



REPUBLIC OF KENYA



KENYA LAW
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**Prime Steel Company Limited v Ochola (Appeal E001 of 2021)
[2023] KEELRC 1615 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1615 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E001 OF 2021**

CN BAARI, J

JULY 6, 2023

BETWEEN

PRIME STEEL COMPANY LIMITED APPELLANT

AND

ALEX OLIVER OCHOLA RESPONDENT

(Appeal from the Judgment and Decree of the Hon. P.K. Rugut, Principal Magistrate, Tamu in Tamu PMCC No. 14 of 2018 delivered on 3rd December, 2020)

JUDGMENT

1. The appeal herein arises from a Judgment rendered on December 3, 2020, where the Trial Court allowed the Respondent's claim and apportioned liability in the ratio of 80:20 in favour of the Claimant.
2. The Appellant being aggrieved by the decision of the Trial Court, lodged this appeal on January 13, 2021.
3. The appeal is premised on the following grounds:
 - i. The Learned Trial Magistrate grossly misdirected himself in treating the evidence and submissions on liability before him superficially and consequently coming to a wrong conclusion on the same.
 - ii. The Learned Trial Magistrate erred in failing to take judicial notice that the court lacked jurisdiction to hear and determine the claim this being a work injury claim.
 - iii. The Learned Trial Magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.



- iv. The Learned Trial Magistrate misdirected himself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the Appellant.
 - v. The Learned Trial Magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the Appellant.
 - vi. The Learned Trial Magistrate erred in failing to hold that the Respondent had failed to prove negligence on the part of the Appellant while the onus of proof lay with the Respondent.
 - vii. The Learned Trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent (if any) and failed to apply precedents and tenets of law applicable.
 - viii. The Learned Trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis-à-vis the Respondent's claim.
 - ix. The Learned Trial Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.
4. Parties sought to canvass the appeal through written submissions, and submissions were filed for both parties.

The Appellant's Submissions

5. It is submitted for the Appellant that the suit herein vide the plaint dated January 10, 2018, was filed on January 30, 2018, whereas the *Work Injury Benefits Act* (WIBA) became operational on June 2, 2008 therefore the Respondent herein lacked legitimate expectation to be heard to conclusion by the Hon. Trial Magistrate.
6. It is the Appellant's further submission that the suit herein ought to have been filed before the Director of Occupational Safety and Health Services as the same was instituted when WIBA was in force. The Appellant had reliance in the decision of the Court of Appeal in Petition No 4 of 2019 – *Law Society of Kenya v Attorney General & Another* [2019] eKLR to support this position.
7. The Appellant submits that the suit herein was heard and determined by the Trial Court when it had no jurisdiction over the matter, hence the entire decision of the Trial Court is null and void and the appeal should therefore be allowed with costs, and the judgment of the Hon. Trial Magistrate be set aside. The Appellant sought to rely in *West Kenya Co Ltd v Joshua Mbasu Shirandula* [2022] for the holding that:

“In view of the foregoing the binding decision of the Supreme Court in *Law Society of Kenya v Attorney General & another* [2019] eKLR vide Petition No 4 of 2019 on all work injury related claims post entry into force of WIBA lying with the Director and only exception on legitimate expectation basis being with respect to litigation pending before court prior to entry in force of WIBA that is 2nd June 2008, the instant suit having been filed on the 6th November 2017, the court finds and determines merit in the appeal and finds that the magistrate court erred in holding it had jurisdiction to hear and determine the suit”.
8. It is the Appellant's submission that the Respondent was not able to establish nexus between his injuries and the purported negligence of the Appellant, and that injuries alone are not sufficient to hold one liable for the same.



9. The Appellant submitted that the Claimant/Respondent failed to prove existence of an employment relationship between himself and the Appellant, as at the date of the purported accident. It is its submission that no contract of employment or pay-slip was produced in court to show that the Respondent was an employee of the Appellant.
10. It is the Appellant's further submission that it owed the Respondent no duty of care, and should not have been held liable for the injuries of the Respondent if at all he sustained any injury.
11. The Appellant submits that the purported consent order on liability adopted on November 12, 2020, was adopted without the instructions of the Appellant, and as such, it was a mistake on the part of the advocate who held brief for the Appellant's advocate, and a mistakes of an advocate should not be visited upon the client. It had reliance in *Lucy Bosire v Kehancha Div Land Dispute Tribunal & 2 others* [2013] eKLR to buttress this position.
12. The Appellant submitted that the award of general damages at Kshs.200,000.00 by the Trial Magistrate was inordinately high and calls upon this Honourable Court to reassess the award for general damages downwards putting into consideration that the injuries sustained by the Respondent were just two soft tissue injury to the 2nd and 3rd fingers of the right hand and nothing more.
13. It is the Appellant's submission that the Respondent should be awarded Kshs.150,000.00 in general damages as was submitted in the Defendant's written submissions.
14. The Appellant prays that this Court allows the appeal and set aside the orders of the Trial Court.

