



**Shreeji Enterprises [K] Limited v Wainaina (Appeal E025 of 2022)
[2023] KEELRC 2354 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2354 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E025 OF 2022
AK NZEI, J
SEPTEMBER 29, 2023**

BETWEEN

SHREEJI ENTERPRISES [K] LIMITED APPELLANT

AND

NAHASHON MUNGA WAINAINA RESPONDENT

(Being an appeal from the judgment and decree of CM's Court at Voi by Hon. T. N. Sinkiyian –[SRM] made on 23rd March 2022 in Voi CMCC No, 165 of 2018)

JUDGMENT

1. The Appellant was the Respondent in Voi Chief Magistrate's Court Case No. 165 of 2018 whereby the Respondent herein had sued it vide a plaint dated June 12, 2018. It had been pleaded in the said plaint:-
 - a. that the Respondent was the Appellant's employee, employed by the Appellant as a truck driver with the responsibility of transporting goods belonging to the Appellant from the Port of Mombasa to the Appellant's business premises situated in Nairobi, or to any other destination depending on instructions given by the Appellant.
 - b. that on February 27, 2016, while in the cause of employment with the Appellant, the Respondent was involved in an accident along Mombasa Voi Road while driving motor vehicle Reg. No. KBY 370G from Nairobi to Mombasa to collect cargo for the Appellant, when he lost control of the said vehicle after its brakes malfunctioned and/or failed due to a mechanical problem, forcing the said vehicle to crush into a lorry/trailer Reg. No. CHS A8EA018441; as a consequence whereof the Respondent sustained grievous bodily injuries and suffered loss and damage.
 - c. that the Appellant and/or its authorized agents failed and or neglected its statutory duties of ensuring that motor vehicle Reg. No. KBY 370G was mechanically sound and was fully



serviced prior to allowing the Respondent to drive it to Mombasa. Particulars of negligence were set out in the plaint).

- d. that as a result of the Appellant's negligence, the Respondent sustained serious injuries, which were particularized in the plaint as blunt abdominal (injury with perforation of colon with peritonitis and spinal injury with paraplegia both lower limbs).
 - e. that the Respondent suffered loss and damage as a result of the said injuries (special damages amounting to ksh. 225,650 were particularized in the plaint).
 - f. that despite having completed the ML/DOSH/FORM 1 for purposes of compensating the Respondent under the Work Injury Benefits Act, the Appellant had refused and/or neglected to make payment.
2. The Respondent sought the following reliefs against the Appellant:-
- a. Special damagesksh. 225,650
 - b. General damages.
 - c. Costs of the suit.
 - d. Interest on (a) and (b) from the date of filing suit.
 - e. Any other or further relief that the Court may deem fit and just to grant.
3. Other documents filed by the Respondent included an affidavit in verification of the plaint, the Respondent's written witness statement and a list of documents dated June 12, 2018, listing 7 documents. The listed documents included a search on motor vehicle Reg No. KBY 370G, a police abstract, a medical report (by Dr. Moses Kinuthia dated May 26, 2017), receipts in support of special damages, various treatment notes/reports, ML/DOSH FORM 1 and a discharge summary.
4. The Appellant defended the suit vide a written statement of defence dated July 12, 2018 whereby it admitted having employed the Respondent as pleaded by him, but denied all the other allegations made in the plaint; putting the Respondent to strict proof of his allegations.
5. The Appellant specifically denied the applicability of the Work Injury Benefits Act and the Occupational Safety Health Act to the Respondent's suit, and further pleaded, in the alternative, that if any accident occurred, which the Appellant denied, then the same was caused and/or contributed by the negligence or omission on the part of the Respondent and the owner of motor vehicle Reg. No. [CHS] A8FA01884. (particulars of negligence on the part of both were set out in the Appellant's written statement of defence).
6. The Appellant further pleaded that the Respondent's suit was frivolous, vexatious and an abuse of the Court's process, and called for it to be dismissed with costs. The Appellant, however, submitted itself to the trial court's jurisdiction.
7. Trial before the trial Court is shown to have opened on November 11, 2021 when the Respondent testified and adopted his written statement as his testimony. He was cross-examined and re-examined. The Appellant closed its case without calling evidence, upon which both parties filed written submissions. The trial Court delivered its judgment in favour of the Respondent on March 23, 2022, awarding him a total of ksh. 6,366,098 in damages, costs of the suit and interest.



