



**Kisii County Government & another v Ontegi (Suing as the legal representative and administrator of the Estate of the Late Evans Moya Moindi) (Appeal 12 of 2020) [2023] KEELRC 558 (KLR) (1 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 558 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL 12 OF 2020  
S RADIDO, J  
MARCH 1, 2023**

**BETWEEN**

**KISII COUNTY GOVERNMENT ..... 1<sup>ST</sup> APPELLANT**

**JAMES ONGWAE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JACKSON MOINDI ONTEGI (SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF THE LATE EVANS MOYA MOINDI) ..... RESPONDENT**

*(Appeal from the judgment and decree of the Hon M.O. Wambani (CM) dared and delivered on 20th August 2019 in the original Nyamira CMCC No. 198 of 2017)*

**RULING**

1. Jackson Moindi Ontegi (the Respondent) sued the County Government of Kisii and Honourable James Ongwae (the Appellants) before the Chief Magistrates Court alleging negligence.
2. In a judgment delivered on August 20, 2019, the Chief Magistrate entered judgment for the Respondent and awarded damages totalling of Kshs 5,305,500/-.
3. The Appellants were aggrieved and they lodged a Memorandum of Appeal with the High Court to challenge the judgment.
4. On November 27, 2019, the High Court struck out the Appeal for lack of jurisdiction.
5. On or around January 15, 2020, the Appellants lodged a Memorandum of Appeal before this Court contending:



- i. That the learned Magistrate erred in law and fact in failing to find that the Court lacked jurisdiction to preside over the cause of action arising under the *Work Injury Benefits Act* (No 13 of 2007) as read together with the judgment of the Court of Appeal dated 17<sup>th</sup> day of November 2017 in CA No 133 of 2011 at Nairobi.
  - ii. That the learned Magistrate erred in law and fact in not finding that the cause of action as filed by the Respondent was time barred under section 17 of the *Work Injury Benefits Act* (No 13 of 2007).
  - iii. That the learned Magistrate erred in law and fact in failing to find that the claim as filed was borne out of grave misapprehension of the substance and procedure under the *Work Injury Benefits Act* (No 13 of 2007).
  - iv. That the learned Magistrate erred in law and fact by ignoring the employee's contributory negligence by dismissing the evidence adduced by Mr Henry Mbaka, the defence witness.
  - v. That the learned Magistrate erred in law and fact by dismissing the said evidence and thus finding the Appellants 100% liable for the accident, the cause of the suit therein.
  - vi. That the learned Magistrate erred in law and in fact while calculating and tabulating the multiplier for the loss of years which is the jurisdiction of the Director of Occupational Safety and Health Services under section 23(1) of the *Work Injury Benefits Act* (No 13 of 2007).
  - vii. That the learned Magistrate upon erroneously finding the said multiplier went ahead and awarded the Respondent an exorbitant amount as damages ignoring the defence of illegality and contributory negligence on the part of the Respondent.
  - viii. That the learned Magistrate erred in law and fact in failing to find that adding the 2<sup>nd</sup> Appellant as party to the suit was case of misjoinder.
  - ix. That the learned Magistrate erred in law and fact by awarding the Respondent a high amount as damages for pain and suffering.
6. The Appellants filed the Record of Appeal on July 29, 2020, and the Court gave directions on January 19, 2023.
  7. The Court directed the Appellants to notify the Respondent of the directions as he was not present
  8. The Appellants filed their submissions on February 1, 2023.
  9. The Respondent filed his submissions on February 22, 2023 (the Respondent wrote to the Court to indicate that he could not file the submissions within time because the Appellants had served them late. The failure led to postponement of the delivery of the judgment to today).

### **Role of the Court on first appeal**

10. The role of a first appellate Court was discussed in *Kamau v Mungai* (2006) 1 KLR 150, where it was held that:  
  
this being a first appeal, it was the duty of the Court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.
11. This Court will abide by the interdict on its role as a first appellate Court.



## Jurisdiction

### Appeal filed out of time

12. The Respondent took objection to the competency of the Appeal on the ground that it was filed out of time and, therefore, the Court had no jurisdiction to entertain it.
13. This objection has no merit since the Court differently constituted had accepted the appeal in the Ruling delivered on June 25, 2020 in Misc Civil Application No 1 of 2020.

### Road traffic accident or industrial accident

14. The Respondent also objected to the jurisdiction of the Court on the basis that the cause of action arose out of a traffic accident and therefore the Appeal should have been lodged in the High Court.
15. The Court does not buy into that preposition.
16. First the High Court struck out the initial Appeal on the ground that it did not have jurisdiction.
17. Second, this Court differently constituted in the Ruling delivered on June 25, 2020, held that the Court had jurisdiction.
18. Third, the road accident leading to the death of the person on behalf of whom the proceedings were commenced was an employee of the County Government of Kisii and the accident occurred in the course of work.
19. This Court is, therefore of the view that it has jurisdiction over the dispute.