The Respondent's Submissions

15. The Respondent submits that the issue of jurisdiction of the Magistrate's Court to handle WIBA cases, and the test of constitutionality of the WIBA statute, was determined by the High Court in the case of *Juma Nyamawi Ndungo & 5 Others v Attorney General; Mombasa Law Society (Interested Party)* [2019] eKLR. It is his submission that the assertion that the Trial Court did not have jurisdiction to determine the matter is unfounded.
16. It is the Respondent's submission that the final determination of the Petition did not in any way vacate the interim orders that were issued in the Petitioners Application dated July 16, 2018, and the Trial Court cannot be said to have lacked the jurisdiction when it heard the Respondent's case to its logical conclusion.
17. It is the Respondent's submission that the Trial Court relied on the Medical Report that was produced in court when calculating the quantum, and thereby awarding Kshs.250,000.00 as general damages, less 20% contribution. It is his further submission that the final award after deducting 20% was Kshs.200,000.00 which award he submits is too low as compared to the injuries that were sustained by the Respondent.
18. It is the Respondent's submission that the Trial Court rightly analyzed the injuries sustained by the Respondent before pronouncing the impugned award.
19. The Respondent finally submits that the Trial Court did not err and urge that this Court upholds the decision and dismiss the appeal.

Analysis and Determination

20. I have considered the Appellant's Record of Appeal together with the submissions by both parties. The grounds of appeal are summarized as follows:



- i. Whether the Trial Magistrate had jurisdiction to hear and determine the claim this being a work injury claim.
 - ii. Whether the Trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent and failed to apply precedents and tenets of law applicable.
21. The role of this Court in a first appeal is to re-evaluate, re-assess and re-analyse the record of appeal, and judiciously exercise discretion on whether or not to uphold the decision of the Trial Court.
 22. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated thus: -

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”
 23. The Appellant’s contention is that the suit herein ought to have been filed before the Director of Occupational Safety and Health Services as the suit was instituted when the *Work Injury Benefits Act* was in force.
 24. The Appellant further argued that the suit having been heard and determined by the Trial Court when it had no jurisdiction, renders the entire decision of the Trial Court null and void.
 25. The Respondent on his part, submitted that the issue of jurisdiction of the Magistrate’s Court to handle WIBA cases, and the test of constitutionality of the WIBA statute, was determined by the High Court in the case of *Juma Nyamawi Ndungo & 5 Others v Attorney General; Mombasa Law Society (Interested Party)* [2019] eKLR, and hence the assertion that the Trial Court did not have jurisdiction to determine the matter is unfounded.
 26. This Court is alive to the confusion brought about by the different decisions of superior courts on matters arising from the *Work Injury Benefits Act* (WIBA). This suit was filed in 2018, a year before the decisions of the Court of Appeal and the Supreme Court that upheld the Constitutionality of the WIBA.
 27. Further, the Chief Justice vide Gazette Notice No 5476 of April 24, 2023, issued Practice directions relating to Pending Court Claims regarding compensation of 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. Clause 7 of the Practice Directions states thus: -

“Taking into account that High Court vide its judgment dated 4th March, 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 Ndiir 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.”
28. Considering that the Respondent's claim was lodged at the Magistrate's Court January 30, 2018, and the Supreme Court judgment rendered on December 3, 2019, it follows that the Trial Court by dint of this practice directions, had jurisdiction to hear and determine the matter on account of legitimate expectation created by the declaration of nullity.
29. On the question of the award granted by the Trial Court, it is apparent from the record of appeal that parties did compromise on liability in favour of the Respondent herein, at 80:20 on November 12, 2020.
30. Further, the Appellant in its submission conceded that the Respondent ought to have been awarded Kshs.150,000.00 in general damages, and not Kshs. 200,000. This in my view is an admission of liability on the part of the Appellant, and the amount awarded was solely at the discretion of the trial Court.
31. In arriving at its award, the Trial Court stated thus: -
- “In light of the injuries suffered, the rate of inflation, the current cost of living, the amounts today would be higher than in the awards given in the cases quoted by the defendant's counsel...”
32. The Trial Court in my view, sufficiently explained its deviation from the awards previously made for similar injuries. Consequently, I find no reason to interfere with the award by the Trial Court.
33. In whole, I find the appeal lacking in merit and is hereby dismissed with costs.
34. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 6TH DAY OF JULY, 2023.

C. N. BAARI

JUDGE

Appearance:

Mr. Otieno Njoga present for the Appellant

Ms. Oriche present for the Respondent

MS. Christine Omolo - Court Assistant.

