



Orwa v China Roads and Bridges Corporation (K) Limited & another (Appeal 11 of 2023) [2023] KEELRC 2845 (KLR) (10 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2845 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 11 OF 2023
B ONGAYA, J
NOVEMBER 10, 2023**

BETWEEN

DAVID OUMA ORWA APPELLANT

AND

**CHINA ROADS AND BRIDGES CORPORATION (K)
LIMITED 1ST RESPONDENT**

**MWATHI MBEVI NDIVO ALSO KNOWN AS DANIEL
MWATHI 2ND RESPONDENT**

(Being an appeal from the ruling and order delivered given on 11.08.2021 by the Hon. Edgar Kagoni, Principal Magistrate, in Nairobi Milimani CMCC No. E4938 of 2020)

JUDGMENT

1. The appellant filed the memorandum of appeal dated 24.08.2021 through Achola Jaoko & Company Advocates. The appellant's grounds of appeal are that the trial Court erred in law and fact as follows:
 - a. That the accident on 05.03.2019 in which the appellant sustained grievous injuries due to negligence on the part of the 2nd respondent gave rise to 2 causes of actions one of which was a claim in torts which is sustainable in a civil court.
 - b. That the appellant has a right in common law, constitutionally and legally to elect to prosecute the suit as a claim in tort as opposed to a claim arising from employment contract under the [Work Injury Benefits Act](#) number 13 of 2007.
 - c. That the claim in torts was sustainable under article 159 of the [Constitution](#) of Kenya (2010) as well as sections 1A, 1B, 3 and 3A of the [Civil procedure Act](#) (Cap 21 of the laws of Kenya).



- d. That the preliminary objection dated and filed on 04.06.2021 was flagrant, frivolous, vexatious and an abuse of due process of the law and of this court.
2. The appellant prayed for orders:
 - a. That the ruling, decision and/or order made on 11.08.2021 be and hereby set aside.
 - b. That the suit be and is hereby re-instated for hearing on merits in the lower court.
 - c. That the costs of the preliminary objection and this appeal be borne by the 1st and 2nd respondents.
 3. The background to the appeal is as follows. The appellant filed a plaint dated 09.09.2020. He was claiming and praying for general damages for pain and suffering and loss of amenities, Kshs.10,500 special damages, Kshs.150,000 future medical expenses, costs and interest with respect to injuries suffered while in the respondent's employment.
 4. The respondent filed a defence as well as a preliminary objection dated 04.06.2021 through Kiruki & Kayika Advocates. The respondent prayed that the suit be dismissed with costs on the grounds that:
 - a. The first instance jurisdiction to handle work injury related claims lies with the director of occupational safety and health services as envisaged under section 2 and section 16 as read together with sections 22, 23 and 51(1) of the Work Injury Benefits Act, No. 13 of 2017.
 - b. The plaintiff's claim is a claim for compensation for injuries which arose during the course of employment and therefore, the original jurisdiction to determine the plaintiff's claim lies with director of occupational safety and health services as established under section 2 of the Work Injury benefits act, no. 13 of 2007.
 - c. That in the foregoing circumstances this court has no jurisdiction whatsoever, to entertain the plaintiff's claim.
 5. The parties subsequently filed submissions and the trial Court in a ruling delivered on 11.08.2021 upheld the preliminary objection dated 04.06.2021 and struck out with costs, the plaint dated 09.09.2020. The appellant has appealed against that ruling.
 6. The Court has considered all material on record. There is no dispute that the appellant was injured while in employment of the respondent as a turn-boy at Kshs. 28,000.00 per month. An accident occurred on 05.03.2019. The plaint was filed on 09.09.2020. The trial Court, correctly so, found that the court lacked jurisdiction because the appellant ought to have of first instance moved the Director of Occupational Safety and Health per section 16 of the Work Injury Benefits Act, 2007 per sections 16, and 52 of the Act. The trial Court upheld the preliminary objection and struck out the suit with costs. It is submitted that the 1st respondent failed to issue a notice of the injury per section 22(3) of the Act. The Court considers that such is no ground to have by-passed the statutory forum but a cause of action for compliance with the section.

In conclusion the appeal is hereby dismissed with costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 10TH NOVEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

