Kariri Limited v Gisiaina (Appeal E123 of 2021)
[2023] KEELRC 1184 (KLR) (17 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1184 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E123 OF 2021

JK GAKERI, J

MAY 17, 2023

BETWEEN

KARIRI LIMITED ..... APPELLANT

AND

REUBEN MAUTI GISIAINA ..... RESPONDENT

(Being an appeal from the whole Ruling of the Honourable E. Riany (Mrs.) Senior Resident Magistrate delivered on the 29th day of July 2021 in CMCC No. 188 of 2018 at Thika)

JUDGMENT

1. This is an Appeal by the Appellant/Respondent challenging the Ruling dated 29th July, 2021 by the Hon. E. Riany, Senior Resident Magistrate, Thika Law Courts.

2. The Appellant/Respondent's counsel had filed a Preliminary Objection dated 7th May, 2021 challenging the jurisdiction of the court to hear and determine the Claimant's suit which was a *Work Injury Benefits Act* (WIBA) matter.

3. The learned trial Magistrate held that the court had jurisdiction to hear and determine the suit. The ruling precipitated this appeal.

Background

4. From the plaint, Claimant's statement, the Respondent's defense and witness statement, it is common ground that the Claimant was injured at the workplace on 25th September, 2017 when he and a colleague, Mr. Isaac Kanyingi were engaged in the removal of windbreak nets around the Respondent's farm using a ladder and hammer. The hammer allegedly dropped from the colleague's hands and injured the Claimant's forehead occasioning injuries for which he was treated on outpatient and recovered fully with no permanent disability.

Appeal

5. The Appellant/Respondent faults the trial Magistrate on the grounds of;

   i. Misapprehension of law and fact in finding that the court had jurisdiction to hear and determine suit as it related to WIBA.

   ii. Failing to consider the Appellant's judicial authorities on jurisdiction.

   iii. Misconstruing the findings of the Supreme Court in Petition No. 4 of 2019 Law Society of Kenya V Attorney General on the scope and applicability of the legitimate expectations with respect to the Respondent's claim.

   iv. Failure to address the law or statute from which jurisdiction to entertain injury claims is derived from.

   v. Making an erroneous decision not backed by law.

6. The Appellant prays for ORDERS THAT:-

   A 1. The Ruling of the learned Magistrate delivered on 29th July, 2021 be set aside.

   A 2. The Honourable Court allow the Preliminary Objection dated 7th May, 2021 and the suit be transferred to the Director of Occupational Safety and Health Services (DOSHS) to hear and determine the same.

7. Alternatively;

   B (1) The Appeal be allowed.

   B (2) The suit be struck out for want of jurisdiction.

   C Costs of the appeal

Appellant's submissions

8. The Appellant's counsel submitted on whether the trial Magistrate had jurisdiction as she found and whether the trial Magistrate misconstrued the findings of the Supreme Court in Law Society of Kenya V Attorney General on the scope and applicability of legitimate expectations.

9. On the first issue, counsel submitted that since the pleadings reveal that the Respondent's injuries were work related, the provisions of the WIBA were applicable effective June 2nd 2008 but the High Court declared various provisions of Act unconstitutional in Petition No. 188 of 2008 Law Society of Kenya V Attorney General & another which decision was set aside by the Court of Appeal in Civil Appeal No. 133 of 2011 Attorney General V Law Society of Kenya & another and the subsequent appeal by the Law Society of Kenya to the Supreme Court was dismissed on 3rd December, 2019 upholding the decision of the Court of Appeal.

10. Counsel submitted that based on the foregoing, the trial court had no jurisdiction in this matter as it was work related and jurisdiction was vested upon the DOSHS under Section 16 of WIBA and the court thus erred in law by holding that it had jurisdiction.

11. As regards the doctrine of legitimate expectation espoused by Radido J. in West Kenya Sugar Co. Ltd V Tito Lucheli Tangale which the trial court relied upon, counsel submitted that the Supreme Court was emphatic on who had a legitimate expectation regarding suits under WIBA that only those with

pending cases had a legitimate expectation that the case would be determined under the law the parties had invoked.

