undertaken about 5 years after the accident it was clear that the Respondent injuries had all healed. That the damages were excessive as per the injuries sustained by the Respondent.
16. The Appellant relied on among other cases the case of *Edward Mutevu Maithya & Another v Edwin Nyamweya* [2022] eKLR where courts awarded Kshs 100,000/= for similar injuries.
17. The Appellants prayed that the Appeal be allowed as prayed.

Respondent's Submissions

18. The Respondent filed his submissions dated 28th February, 2024 and submitted on the duty of the first appellate court while relying on the case of *Abok James Odera t/a Aj Odera & Associates v John Patrick Machira t/a Machira* eKLR while submitting that the whole appeal should be disallowed.
19. The Respondent on the issue of his suit at the lower court being time bared counsel submitted that the Appellant misconstrued provisions of section 27 of the WIBA hence the suit in the trial court was not time barred.
20. The Respondent submitted that the Appellant's allegations that they were not aware of the accident were not true. That the Appellant from its witness statements was aware of the accident.
21. The Respondent submitted that he could not be said to be on a frolic of his own at the time of the accident because he was in the course of his employment, in the Appellant's premises, injured by its vehicle and the Appellant did not produce evidence to show he was engaged in duties he was prohibited from.
22. The Respondent on the issue of trial court finding the Appellant 100% liable submitted that his hand was crushed against the wall as he was directing the vehicle belonging to the Appellant to park due to the fact that the parking area was relatively small. That it was the duty of the Appellant to ensure that the parking space was spacious enough to fit the vehicle to park without injuring the person directing the vehicle.
23. The Respondent submitted that the Appellant did not demonstrate how the Respondent contributed to the accident occurring like if he was reckless and what he would do with the small parking space. That the trial court was right in finding the Appellant 100% liable.
24. On the issue of quantum of the damages awarded by the trial court the Respondent submitted that as per the nature of injuries he sustained and his submissions on quantum the award by the trial court was justified.
25. It was the Respondent's submissions that nothing was brought forth by the Appellant to move this court to interfere with the trial court's discretion and set aside its award. The Respondent prayed that the Appeal ought to be dismissed as it could not stand.



Determination

26. The court has considered the pleadings by both parties and the submissions by the parties and this being a first Appeal the court will proceed to re-analyse the evidence before it as was held in the case of *Selle v Associated Motor Boat Company Limited* [1968] E.A 123 thus:-

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

27. In this case, the Judgment of the trial court entered judgment against the Appellant as follows:

- a. Liability 100%
- b. General Damages Kshs 200,000/-
- c. Special Damages Kshs 13,596/-

Grand Total Kshs 213,596/- plus costs and interests at court rates.

28. This court notes that the first issue it ought to concern itself with is whether the suit at the trial court was time barred which will determine if the court will continue with determination of the other issues in the Appeal or not.

29. The Court notes that the issue of time limitation was never raised at the lower court by the Respondent but that did not stop the trial court from determining such an issue which goes to its jurisdiction to hear and determine the matter which the trial court did not address. The trial court ought to have acted suo motu and determine this issue that went to its jurisdiction.

30. The Supreme Court in the case of *Nasra Ibrahim Ibren vs Independent Electoral and Boundaries Commission & 2 Others Supreme Court Petition No. 19 of 2018*, stressed the fact that jurisdiction is everything and that a court may even raise a jurisdictional issue suo motu. It said:

“A jurisdictional issue is fundamental and can even be raised by the court suo motu as was persuasively and aptly stated by Odunga J in *Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were* [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in *Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B”* [2008] 1 EA 367 stated thus:

“What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded...” (Emphasis supplied)



31. In the case of *South Nyanza Sugar Co. Ltd v Ochola (Civil Appeal 35 of 2021)* [2023] KEHC 26659 (KLR) (19 December 2023) (Judgment) the court held that;

The foregone position is that the suit filed in the trial court was statute - barred. The trial court had no jurisdiction to entertain it. Even if the Magistrate proceeded with the suit to its logical conclusion and the issue of jurisdiction is raised on appeal, the appellate court would have to deal with it first. The suit in the trial court should have been struck out for being incompetent.

32. In this case the accident occurred in 16th October, 2009. The court notes that the *Work Injury Benefits Act* [2007] herein *WIBA* had already come in to force on 20th December, 2007. The claim herein was to be governed by the *WIBA*.

33. This was the position in the case of *Longonot Horticulture Limited v James Wakaba Maina* [2019] eKLR where Lady Justice Monica Mbaru had this to say:-

“In this regard, the respondent whose claim is grounded on his employment by the appellant and claims to have been injured while at work on 23rd January, 2009 the appropriate legislation with regard to any claims made against the appellant is *WIBA*. The *Employment Act*, 2007 does not apply in this instance as there is a specific legislation with regard to work injury and disease.”

34. Section 27(1)(2) of the *WIBA* provides as follows:-

- (1) A right to benefits in accordance with this Act shall lapse if the accident is not reported to the employer within twelve months after the date of such accident.
- (2) Notwithstanding the provisions of subsection (1), the failure to report an accident to an employer as required in subsection (1) is not a bar to compensation if it is proved that the employer had knowledge of the accident from any other source.

35. The issue of the knowledge of the accident by the employer is not clear since the Appellant admitted that the Respondent was their employee but denied that he was injured while undertaking its duties and knowledge of the accident. In addition, section 21 of the *WIBA* requires the employee to notify the employer either verbally or in writing of the accident. There was no evidence provided by the Respondent in that regard. The Respondent ought to have acted within one year as per the *WIBA* provisions.

36. This court notes that at the time this suit was filed in the lower court there was already a decision by the High Court vide its judgment dated 4th March, 2009 in *Law Society of Kenya v. Attorney General & Another* [2009] eKLR which 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 the Respondent was justified in filing their claim at the lower court.

37. The court then asks itself whether by filing their suit in 2014 when the accident happened in 2009 the Respondent was time barred. The court notes that section 26 and 27 of the *WIBA* provides that such a claim can only be brought within 12 months unless it was reported verbally or in writing to the employer as per section 21 of *WIBA*. The Respondent did not produce any evidence of notifying the Appellant of the Accident. The Respondent was therefore bound to file the case in the lower court within 12 months.



37. In the above case of Longonot Horticulture Limited v James Wakaba Maina [2019] eKLR the court observed that; “Time limitations under WIBA claims cannot be enlarged by the lower court” to mean that the trial court could not extend time for filing WIBA matters once the period was over.
37. In the foregoing this court notes that the trial court had no jurisdiction to entertain this suit which was time barred. The Court will therefore not address the other issues raised in this appeal since from the word go the trial court did not have the Jurisdiction to entertain this suit.
38. In the upshot the Appeal succeeds and the suit in the lower court is struck out for being incompetent and time barred.
39. The court takes in to account the circumstances of this Appeal and orders each party to bear their own costs.

DATED AT NAIROBI THIS 27TH DAY OF SEPTEMBER, 2024

DELIVERED VIRTUALLY THIS 27TH DAY OF SEPTEMBER, 2024

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

