



REPUBLIC OF KENYA



KENYA LAW
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**Zhongmei Engineering Group Ltd v Nyachiro (Appeal 2 of 2023)
[2023] KEELRC 1165 (KLR) (17 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1165 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL 2 OF 2023**

S RADIDO, J

MAY 17, 2023

BETWEEN

ZHONGMEI ENGINEERING GROUP LTD APPELLANT

AND

JOSHUA OGAMBA NYACHIRO RESPONDENT

*(Being an appeal from the judgment of the Honourable Senior
Resident Magistrate Hon Nyigei dated 15th day of December 2021
in Chief Magistrates Court Civil Suit No. 17 of 2017 at Nyamira)*

JUDGMENT

1. Joshua Ogamba Nyachiro (the Respondent) sued Zhongmei Engineering Group Ltd (the Appellant) before the Principal Magistrates Court on 21 February 2017 alleging breach of duty of care/negligence.
2. On 27 October 2021, the parties entered into a consent on liability at the ratio of 25/75 in favour of the Respondent.
3. The Cause proceeded to hearing on quantum of damages and in a judgment delivered on 15 December 2021, the Principal Magistrate awarded the Respondent general damages of Kshs 750,000/- (after factoring contributory negligence) and special damages of Kshs 4,383/-. The Respondent was also awarded costs and interest.
4. The Appellant was aggrieved and it filed a Memorandum of Appeal with the High Court sitting in Nyamira on 12 January 2022.
5. Pursuant to leave, the appellant filed an Amended Memorandum of Appeal on 1 July 2022, contending:



- (1) That the learned trial Magistrate erred in law and fact in relying on extraneous evidence and thereby arriving at an erroneous conclusion condemning the Defendant to quantum of general damages of Kshs 1,750,000/- (sic) which was manifestly excessive in the circumstances.
 - (2) That the learned trial Magistrate erred in law and fact in failing to appreciate the impeccable defence of the Defendant and thereby arriving at a wrong and erroneous conclusion condemning the Defendant to special damages of Kshs 101,000/- (sic) without concrete documentary evidence.
 - (3) That the learned trial Magistrate erred in law and fact by failing to appreciate the impeccable defence of the Defendant and thereby arriving at a wrong and erroneous conclusion condemning the Defendant to net damages of Kshs 1,488,601/- (sic).
 - (4) That the learned trial Magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, precedent law thus bringing the law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to damages.
 - (5) That the learned trial Magistrate erred in law and fact in failing to appreciate as follows:
 - (i) That the Plaintiff's pleadings and evidence tendered in support thereof was incapable of sustaining excessive award of damages.
 - (6) That the learned trial Magistrate erred in law and fact in entering judgment in favour of the Plaintiff against the Defendant inspite of the Plaintiff's miserable failure to establish his case especially on quantum.
 - (7) That the learned trial Magistrate erred in law and fact in entertaining the subject matter herein and proceeding to pronounce judgment notwithstanding that the trial Magistrate had no jurisdiction to hear and determine WIBA matters and in total disregard of sections 16(2)(1), 23(1), 25(1) & (3), 52(1) & (2) and 58(2) of the *Work Injury Benefits Act*, 2007 and also in total disregard of the Supreme Court decision in Petition No. 4 of 2019, (*Law Society of Kenya v the Attorney General and Central Organisation of Trade Unions*).
 - (8) That the learned trial Magistrate erred in law and fact in failing to appreciate the legal position to be considered. The Court award is unsustainable and baseless in the circumstances.
6. The High Court gave directions on the Appeal and the Respondent filed his submissions on 4 October 2022 and the Appellant on 1 November 2022.
 7. On 7 December 2022, the High Court reserved judgment to 9 March 2023, but on this date, the Court declined jurisdiction and directed that the Appeal be transferred to this Court.
 8. The parties appeared before this court on 23 March 2023, when the Court reserved judgment to today.

Role of the Court on first appeal

9. The role of a first appellate Court was discussed in *Kamau v Mungai* (2006) 1 KLR 150, where it was held that:

this being the 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.
10. The court will keep the interdict in mind.



Jurisdiction

11. The appellant did not object to the jurisdiction of the Principal Magistrate up to the time of delivery of judgment.
12. It has now objected to the jurisdiction of the Principal Magistrate. It is now well settled that the question of jurisdiction can be raised any time, even on appeal and equally at the instance of the court.
13. In objecting to jurisdiction, the appellant asserted that the respondent was injured in the course of work and that since he filed the suit on 21 February 2017, when the [Work Injury Benefits Act](#) had come into operation, the dispute should have been placed before the Director, Occupational Safety and Health at the first instance.
14. The appellant relied on the Court of Appeal authority of the [Attorney General v Law Society of Kenya](#) (2017) eKLR, and which decision was upheld by the Supreme Court in [Law Society of Kenya v Attorney General & Ar](#) (2019) eKLR.
15. It cannot be disputed that section 16 of the [Work Injury Benefits Act](#) (the Act commenced in 2008) ousted the first instance jurisdiction of the Courts in claims arising from accidents, injuries or diseases occurring in the course of work or in the workplace.
16. The Law Society of Kenya felt that several sections of the Act including section 16 were invalid or unconstitutional, and it approached the High Court seeking orders of invalidity.
17. Before the determination of the petition by the High Court, the Law Society of Kenya sought interim orders.
18. On 22 May 2008, the High Court granted an order in the following terms:

