



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT MOMBASA
APPEAL NO. 4 OF 2021

A.A. ENGINEERING & WORKS LIMITEDAPPELLANT

VERSUS

MARTIN OBUDI OYIEKERESPONDENT

(Being an Appeal from the Judgment & Decree of the Senior Principal Magistrate's Court at Mombasa SRMCC No. 681 of 2014 by Hon. Francis Kyambia [SPM] on 14/9/2018)

J U D G M E N T

1. The Appellant was the defendant in Mombasa Chief Magistrate's Court Civil suit No. 681 of 2014, whereas the Respondent was the Plaintiff. The suit was a claim for damages arising from work injuries. It was a work injury claim.
2. Vide a plaint dated 3rd April 2014 and filed in the said Court on 9th April 2014, the Respondent herein sued the Appellant and pleaded, *inter alia*:-
 - a) that at all times material to the suit, the Respondent was employed by the Appellant as a helper.
 - b) that it was an express and/or implied term of the employment contract between the Appellant and the Respondent that it was the Appellant's duty to take all reasonable precautions to ensure the safety of the Respondent, not to expose the Respondent to risk of danger or injury which they know or ought to have known, and to provide and maintain adequate and suitable working environment to enable the Respondent to carry out his duties in safety.
 - c) that on or about 11/10/2013, while in the course of his employment, the Respondent was instructed by his Supervisor to fix metallic doors (and) while doing so, the same (doors) fell on him causing severe injuries, pain and loss.
 - d) that the accident was caused solely by negligence of the Appellant (Defendant), its servants, agents and/or employees and the Respondent(plaintiff) held the Appellant wholly and/or vicariously liable for the acts and/or omissions of its servants, agents and/or employees.
3. The Respondent set out particulars of the injuries sustained by him as a result of the work place accident as well as particulars of negligence on the part of the Appellant and/or its agents, servants and/or employees and prayed to be awarded general damages, costs of the suit and interest.
4. The Appellant defended the suit by entering appearance on 25th April 2014 and subsequently filing a statement of defence dated 29th April 2014 and filed in Court on 30th April 2014. Vide the said statement of defence, the Appellant:-
 - a) denied the existence of a contract between itself and the Respondent, the occurrence of the accident, the particulars of injuries and particulars of negligence on its part, and put the Respondent to strict proof thereof.
 - b) pleaded that the accident (if at all) was caused by negligence on the part of the Respondent, whose particulars the Appellant set out.
 - c) admitted the Court's jurisdiction.
5. The trial Court heard the Respondent's (Plaintiff's) case on 24th January 2018 in the absence of the defendant (Appellant) and fixed

hearing of the defence case on 19th February 2018, on which date hearing of the defence case was adjourned to 14th May 2018. On the said date, an application for adjournment by the defence was declined. The defence case was closed (on 14th May 2018) without the defendant (the Appellant herein) calling any witness after the trial Court noted that the defendant (Appellant) had not filed any witness statement. Both parties filed written submissions thereafter.

6. The trial court rendered its judgment on 14th September 2018, whereby the Respondent (Plaintiff) was awarded ksh.1,502,000 in damages, costs of the suit and interest.

7. Aggrieved by the said judgment, the Appellant filed the present appeal vide a Memorandum of Appeal dated 12th October 2018 and filed in the High Court at Mombasa on 15th October 2018, whereat it was registered as Civil Appeal No. 213 of 2018.

8. Pursuant to directions given by the High Court on 17th September 2020, the Appellant's Appeal was transferred to this Court, whereat it was registered as Appeal No. 4 of 2021.

9. When the appeal came up for mention before me on 10th November 2021, the Appellant sought, and was granted leave to amend its Memorandum of Appeal, and to file a Supplementary Record of Appeal within fourteen days. A supplementary Record of Appeal containing an amended memorandum of appeal (dated 11th November 2021) was filed on 16th November 2021. The following grounds of appeal were raised in the amended memorandum of appeal:-

a) The Learned Magistrate erred in law and in fact in allowing the sum of ksh.1,500,000 under the head of general damages to the Respondent.

b) The learned Magistrate erred in law and in fact by making an award which is excessive in the circumstances.

c) The learned Magistrate erred in law and in fact in failing to consider the medical evidence on record and the respective submissions by the parties.

d) The learned Magistrate erred in proceeding and determining the matter without jurisdiction.

e) That the learned Magistrate erred in disregarding the provisions of Section 16 of the Work Injury Benefits Act, 2007.

10. Parties filed and exchanged written submissions on the appeal pursuant to the Court's directions in that regard, and counsel for both parties appeared before me virtually on 7th February 2022 for oral highlighting of the submissions, which they ably did. I have considered the filed written submissions and oral presentations made by Counsel in the highlighting of their respective written submissions.