### Work Injury Benefits Act

20. Before this Court, the Appellants contend that by virtue of section 17 of the *Work Injury Benefits Act* as read with the decision of the Court of Appeal in *Attorney General v Law Society of Kenya & Ar* (2017), the Chief Magistrate did not have jurisdiction over the dispute.
21. According to the Appellants, the jurisdiction lay with the Director of Occupational Safety and Health.
22. The Respondent was involved in an accident on January 1, 2016, and the suit was filed on his behalf on August 7, 2017.
23. This Court had occasion to address its mind to claims under the *Work Injury Benefits Act* in *West Kenya Sugar Co Ltd v Tito Lucheli Tangale* (2021) eKLR (the judgment was challenged and the appeal is pending before the Court of Appeal).
24. At the time the Respondent was suing the Appellants, the High Court had declared section 16 of the *Work Injury Benefits Act* invalid and an appeal which had been lodged with the Court of Appeal against the declaration of invalidity was still pending.
25. What is noteworthy is that the Court of Appeal had not issued any stay of the High Court judgment, meaning that by August 7, 2017, when the Respondent sued, section 16 of the *Work Injury Benefits Act* was not part of the law of Kenya.
26. Since the Respondent sued at a time the High Court order on invalidity of section 16 of the *Work Injury Benefits Act* was still the law, this Court finds that the Chief Magistrate had jurisdiction.



27. This Court also notes that the Court had rendered itself on the question of jurisdiction on this ground in the Ruling of June 25, 2020.

### **Misjoinder**

28. The Appellants objected in their pleadings to the joinder of the 2<sup>nd</sup> Appellant to the suit.
29. The Respondent had sued the 2<sup>nd</sup> Appellant in his personal capacity and as the (then) Governor.
30. The pleadings did not allege any direct nexus or negligence between the Respondent, the 2<sup>nd</sup> Appellant and the accident.
31. The Court agrees with the Appellants that the 2<sup>nd</sup> Appellant was not a necessary or material party to the proceedings.

### **Liability**

32. The Chief Magistrate found the Appellants 100% liable for the accident which led to the death of the deceased employee on whose behalf the suit was brought.
33. In reaching the conclusion, the Chief Magistrate stated that she had relied on the evidence of the Respondent (father to the deceased), another witness who stated he saw the motor vehicle roll and the Police abstract.
34. The Court has relooked at the testimony of the Respondent. Apart from alleging that the motor vehicle which was under the control of the deceased was defective, he did not provide any evidence of negligence or the defects in the vehicle.
35. Even the copy of the police abstract which was produced by the Respondent did not have an entry on the mechanical state of the vehicle. The Police did not blame any person for the accident or indicate otherwise.
36. Although the parties had agreed by consent to the production of the motor vehicle assessment report on August 14, 2018, when the parties returned to Court on September 4, 2018, the Respondent opted to close his case without production of the assessment report.
37. The Court has also examined the testimony of the second witness who was presented by the Respondent. He testified that he saw the vehicle roll while being driven at normal speed but on cross-examination conceded that he did not know at what speed the vehicle was moving.
38. The Appellants' witness on the other hand testified that the deceased had no permission to use the motor vehicle on the material date (work ticket had not been signed to authorise use) and that there had been no reported emergency the vehicle (fire-fighting vehicle) was responding to.
39. After relooking at the evidence before the Chief Magistrate, this Court finds that the Respondent did not prove to the required standard that there was any negligence or failure of the statutory duty of care on the part of the Appellants.
40. The finding on liability was not borne by the evidence on record.

### **Quantum**

### **Multiplier**

41. The Chief Magistrate awarded the Respondent Kshs 5,152,000/- for lost years.



42. The Court considered that the deceased was 32 years old and would have retired at 60 years and adopted the deceased monthly salary of Kshs 23,000/-, dependency ratio of 2/3.
43. The Appellant did draw the attention of the Court to any precedents to show that the Chief Magistrate used the wrong multiplier.

### **Exorbitant damages**

### **Pain and suffering**

44. The Chief Magistrate awarded the Respondent Kshs 50,000/- for pain and suffering.
45. The Appellants contended that the award was high.
46. However, the Appellants did not demonstrate that the award was exorbitant as it did not cite any precedents.

### **Conclusion and Orders**

47. The Respondent did not prove liability on the part of the Appellants.
48. The judgment of the Chief Magistrate is, therefore, set aside and substituted with an order dismissing the Cause.
49. Each party to bear own costs of the Appeal and before the Chief Magistrates Court.

**Delivered virtually, dated and signed in Kisumu on this 1st day of March 2023.**

**Radido Stephen, MCI Arb**

### **Judge**

### **Appearances**

For Appellants Kennedy C. Onsembe, Advocate, County Attorney's Office

For Respondent Gichaba & Co. Advocates

Court Assistant Chrispo Aura