12. According to counsel, since the Respondent's suit was filed in 2018, it ought to have been filed under WIBA and the doctrine of legitimate expectation was inapplicable.

13. Reliance was made on the sentiments of Ongaya J. in Heritage Insurance Company Ltd V David Fikiri Joshua & another (2021) eKLR to buttress the submission on litigants who had a legitimate expectation.

14. Finally, counsel urged that the learned trial Magistrate erred in law by dismissing the appellant's Preliminary Objection dated 7th May, 2021.

Respondent's submissions

15. Counsel isolated three issues, namely;

    i. Whether the learned Magistrate misapprehended the law leading to making an erroneous decision.

    ii. Whether jurisdiction issues were fully addressed.

    iii. Whether the scope and applicability of legitimate expectation was misconstrued.

16. As regards the 1st issue, counsel urged that the Learned Magistrate analysed several decisions including Kenya Breweries Ltd & another V Keroche Breweries Ltd (2020) eKLR, Owners of Motor Vessel "Lilian S" V Caltex Oil Ltd (1989) eKLR, Law Society of Kenya V Attorney General & another (2019) eKLR, West Kenya Sugar Co. Ltd V Tito Lucheli & another (2021) eKLR, among others to arrive at the decision.

17. That since the suit was instituted within the time frame enunciated by Radido J. in West Kenya Sugar Co. Ltd case, it could invoke the legitimate jurisdiction that the claim would be heard to conclusion before the court in which it was lodged and relied on paragraphs 63, 67, 85 and 88 of the decision of the Supreme Court.

18. Counsel submitted that the Respondent having commenced the action on 17th March, 2018, had a legitimate expectation of its resolution by the court.

19. On the second issue of jurisdiction, counsel submitted that it was common ground that the Respondent's claim was work injury and within the purview of the WIBA, 2007 but urged that the foregoing notwithstanding, the suit was filed in 2018 when certain provisions of the WIBA 2007 that conferred jurisdiction upon the DOSHS had been declared unconstitutional by the High Court.

20. That by the time the Court of Appeal delivered its decision, the suit was pending trial in the Chief Magistrates Court. This submission is not true as the suit was filed after the decision had been delivered in November 2017.

21. Counsel further relied on the Hon. Chief Justice Circular dated 15th September, 2020 on suits under WIBA, 2007 to urge that the Respondent had legitimate expectation that the suit would be determined under the law he had invoked.

22. Relying on paragraph 85 of the decision of the Supreme Court, counsel submitted that since the Respondent moved to court on 12th March, 2018, the prevailing judicial authority was the High Court decision in Law Society of Kenya & another V Attorney General (2009) eKLR that Section 16 of WIBA, 2007 was null and void and the Respondent was entitled to file the instant suit.

23. Counsel associated himself with the holding by Radido J. in West Kenya Sugar Co. Ltd case on the state of the law between 2008 and December 2009.

24. As regards the scope and applicability of legitimate expectation, counsel relied exclusively on the sentiments of Radido J. in the West Kenya Sugar Co. Ltd case on the doctrine of legitimate expectation to the effect that;

> " . . . these litigants who filed their disputes with the courts from 22nd May, 2008 to 3rd December, 2019 on the firm belief that the judge declared law was the valid law in place then, are entitled to successfully assert legitimate expectation in having the claims heard to a conclusion before the courts were they have been lodged."

25. This being a first appeal, the role of this court is to conduct a retrial as stated and restated in legions of decisions.

26. In Abok James Odera t/a A.J. Odera & Associates V John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR, the court stated;

> " This being a first appeal, we are reminded of our primary role as a first appellate court, namely; to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trail judge are to stand or not and give reasons either way."

27. In Gitobu Imanyara and 2 others V Attorney General (2016) eKLR, the Court of Appeal stated as follows;

> " An appeal to this court from a trial by the High Court is by way of a 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 witness and should make due allowances in this respect."

28. The court expressed similar sentiments in Peters V Sunday Post Ltd (1958) EA 424.

29. The Appellant faults the Learned Magistrate on the twin grounds that she erred in law and fact in finding that she had jurisdiction to handle claims related to injuries at the workplace and misconstrued the findings in Petition No. 4 of 2019 on the scope of applicability of legitimate expectation with respect to the Respondent's claim and arrived at a wrong conclusion.