I will order that, pending the hearing and determination of the main cause, all pending litigation which had been commenced on the basis of either the Workmen's Compensation Act or of the common law, or of a combination of both regimes of law, shall continue to be prosecuted and, in a proper case, finalised on the basis of the operative law prior to the entry into force of the [Work Injury Benefits Act](#), 2007....
19. The High Court eventually heard the Petition on the merits and on 4 March 2009, it issued a declaration that section 16 of the Act (amongst other sections) were inconsistent with [the Constitution](#) and, therefore, null and devoid of the status of law.
20. The judgment was appealed and the Court of Appeal overturned it on 17 November 2017.
21. However, of note is that pending the determination of the Appeal, the Court of Appeal did not stay the declaration of invalidity by the High Court (the Court of Appeal had dismissed a Motion seeking stay of execution (see Nairobi Civil Appl. No. 144 of 2009 (UR 97/2009) and reported as [Attorney General v Law Society of Kenya & Ar](#) (2009) eKLR).
22. The respondent herein approached the Principal Magistrates Court on 21 February 2017.
23. The state of the law as of 21 February 2017 was that section 16 of the [Work Injury Benefits Act](#) was invalid (judge made law).
24. The Court also note that the Chief Justice has issued Practice Directions Relating to Pending Court Claims regarding compensation for work related injuries and diseases instituted prior to the Supreme Court decision in [Law Society of Kenya v Attorney General and Another](#), Petition No. 4 of 2019 (2019) eKLR through Gazette Notice No. 5476 of 28 April 2023.



25. The directions underscore the jurisdiction of the courts in claims filed with the courts prior to the Supreme Court decision.
26. In light of the above, this court finds that the Principal Magistrates Court had the requisite jurisdiction at the material time to entertain the claim advanced by the respondent.

Assessment of general damages

27. The appellant wrongfully indicated in ground 1 of the amended memorandum of appeal that the Principal Magistrate awarded general damages of Kshs 1,750,000/-. The award was Kshs 1,000,000/-.
28. The appellant contended that the assessment and award of general damages of Kshs 1,000,000/- (before contributory liability) was excessive in the circumstances of the case and that the Principal Magistrate ignored precedent and the correct legal principles.
29. However, the appellant did not make any submissions in support of this ground of appeal.
30. The record indicates that the respondent sustained fractures of the acetabulum right limb and on the left ankle, and was admitted into hospital for about 13 days.
31. In assessing the damages, the Principal Magistrate relied on [*Jacinta Wanjiku v Samson Mwangi* \(2006\) eKLR](#).
32. In the aforesaid authority, the Plaintiff had sustained injury to his lumber spine of a serious nature, traumatic disc protrusion with spinal stenosis at L4/5 and L5/S1 levels. (3 medical reports were produced).
33. The injuries sustained by the party in the authority relied on by the Principal Magistrate were completely unlike the injuries sustained by the Respondent herein.
34. The Principal Magistrate, therefore, should not have relied or used it to assess the damages.
35. The Respondent did not file submissions before the Principal Magistrates Court but before this Court, he cited the authorities of [*Kimathi Muturi Donald v Kevin Ochieng Aseso* \(2021\) eKLR](#) and [*Wycliffe Omurwa Masanta v Easy Coach Ltd & Ar* \(2019\) eKLR](#).
36. These authorities do not aid the respondent's case as the injuries were more extensive.
37. In the Muturi case, the injuries were fracture of the upper tibia, fracture of the head of the right fibula and fracture of the floor of the socket of the left hip joint.
38. In the Masanta decision, the injuries were posterior dislocation of the right hip joint, traverse fracture of the right fibula, head injury, soft tissue injuries of the forehead, right periorbital haematoma, laceration on the lower lip and deep laceration and swelling on the left leg.
39. In [*Joseph Njeru Luke & Ors v Stella M. Kioko* \(2020\) eKLR](#), the plaintiff sustained a pelvic fracture and soft tissue injuries and was awarded Kshs 750,000/-.
40. The injuries in the Njeru Luke case were more or less similar to the instant case.
41. The court is, therefore, of the view that the award of Kshs 1,000,000/- was not inordinately excessive in the circumstances.

Special damages

42. The respondent had pleaded special damages of Kshs 4,383/- and was awarded the same.



43. The record indicates that the respondent produced receipts totalling Kshs 4,383/- comprising medical report and expenses and the same were admitted by consent of the parties.
44. The award of special damages was, therefore, grounded on the documentary evidence admitted by the appellant.

Conclusion and Orders

45. From the foregoing, the court holds:
- i. The Principal Magistrate's Court had jurisdiction.
 - ii. The assessment and award of general damages was not excessive.
46. The Court finds the Appeal has no merit.
47. The appeal is dismissed with costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 17TH DAY OF MAY 2023.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Appellant Onyinkwa & Co. Advocates

For Respondent Shem Kebogo & Co. Advocates

Court Assistant Chrispo Aura

