Karisa v Co-operation Group Company Limited & another (Appeal E017 of 2024) [2024] KEELRC 2686 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2686 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

APPEAL E017 OF 2024

M MBARŨ, J

OCTOBER 31, 2024

BETWEEN

STALLONE MWAMBIRE KARISA ..... APPELLANT

AND

CO-OPERATION GROUP COMPANY LIMITED ..... 1ST RESPONDENT

CHINA HENAN INTERNATIONAL ..... 2ND RESPONDENT

(Being appeal from the judgment of Hon. Thamara delivered on 5 December 2022 in Malindi CMCC No.248 of 2019)

JUDGMENT

1. The appeal arises from the judgment delivered on 5 December 2022 in Malindi CMCC 248 of 2019. The appellant is seeking the judgment be set aside and substituted with an order granting the prayers in the Plaint with costs.

2. The background of the appeal is a claim that was filed by the appellant before the trial court.

3. The appellant's case was that he was employed by the respondent as a foreman. Parties agreed that the appellant would be placed in a safe working environment not be exposed to risk or danger and be provided with adequate and suitable plans and appliances to provide a safe working system. However, on 23 August 2018, while the appellant was at the Mambrui pipeline site and preparing a trench for pipe arranging, the walls of the trench collapsed and he was buried by soil as a result sustained injuries. The accident was caused solely due to the negligence and breach of employment contract of the respondent, its servants, agents or employees and hence vicariously liable for the acts of omission. The particulars of the negligence were that the respondent failed to take reasonable precautions for the safety of the appellant and hence exposed him to risk and damage. He suffered multiple lacerations on the head and multiple abrasions to the left lower limb. And claimed the following;

a. General damages for pain and suffering;

b. Special damages of Ksh.2,000;

c. Costs of the suit;

d. Interests.

4. In response, the respondent case was that the alleged accident on 23 August 2018 related to a work injury regulated under the provisions of the Work Injuries Benefits Act (WIBA) which commenced on 20 December 2007. Under Section 16 of WIBA, no action lie by an employee for recovery of damages of any occupational accident or disease against the employer save as provided under the WIBA as held in Court of Appeal Civil Appeal No.133 of 2011 – Attorney General v Law Society of Kenya, Central Organization of Trade Unions. The claim should be dismissed for offending the mandatory provisions of WIBA.

5. The respondent also responded that it had a duty to take reasonable precautions for the safety of the appellant while at work but also he had a duty to take reasonable precautions for his safety while working. The appellant was involved in an accident due to his negligence in taking safety precautions, due care and attention and exposing himself to risk and damage.

6. The learned magistrate heard the parties and delivered judgment and held that the appellant failed to exhaust the mechanism provided under WIBA prior to filing his claim. Suits filed after the enactment of WIBA deny the court jurisdiction as the primary forum and hence the suit was dismissed with costs.

7. Aggrieved, the appellant filed this appeal on six (6) grounds;

1. The learned trial magistrate erred in law and fact in finding that the court lacked jurisdiction to hear and determine the suit;

2. The learned trial magistrate erred in law and fact in determining the issue of jurisdiction when the same issue had already been determined with finality by a court of competent jurisdiction hence res judicata;

3. The learned trial magistrate erred in law and fact in failing to take into account authorities cited by the appellant;

4. The learned trial magistrate erred in law and fact in failing to consider or have any sufficient regard for the submissions filed on behalf of the respondent.

