Muchoki v Muraya (Employment and Labour Relations Appeal E013 of 2022) [2023] KEELRC 840 (KLR) (13 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 840 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E013 OF 2022

ON MAKAU, J

APRIL 13, 2023

BETWEEN

BONIFACE GUCHU MUCHOKI ..... APPELLANT

AND

BEDAN KIMERIA MURAYA ..... RESPONDENT

(Being an Appeal from the Judgment of Honorable E.Muriuki Nyaga, Senior Principal Magistrate at Murang'a Chief Magistrates Court ELRC Case No. 29 of 2015 delivered on 30th June, 2022)

JUDGMENT

1. The appellant seeks to reverse the decision by Hon EM Nyaga SPM by which his entire suit was dismissed with costs. In the said suit the appellant sued the respondent seeking to recover special damages, General damages for pain, suffering and loss of amenities, and general damages for loss of earning capacity, for injuries suffered while in the course of his employment by the respondent on March 25, 2014.

Pleadings

2. The appellant's averred that he was employed by the respondent as a general Labourer earning Kshs 6000 per month. On March 25, 2014 he was directed to operate a chaff cutter which had a defective switch. In the process of his duty, the wet nappier grass he was cutting got stuck in the machine and he went to dislodge the stuck fodder. In the process of doing so, the electric switch came on and the machine swiftly cut off his left 3rd and 4th fingers. He blamed his employer for the accident on grounds that he breached his statutory duty to provide safe working conditions to his employees including the plaintiff.

3. The respondent denied liability in his defence and attributed the accident to the appellant's negligence while engaging in a frolic of his own in an area he was not employed.

Evidence

4. He testified that on March 25, 2015, he was working as a casual employee for the respondent for the respondent using an electrical chaff cutter. In the course of the work, the grass got stuck and he tried to stop the engine, in order to remove the stuck grass. While removing the grass his left hand was cut by the machine and he was rushed to the hospital where he was admitted for 3 days. After discharge from the hospital he reported back to work but he was dismissed on ground that he was now disabled.

5. Thereafter he reported the matter to the Labour Office and Makuyu Police station where he got a P3 form. He produced as exhibits, his treatment card, ad discharge summary, medical receipts, and demand letter. His P3 form and medical report by Dr.Kanyi Gitau were marked as MFI 1 & 7 respectively.

6. On cross-examination, he stated that he had worked for the respondent for one and half years before the accident and he had not used the chaff cutter. He stated that the machine was being operated by one John Njeru and Muturi but he did not know when they were operating. He admitted that he had his own assignment.

7. He further stated that the accident occurred in the afternoon after he had delivered milk at Kenol. He had also finished the work given by the respondent's wife including cleaning the compound and cutting grass from the shamba (farm).

8. He confirmed that he knew a chaff cutter and the respondent's one had two rollers before the blade, that press grass to enable one to cut them. He confirmed that Mr.Njeru and Muturi were not present when he got injured. He explained that when the grass got stuck, he went the other side to remove the stuck grass then the machine started and injured him. He denied going there to charge his phone or to play with the machine. He confirmed that the employer paid his hospital bills but claimed for a refund.

9. The respondent testified as DW1 and adopted his written statement as evidence in chief. In brief he admitted that the appellant was his employee but contended that his duties were only limited to milk delivery, cooking for dogs and ensuring that the compound around the homestead was clean. He clarified that the appellant was not employed to operate any chaff cutter. Besides, the chaff cutter was situated at entirely different place from the appellant's work station.

10. The respondent denied the particulars of negligence pleaded by the appellant and blamed him for engaging in a frolic of his own. The respondent further stated that he took the appellant to hospital on humanitarian grounds and paid for his medical bill on the understanding that he would be refunded the same.

11. He further stated that he reported the accident to Murang'a County Occupational Safety and Health Officer on 26th March 2014 and the officer investigated the matter by interviewing the appellant and the other employees who were on site at the time of the accident and prepared a report based on the findings.

12. After considering the evidence, the trial court observed that the appellant was not employed to operate the chaff cutter and in his own admission, he did not know how to operate it. Accordingly the court applied the maximum of volenti non fit injuria to the suit and dismissed it with costs on grounds that the appellant had not proved it on a balance of probabilities.

The Appeal

13. The appeal seeks to reverse the said judgment on the following grounds:-

    1. The Learned Magistrate relied on hearsay evidence by the respondent despite the respondent stating that his wife was the one who had directed the appellant on his duties.