30. As regards jurisdiction, counsels for the parties have adopted contrasting positions. While the appellant's counsel urged that the Learned Magistrate had no jurisdiction, the Respondent's counsel urged that she had.

31. On the centrality of jurisdiction in litigation, the celebrated sentiments of Nyarangi JA Owners of Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd (1989) eKLR are instructive;

> " 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 obligated 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."

32. (See also Samuel Kamau Macharia & another V Kenya Commercial Bank Ltd & 2 others).

33. The appellant's Preliminary Objection dated 7th May, 2021 challenge the jurisdiction of the learned Magistrate to hear and determine the suit pursuant to the Supreme Court decision in Law Society of Kenya V Attorney General & another (Supra).

34. It is common ground that the suit before the Learned Magistrate relate to compensation for injuries at the workplace an area of law dealt with by the *Work Injury Benefits Act*, 2007 whose preambular provision states as follows;

> " An Act of Parliament to provide for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes."

35. The Act came into force on 2nd June, 2008.

36. Section 16 of the Act provides that;

> No action shall lie by an employee or and dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.

37. Similarly, Section 21 provides that;

> Written or verbal notice of any accident provided for in Section 22 which occurs during employment shall be given by or on behalf of the employee concerned to the employer and a copy of the written notice or notice of the verbal notice shall be sent to the Director within twenty four hours of its occurrence in the case of a fatal accident.

38. The purpose of the notice is to trigger inquiries by the Director as provided by Section 23(1) of the WIBA, 2007 That:

> After having received notice of an accident or having learned that an employee has been injured in an accident, the Director shall make such inquiries as are necessary to decide upon any claim or liability in accordance with this Act.

39. By a judgement delivered on 4th March, 2009, J.B. Ojwang J. (as he then was) found the provisions of Section 4; 7(1) and (2); 10(4); 16; 33(1); 25(1) and (3); 52(1); and 58(2) of WIBA inconsistent with *the Constitution* and thus null and void.

40. In an appeal by the Attorney General in Appeal No. 133 of 2011, the Court of Appeal found the foregoing provisions of WIBA consistent with *the Constitution* other than Section 7 and 10(4), in its judgement delivered on 17th November, 2017.

41. With reference to Section 16 of WIBA, 2007, the Court of Appeal was emphatic that;

> " The section is to the effect that no employee or his dependants can institute a court action against the employer to claim damages in respect of work-related accident or disease resulting

in the disablement or death of such employee. The recourse provided for such an employee or his dependant is to notify the Director . . .

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

42. The court found no justification why Section 16 had been declared to be inconsistent with *the Constitution*.

43. The court set aside the High Court's holding that Sections 4, 16, 21(1), 23(1), 25(1) (3), 52(1) (2) and 58(2) were inconsistent with the former Constitution.

44. Arguably, after 17th November, 2017, Section 16 and other provisions above were part of the legal terrain as far as compensation for work-related injuries and disease were concerned.

45. Needless to emphasize, the Supreme Court upheld the decision of the Court of Appeal.

46. As regards Section 16 of the WIBA, 2007, the court held as follows;

> " In doing so, a plain reading of Section 16 of the Act would reveal that its intention is not to limit access to courts but to create a statutory mechanism where any claim by an employee under the Act is subjected initially, to a process of dispute resolution starting with an investigation and award by the Director aforesaid and thereafter, under Section 52 an appeal to the then Industrial Court . . ."

47. Further, the court was unambiguous;

> " That Section 16 cannot be read in isolation so as to create the impression that it curtails the right to immediately access the court because by looking at the intention of Section 16, the purpose it fulfils is apparent. That the purpose is related in Section 23 which calls for initial resolution of dispute via the Director and this can be deemed as an alternative dispute resolution mechanism. But what if one is still aggrieved by the decision of the Director. The answer to that question lies in Section 52 of the Act which allows aggrieved parties to seek redress in a court process . . ."

48. Having found that the provisions of Section 16 were part of the operative legal framework from 17th November, 2017, I will now proceed to determine whether the respondent's claim ought to have been filed in court or notified to the DOSHS in accordance with the provisions of WIBA.