5. The learned magistrate erred and relied on wrong principles in arriving at the judgment.

6. In all the circumstances of the case, the learned magistrate failed to do justice.

8. Both parties attended and agreed to address the appeal by way of written submissions.

9. The appellant did not file any written submissions. None are available on the CTS or in hard copies.

10. The respondent submitted that jurisdiction is primordial in every suit. Any suit filed devoid of jurisdiction cannot be remedied. The Supreme Court in Petition No. 4 of 2019 – Law Society of Kenya v Attorney General and *Central Organization of Trade Unions upheld the Court of Appeal judgment in Civil Appeal No. 133 of 2011* and confirmed that the court has no original jurisdiction to hear work injury claims based on WIBA which commenced on 2 June 2008. In the case of Heritage Insurance Company Limited v David Fikiri Joshua & another [2021] eKLR the court held that once a statute

is declared unconstitutional it becomes a nullity from the date of its commencement. This position is reiterated in the case of Peter Gichuki King'ara v IEBC & 2 others [2013] eKLR.

11. Matters filed before WIBA commenced on 23 May 2008 were to continue and conclude before the subject court. Any other claim of a similar nature was to be reported to the Director under the provisions of Section 16 of WIBA. Any claims filed in court outside the legal provisions under WIBA deny the court's original jurisdiction and should be dismissed.

12. The respondent submitted that in this case, the jurisdiction of the court was ousted effective 20 December 2007 with the enactment of WIBA. The appellant alleged that he suffered a work injury on 23 August 2018 and should have filed a complaint with the Director under WIBA. To move the court as herein done is without jurisdiction and the claim was correctly dismissed by the trial court for lack of jurisdiction. This appeal should also be dismissed with costs.

Determination

13. This being a first appeal, the court's primary role is to re-evaluate, re-assess and re-analyses the extracts on the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and give reasons either way. See the case of Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that;

> On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.

14. The appellant raises several issues in the appeal, with the substantial question being that the trial court had addressed jurisdiction with finality and delivered a ruling. Reverting to the same issue in the judgment was in error.

15. In the pleadings, the respondent raised the question of jurisdiction. On 9 March 2021 [not 25 August 2021], the trial court delivered a ruling and dismissed the objections, allowing the hearing to proceed. The judgment was delivered on 5 December 2022.

16. The ruling delivered on 9 March 2021 [not 25 August 2021] related to objections that;

> This court [trial court] has no jurisdiction to hear and determine this matter since it is a Work Injury Claim pursuant to the Work Injuries Benefits Act of 2007 which commenced on 20 December 2007.

17. The learned Magistrate gave an outline of the various proceedings before the High Court, the Court of Appeal and the Supreme Court where the constitutionality of the WIBA had been made. In High Court Petition 185 of 2008, the court declared WIBA provisions unconstitutional. In Civil Appeal No.133 of 2017, the orders of the High Court were set aside. In Supreme Court Petition No. 4 of 2019, the position by the Court of Appeal was reaffirmed.

18. The learned magistrate also held that;

> The superior court have made a determination that matters already commenced must proceed under the legal regime that they were instituted. The Supreme Court stated as follows...;

> We note that it is not in dispute that prior to the enactment of the Act, litigation relating to work injuries has gone on and a number of the suits had progressed up to decree stage, some of which were still being heard while others were still at the preliminary stage.
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> All such matters were being dealt with under the then existing and completely different regimes of law ... the claimant in these pending cases have legitimate expectations that upon the passage of the Act, their cases would be conducted under the judicial process which they had invoked. ...

19. There is no appeal against this ruling.

20. Parties proceeded to hearing of the main suit.

21. Indeed, as held in the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 the Court of Appeal held as follows;

> I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. [Underline added].

22. The Supreme Court in Samuel Kamau Macharia and v KCB and Others [2012] e-KLR, held that jurisdiction flows either from *the Constitution* or Legislation, or both. The Court can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred by the law. It must not expand its limits through judicial craft or innovation. This pronouncement was preceded by the decision of the Owner of Motor Vessel Lillian ''S'' v Caltex Oil Kenya Limited, cited above where it was held that without jurisdiction the Court has no power to make one more step.

23. It is agreed by both parties that the appellant's work injury was on 23 August 2018.

24. At this point, there was a judgment from the Court of Appeal in Civil Appeal No. 133 of 2011 – Law Society of Kenya v Attorney General & COTU which was delivered on 17 November 2017 allowing in part the appeal. The major effect was to allow parties to attend before the Director for all work injury-related claims.

