



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

APPEAL NO. 12 OF 2016

CHARO KARISA SATHINE.....APPELLANT

VERSUS

K K SECURITY.....RESPONDENT

(Being an appeal from the judgment of Hon. F. Kyambia –SPM in Mombasa

PMCC No. 1931 of 2011 delivered on the 23rd November 2016)

JUDGMENT

1. Vide a plaint dated 4th June 2010 and initially filed in the Principal Magistrate’s Court at Kilifi in the year 2010, the Appellant sued the Respondent for recovery of damages arising from work injuries sustained by the Appellant on 25th February 2010. The Appellant (being the plaintiff in the said suit) pleaded that being an employee of the Respondent herein, he was attacked and injured by armed robbers while in the normal course of his employment, having been instructed to guard the Respondent’s client’s residence at Bofa in Kilifi.
2. The suit was defended by the Respondent, who filed a statement of defence denying the appellant’s claim and pleading negligence and voluntary assumption of risk on the part of the Respondent, and admitting the trial Court’s jurisdiction.
3. The suit was subsequently transferred, by consent of both parties, from Kilifi Principal Magistrate’s Court to Mombasa Chief Magistrate’s Court, whereat the suit was heard and dismissed with costs by the Court vide its judgment dated 23rd November 2016. The Court delivered its said judgment upon hearing the appellant (who was the plaintiff in the suit) and his witness as the Respondent herein (being the defendant in the suit) opted to close its case without calling any evidence, and upon receiving written submissions from both parties.
4. Aggrieved by the trial Court’s said judgment, the appellant filed the present appeal, and has raised seven grounds of appeal, six of which dispute and/or question the trial Court’s finding on liability while the seventh ground calls to question the trial Court’s jurisdiction over the subject dispute before it.
5. When the appeal came up for directions before this Court on 6th July 2021, the Court ordered that the issue of jurisdiction be determined as part of the main appeal, and directed both parties to file written submissions. Submissions have since been filed.
6. I will proceed to address the issue of jurisdiction first. In the case of Owners of Motor Vessel “Lilian S” –vs- Caltex Oil (Kenya) Limited [1989] KLRI, it was held (Nyarangi JA, as he then was) that:-

“...I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court ceased of the matter is then obliged to decide the issue straight away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

7. In Supreme Court of Kenya Application No. 2 of 2011 SAMUEL KAMAU MACHARIA –VS- KCB AND OTHERS [2012] eKLR, the Supreme Court had the following to say:-

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

8. The suit before the trial Court was purely a work injury claim. The appellant had pleaded in his plaint dated 4th June 2010 as follows:-

Paragraph 3

“ at all material time to this suit, the plaintiff was an employee of the defendant.

Paragraph 5

on or about 25th February 2010, the plaintiff was lawfully and carefully engaged in his normal employment having been instructed to guard the defendant's client's residence at Bofa, kilifi in the process of which he was violently attacked by armed robbers who raided the residence as a result of which he sustained serious physical injuries, damage and loss.”

9. The appellant prayed for general and special damages as well as costs of the suit and interest at Court's rates.

10. Section 16 of the Work Injury Benefits Act [2007] provides:-

“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.”

11. The Court of Appeal in Civil Appeal No. 133 of 2011 – Attorney General –vs- Law society of Kenya & Another upheld the constitutionality of Sections 4,16,21(1), 23, 35(1)(3), 52(1) (2) and 58 of the work Injury Benefits Act 2007. This decision was upheld/affirmed by the Supreme Court of Kenya in the case of LAW SOCIETY OF KENYA –VS- ATTORNEY GENERAL & ANOTHER [2019] eKLR.

12. It follows that the suit filed by the appellant in the trial Court in the year 2010 was filed in a Court without jurisdiction. The trial Court lacked jurisdiction to entertain, to hear or to determine the suit before it. The suit was a nullity at its inception. Out of nothing flows nothing. The trial Court's judgment cannot, therefore stand. It matters not that the Respondent herein had submitted to and admitted the said Court's jurisdiction in its statement of defence. As already stated in this judgment, a Court's jurisdiction is conferred by the constitution and the statutes. It cannot be conferred by parties to a suit by their pleadings.

