



Wachira Builders Limited v Lwiki (Employment and Labour Relations Appeal E048 of 2021) [2023] KEELRC 2011 (KLR) (4 August 2023) (Judgment)

Neutral citation: [2023] KEELRC 2011 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E048 OF 2021**

**B ONGAYA, J
AUGUST 4, 2023**

BETWEEN

WACHIRA BUILDERS LIMITED APPELLANT

AND

EVANS WAFULA LWIKI RESPONDENT

(Being an appeal from the Judgment and Decree by Honourable P. Muholi, Principal Magistrate delivered on 31.05.2021 in CMCC No. 753 of 2018 at Nairobi)

JUDGMENT

1. The appellant filed the amended memorandum of appeal on January 9, 2023 through the firm of Mumo & Kanjama Advocates. The appellant appeals against the trial court's judgment delivered on March 31, 2021 (by Hon. P. Muholi, the learned trial Magistrate) and upon the grounds that he erred in law as follows:
 - a. Holding that the defendant was 100% liable for the accident or at all when there was clear and overriding evidence to the contrary.
 - b. Failing to take into account the impeccable evidence of the defense, submissions and relevant authorities and thereby arriving at a wrong and erroneous conclusion condemning the defendant to 100% liability and or at all.
 - c. Awarding damages that were inordinately high in favour of the plaintiff without any legal and or evidential justification.
 - d. Failing to appreciate as follows:
 - i. That the evidence adduced in support of the plaintiff's case was incongruous with the pleadings which were at variance with the testimony adduced.



- ii. That the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining any award of damages.
 - e. Entering judgment in favour of the plaintiff against the defendant in spite of the plaintiff's failure to establish his case on a balance of probability especially on the issue of negligence.
 - f. Making an award of future medical expenses which was manifestly excessive in the circumstances of the case.
 - g. Failing to appreciate the legal position that there could be no liability without fault.
 - h. Since the lower court did not have jurisdiction to hear and determine the matter.
2. The appellant prayed for the following orders:
 - a. This appeal be allowed.
 - b. That the Judgment and decree of the Honourable P. Muholi (PM) delivered on March 30, 2021 be set aside and the plaintiff's suit in CMCC No. 753 of 2018 be dismissed with costs.
 - c. That the costs of the appeal be awarded to the appellant.
 3. Both the appellant and the respondent filed their respective submissions to the appeal.
 4. The respondent filed suit against the appellant herein vide the plaint filed on February 9, 2018. His case was as follows. He was an employee of the appellant as a hand helper on casual basis. That he was injured while on lawful duties at the appellant's premises on August 4, 2016.
 5. The respondent blamed the appellant for the accident for breach of its statutory duties by assigning him duties to carry sand for construction using a bag when the wooden scaffolding broke making him to fall to the ground and as a result suffered injuries which included a fracture to the humerus, a cut wound to the left leg and blunt trauma to the head.
 6. The respondent averred that he subsequently underwent surgery at the Kenyatta National Hospital where metal plates were inserted and that he will need future medical expenses of Kshs.100,000/- for its removal. He testified as to the circumstances surrounding the accident and urged the trial court to find the appellant to blame for the accident and allow his claim as pleaded in the plaint.
 7. In its defense, the appellant admitted having employed the respondent herein. However, it maintained that it was not to blame for the accident that occurred on August 4, 2016 and that the respondent was injured during a frolic of his own. The appellant maintains that the respondent was to blame for the accident as he decided to use the wooden scaffold going down and later decided to jump off and as a result sustained the injuries as pleaded in his plaint.
 8. The appellant's witness (DW1) in his testimony stated that he was not present at the time of the accident and that his evidence was on the basis of what he had been told by his supervisor (who was not called to testify).
 9. The trial Court in its judgment found the appellant 100% liable for the accident and awarded the respondent Kshs.1,050,000/- as general damages for pain and suffering, Kshs. 2,000/- as special damages and Kshs.100,000/- in future medical expenses.
 10. Aggrieved by the trial court's decision the appellant filed the instant appeal raising the grounds as earlier enumerated herein above.



11. As the court of first appeal, this court is guided by the findings in the case of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 where the court stated:

“This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Sarif v Ali Mohammed Solan* [1955] 22 EACA 270).”

12. The 1st issue is whether the trial court lacked jurisdiction to entertain and determine the suit. It is submitted for the appellant that the trial court lacked jurisdiction because section 16 of the *Work Injury Benefits Act* (WIBA) barred filing of the injury claim before the trial court. The suit was filed on February 9, 2018 long after the decision by the Court of Appeal on November 17, 2017 affirmed constitutionality of *WIBA* in *Attorney General v Law Society of Kenya & another* [2017]eKLR. The Court of Appeal decision was subsequently affirmed by the Supreme Court. section 16 of *WIBA* states: No action shall lie by an employee or any dependant 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.

13. For the respondent, it is submitted that section 16 of *WIBA* does not apply because in gazette notice No. 99 of April 28, 2023 the Chief Justice gave practice directions relating to pending court claims regarding compensation for work related injuries and diseases instituted prior to Supreme Court decision in *Law Society of Kenya v Attorney General & another*, Petition 4 of 2019. The court finds that the present appeal is a matter pending before the court in terms of the practice not and must be decided upon its merits. The jurisdictional issue as raised for the appellant is one such consideration of merits of the appeal. The respondent has not offered any good ground of failure to comply with the section 16 of *WIBA* and per the Court of Appeal decision cited for the appellant. The court finds that the trial court lacked jurisdiction to hear and determine the suit as the trial court was as well bound by the decision by the Court of Appeal cited for the appellant. Upon that finding the trial court’s decision is found to have been a nullity and in which case there is no valid trial court decision upon which the grounds in the memorandum of appeal would be urged and considered. The appeal will succeed with costs.

14. In conclusion the appeal herein is determined with orders:

1. The declaration the trial court lacked jurisdiction to hear and determine the suit as the impugned judgment of the trial court herein is a nullity and thus void.
2. The purported decree and all processes flowing from the purported judgment of the trial court herein is set aside as essentially vacuous and nullity.
3. The respondent to pay the costs of the appellant both for the appeal and proceedings before the trial court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 04TH AUGUST, 2023.

BYRAM ONGAYA



PRINCIPAL JUDGE

