



**Zhongmei Engineering Group Ltd v Obiero (Appeal 1 of 2023)
[2023] KEELRC 1176 (KLR) (17 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1176 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL 1 OF 2023**

**S RADIDO, J
MAY 17, 2023**

BETWEEN
ZHONGMEI ENGINEERING GROUP LTD APPELLANT
AND
JAMES MATOKE OBIERO RESPONDENT

JUDGMENT

1. James Matoke Obiero (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 3 November 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 1 December 2021, the Principal Magistrate awarded the Respondent general damages of Kshs 1,312,500/- (after factoring contributory negligence), special damages of Kshs 101,000/- and future medical expenses of Kshs 75,000/-. 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 15 December 2021.
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/- 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/- 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/-.
 - (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 in spite 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 notes 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 contended that the assessment and award of general damages of Kshs 1,750,000/- (before contributory liability) was excessive in the circumstances of the case, and that the Principal Magistrate ignored precedent and the correct legal principles.
28. However, the Appellant did not make any submissions in support of this ground of appeal.
29. The record indicates that the Respondent sustained fracture of the limb spine and pelvis and was admitted into hospital for about 5 days.
30. In assessing the damages, the Principal Magistrate relied on Sammy Machoka Oira v Josphat Mwangi Kihuro & Ar [2008] eKLR.
31. In the case, 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).
32. 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.
33. The Principal Magistrate therefore should not have relied or used it to assess the damages.
34. The Respondent did not file submissions before the Principal Magistrates Court, but before this Court he relied on the authorities of Reginald Mpinda v Reuben Muthiora Johny [2022] eKLR and Kimathi Muturi Donald v Kevin Ochieng Aseso [2021] eKLR.
35. These authorities do not aid the Respondent's case as the injuries were more extensive.
36. 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.
37. In the Mpinda case, the injuries were oblique fracture on mid third ulna, nerve injury and wounds on both knees (there was 100% loss of function of the right upper limb).
38. 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/-.
39. The injuries in the Njeru Luke case were more or less similar to the instant case.
40. The Court agrees that the award of general damages was inordinately excessive.
41. The Court is, therefore, of the view that an award of Kshs 1,200,000/- would have been appropriate (before factoring consent liability).

Special damages

42. The Respondent had pleaded special damages of Kshs 127,500/- but was awarded Kshs 101,000/-.
43. The record indicates that the Respondent produced receipts totalling Kshs 101,000/- and the same were admitted by consent of the parties.
44. The award of this head of special damages was therefore grounded on the documentary evidence admitted by the Appellant.



Future medical expenses

45. The Appellant did not expressly challenge the award of future medical expenses. The record indicates that the medical report produced by the Respondent indicated that future surgery at a cost of Kshs 75,000/- would be required.
46. The Court will not disturb this award in the circumstances of the appeal.

Conclusion and Orders

47. From the foregoing, the Court holds:
- i. The Principal Magistrate's Court had jurisdiction.
 - ii. The assessment and award of general damages was excessive.
48. The Appeal only succeeds to the extent that the assessment and award of general damages of Kshs 1,750,000/- is set aside and substituted with an award of Kshs 1,200,000/- (Kshs 900,000/- after factoring in contributory liability).
49. The Appellant has partially succeeded. Each party to bear own costs of the appeal. The Respondent to have costs before the Principal Magistrate's Court.

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

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Appellant Onyinkwa & Co. Advocates

For Respondent Shem Kebogo & Co. Advocates

Court Assistant Chrispo Aura

