



**S. S. Mehta & Sons Limited v Dida (Appeal 13 of 2023)
[2023] KEELRC 1917 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1917 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL 13 OF 2023**

**M MBARŪ, J
JULY 13, 2023**

BETWEEN

S. S. MEHTA & SONS LIMITED APPELLANT

AND

GASPER TSORI DIDA RESPONDENT

(Being an appeal from the judgment and decree of the Hon. G. Kiage in Civil Suit No. 1571 of 2017 in Chief Magistrates Mombasa delivered on 27 February 2020)

JUDGMENT

1. The background of this appeal is a claim filed by the respondent herein in Mombasa Magistrates Court civil case No.1571 of 2017 on the grounds that he was employed by the appellant as a compressing machine operator and it was the duty of the appellant to ensure work safety but on 29 August 2012, the respondent, while on duty at Jaribuni, when a colleague was filling a tyre, the pressure exceeded limit causing it to burst occasioning him severe injuries. The claim was that such injury arose out of negligence and duty of the appellant to provide a safe working environment and leading to loss of the right eye, multiple injuries to the head and for which he held the appellant liable.
2. In response, the appellant's case was that the respondent was on duty when he had an accident by reason of failing to take precautions and own safety measure while at work.
3. The trial court heard the parties and in the judgment delivered on 27 February 2020 and held liability at 10:90% for the claimant and respondent respectively; general damages awarded at Ksh.2,000,000, special damages Ksh.2,000 less 10% all at ksh.1,961,960.
4. Aggrieved, the appellant's appeal on the grounds that the trial court failed to consider that the claim was time barred under section 4(1) of the *Limitation of Action Act* and section 90 of the *Employment Act* by reason of the fact that the accident occurred on 29 August 2012 and the claim was filed on 18



September 2017 well after 3 years from the date the cause of action arose. The suit ought to have been filed before 28 August 2015.

5. Other grounds of appeal are that the finding on liability at 10%:90% contributory negligence was in error as the evidence submitted was not considered and that the respondent was the author of his own misfortune for failing to take his own safety while at work. Despite being provided with work tool, he failed to use a helmet and goggles.
6. The trial court failed to consider section 13 (1) of the [Occupational Safety and Health Act](#) and the award of Ksh.2,000,000 in general damages was excessive and contrary to the general principles of law. there is no justification as to how such an amount was arrived at and the judgment should be set aside.
7. Both parties agreed to address the appeal by way of written submissions.
8. The appellant submitted that the leaned magistrate had no jurisdiction to hear or determine the claim which related to work injury that occurred on 29 August 2012 and the suit was only filed on 18 September 2017. The claim ought to have been filed with the Director of Occupational Safety and Health Services (Director) as provided for under the [Work Injury Benefits Act](#) (WIBA). The apportionment of liability at 90% liability for the work injury is against the weight of the evidence submitted and inordinately high.
9. Without jurisdiction to hear and determine the suit, the appeal should be allowed. In [South Nyanza Sugar Company Limited v Joshua Aloo Aloo](#) [2021] eKLR the court held that limitation is a jurisdictional issue and should be considered even if it is not pleaded. The trial court should not have heard the suit for want of jurisdiction since it related to work injury and under section 4(1) of the [Limitation of Actions Act](#), any claim under WIBA should be initiated with the Director and without jurisdiction, the trial court ought to have stopped. The respondent should have filed the claim within 3 years within the meaning of section 90 of the [Employment Act](#) if the complaint was not filed with the Director.
10. In the case of [Law Society of Kenya v Attorney General & another](#) [2019] eKLR the Supreme Court held that all work injury claims should be filed first with the Director.
11. The respondent submitted that the trial court had jurisdiction to hear and determine the claim before it in line with WIBA. The cause of action arose on 28 August 2012 and the suit filed on 18 September 2017 and upon obtaining leave in Misc. Civil Application No.962 of 2017 which leave was granted on 17 October 2017 and which was allowed by the trial court. in [Law Society of Kenya v Attorney General & another](#) [2019] eKLR this arose after litigants challenging WIBA and jurisdictional questions which have since been addressed after this claim had been filed. Upon getting leave, the claim is properly before the court.
12. The respondent submitted that the trial court applied the evidence before it is assessing general damages as held in [Elizabeth O Odhiambo v South Nyanza Sugar Co Limited](#) [2019] eKLR that upon admitting the pleadings as filed, the decision given on a claim or defence should be applied accordingly and this appeal should be dismissed with costs.

