



**Oyuga v Harvest Limited (Appeal 2 of 2023)
[2023] KEELRC 1922 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1922 (KLR)

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

**B ONGAYA, J
JULY 28, 2023**

BETWEEN

WILSON ONYANGO OYUGA APPELLANT

AND

HARVEST LIMITED RESPONDENT

(Being an appeal from the judgment and decree of Hon. Y.A Shikanda, Senior Resident Magistrate, delivered on 29th September, 2018 in Civil Suit No. 237 OF 2010)

JUDGMENT

1. The appellant filed the memorandum of appeal dated 19.10.2018 in the High Court through Y. Jeruto & Co. Advocates. It was stated that the appellant appealed against the judgment delivered on September 26, 2018 (but the record shows September 29, 2018). The appellant stated that the trial court erred in law and fact and misdirected itself as follows:
 - a. By declining to exercise jurisdiction that is granted to it by the Constitution and statutes.
 - b. By failing to apply the Gazette Notice Number 9243 dated 27.07.2011 published in the Kenya Gazette on August 5, 2011 which is still in force and which had designated all courts in the 47 counties presided over by magistrates of the rank of Senior Resident Magistrate and above as special courts to hear and determine employment and labour relations cases within their jurisdictions.
 - c. By holding that no magistrate has been appointed pursuant to section 29(3) of the Employment and Labour Relations Act.
 - d. By holding that the magistrate's court had no jurisdiction because the same had not been granted under the Work Injury and Benefits Act.



- e. By relying on and applying a case or precedent that was decided based on the former (1969) Constitution of Kenya regarding the jurisdiction of the magistrate's court to determine disputes on work injury.
 - f. By misinterpreting sections 9 (b) of the Magistrates Court Act and section 29 of the Employment and Labour Relations Act.
2. The appellant prayed for orders:
 - a. That the appeal be allowed and a declaration be made to the extent that the Magistrate Court had jurisdiction to hear and determine the matter before it on work injury compensation.
 - b. The matter be referred back to the magistrate's court for substantive determination of the suit.
 - c. In the result the orders made by the learned magistrate be set aside.
 - d. The costs of the appeal be granted to the appellant against the respondent.
 - e. This honourable court be pleased to grant any or such other or further orders as it deems fit.
 3. The respondent filed submissions on the appeal on March 9, 2023 before the High Court through Masire & Mogusu Advocates.
 4. The appellant filed a Notice of Motion application dated 05.07.2021 for orders;
 - a. That the application be certified as urgent and service thereof dispensed with and the same be heard ex-parte in the same instance.
 - b. That the honourable court be pleased to transfer Civil Appeal No. 137 of 2018 from the High Court at Machakos to the Employment and Labour relations court at Nairobi for hearing and determination.
 - c. That the honourable court be pleased to make such further or other orders as it may deem fit and just to grant
 - d. That the costs of the application be in the cause
 5. By order issued on April 17, 2023 by Hon Lady Justice M.W. Muigai, the appeal was transferred to the ELRC for hearing and determination.
 6. The background to the appeal is as follows. The appellant filed the plaint on February 22, 2010. The appellant alleged that between September, 2002 and July, 2009 he was the respondent's employee and was tasked with spraying flowers with pesticides and in the course of spraying the appellant was exposed to considerable amount of the said pesticides. By consequence of the appellant inhaling the said pesticides he said he sustained severe injuries and suffered lung damage.
 7. The appellant alleged particulars of negligence and breach of the contract of the employment against the respondent. He prayed for judgment against the respondent for general damages; special damages of Kshs.2, 000; costs of the suit; and interest.
 8. The respondent opposed the suit and filed the defence on April 22, 2010. The respondent denied that the appellant was employed by the respondent. In alternative, the respondent stated that the injuries, loss and damage had been wholly or in part caused by the appellant, if at all, the appellant was its employee. The respondent pleaded particulars of contributory negligence on the part of the appellant. The respondent pleaded that the appellant voluntarily accepted the risk or injury resulting from each



and every one of the acts or omissions complained of in carrying out the work in issue. The respondent prayed that the appellant's suit be dismissed.