25. The lower courts including the High Court were bound under the Court of Appeal judgement from 17 November 2017 through stare decisis.

26. In this regard, the doctrine of stare decisis as encapsulated in Article 163(7) of *the Constitution* provides that all courts other than the Supreme Court are bound by the decisions of the Supreme Court. See Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others SC App. No. 5 of 2014; [2014] eKLR.

27. This position is reiterated in the case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023*) [2024] KESC where the Supreme Court held that;

> ... unlike in other jurisdictions, Kenya's stare decisis principle is a constitutional obligation meant to enhance the legal system's predictability and certainty. In the case of Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others, SC Petition No. 2B of 2014 [2014] eKLR,

> we stated that Article 163 (7) of the Constitution is the embodiment of the time-hallowed common law doctrine of stare decisis. It holds that the precedents set by this Court are binding on all other Courts in the land. It is imperative for all courts bound by decisions to rigorously uphold their authority, ensuring the effective functioning of the administration of justice. Without this steadfast and uniform commitment, the legal system risks ambiguity, eroding public trust, and causing disorder in the administration of justice.

28. The Supreme Court, in *Law Society of Kenya v Attorney General & COTU in Petition 4 of 2019* delivered judgment on 3 December 2019 and held that all work injury claims should be initiated before the Director.

29. The Supreme Court noted that;

> While this matter was before us awaiting determination, E.K. Ogola J, on 10th June 2019, in the High Court of Kenya at Mombasa, rendered a decision in the case of Juma Nyamawi Ndungo & 5 others v Attorney General; Mombasa Law Society (Interested Party), Constitutional Petition No. 196 of 2018 [2019] eKLR. Broadly, some of the issues for determination in that matter included whether the WIBA was unconstitutional in light of *the Constitution* 2010.
>
> We are greatly dismayed that the learned Judge did not take judicial notice of the pendency of this Appeal although he was aware of it. As a matter of fact, he stated so in his judgment that an appeal had been preferred to us against the decision of the Court of Appeal to the apex court on matters whose determination may well have been binding on him. The learned judge ought to have held his horses and acknowledge the hierarchy of the courts and await for this court to pronounce itself before rendering himself, if at all. As we perceive it, his judgment has created unnecessary confusion in the application of WIBA and cannot be allowed to stand as it may [may or is]? also be contrary to this Judgement. The findings and Orders expressed in that judgment must therefore be read in the context of the decision of the Court of Appeal and our finding and Orders in this appeal. That is all there is to say on that matter.

30. To therefore secure the effective functioning of the administration of justice and the uniform commitment to order in the delivery of justice, I find that by 9 March 2021 when the trial court delivered its ruling, the Court of Appeal and the Supreme Court had rendered judgments. All courts were therefore guided. All work injury claims should have been initiated through the mechanism outlined under WIBA.

31. The appellant filed his suit on 30 October 2019. This was after the Court of Appeal Judgment. The issues on jurisdiction were addressed on 9 March 2021 way past the Supreme Court Judgment.

32. The trial court should have downed its tools at that point by taking judicial notice of the hierarchy of courts and the findings of superior courts.

33. The question of jurisdiction remained an issue even as parties proceeded for a full trial. Despite there being no appeal against the ruling delivered on 9 March 2021, looking at the entirety of the issues before the trial court, the learned magistrate was correct in going back on such a matter. At this point on appeal, this court is not stopped from re-evaluating the entire record and findings by the trial court and addressing the question of jurisdiction.

34. The findings by the learned magistrate in the judgment delivered on 5 December 2022 in Malindi CMCC 248 of 2019 cannot be faulted. The judgment is based on the proper application of the law and the facts presented before the court.

35. Accordingly, the appeal is without merit and is hereby dismissed with costs to the respondent.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 31ST DAY OF OCTOBER 2024.

M. MBARŨ

JUDGE