



REPUBLIC OF KENYA



**West Kenya Sugar Co Ltd v Joshua (Employment and Labour Relations
Appeal E008 of 2021) [2023] KEELRC 1968 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1968 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E008 OF 2021**

JW KELI, J

JULY 27, 2023

BETWEEN

WEST KENYA SUGAR CO LTD APPELLANT

AND

SHIUNDU MUNGANYI JOSHUA RESPONDENT

*(Appeal against the Ruling and Order of Hon. Mildred Munyekenye
(SRM) delivered on the 14/7/2021 at Webuye PMCC No. 212/2017
between Shiundu Munganyi Joshua v West Kenya Sugar Co. Ltd)*

JUDGMENT

1. The Appellant being dissatisfied by Ruling and Order of Hon Mildred Munyekenye (SRM) delivered on the July 14, 2021 at Webuye PMCC No 212/2017 between Shiundu Munganyi Joshua v West Kenya Sugar Co Ltd filed Memorandum of Appeal dated July 24, 2021 vide record of appeal filed in court on the November 21, 2022 seeking the following orders:-
 - a. The Appeal herein be allowed and the order made on July 14, 2021 be set aside in its entirety.
 - b. That this Honorable court be pleased to order/hold that the sub-ordinate court has no jurisdiction to hear and determine Work Injury related claims in line with the provisions of section 16,23 and 53 of the [Work Injury Benefits Act](#) and in line with the court of Appeal decision in Civil Appeal No 133 of 20211 Hon Attorney General v Law Society of Kenya and Central Organization of Trade Unions
 - c. Cost of this Appeal be awarded to the Appellant.
2. The Appeal was premised on the following grounds:-
 - i. That the learned trial Magistrate erred in law and fact in making the aforementioned decision based on a complete misapprehension of the law.



- ii. That the learned trial Magistrate erred in law and fact in failing to hold that the court did not have jurisdiction to handle claims relating to work related injuries as provided in the *Work Injury Benefits Act* No 13 of 2017 which governs claims/ cases of that nature.
 - iii. That the learned trial Magistrate erred in law and fact in making a decision based on a misapprehension of the *Constitution* and the Supreme Court decision to wit:- Supreme Court in *Supreme Court Appeal No 4 of 2019 ; Law Society of Kenya v Hon Attorney General and Central Organization of Trade Unions(K)*.
 - iv. That the learned trial Magistrate erred in law and fact by failing in making the aforesaid decision without addressing himself to the law/statute from which the jurisdiction to handle work injury claims is derived from.
 - v. That the learned trial Magistrate erred in law and fact in making an erroneous decision that had no backing in law.
3. The court directed that the Appeal be canvassed by way of written submissions. The Appellant's written submissions drawn by Dennis Onyimbo Onyikwa Advocate instructed by M/S Onyinkwa & Co Advocates were dated May 17, 2023 and received in court on the May 19, 2023. The Respondent did not file submissions.

Background to the appeal

4. The Respondent filed a suit Webuye PMCC CASE NO 212 OF 2017 against the Respondent for injuries alleged to have been suffered at the workplace vide a Complaint dated November 3, 2017 seeking the following reliefs:-
- a. General damages
 - b. Special damages of Kshs 10,000/-.
 - c. Costs of this suit
 - d. Interest on (a), (b) and (c) above at court rates
 - e. Any other of further relief that this honourable court may deem fit and just to grant. (pages 3 & 22 of the record are all pleadings by the plaintiff before the lower court)
5. The Respondent entered appearance and filed defence and all their pleadings and documents (pages 23-35 is the defence case).
6. While the suit was pending the respondent/Appellant filed notice of preliminary objection dated March 10, 2020 pleading as follows:-
- i. That this honourable court has no jurisdiction to entertain, hear and/or determine the matter herein pursuant to the provisions of Section 16,23 (1) and 52 of the Work Injury Benefit Act.
 - ii. That this suit having been filed in the year 2017 was filed during the subsistence of the Work Injury Benefit Act not the Workmen's Compensation Act and/or common law and therefore the operative law herein is the Work Injury Benefit Act which mandates that litigation related to work injuries should be handled in the first instance by the Director of Occupational Safety and Health Services and not this honourable court.