49. In West Kenya Sugar Co. Ltd V Tito Lucheli Tangale (2021) eKLR, relied upon by the Respondent and the Learned Magistrate substantially, the Respondent (Tito Lucheli) filed his case at the Magistrates Court on 8th June, 2017 and the learned trial Magistrate found that the court had jurisdiction to hear and determine the suit. The Appellant filed an appeal before the High Court and the appeal was later transferred to the Employment and Labour Relations Court for determination. The court held that;

> " What is clear to this court is that until set aside and or vacated, a court order and this includes judge-made law or judge-declared law is valid and a litigant or citizen can order his or her life in the firm belief that the declared law is the law at the particular point in time. . ."

50. Further, the court stated;

> " The consequence being that the declaration by the High Court that Section 16 of the *Work Injury Benefits Act* was still the law upto the time, the Court of Appeal delivered judgement on 17th November, 2017."

51. Further on, the court concluded as follows;

> " In the courts respectful view, bar any orders, all claims which were lodged with the courts from 22nd May, 2008 to 3rd December, 2019 being claims underpinned by judge-made law or judge-declared law were validly within the jurisdiction of the courts."

52. What were the implications of the Court of Appeal decision rendered on 17th November, 2017?

53. Needless to emphasize, in West Kenya Sugar Co. Ltd V Tito Lucheli Tangale (Supra), the Respondent instituted the suit on 8th June, 2017 during the currency of the decision by J.B. Ojwang J. (as he then was).

54. In the court's view, the legal terrain, however changed when the Court of Appeal delivered its decision on 17th November, 2017 as it set aside the decision of the High Court save as regards the provisions of Section 7 (in relation to Ministerial approval or exemption) and 10(4) of the WIBA, 2007.

55. The provisions of Sections 4, 16, 21(1), 23(1), 25(1) (3), 52(1) (2) and 58(2) of the WIBA, 2007 were no longer unconstitutional and were part of the operational legal framework.

56. The learned trial Magistrate held as follows;

> " The present suit was instituted by way of a plaint dated 7th March, 2018 and it is not in dispute that this matter begun within the time frame provided, that is 22nd May, 2008 to 3rd December, 2019 which places it squarely within the jurisdiction of the court as litigants, by virtue of Radido Js' findings in West Kenya Sugar Co. Ltd V Tito Lucheli Tangale (2021) eKLR, moved to court on the assurance of judge-made law."

57. While the suit in West Kenya Sugar Co. Ltd V Tito Lucheli Tangale (supra) was instituted during the currency of judge-made law, which the court is in agreement with, the instant suit was commenced after the Court of Appeal decision had been delivered and no appeal had been preferred against the decision until 4th February, 2019, a duration of about 1 year and 2 months. The law then, was as declared by the Court of Appeal, a decision the Supreme Court upheld on 3rd December, 2019.

58. In the courts view, the two cases are distinguishable having been filed during the currency of the decisions of the High Court and Court of Appeal.

59. For the foregoing reasons, it is the finding of the court that the learned trial Magistrate had no jurisdiction to hear and determine the Respondent's case by virtue of Section 16 of the *Work Injury Benefits Act*, 2007 as submitted by the appellant.

60. The Respondent has not furnished any justification why he did not invoke the legal framework as prescribed by the provisions of the *Work Injury Benefits Act*, 2007.

61. As regards legitimate expectation, while the appellant urges that the learned Magistrate misconstrued the findings of the Supreme Court in Petition No. 4 of 2019 as regards the scope and application of the doctrine of legitimate expectation, the Respondent relied exclusively on the sentiments of Radido

J. in West Kenya Sugar Co. Ltd V Tito Lucheli Tangale (Supra) and in particular paragraph 30 to urge that since the suit was filed within the period enunciated by Radido J., the court had jurisdiction to hear and determine the suit.