11. The Appellant has stated in its 4th and 5th grounds of appeal that the trial Magistrate erred in proceeding (with) and determining the suit before him without jurisdiction, and in disregarding the provisions of Section 16 of the Work Injury Benefits Act, 2007. I will first address those two grounds as a Court's jurisdiction is everything and any judgment/decreed passed or order made without jurisdiction is a nullity.

12. The foregoing position is underlined in the Court of Appeal's decision in the case of OWNERS OF MOTOR VESSEL "LILIAN S" –VS- CALTEX OIL (KENYA) LIMITED, [1989] eKLR, where it was held (Nyarangi, JA as he then was):-

"...I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.."

13. Section 16 of the Work Injury Benefits Act, 2007 provides:-

"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."

14. The suit before the Magistrate's Court was a claim for recovery of damages arising from an occupational accident and was filed in court on 9th April 2014. It was submitted on behalf of the Appellant that the Work Injury Benefits Act (WIBA) which became operational on 2nd June 2008 (by dint of) Gazette Notice No. 60 of 23rd May 2008; donated jurisdiction to handle work injury related matters to the Director of Occupational Safety and Health Services as envisaged under the said Act. That only matters that had been filed, and were pending in Court before 23rd May 2008, were to be continued and concluded in the Courts.

15. On the other hand, it was submitted on behalf of the Respondent that the trial Court had the requisite jurisdiction to hear and to determine the primary suit on the basis of judge made law which had been in place since enactment of the Work Injury Benefits Act 2007 (WIBA) at one time or the other, and that suits filed between 22nd May 2018 and 3rd December 2019 were filed in Courts with jurisdiction. That the primary suit having been filed on 9th April 2014, the trial Court had the requisite jurisdiction to hear and to determine the suit.

16. Counsel for the Respondent cited, and quoted extensively from the case of WEST KENYA SUGAR CO. LTD-VS- LUCHELI TINGALE [2021] eKLR where the Court addressed the doctrine of legitimate expectation vis-à-vis work injury claims filed in Courts between 22nd May 2008 and 3rd 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 in 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

17. 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 and to 3rd December 2019 on the firm belief that the Judge declared law was the valid law in place then were entitled to successfully assert legitimate expectation in having the claims heard to a conclusion before the Courts where they were lodged.

18. Very true, Judges to 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.

19. I have said before that in my view, Judge made or Judge declared law does not, and cannot supercede or replace the statute.

20. In the case of SAMUEL KAMAU MACHARIA –VS- KCB & OTHERS [2012] eKLR, the Supreme Court of Kenya stated as follows:-

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus a Court of law 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.”

21. The suit filed by the Respondent herein in the trial Court was filed in a Court that had no jurisdiction. The trial Court lacked jurisdiction to entertain, to hear and 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 stand.

22. The Respondent’s submission that the appellant had, in his pleadings, admitted the trial Court’s jurisdiction and cannot therefore raise the issue of jurisdiction this late in the day (on appeal) is, with respect, untenable. Indeed, it matters not that the Respondent herein had submitted to and admitted the trial Court’s jurisdiction in its statement of defence. As already stated in this judgment, a Court’s jurisdiction is conferred by the Constitution and statutes. It cannot be conferred by parties to a suit by their pleadings. It was held in the case of KENIDIA ASSURANCE COMPANY LIMITED –VS- OTIENDE [1997] KLR38 that:

...the appellant’s admission of jurisdiction in their defence and their invitation to the judge to decide the agreed issues cannot confer on the Court jurisdiction when none exists.”

23. In the case of MODERN PORTS AUTHORITY –VS- MODERN HANDLING [EA] LIMITED [2017] eKLR, 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 by the Court itself, provided that where the Court raises it “suo Moto” parties are to be accorded an opportunity to be heard.”

24. The issue of jurisdiction was first raised by the Appellant in the amended Memorandum of Appeal dated 11th November 2021 and filed in Court on 16th November 2021 vide a Supplementary Record of Appeal. Both parties have, in detail, addressed the issue of jurisdiction in their respective written submission, which I have considered.

25. Having found that the appeal herein arose from a judgment of the trial 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 and 3 of the amended 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.

26. In sum, the Appellant’s appeal herein succeeds and is allowed to the extent that it challenges the trial Court’s jurisdiction, and is allowed to that extent with no orders as to costs. The Lower Court’s judgment delivered on 14th September 2018 is set aside and is substituted with an order dismissing the Lower Court’s suit (Mombasa Chief Magistrate’s Court Civil Suit No. 681 of 2014) with no order as to costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10TH DAY OF MARCH 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:

Mr. Abaja for Appellant

Miss Wanyama Respondent