8. Dissatisfied with the trial Court's said judgment, the Appellant preferred the appeal herein, vide a memorandum of appeal dated March 31, 2022 and filed in Court on April 1, 2022, and set out the following grounds of appeal:-
- a. the learned trial magistrate erred in law and in fact by hearing and determining the suit without jurisdiction.
 - b. the learned trial magistrate erred in law and in fact by disregarding the provisions of Section 16 of the *Work Injury Benefits Act* 2007.
 - c. the learned magistrate erred in law and in fact by awarding ksh. 2,729.088 as compensation for injuries which is unconventional and manifestly excessive.
 - d. the learned trial magistrate erred in law and in fact by awarding compensation for dependency which was neither pleaded nor proved.
 - e. the learned trial magistrate erred in law and in fact by awarding loss of earning which was neither pleaded nor proved.
 - f. the learned trial magistrate erred in law and in fact by awarding ksh. 220,000 as special damages yet the same offended the provisions of Section 19 of the *Stamp Duty Act*.
 - g. the learned trial magistrate erred in law and in fact in finding and holding that the Respondent had proved his case on a balance of probability.
 - h. the learned magistrate rendered the judgment and awarded on extraneous matters in total disregard of the evidence on record.
9. The Appellant sought the following reliefs:-
- a. that judgment and decree of the subordinate Court made on March 23, 2022 in Voi CMCC No. 165 of 2018 be varied and/or be set aside by this Honourable Court.
 - b. that the Appellant's appeal herein be allowed with costs.
 - c. such and any other order this Honourable Court may deem just and expedient.
10. This is a first appeal, and in a first appeal, the entire case as presented is up for fresh consideration. A first appeal is by way of a re-trial, and the duty of a first appellate Court is to re-evaluate, re-analyse and to reconsider the evidence adduced by the disputants in the trial Court, and to reach its won conclusion, bearing in mind that it did not see the witnesses testify, and therefore giving allowance for that.
11. It was stated as follows in, *Mursal & Another -vs- Manese* [2022] eKLR:-
- “A first appellate Court is mandated to re-evaluate the evidence before the trial Court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses testify.”
12. The Court went on to state as follows:-
- “A first appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. a first appeal is a valuable right of the parties and unless restricted by the law, the whole case is therein open for rehearing, both on questions of fact and law....



A first appellate Court is the final Court of fact ordinarily, and therefore a litigant is entitled to a full, fair and independent consideration of the evidence at the appellate stage. Anything less is unjust”

13. I will handle the first and the second grounds of appeal, which relate to jurisdiction, together, and will handle the rest of the grounds; together, and in so doing I will address the following three issues which, in my view, fall for determination:-
 - a. whether the trial Court was seized of jurisdiction to hear and to determine the Respondent’s suit before it.
 - b. whether the trial Court fell into error in awarding damages to the Respondent.
 - c. whether the Appellant is entitled to the reliefs sought.
14. It is clear from the plaint filed by the Respondent in the trial Court, and which I have set out in paragraph 1 of this judgment, that the Respondent’s suit was a work injury claim. Section 16 of the [Work Injury benefits Act](#), 2007 provides as follows:-

“No action shall lie by any 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.”
15. While the foregoing section takes away the Court’s jurisdiction to determine liability and to assess or award damages in work injury claims, Section 23 of the said Act vests such jurisdiction on the Director of Occupational Safety and Health Services (DOSHS). The section provides as follows:-
 - (1) After having received notice of an accident or having learned that an employee has been injured in an accident, the director shall make such enquiries as are necessary to decide upon any claim or liability in accordance with this Act.
 - (2) An enquiry made under subsection (1) may be conducted concurrently with any other investigation.
 - (3) An employer or employee shall, at the request of the director, furnish such further particulars regarding the accident as the director may require.
 - (4) A person who fails to comply with the provisions of Subsection (3) commits an offence.”
16. It is clear from the foregoing provisions of the [Work Injury Benefits Act](#) (WIBA) that determination of liability and assessment of compensation payable in Work Injury Claims is the preserve of the Director of Occupational Safety and Health Services. None of the parties herein raised the issue of jurisdiction on the part of the trial Court, either in their pleadings or by evidence in Court. Jurisdiction is such an importance matter that it can be raised at any time, even for the first time on appeal. The Court of Appeal stated as follows in *Kenya Ports Authority -vs Modern Coast Holdings [e.a] Limited* [2017] eKLR:-

“We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised at any time, in any manner, even for the first time on appeal, or even viva-voce,



and indeed by the Court itself, provided that where the Court raises it suo Moto, parties are to be accorded an opportunity to be heard.”

17. The Supreme Court of Kenya stated as following Samuel Kamau Macharia -vs- Kcb & Another [2012] eKLR:-

“ A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus a Court of law can only exercise jurisdiction conferred by the Constitution of other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

18. The Respondent’s suit is shown to have been filed in the trial Court on June 13, 2018, during the period when some sections of WIBA, including Sections 16 and 23, had been invalidated by the High Court before that decision was overturned by the Court of Appeal’s in Civil Appeal No. 133 Of 2011 – Attorney General -vs- Law Society Of Kenya & Another. The Court of Appeals decision was upheld by the Supreme Court of Kenya in Law Society of Kenya -vs- Attorney General & Another [2019] eKLR.

19. It is clear from the foregoing that the Respondent’s suit was filed in a Court without jurisdiction. The trial Court lacked jurisdiction to entertain, to hear and to determine the suit. The suit itself was one that never was. The Court of Appeal stated as follows in Phoenix Of E.a. Assurance Company Limited -vs- S.m. Thiga T/a Newspaper Services [2019] eKLR:-

“ ...jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it...A suit filed without jurisdiction is dead on arrival and, cannot be remedied.

Without jurisdiction, the Court cannot confer jurisdiction on itself. The subordinate Court would not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction.”