    2. The Learned Magistrate also erred in law in relying on hearsay evidence to wit the report by the Director of Occupational and Health Safety Services whereas the said witness himself relied on evidence from person who were not called to give evidence and whose statements he did not possess.

    3. The Learned Magistrate also erred in law in deeming that the said report was an adequate investigation whereas the said Director did not interview the appellant so as to get his side of the matter.

    4. The Learned Magistrate also erred in fact and in law in finding that the chaff cutter machine that cut off the appellant's fingers was in good working condition in absence of an inspection report and/or evidence by the appellant's co-workers who had been operating the chaff cutter.

    5. The Learned Magistrate also erred in fact and in law in taking it against the appellant for operating the chaff cutter without the knowledge to do so without direct evidence to contradict the appellant's assertion that he was directed to operate the machine whether or not its operation was one of his duties.

    6. The Learned Magistrate also erred in law in invoking the doctrine of Volenti Non Fit Injuria whereas the appellant did not voluntarily assume the risk of injury as he was directed to operate the chaff cutter, while the one directing him to operate the machine was aware of the appellant's limited knowledge.

    7. The Learned Magistrate completely disregarded the submissions for the appellant.

    8. The Learned Magistrate despite his findings that the appellant's case had not been proved nevertheless wrongly failed to assess the damages/award he would have made had the appellant succeeded.

14. The appeal prays for the following reliefs:-

    1. That the judgment in the lower court be set aside and the appellant's suit be allowed with costs.

    2. That the court be pleased to assess the damages on the basis of the appellant's submissions in the lower court.

    3. That the costs in this appeal be granted to the appellant.

    4. That the court grant such further or other relief as the justice of the case merits.

Submissions

15. It was submitted by the appellant that the trial court relied on hearsay evidence from the DW1 and the report by the Director of Occupational and Health Safety services which was based on information given by persons who were not called as witnesses in the suit. It was argued that without the primary witness attending court to corroborate the report, the evidence therein remained hearsay.

16. It was further submitted that the trial court erred in finding that the chaff cutter was in good working condition in the absence of an inspection report and/or evidence from the appellant's co-workers who had been operating the machine. It was further submitted that the trial court by finding that the appellant was operating the machine without the knowledge to do so, it was argued that the said decision was made in the absence of any evidence from the respondent's wife who instructed the appellant to operate the chaff cutter.

17. In view of the foregoing matter, it was submitted that the respondent did not discharge the burden of proof that the chaff cutter was in good working condition and that the appellant went outside the scope of his duties by operating the machine.

18. As regards the doctrine of Volenti non fit injuria, it was submitted that the appellant did not assume the risk of injury as he was directed to operate the chaff cutter while respondent's wife was well aware that he lacked the knowhow to operate the machine. It was further argued that the appellant's evidence that he was directed to operate the machine was not rebutted by evidence from the respondent's wife who gave the instruction to him. For emphasis reliance was placed on the case of *Tile and Carpet Centre Limited v Geoffrey Kipkorir Langat* [2021] eKLR.

19. On the other hand, it was submitted for the respondent that the appellant failed to prove his claim to the required standards. It was argued that the only evidence adduced to support his claim was medical evidence and treatment receipts as opposed to such evidence as would establish tort of negligence against the respondent. As such it was submitted that the evidence adduced by the appellant was not sufficient to prove that respondent's action or inaction caused injury to the appellant.

20. Further to the said gaps in the appellants evidence, thee admission that he had never operated on the machine before and that he lacked the knowledge of operating the machine which was normally operated by one Njeru and Muturi. Consequently it was submitted that the trial court was right in dismissing the suit because there was no evidence to showing the link between the appellant's injury and the alleged breach of duty owed by the respondent. Reliance was placed on the case of *Bwire v Wayo & Sailoki* [2022] KECH 7 KLR where the burden of proof was dismissed.

21. It was further submitted that the respondent adduced evidence in the form of a report by the Director of Occupational Health and Safety services which showed that investigation on the appellant's injuries had established that the appellant was not entitled to compensation for the injuries because he sustained the same while outside the scope of his designated work station.

22. As regards the condition of the chaff cutter, it was submitted that the same was in good working condition and that is why it cut the appellant when he operated on it. Besides, had the machine been faulty the Director's investigations report would have indicated so. The said investigation is permitted by section 53 of the *Work Injury Benefits Act*. Reliance was placed on the case of *Maridadi Flowers Ltd v Director of Occupational Safety and Health Services* [2021] KEELRC 2 (KLR) where the court found that the investigation report by the Director was done procedurally under the law.