NOTE : The Defendant at the hearing of the preliminary objection rely on the decision made by the Supreme Court in Supreme Court Appeal No 4 of 2019 Law Society of Kenya v Attorney General and Central Organisation of Trade Union (K)(page 91)

7. The trial court delivered a ruling on the notice of preliminary objection by the respondent /appellant on the July 14, 2021 (page 103-104) The ruling was to the effect that the magistrate court had jurisdiction to hear determine the case relying on the decision by Justice Radido in Kisumu ELRC APPEAL NO 4 OF 2019 *West Kenya Sugar Ltd v Tito Lucheli Tangale* where the court had held that cases filed between the period May 22, 2008 and December 3, 2019 were properly before the courts as there was legitimate expectation there had been no stay of the Order of the High Court(page 104).

Determination

Issues for determination.

8. The Appellant in their written submissions identified the following issues for determination:-
- Whether the learned trial magistrate completely misapprehended the law(ground 1)
 - Whether the learned trial magistrate had jurisdiction to determine the matter (ground 2 to 5)
 - Whether the respondent had legitimate expectation
9. The Court having read the impugned ruling, the memorandum of appeal considered the issues addressed by the appellant proper.
10. The Court sitting on appeal from trial court is guided by the settled law that it must reconsider the evidence, re-evaluate the evidence itself and draw its own conclusions bearing in mind it has neither seen or heard the witnesses and should make allowance for that fact. See *Selle & Another v Associated Motor Boat Co Ltd & Others (1948)EA123*. In the instant appeal, the impugned ruling is on matters of law so the court will re-evaluate the law and authorities relied on by the parties in determining the appeal.

In the instant case the court found the submissions similar to decided case in Kakamega ELRC Appeal No 20 of 2023 *West Kenya Sugar Ltd v George Mukubwa*(delivered on the June 29, 2023_ . The challenged decision was on a similar preliminary objection. The court pronounced itself on similar appeal and finds it's a waste of limited judiciary time to repeat itself. Consequently the court adopts the said judgment in KAKAMEGA ELRC APPEAL NO 20 OF 2023 *West Kenya Sugar Ltd v George Mukubwa* to apply in the instant appeal. In *George Mukubwa* appeal case the court in dismissing the appeal addressed the recent development in *Work Injury Benefits Act* case and adopts the decision to apply in the instant case as follows:-

Decision

11. The court issued hearing directions on the March 27, 2023 before the issuance of the practice directions in Kenya Gazette No 5476 issued on the April 28, 2023. The directions were issued by the Chief Justice and the President of the Supreme Court of Kenya under the legal framework of the *Constitution* of Kenya, the *Judicature Act*, the *Judicial Service Act*, the *Employment and Labour Relations Court Act* and the *Work Injury Benefits Act*. The practice directions state as follows:-

'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) ECLR



In Exercise of the powers conferred under Articles 159 (2) and 161 (2) (a) of the Constitution of Kenya, section 10 of the Judicature Act, and Section 5 (1) and 2 (c) of the Judicial Service Act, the Chief Justice issues the following Practice Directions—

Citation 1. The Practice Directions may be cited as 'Practice Directions relating to pending court claims for compensation for work related injuries and diseases instituted prior to the Supreme Court decision in *Law Society of Kenya v Attorney General & Another*, Petition No 4 of 2019; [2019] eKLR' (hereinafter referred to as the Supreme Court decision) Commencement

2. These Practice Directions shall come into force upon the date of issue.

Application 3. The Practice Directions shall apply to the Employment and Labour Relations Court and Magistrates appointed and gazetted by the Chief Justice pursuant to section 29 (3) and (4) of the Employment and Labour Relations Act, 2011 to preside over cases involving employment and labour relations.

Objectives 4. The Objectives of the Practice Directions are to—

- (a) consolidate and standardize practice and procedure in the Employment and Labour Relations Court and the Magistrates Courts in relation to claims for compensation for work related injuries and diseases instituted prior to the Supreme Court decision dated December 3, 2019, which are pending in courts;
- (b) enhance access to justice;
- (c) facilitate timely and efficient disposal of cases that were filed prior to the Supreme Court decision; and
- (d) ensure uniformity in court experience.