Determination

13. This being a first appeal, this court is mandated in law to consider this appeal by way of re-hearing the evidence adduced before the trial court both on matters of law and on matters of fact as held by the Court of Appeal in the case of *Selle versus Associated Motor Boat Co.* [1968] EA 123.



14. The jurisdiction of the trial court is challenged on the basis of section 4(1) of the [Limitation of Action Act](#) read together with section 90 of the [Employment Act](#).
15. The claim before the trial court arose on 29 August 2012 following a work injury to the respondent. He filed his claim on 18 September 2017 after obtaining leave to file suit out of time in Misc. Civil Suit No.962 of 2017 (O.S) and leave granted on 17 October 2017. Leave was granted under the provisions of order 37 rule 6(1) of the [Civil Procedure Rules](#) and section 27 of the [Limitation of Actions Act](#).
16. Indeed, the litigation leading to the Supreme Court judgment in [Law Society of Kenya v Attorney General & COTU](#) [2019] eKLR is evidence of the terrain that litigants have had to walk. It has been rough, back and forth. This has culminated into the Chief Justice Practice Directions issued on 24 April 2023 through Gazette Notice No.5476 under the [Judicature Act](#)—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 and that;
 - (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.
17. Upon these directions, any claim filed as per the required procedure, the legitimate expectation is that it should be dully addressed as per the jurisdiction invoked. Indeed, the practice prior to Law Society of Kenya v Attorney-General and Another, Petition No. 4 of 2019 was for parties seeking in work injury to apply the [Civil Procedure Act](#) and the Rules thereto in commencing suits. A case seeking compensation for work injury being treated as an ordinary suit filed in terms of the Limitations of Actions Act and which allow for extension of time to file suit for good cause and once the trial court was satisfied that the due procedure was applied, nothing stopped the hearing of the parties on the merit.
18. Parties are now guided, all claims emanating from the shop floor and relating to work injury ought to commence under the mechanism outlined under WIBA.
19. The respondent and the learned magistrate cannot be faulted from invoking the available mechanism as of 19 September 2017. A suit filed at the lower court and where time had lapsed, the [Limitation of Actions Act](#) allowed for extension of time.
20. In this regard, the application of section 90 of the [Employment Act](#), 2007 by the appellant is a misnomer.



21. With regard to the award of general damages, the trial court was challenged as having an excessively high award of Ksh.2,000,000 without giving any reasons.
22. In the judgment delivered on 25 February 2020, the learned magistrate held that the respondent had proposed an award of Ksh.2,000,000 and relied on the case of ... the respondent on the other hand proposed an award of Ksh.500,000. The proposal by the respondent was adopted in its entirety.
23. Award of damages in work injury claims is discretionary based on the pleadings, the evidence and the law. The given award must be justified and the discretion bestowed on the court applied judicially. The court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders.
25. This position is amplified in the case of *George Kimotho Ilewe v Joseph Mathuku Ngewa & another* [2022] eKLR that;

... an exercise of discretion and just like any other exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously
26. And in the case of *Stephen Mwallyo Mbondo v County Government of Kilifi* [2021] eKLR the court held that;

“An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice”
27. The parties filed their detailed written submissions, relied on caselaw and with regard to injury and loss of the right eye, head injury and multiple skull fractures with frontal right meteoroid and right maxillary sinus haematoma, in the case of *Elizaphen Mokaya Bogonko v Fredrick Omondi Ouna* [2022] eKLR, following injury to the right eye and head fractures following injury in November 2019 and general damages were assessed at Ksh.850,000. In the case of *GA (Minor suing thro' her father and next friend BZ) v Paul Mutbiku* [2020] eKLR where the High Court increased an award of Ksh 300,000 to Ksh 500,000.00 in general damages in a case where the injury related to a skull fracture and other injuries. In Machakos HCCA No. 312 of 2009, *Isaac Waweru Mundia v Kiilu Kakie Ndeti T/A Wikwatyo Services* in which the plaintiff was awarded Ksh. 1,000,000/- general damages for fracture of base of skull at the mandible, coupled with multiple soft tissue injuries. The case was decided in 2012.
28. Similarly in this case, an award of Ksh.1,000,000 is found appropriate on the apportioned liability of 10% for the respondent and 90% for the appellant.
29. Accordingly, the appeal is partially successful on the award of general damages and the lower court's award of general damages in the sum of Ksh 2,000,000 is hereby set aside and substituted with the award of Ksh 1,000,000 general damages. For this appeal, each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 13 DAY OF JULY, 2023.

M. MBARŪ

JUDGE



In the presence of:

Court Assistant: Japhet Muthaine

..... and