9. The learned trial Chief Magistrate delivered the judgment in the suit before the trial court in favour of the respondent and against the appellant for orders as follows:
 - a. The plaintiff's suit against the defendant is hereby dismissed for want of jurisdiction.
 - b. Costs of the suit.
10. The appellant filed submissions before this court on July 18, 2023 and urged the grounds set out in the memorandum of appeal.
11. The issue for determination in this appeal is whether the trial Court erred in finding that it lacked the necessary jurisdiction to hear and determine the suit.
12. It is submitted for the appellant that the effect of Kenya gazette notice number 9243 dated July 27, 2011 was in essence to allow the learned trial magistrate to exercise jurisdiction and hear the matter before him which was a work injury claim.
13. The appellant submits that as at the time of filing the suit at the lower court there was already a determination by the High court by Justice Ojwang in *Law society of Kenya v Attorney General & another* (2009)eKLR which inter alia made a finding that the impugned section 16 of the *Work Injury Benefits Act* (WIBA) as well as sections 4,7(1)(2), 10, 21(1), 23(1), 25(1)(3), 52(1)(2) and sections 58(2) of the WIBA were unconstitutional and as such that determination paved way for the institution of the proceedings in the lower court. Section 16 of WIBA provides that disputes about occupational injuries, diseases and deaths be determined in accordance with the procedures in WIBA and institution of suits in courts as of first instance is ousted.
14. That soon thereafter following the said determination by Justice Ojwang the then Chief Justice Willy Mutunga did issue a Gazette Notice no 9243 on 27.07.2011 in which he essentially appointed all magistrates from the rank of senior resident magistrate and above to hear work injuries related matters essentially conferring jurisdiction to the learned trial magistrate as far as the suit at the lower court is concerned.
15. That on July 24, 2018 Justice E.K.Ogola issued interim orders in the following terms;

“ That this honourable court be and is hereby pleased to issue a conservatory order in the form of a stay order staying the operation of the provisions of section 16,23,53(c) and 53(d) of the *Work Injury Benefits Act* no. 13 of 2007 and to give an interim relief allowing all cases by any litigants in the magistrate's courts of the Republic of Kenya arising from injuries at place of work to proceed for hearing, mention and or any action in furtherance of their hearing and determination and or conclusion and enforcement of the judgment delivered in the said cases pending the hearing and determination of the constitutional petition herein’.
16. That the effect of the said order highlighted aforesaid, essentially was to allow for the matter in the lower court to be allowed to proceed to its logical conclusion since after all the appellant did have a legitimate expectation to have his matter heard and determined judiciously.
17. Further, the appellant submitted that this honourable court ought to allow the instant appeal in light of the practise directions on work injury matters issued by the chief justice Martha Koome vide gazette notice no 1889 dated April 24, 2023 which at practise direction no 7 allows for the instant matter to be heard to its logical conclusion.