Judgment of the Supreme Court 5.

The Supreme Court vide a judgment rendered on December 3, 2019, determined that sections 16, 23 (1), 25 (1) and (3), 52 (1) and (2) as well as section 58 (2) of the Work Injury Benefits Act (WIBA) are consistent with the former Constitution and the Constitution 2010, specifically;

- (a) Section 16 as read with sections 23 and 52 of the WIBA does not limit access to courts but creates a statutory mechanism where any claim by an employee under the Act is subjected, initially, to a process of alternative dispute resolution mechanism starting with an investigation and award by the Director of Occupational Safety and Health Services and thereafter, under section 52 an appeal mechanism to the Employment and Labour Relations Court (formerly the Industrial Court).
- (b) Retrospective operation of statutes is not per se illegal or in contravention of the Constitution and section 58 (2) clearly expresses the intention that the Act shall apply retrospectively. Consequently, section 58 (2) of the Act does not take away the right to legal process, or extinguish access to the courts or to take away property rights without due process.
- (c) Be that as it may, claimants with pending cases have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process invoked (d) Also noting that many claims have not been finalized and due to passage of time, it has not been feasible to withdraw them and follow the alternative dispute resolution route. Further, considering the resolution passed by the Law Society of Kenya's meeting held on March 21, 2023 urging that practice directions be issued for all pending claims be finalized in the respective courts.



Consequently, 6. (a) All claims with respect to compensation for work related injuries and diseases filed in various courts before the commencement of WIBA shall proceed to conclusion under the Workmen's Compensation Act, Cap 236 (repealed).

- (b) All judgments and rulings relating to work related injuries claims pending before the Employment and Labour Relations Court and the Magistrates Court shall be delivered by the same court.

Claims Filed after Commencement of WIBA but before the Supreme Court decision 7. Taking into account that High Court vide its judgment dated March 4, 2009 in *Law Society of Kenya v. Attorney General & Another* [2009] eKLR declared some of the provisions in WIBA including Sections 16, 23(1) and 52, which prescribe the procedure for lodging claims under the Act unconstitutional. Consequently, the said declaration of nullity created a legitimate expectation that claimants could directly lodge claims for compensation for work related injuries and diseases in court. As such, litigants cannot be penalized for relying on the declaration of nullity, as appreciated by the Supreme Court in *Attorney-General and 2 Others v Ndiu and 79 Others; Prof Rosalind Dixon and 7 Others (Amicus Curiae) (Petition 12, 11 and 13 of 2021 (Consolidated))* [2022] KESC 8 (KLR) to lodge their claims in court. Therefore, (a) All claims with respect to compensation for work related injuries and diseases filed after the commencement of WIBA and before the Supreme Court decision at the Employment and Labour Relations Courts or the Magistrates' Courts shall proceed until conclusion before the said courts. (b) All pending judgments and rulings relating to compensation for work related injuries and diseases before the Employment and Labour Relations Court and the Magistrates' Courts shall be delivered by the same court.

Claims Filed after the Supreme Court Decision 8. (a) All claims with respect to compensation for work related injuries and diseases shall commence before the Director of Occupational Safety and Health Services. (b) All appeals emanating from the decision of the Director of Occupational Safety and Health Services shall lie before the Employment and Labour Relations Court. (c) Such appeal shall be heard and determined through the appropriate appellate mechanism within the judicial hierarchy.

Sanctions for Non-Compliance 9. Non-compliance with these Directions shall result in such penalty as the Courts may order.

Miscellaneous 10. The Chief Justice may amend these Practice Directions from time to time.

Dated the April 24, 2023.

Martha K Koome, Chief Justice and President of the Supreme Court.'