13. Turning to this Court's jurisdiction; does this Court have jurisdiction to hear and to determine an appeal arising from the Magistrate's Court's decision on an occupational/work injury claim? The Appellant submitted that this Court has jurisdiction by virtue of **Judge made law that has been in place since the enactment of the Work Injury Benefits Act 2007 at one time or the other, and that suits filed between 22nd May 2008 and 3rd December 2019 were filed in Courts with jurisdiction.**

That the Primary suit having been filed on 7th June 2010, this Court has jurisdiction to hear and to determine the appeal herein.

14. Counsel for the Appellant referred the Court to the case of West Kenya Sugar Co. Ltd –vs- Lucheli Tangale [2021] eKLR where the Court addressed the **doctrine of legitimate expectation vis-à-vis work injury claims filed between 22nd June 2008 and 2nd December 2019**. This was a period during which some sections of the Work Injury Benefits Act, including Section 16 thereof, stood suspended and subsequently declared unconstitutional by the High Court; before that decision was ultimately overturned by the Court of Appeal.

15. In the West Kenya Sugar Company case (supra), the Court was of the view, and indeed found, that litigants who had filed their disputes with the Courts from 22nd May 2008 to 3rd December 2019 on the firm belief that the judge declared law was the valid law in place then are entitled to **successfully assert legitimate expectation in having the claims heard to a conclusion before the Courts where they were lodged.**

16. In response to the Appellant's foregoing submission, the Respondent submitted that the Appellant (who was the plaintiff in the primary suit) should have followed the law as clearly stipulated, and should have filed the matter before the proper adjudicator, that being the Director of Occupational Safety and Health Services.

17. True, Judges do make and declare law. They do so while interpreting the written law, in the process of making decisions where the written law is either silent or has elements of ambiguities or where the law or rules of procedure mandate the Judge to decide or direct specific issues as the judge deems fit and just. This judge made or judge-declared law forms part of what is popularly known as Case Law.

18. In my view, judge-made law or case law cannot supersede and/or replace the statute. The Appellant herein should have pursued his claim in the manner provided in the Work Injury Benefits Act. He wrongfully filed his claim in a Court that had no jurisdiction to either entertain or hear and determine the same. The judgment rendered by the Lower Court on 23rd November 2016 without jurisdiction is a nullity, and I so find. This court cannot be called upon to sit on appeal over an invalid judgment.

19. Under Section 52(2) of the Work Injury Benefits Act, an appeal to this Court only lies from the decision of the Director of Occupation Safety and Health Services in the manner provided under Part VIII of the said Act.

20. In his written submissions filed pursuant to this Court's directions given on 6th July 2021, the Appellant abandoned ground no. 7 in his Memorandum of Appeal. This the Appellant did despite this Court's specific orders directing parties herein to submit on the issue of

jurisdiction. With or without abandonment of the ground on jurisdiction, and whether or not the issue of jurisdiction was raised before the trial Court, this Court can, even on its own motion, address itself take to, and take up the issue of jurisdiction and make a decision thereon. Counsel for the Respondent referred the Court to the Case of MODERN PORTS AUTHORITY –VS- MODERN HANDLING EA LIMITED [2017] eKLR where the Court of Appeal held:-

“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 even by the court itself, provided that where court raises it “suo moto”, parties are to be accorded an opportunity to be heard.”

21. As already stated in paragraph 4 of this judgment, the issue of jurisdiction was first raised by the Appellant in his Memorandum of Appeal, being ground no. 7 therein. Both parties have, in detail, addressed the issue of jurisdiction in their written submissions, which I have considered.

22. Having found that the appeal herein arose from a judgment of the Lower Court that was rendered without jurisdiction and one that never was in view of Section 16 of the Work Injury Benefits Act 2007, I will not address the issues raised in grounds 1,2,3,4,5 and 6 of the Appellant’s memorandum of appeal; as this Court has no jurisdiction to do so, by dint of Sections 16 and 52(2) of the Work Injury Benefits Act 2007.

23. The Appellant’s appeal is, therefore, hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF FEBRUARY 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Miss Katana for Appellant

Miss Wanyama for Respondent