



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njeri Alias Robert Wanjohi v Hydery [P] Limited (Appeal  
12 of 2018) [2022] KEELRC 1212 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1212 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL 12 OF 2018  
AK NZEI, J  
APRIL 28, 2022**

**BETWEEN  
ROBERT WANJOHI NJERI ALIAS ROBERT WANJOHI ..... APPELLANT  
AND  
HYDERY [P] LIMITED ..... RESPONDENT**

*(Appeal from the decision of Hon. Kyambia delivered on  
28/9/018 in Mombasa in SRM's Court case no. 1693 of 2015)*

**JUDGMENT**

1. There is before this Court an appeal by Robert Wanjohi Njeri alias Robert Wanjohi (the Appellant) against the judgment of Mombasa Senior Resident Magistrate, Honorable Kyambia, delivered on 29/9/2018 in Mombasa SRMCC No. 1693 of 2015. The Appellant, who was the plaintiff in the said suit, had sued the Respondent claiming damages arising from injuries sustained in an occupational accident pleaded by the Appellant to have occurred on 2<sup>nd</sup> February 2015.
2. In a plaint dated 30<sup>th</sup> June 2015 and filed in Court on 8<sup>th</sup> September 2015, the appellant pleaded that he was, at the material time, employed by the Respondent as labourer and that by virtue of the contract of employment, the Respondent was obligated to take all reasonable measures to ensure that the place where the Appellant carried out his work was safe, and to maintain proper and safe system of work.
3. The Appellant pleaded that on 2<sup>nd</sup> February 2015, whilst the Appellant was offloading 50kg bags of fertilizer from a lorry into a godown at the behest of his supervisor, the Appellant fell and sustained injuries as a result of fertilizer which was negligently spilt on the floor of the godown. The Appellant pleaded negligence on the part of the Respondent and claimed general damages, special damages, costs of the suit and interest.



4. The Respondent entered appearance and filed a statement of defence dated 21<sup>st</sup> October 2015, denying liability and putting the appellant to strict proof of his allegations. The Respondent pleaded as follows at paragraphs 7 and 9 of its statement of defence:-

“7. The defendant avers that the plaintiff was never in its employment on 2/02/2015 or at all and that if at all he was injured, then the same was not while in the course of his employment with the defendant and the Defendant intends to prove the same in the course of hearing of this suit.

9. The Defendant avers that the plaintiff’s claim for damages against itself is misconceived and bad in law.”

5. The trial Court conducted a full trial of the suit and delivered its judgment on 28th September 2018, dismissing the suit before it with costs. The Court rendered itself thus:-

“...DW1 produced the said list in Court and it clearly shows that the plaintiff is not in the list. I find and on a balance of probability that the plaintiff was not on duty on the material date as per the evidence tendered before the Court. As such the defendant cannot be held liable. To that extent the plaintiff’s suit against the defendant is dismissed.

I am obliged to give my opinion on the guiding in the event my finding on liability is wrong... I would have assessed general damages at 100,000 had the plaintiff succeeded in his claim. I would also have awarded special damages of 2,070 pleaded.

However, the upshot is that the plaintiff’s case is hereby dismissed with costs.”

6. It is the foregoing judgment of the Lower Court which provoked filing of the present appeal. The Appellant’s Memorandum of Appeal dated 8<sup>th</sup> October 2018 raises a total of thirteen grounds of appeal, which I will not consider until I have addressed the all important issue of jurisdiction, though not taken up on appeal by either of the parties to the appeal herein.

7. The Court of Appeal held as follows in the case of *Kenya Ports Authority v Modern Handling Ea Limited* [ 201&] 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.”

8. It is clear from the pleadings filed in the Lower Court that the suit before the trial Court was a work injury claim. As stated earlier in this Judgment, the Respondent pleaded in its statement of defence that “the plaintiff’s claim for damages against the defendant was misconceived and bad in law.” . This particular issue does not seem to have been pursued by the parties during the trial, and the trial Court does not seem to have considered it while determining the case before it.

9. 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.”

10. The Court of Appeal in Civil Appeal No. 133 Of 2011 *Attorney General v 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; and the decision was upheld/affirmed by the Supreme Court of Kenya in the case of *Law Society Of Kenya –vs- Attorney General & Another* [2019] eKLR
11. The Lower Court suit, filed on 8<sup>th</sup> September 2015, was filed in a Court without jurisdiction. The Lower Court lacked jurisdiction to entertain, to hear and to determine the suit before it. The suit was a nullity at its inception. As stated by this Court in the case of *Charo Kasira Sathine –vs- Kk Security* [2022] eKLR:-

“ 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..... a Court’s jurisdiction is conferred by *the Constitution* and the statutes. It cannot be conferred by parties to a suit by their pleadings.”
12. In *Samuel Kamau Macharia –vs- Kcb And 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 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...”
13. Without jurisdiction, the trial Court heard and determined the suit before it, dismissing the same based on its assessment of the facts of the case and evidence adduced by the parties. Having made a finding that the suit before the trial Court was a nullity at its inception, I will not disturb the order dismissing the suit. The evidence adduced before the trial Court having been tendered on a suit that never was by virtue of Section 16 of the *WIBA*, there is nothing for this Court, as an appellate Court, to re-evaluate.
14. In sum, the appeal is hereby dismissed. Each party shall bear their own costs, both in this Court and in the Court below.
15. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28<sup>TH</sup> DAY OF APRIL 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:

N/A for Appellant

Miss Waithera for Respondent