20. An order made or a decree passed without jurisdiction is a nullity. I stated as follows in the case of Charo Karisa Sathine -vs- K K Security [2022] eKLR:-

“Out of nothing flows nothing. The trial Court’s judgment cannot therefore, stand. It matters not that the Respondent had submitted to, and admitted the Court’s jurisdiction in it defence. As already stated in this judgement, a Court’s jurisdiction is conferred by the Constitution and by the statutes. It cannot be conferred by parties to a suit by their pleadings.”

21. The Respondent’s submissions herein that the Appellant admitted the trial Court’s jurisdiction in its pleadings filed in that Court is without any legal weight, as parties cannot confer jurisdiction on a Court by their pleadings, or even by consent. The Respondent also submitted on the principle of legitimate expectation as mentioned in Law Society of Kenya -vs- Attorney General & Another [2019] eKLR where the Supreme Court state:-

“In agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of the Act, litigation relating to work injuries had gone on, and a number of the suits had progressed upto decree stage, some of which were still being heard, while others were still at the preliminary stage. All such matters were being dealt with under the then existing and completely different regimes of law.



We thus agree with the Appellate Court that claimants in those pending cases have a legitimate expectation that upon the passage of the Act, their cases would be concluded under the Judicial process which they had invoked. However, were it not for such legitimate expectation, WIBA, not being unconstitutional and even more progressive statute, as we have shown above, we opine that it is best that all matters are finalized under Section 52 of aforesaid.”

22. The foregoing edict of the Supreme Court is clear, and in my understanding of the same, referred to matters filed before enactment of WIBA, which would be finalized under Section 52.
23. For some time, the foregoing edict of the Supreme Court of Kenya received different interpretations by deferent Courts. In *West Kenya Sugar Company Limited -vs- Tito Luchaeli Tingale* [2021] eKLR, cited by the Respondent herein, for example, the Court was of the view that the pending work injury claims should be heard and concluded by Courts. Other Courts disagreed, and were of different view. In the case of *Manuchar Kenya Limited -vs- Dennis Odhiambo Olwete* [2020] eKLR (Ndolo, J), the Court was of the view that all work injury claims arising after enactment of the [Work Injury Benefits Act](#) (2007) were to be processed and dealt as set out in the said Act, as the Court’s jurisdiction over such claims had been expressly and unambiguously ousted by the said statute. I followed this view IN the case of *Festo Sivona Maskini Alias Festo Sivona -vs- Barkresh Grain Milling [K] LTD* [2022] eKLR, among other cases.
24. On April 24, 2023, the Chief Justice issued and published 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 -vs- Attorney General and Another*, Petition No. 4 of 2019 [2019] eKLR. Under direction no. 7 of the said directions, published on April 28, 2023:-
 - 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 Magistrate’s 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 Magistrate’s Court shall be delivered by the same Court.
25. Under direction no. 8 on claims filed after the Supreme Court decision:-
 - 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 be before the Employment and Labour Relations Court.
 - c. such appeal shall be heard and determined through the appropriate appellate mechanism within the judicial hierarchy.”
26. It is to be noted that the Respondent’s suit was filed in the trial Court after enactment of the WIBA and before the Supreme Court’s decision, while the trial Court’s judgment was delivered on 23/03/2022, a year before issuance and gazettelement of the practice directions referred to in paragraph 24 and 25 of this judgment. The practice directions appear to be silent on the fate of pending appeals arising from the decisions of the Magistrate’s Courts in claims/suits filed after the enactment of WIBA and before



the Supreme Court's aforesaid decision. This, in my view, raises the question of whether the practice directions can apply in retrospect regarding such appeals.

27. The practice directions specifically refer to pending claims and pending rulings and judgments. If the intention was that the said directions would apply to already pending appeals arising from judgments pronounced before the date of the practice directions, that would have been expressly stated in the directions. There is no such direction.
28. In view of the foregoing, and in as much as this Court sympathizes with the Respondent, the inevitable finding of this Court is that the trial Court heard and determined the suit before it without jurisdiction, and the appeal herein is hereby allowed on that account. The judgment and decree of the subordinate Court made on March 23, 2022 in Voi CMCC NO. 165 of 2018 is hereby set aside.
29. Having made that finding, I will not delve into the other grounds of appeal, as doing so will be a mere academic exercise which I will not engage in. I will, however, not strike out the suit filed in the trial Court.
30. One of the prayers made by the Appellant in the memorandum of appeal is that this Court makes such other order as it may deem just and expedient. I order a re-trial in the Respondent's suit filed in the lower Court, being Voi CMCC NO. 165 of 2018. The re-trial shall proceed on priority basis in line with the practice directions gazetted on April 28, 2023 and already referred to in this judgment, and shall be conducted before a Magistrate at Voi Chief Magistrate's Court other than T.N. Sinkiyian SRM. Any security that may have been provided by the Appellant pending hearing and determination of this appeal, if any was ordered by the trial Court, shall remain in place pending the fresh hearing and determination of the lower Court suit.
31. Each party will bear its won costs of the appeal.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH SEPTEMBER

2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Respondent fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... for Appellant

..... Respondent

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