



REPUBLIC OF KENYA



**KENYA LAW**  
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**Pongwe v Mohammed & another (Appeal E006 of 2020)  
[2023] KEELRC 3105 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3105 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E006 OF 2020  
AK NZEI, J  
NOVEMBER 23, 2023**

**BETWEEN**

**HASSAN ABDALLA PONGWE ..... APPELLANT**

**AND**

**MOHAMMED SALIM MOHAMMED ..... 1<sup>ST</sup> RESPONDENT**

**TONONOKA DISTRIBUTORS ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the decision of Hon. Wambugu  
delivered on 7/10/2020 in Kwale SRM case No. 170 of 2013)*

**JUDGMENT**

1. The Appellant was the plaintiff in Kwale Resident Magistrate's Court civil Suit No. 170 of 2013, whereby vide an amended plaint dated 25/3/2014, the Appellant sought the following reliefs from the Respondents who were the defendants in the said suit:-
  - a. Special damages .....ksh. 3,300
  - b. General damages and cost of future operation
  - c. Costs
  - d. Interest on (a) and (b) above at Court rates.
  - e. Further or any relief that the Honourable Court deem(s) just and fit to grant.
2. The Appellant had pleaded that he was at all material times an employee of the Respondents and that on or about 9/2/2013, while in the lawful course of employment with the Respondents as a turn boy in the Respondents' motor vehicle Registration No. KYN 017 along Likoni -Lunga lunga road, the said motor vehicle, driven negligently by the Respondents' driver and/or agent, was involved in an



accident; as a result of which the Appellant sustained serious injuries, loss and damage. Particulars of negligence, injuries and damage were set out in the said amended plaint.

3. The 1<sup>st</sup> Respondent defended the suit and denied the Appellant's claim. The 2<sup>nd</sup> Respondent is not shown to have defended the suit, and an interlocutory judgment is shown to have been entered against it by the trial Court.
4. Trial was conducted by the trial Court, whereby evidence was taken from the Appellant and his witnesses, and from the 1<sup>st</sup> Respondent. Written submissions were filed on behalf of the claimant and the 1<sup>st</sup> Respondent, whereupon the trial Court delivered its judgment on 7/10/2020, dismissing the Appellant's suit with no order as to costs. The trial Court made a finding that the suit had been filed on 11/9/2013, long after the enactment of the Work Injury Benefits Act 2007, and that the Court had been divested of the jurisdiction to hear the same. The trial Court rendered itself thus:-

“Thus the Work Injury Benefits Act was enacted and came into force in 2007. The matter was filed on 11<sup>th</sup> September 2013. Thus as at the date of filing this suit, the Court had been divested of its jurisdiction to hear these matters by statute. I thus find that I had no jurisdiction to hear this suit. this Court was not the proper forum to file the same. The same is dismissed with no order as to costs.”

5. Aggrieved by the said judgment, the Appellant preferred the present appeal vide a memorandum of appeal dated 3/11/2020 and set forth the following grounds of appeal:-
  - a. the learned magistrate erred in both law and fact by striking out the suit without according the Appellant an opportunity to submit on the law; and without considering the doctrine of legitimate expectation.
  - b. the learned magistrate erred in both law and fact in failing to consider that at the time the suit was filed, Section 16 of the Work Injury Benefits Act had been declared unconstitutional, and that the suit was legitimately filed in Court.
  - c. that the learned magistrate erred in law and fact by failing to adhere to the constitutional provisions on fair hearing and trial, and the doctrine of legitimate expectation, and failing to adhere to the rules of natural justice.
  - d. the learned trial magistrate erred in law and fact in failing to make a finding on liability; to assess damages and to grant costs to the Appellant.
  - e. the learned magistrate erred in law fact in failing to adhere to constitutional provisions on fair hearing and trial; to consider the Appellant's written submissions, and by delaying delivery of judgment, leading to miscarriage of justice.
6. The Appellant sought the following reliefs on appeal:-
  - a. that the appeal be allowed, the judgment delivered on 7/10/2020 against the Appellant be set aside and the matter be taken back before another Court for fresh judgment to be written.
  - b. that the Appellant be granted costs of the lower Court case and this appeal.
7. This being a first appeal, the whole case as presented in the trial Court is open to fresh consideration by this Court. I will, however, not interrogate the issues raised in the grounds of appeal. I will go straight to the issue of jurisdiction on the part of the trial Court. It is clear from the plaint filed by the Appellant