18. It was submitted for the respondent that the gazette notice number 9243 dated July 27, 2011 was published on August 5, 2011 and the suit before the trial court was filed sometime in February, 2010 as per the plaint. While the WIBA commencement date was June 2, 2008, two years before the institution of the suit.
19. The respondent submitted further that it was evident under section 16 of the WIBA that all matters concerning injuries sustained during work, be brought under WIBA, and that at the time of instituting this suit, the WIBA was in full effect, ousting any court of law the jurisdiction to entertain work injury claims unless the same was an appeal concerning the decision of the director work injury benefits.
20. Again it was submitted for the respondent that the trial magistrate applied his mind to the contradiction borne out of the gazette notice by the Chief Justice coupled with the failure to gazette the name of the magistrates to undertake these matters and section 16 and 58(2) of *WIBA*. It was submitted that the trial court correctly applied the law by concluding that the Chief Justice, respectfully, erred in law by exercising his powers to confer powers under one Act that was expressly prohibited by another, and it is indeed true that the Employment and Labour Relations Act confers powers to appoint magistrates' courts to handle employment matters but concerning work injuries, the WIBA expressly prohibits any court to handle such matters unless it is by way of appeal.
21. Further the respondent submitted that the Court of Appeal in Nairobi Civil Appeal no. 133 of 2011 *Attorney General v Law Society of Kenya & another* (2017) eKLR, affirmed the constitutionality of section 16 of WIBA which provision ousts the original jurisdiction of courts to hear and determine matters relating to a work injury.
22. The court has considered the elaborate submissions made for the parties. The court makes findings as follows.
23. The trial Court dismissed the appellant's suit against the respondent for want of jurisdiction and costs were awarded to the respondent. In doing so, the trial Court stated "The plaintiff elected the wrong forum for adjudication of the dispute. The upshot of the above considerations is that this court is devoid of jurisdiction to determine this claim. The plaintiff ought to have moved the Director of Work Injury Benefits pursuant to provisions of the *Work Injury Benefits Act*. On this ground alone, the suit must of necessity fail. Having found as such it would be futile to consider or determine the other issues." It is submitted for the appellant that the trial Court misdirected itself in disregarding Gazette Notice No. 9243 of 27.07.2011 which appointed all Magistrates in the rank of Senior Resident Magistrate and above to hear work injury related matters essentially conferring jurisdiction to the trial Magistrate as far as the suit was before the trial Court. The trial Court considered the provisions of the Gazette Notice issued under section 16(2) of the *Labour Institutions Act* which had been repealed but was similar to section 29(3) of the *Employment and Labour Relations Court Act*. Section 29 of the *Employment and Labour Relations Court Act* provides, in part, thus: (3) The Chief Justice may, by notice in the gazette, appoint certain magistrates to preside over cases involving employment and labour relations in respect of any area of the country. (4) Subject to article 169(2)(a) of *the Constitution*, the magistrates appointed under subsection (3) shall have jurisdiction and powers to handle— (a) disputes relating to offences defined in any Act of Parliament dealing with employment and labour relations; (b) any other dispute as may be designated in a Gazette notice by the Chief Justice on the advice of the Principal Judge.
24. In Gazette Notice No. 9243 of 27.07.2011, the Chief Justice specified that the matters to be presided over by magistrates of the rank of Senior Resident Magistrate and above would include work injury related matters and offences under the *Labour Institutions Act*, 2007; *Employment Act*, 2007; *Occupational Safety and Health Act*, 2007; and, the Labour Relations Act, 2007. The court finds that



the trial Court correctly found that despite the repeal of Section 16(2) of the *Labour Institutions Act*, the Gazette Notice had not been revoked by issuance of another Gazette notice as envisaged in section 27 of the *Employment and Labour Relations Court Act*, 2011. That finding was sound as it was per section 24 of the *Interpretation and General provisions Act* which states: Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder. The court finds that the trial court did not as well err in finding that the magistrates of the rank of Senior Resident Magistrates and above enjoyed jurisdiction to entertain cases per the jurisdiction given under the gazette notice. The court further finds that the trial court did not err when it found that, with due respect, the gazette notice could not confer valid jurisdiction to determine disputes of work injury claims because it was inconsistent with provisions of section 16 of WIBA which provides thus: No action shall lie by an employee or any dependent 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. In particular, the court returns that no subsidiary legislation shall be inconsistent with any primary statutory provision per section. The suit had been filed after WIBA had come into operation on December 20, 2007 and with respect of an injury said to have been continuing from September 2002 to July 2009 so that section 16 of WIBA duly applied as found by the trial court. However, the court finds that the trial court erred in finding that the gazette notice needed to appoint individual magistrates by name as it was sufficient that the appointment was by rank of all magistrates of and above Senior Resident Magistrate. There was no requirement of appointment by name stipulated in the enabling legislation. By the foregoing findings of the court and on the material before the trial court, the trial court did not err in finding that it did not have jurisdiction to entertain the suit.

25. It is submitted for the appellant that the trial court was bound by the High Court (Ogola) decision in *Juma Nyamawi Ndungo & 5 others v Attorney General; Mombasa Law Society (Interested Party)* [2019] eKLR where conservatory order had been issued on July 24, 2018 staying the operation of provisions of sections 16, 23, 53(c) and 53 (d) of *WIBA* and allowing all cases by any litigants in the magistrate's courts being injury claims to proceed for hearing and determination pending the hearing and determination of the petition therein. The court finds that when the trial court made its decision on September 29, 2018, there is nothing on record to suggest that the decision now invoked for the appellant was drawn to the attention of the trial court and urged as a basis for the trial court to assume jurisdiction.
26. The court returns that in view of the findings the grounds of appeal will collapse.
27. In view of the legal circuitousness surrounding constitutionality of WIBA and work injuries, each party to bear own costs of the appeal.

In conclusion, the appeal is disallowed and each party to bear own costs of the proceedings.

SIGNED, DATED AND DELIVERED IN COURT AT MACHAKOS THIS FRIDAY 28TH JULY, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