62. Both the Court of Appeal and the Supreme Court addressed the issue of legitimate expectation.

63. The Court of Appeal expressed itself as follows;

> With respect, we agree that Claimant's in those pending case have legitimate expectations that upon the passage of the Act, their cases would be concluded under the judicial process which they had invoked. Indeed, as a result of this concern, the learned judge in a ruling on an interlocutory application directed that . . . The legislative practice where a new judicial forum is created to replace an existing system is to finalize all proceedings pending in the previous system before that forum where they are commenced. For instance, upon the establishment of the Employment and Labour Relations Court, Section 33 of the *Employment and Labour Relations Court Act* provided for what would happen to pending claims . . ."

64. Clearly, the court did not address the fate of matters filed in court after the commencement of the *Work Injury Benefits Act* after delivery of the High Court decision on 4th March, 2009.

65. Needless to belabour, the Court of Appeal and the Supreme Court found the purpose of the *Work Injury Benefits Act* noble as it was designed to protect employees who were injured or contracted diseases in the course of their duties and was thus better than the Workmen's Compensation Act, Cap 236.

66. The Supreme Court addressed the issue of legitimate expectation in paragraph 84 and 85 of its judgment initially citing the sentiments of Court of Appeal above.

67. Paragraph 85 states as follows;

> " In agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of the Act, litigation relating to work-injuries had gone on and a number of the suits had progressed to the decree stage; some of which were still being heard; while others were still at the preliminary stage. All such matters were being dealt with under the then existing and completely different regimes of law. We thus agree with the Appellate Court that Claimants in those pending case have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process which they invoked. However, were it not for such legitimate expectation, WIBA, not being unconstitutional, and an even more progressive statute, as we have shown above we opine that it is best that all matters are finalized under Section 52 aforesaid. The above proposition would be the most prudent way for a judicial system to operate."

68. It is common ground that both the Court of Appeal and the Supreme Court addressed the doctrine of legitimate expectation in the context of claims filed in court prior to the commencement of the *Work Injury Benefits Act*, 2007 on 2nd June, 2008 and made no reference to claims filed in court after the High Court decision delivered on 4th March, 2009.

69. Indeed in paragraph 88, the Supreme Court alluded to the possibility of suits filed under the previous legal regime to being continued under WIBA subject to taking into account the invoked legal regime.

70. In his submissions, counsel for the Respondent did not address how the learned trial Magistrate applied the doctrine of legitimate expectations as espoused by the Supreme Court.

71. The learned magistrate stated as follows;

> " From a reading of the aforementioned paragraph (85) my interpretation of the Supreme Court's assertion is that in the absence of legitimate expectation, Section 52 of the *Work Injury Benefits Act* should be followed. The Plaintiff having instituted this matter before this court by way of plaint dated 7th March, 2018, did so having legitimate expectation that the judge-made law at the time was operational. This was before the Supreme Court decision in . . . and as Radido J. in . . . held, the Plaintiff is entitled to successfully assert legitimate expectation in having the claims heard to a conclusion before this honourable court."

72. As adverted to elsewhere in this judgement, by 7th March, 2018 when the Respondent filed the instant suit, the decision of J.B. Ojwang (as he then was) had already been set aside by the Court of Appeal and by parity of reasoning the applicable law was as espoused by the Court of Appeal as opposed to the High Court, as no appeal had been lodged to challenge the Court of Appeal decision.

73. It is unclear to the court on what basis the Respondent could assert legitimate expectation as the WIBA had been declared a generally progressive framework save for Sections 7 and 10(4).

74. Similarly, the import of paragraph 88 which the learned Magistrate paraphrased was far reaching though not captured in the ruling.

75. In sum, the court is persuaded that the learned Magistrate misconstrued the scope and applicability of the doctrine of legitimate expectations as espoused by the Supreme Court in Law Society of Kenya V Attorney General & another (Supra).

76. In the upshot, it is the finding of the court that the Appeal herein is merited and;

    a. The ruling delivered by the learned trial Magistrate on 29th July, 2021 is set aside.

    b. The Preliminary Objection dated 7th May, 2022 is allowed and the claim be hereby transferred to the Director Occupational Safety and Health Services for determination.

    c. Parties to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 17TH DAY OF MAY 2023

DR. JACOB GAKERI

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 15th March 2020 and subsequent directions 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 has 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.

DR. JACOB GAKERI

JUDGE