12. The court appreciates that the Chief Justice has authority to issue practice directions under Section 27 of the Employment and *Labour Relations Act* which reads:- '27. Rules and Regulations (1) The Chief Justice, make rules for regulating the practice and procedure of the Court. (2) Without prejudice to the generality of subsection (1), such rules may provide for— (a) regulating the sittings of the Court and the selection of Judges for any purpose; (b) prescribing forms and fees in respect of proceedings in the Court and regulating the costs of and incidental to any such proceedings; (c) prescribing the time within which any requirement of the rules is to be complied with; (ca) delegating judicial, quasi-judicial and non-judicial duties to the Registrar; and (d) any other matter required under this Act or any other written law.' The court finds that practice directions became necessary as this court took different positions on the interpretation of legitimate expectation of parties with cases before the



magistrate courts before the pronouncement of the court of Appeal and the Supreme Court on WIBA jurisdiction.

13. The practice directions address the fate of cases filed and pending in court post WIBA and before the Supreme court decision delivered on December 3, 2019. The court further observes there was a resolution passed by the Law Society of Kenya's meeting held on March 21, 2023 as stated in the directions, urging that practice directions be issued for all pending claims be finalized in the respective courts. The court finds that the foregoing Practice Directions would have given life to the cases like the instant one which the court would, save for the directions have struck out. The Constitution of Kenya in Article 159(1-2) provides for exercise of judicial authority as follows:-

' 159. Judicial authority (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution. (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles— '(a) justice shall be done to all, irrespective of status; '

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and (e) the purpose and principles of this Constitution shall be protected and promoted.'

14. The court is required to promote access to justice under Article 48 of the Constitution which reads:- 'The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.'

15. The court in exercise of its judicial power in the matter then finds the question would be whether the appellant would suffer any prejudice pursuant to the Practice Directions. Article 159 (2)(d) provides that justice shall be administered without undue regard to procedural technicalities and that means the court should focus on substantive justice. There is no tangible prejudice to be suffered by the appellant in the instant case. The magistrates have same capacity as the Director if not better due to experience to handle work injury claims which involves assessment of damages a routine duty of the lower courts.

16. The court finds by doctrine of necessity the WIBA practice directions as gazetted by the Chief Justice pass muster in the eyes of the court so as to promote access to justice to litigants who are caught up with WIBA cases filed in court in the period between Justice Ojwang decision and the Supreme Court decision. In the upshot the practice directions having expressly granted jurisdiction to the magistrates to handle WIBA matters filed in court before the delivery of the Supreme Court decision of December 3, 2019, then the appeal fails.

Whether the learned trial magistrate has jurisdiction to determine the matter (ground 1 to 5)

17. The answer on issue of jurisdiction then is that pursuant to the Chief Justice and President of the Supreme Court Practice Directions Vide Gazette Notice No 5476 issued on the April 28, 2023 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) e KLR, the magistrates courts are now clothed with jurisdiction in work related injuries and disease claims pending in court before the delivery of the Supreme Court decision in *Law Society of Kenya v Attorney General And Another*, Petition No 4 Of 2019 on December 3, 2019.



Conclusion

18. In the upshot the appeal dated September 6, 2021 is hereby dismissed for the foregoing reason of the Chief Justice practice directions vide Gazette Notice No 5476 issued on the April 28, 2023 to effect that WIBA matters filed before the delivery of the Supreme Court decision on the December 3, 2019 be heard and determined by the magistrates.
19. The court to temper justice with mercy in view of the recent development of the practice directions issued while the appeal was pending, orders each party to bear own costs in the appeal.
20. It is so ordered.”
21. I adopt the foregoing decision with approval to apply in the instant appeal.

Conclusion

21. In the upshot the appeal dated July 24, 2021 is hereby dismissed for the foregoing reason of the Chief Justice practice directions vide Gazette Notice No 5476 issued on the April 28, 2023 to effect that WIBA matters filed before the delivery of the Supreme Court decision on the December 3, 2019 be heard and determined by the magistrates.
22. The court to temper justice with mercy in view of the recent development of the practice directions issued while the appeal was pending, orders each party to bear own costs in the appeal.
23. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT KAKAMEGA THIS 27TH JULY 2023.

JEMIMAH KELI,

JUDGE.

In The Presence Of:-

Court Assistant : Brenda

For Appellant : Ms. Nyabuto

For Respondent:- Mulama