23. In view of the foregoing matters, it was submitted that ground 1& 2 of the appeal fails because the respondent's evidence and the report by the Director were not hearsay. It was submitted that the

respondent produced documentary evidence to support his defence including the letter by the Director dated 11th September 2014 which explained that the appellant was not eligible for compensation as the injuries were sustained while at work station outside his scope of duties.

24. It was further submitted that the Director's report is a public document done by an expert in accident investigation and therefore reliance on the same holds probative value as it is an expert opinion within the meaning of Section 63 (2) (d) of the *Evidence Act*. Such expert opinion cannot, be termed hearsay as alluded by the appellant. It is secondary evidence within the meaning of Section 68(1) (2) of the *Evidence Act* and since it emanates from a public officer, it is a public document within the meaning of section 79 of the Act.

25. As regards ground 3, 4 and 5 of the appeal it was submitted that the appellant had a burden of proof that the chaff cutter was not in good working condition. Reliance was placed on section 107 of the *Evidence Act* which provides that whoever desires any court to give a judgment as to any legal right or liability must prove that the relevant facts. Further reliance was placed on the case of Bwire v Wayo & Sailoki, supra, where the court acknowledged that the burden of proof in an action for negligence rests primarily on the plaintiff, to show that he was injured by a negligent act or omission for which the defendant is responsible. That the said burden involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which the breach of duty a casual connection must be established.

26. It was submitted that the appellant did not prove a duty of care owed by the respondent, and that the said duty of care was breached by the respondent. Whereas the injuries were not denied, it was submitted that the appellant did not adduce any evidence to prove that the injuries were caused by the respondent's negligence. Therefore it was submitted that the trial court was right in holding that the appellant was injured while working outside the scope of his duties.

27. As regards ground 6 of the appeal, it was submitted that the trial court was right in applying the maxim of Volenti non fit injuria. The said finding was based on the evidence and fact that the appellant was working outside the scope of his duties and upon admission that he never knew how to operate the chaff cutter, which was designated to Njeru and Muturi for operation.

28. On without prejudice to the foregoing, it was submitted that if the appellant was aggrieved by the decision of the Director, he ought to have invoked the procedure laid down by Section 51 of WIBA. For emphasis the decision by Wasilwa J in Maridadi Flowers case, supra, was cited.

Mandate of this court

29. As a first appellate court, my mandate it to re-evaluate the evidence rendered before the trial court and the impugned judgment and come up with my own independent conclusions bearing in mind that I did not have the advantage of seeing and hearing the witness first hand. This position has been upheld by the court in Kenya including *Selle & another v Associated Motor Boat Co.Ltd & others* where the court held that:-

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

30. Again *Bundi Murube v Joseph Onkuba Nyamaro* [1982-88] 1 KLR 108 the court held that:-

> "...a court on appeal will not normally interfere with a finding of fact by the trial court unless, it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably, to have acted on wrong principles in making the findings he did."

Analysis and determination

31. Having perused and considered the record of appeal and the submissions made herein, the following issues arose for determination;

    a) Whether the suit filed by the appellant was incompetent.

    b) Whether the appellant was working within the scope of his duties when suffered injuries.

    c) Whether the appellant suffered the injuries due to the negligence by the respondent.

    d) Whether the respondent is liable to compensate the appellant for injuries suffered.

Incompetent suit

32. The respondent made the following statement in paragraph 34 of its submission herein:-

> "Without prejudice to the foregoing, in the event the Appellant was aggrieved by the decision of the Director, section 51 of the *Work Injury Benefits Act* is instructive as to the procedure to be followed by such an aggrieved party."

33. Section 51 of *WIBA* provides that:

> "(1) (1) Any person aggrieved by a decision of the Director on any matters under this Act, may within sixty days of such decision, lodge with the Director an objection against such decision.
>
> (2) The objection shall be in writing in the prescribed form accompanied by particulars containing a concise statement of the circumstances in which the objection is made and the relief or order which the objector claims, or the question which he desires to have determined."

34. The appellant ignored the above procedure and when the respondent raised the matter in paragraph 6 of his defence, the appellant just responded that he was unaware about the matters raised in paragraph 6 and 7 of the defence. Again on March 19, 2021 the respondent filed a notice of preliminary objection to the suit on ground that the court lacked jurisdiction to hear and determine the issues under the *WIBA*.

35. The appellant filed what he called "Grounds of opposition to the preliminary objection" urging the court to dismiss the objection with costs. Written submissions were filed to dispose of the objection but no decision was made on the objection. Instead the court record shows that the respondent took to the witness stand on April 19, 2022 and the hearing was concluded.