in the trial Court, which I have substantially reproduced in this judgment, that the Appellant's suit was a work injury claim. Section 16 of the *Work Injury Benefits Act* (WIBA) 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.”

8. While the foregoing Section takes away the Courts' jurisdiction to determine liability and to assess or award damages in work injury claims, Section 23 of the said Act vest such jurisdiction on the Director of Occupational Safety and Health Services (DOSHS). The Section Provides:-

“(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 inquiry 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.”

9. It is clear from the foregoing statutory provisions that determination of liability and assessment of compensation payable in work injury claims and occupational diseases is within the exclusive province of the Director of Occupational Safety and Health Services. None of the parties herein raised that issue before the trial Court, either in their pleadings or in evidence. The trial Court, however, took up the issue in its judgment and made a finding that it had no jurisdiction to hear or to determine the claim.

10. For record purposes, jurisdiction is such an important issue such that it can be raised at any stage of proceedings, even by the Court itself. The Court of Appeal stated as follows in *Phoenix Of E.a. Assurance Company Ltd -vs- S.m. Thiga T/a Newspaper Services Limited* [2019] eKLR:-

“.... Jurisdiction is premodial 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.”

11. One of the grounds of appeal raised by the Appellant herein is that as at the time the Appellant's suit in the trial Court was filed, Section 16 of WIBA had been declared unconstitutional. True that, 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 in its Civil Appeal No. 133 of 2011 (*Attorney General -vs- Law Society Of Kenya & Another*). The Court of Appeal's decision was upheld by the Supreme Court of Kenya in *Law Society Of Kenya -vs- Attorney General & Another* [2019] eKLR.



12. I recently stated as follows in this Court’s Appeal No. E025 Of 2022 Shreeji Entrprises [k] Limited -vs- Nahashon Munga Wainaina [2023] eKLR; and I repeat the same herein:-

“21. The Respondent’s submission 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 stated:-

“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 a 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 24/4/2023, 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 28/4/2023:-



- 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.”
13. It is worthy noting that the Appellant’s suit was filed after the enactment of the WIBA and before the Supreme Court’s aforesaid decision; while the trial Court’s judgment was delivered after the Supreme Court’s decision. Interestingly, the Appellant is shown to have prosecuted and closed his case long before the Supreme Court’s judgment. The defence case is also shown to have been closed before the Supreme Court’s decision. The trial Court’s decision is however shown to have been delivered over a year from the date of closure of the defence case, and long after the Supreme Court’s aforementioned decision. The practice directions referred to in paragraph 12 of this judgment were gazetted during the pendency of the appeal herein, and are silent on the fate of pending appeals arising from suits filed after enactment of WIBA and before the Supreme Court’s decision.
14. Justice of the appeal herein demands that the suit be send back to the trial Court for determination on merits, based on the evidence on record.
15. Accordingly, the appeal is allowed. The trial Court’s Judgment delivered on 7/10/2020 is hereby set aside. The Appellant’s suit shall be determined on merit by a magistrate at Kwale Principal Magistrate’s Court other than Patrick Wambugu Mwangi – Principal Magistrate.
16. Each party will bear its own costs of this appeal.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23<sup>RD</sup> NOVEMBER 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 Court fees.

**AGNES KITIKU NZEI**



**JUDGE**

Appearance:

.....Appellant

.....Respondent