36. The issue of jurisdiction was never raised in the submissions by both parties although the respondent relied on the Court of Appeal decision in *Hon Attorney General v Law Society of Kenya & another* [2017] eKLR which ruled out the jurisdiction of courts in *WIBA* matters.

37. In the judgment that followed, the trial court said nothing about what happened to the preliminary objection raised on the court's jurisdiction. He also said nothing about the cited court of appeal decision, supra which had ruled against the jurisdiction of the court on WIBA matters. The said decision by the Court of Appeal binds the trial court just as it does to this court.

38. In the said case of *Attorney General v Law Society of Kenya & another*, the Court of Appeal expressed itself as follows concerning claim by employees under WIBA:-

> " The records provided for such an employee or dependant is to notify the Director, who under section 23(1) of the Act shall upon receipt of the notice of the accident;
>
> "(1)... or having learned that an employee has been injured in an accident the Director shall make such enquiries as are necessary to decide upon any claim or liability in accordance with this Act."

39. Section 16 as read with section 23(1) confer powers of adjudication of any claim for compensation arising from injury or death in work place upon the Director and expressly bars institution of court proceedings by the aggrieved employees."

40. Courts of concurrent jurisdiction have made decisions on the jurisdiction of the courts over WIBA matters filed during the pendency of the appeal in the aforesaid matter. An example is the case of *West Kenya Sugar Co Ltd v Tito Lucheli Tangale* [2021] eKLR where Randido J invoked the doctrine of legitimate expectation to hold that a trial court had jurisdiction to determine a suit filed before the aforesaid Court of Appeal decision.

41. Although I find the foregoing decision persuasive, nevertheless the doctrine of stare decisis dictates that I am bound by the decision of the superior courts. It is a matter of common knowledge that the decision by the Court of Appeal that courts have no original jurisdiction in WIBA matters had already been upheld by the Supreme Court in 2019 even before the suit herein was heard.

42. Based on the express provisions of section 51 of the WIBA and the binding decisions by both the Court of Appeal and the Supreme Court of Kenya, I must hold that the trial court lacked original jurisdiction to hear and determine the suit as it sought compensation for injuries suffered by an employee at the work place. The said dispute ought to have been adjudicated by the Director of Occupational Health and Safety Services (DOHSS) under section 16 and 51 of the WIBA.

43. In view of the foregoing, I find that the suit filed in the lower court was incompetent by dint of section 16 and 51 of the *WIBA*. For the same reason the appeal herein is equally incompetent since the appellate jurisdiction of this court in WIBA matters can only be invoked under section 52(2) of the *WIBA* to impugn a decision by the Director, OSHS. The said section provides that:-

> " An objector may within thirty days of the Director's reply being received by him, appeal to the Industrial court against such decision."

44. It is now well settled that a court of law ought to down its tools if it has no jurisdiction. The corollary to the foregoing is that jurisdiction is everything and that a court must always verify its jurisdiction in any matter before it to ensure that it does not proceed in vain. The importance of jurisdiction was emphasized by the Court of Appeal in *Kenya Ports Authority v Modern Holding (EA) Ltd* [2017] eKLR where it held that:-

> " We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage and even on appeal, though it is always prudent to rise it as soon as the occasion arises.

It can be raised at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the court itself provided that where the court raises it suo motu, parties are to be accorded the opportunity to be heard."

45. The respondent cautioned the court against proceeding in futility when he stated as followers in his last paragraph of his submissions in support of his preliminary objection:

> " The raising of the preliminary objection at any stage of the suit should be given attention by this Honourable court to enable it not to hear this matter to the end in futility, and so much so it will save this courts time."

46. As already observed herein above, the trial court seemed to have ignored or neglected the issue of jurisdiction and assumed that parties have consented to adjudicate the matter before him. However it is trite law that parties cannot confer jurisdiction on a court by consent or otherwise. The trial court lacked jurisdiction and so, he proceeded in futility. His judgment was a nullity. I gather support from Nyaragi JA in the case of *Owners of the Lillian "S" v Caltex Oil (Kenya) Ltd* [1989] eKLR where he held that:-

> " 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

47. In view of the matters above, I must hold that there is no competent appeal before me pursuant to section 52 of the *WIBA*. Further, the lower court suit was incompetent for all intends and purpose for offending section 16 and 51 of the *WIBA*. Therefore I decline to consider the merits of the appeal and instead strike it out with no costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 13TH DAY OF APRIL, 2023.

ONESMUS N MAKAU

JUDGE

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 April 15, 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE