Jumbo North(EA) Limited v Buleti (Employment and Labour Relations Appeal E022 of 2021) [2022] KEELRC 1634 (KLR) (29 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1634 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

EMPLOYMENT AND LABOUR RELATIONS APPEAL E022 OF 2021

NJ ABUODHA, J

JULY 29, 2022

BETWEEN

JUMBO NORTH(EA) LIMITED ..... CLAIMANT

AND

FREDRICK SHITEMI BULETI ..... RESPONDENT

JUDGMENT

1. By a memorandum of appeal filed on 5th July, 2021 the appellant herein appealed against the judgment of the Chief Magistrate's Court (Hon. C. Obulutsa) on the following main grounds.

    a. That the learned trial Magistrate erred in law and fact in holding the Appellant herein 100% liable in negligence without considering the evidence and the legal concept of negligence.

    b. That the learned trial Magistrate erred in law and in fact in holding that the respondent had established a case against the appellant contrary to the evidence on record.

    c. That the learned trial Magistrate erred in law and fact in entering judgment for the respondent without considering the credible evidence by the defence witness who confirmed that the Appellant was not injured at the appellants' premises as alleged.

    d. That the learned trial Magistrate erred in law and in fact in failing to hold the respondent wholly liable and/or substantially liable for the accident.

    e. That the learned trial Magistrate erred in law and in fact in awarding damages to the respondent without any basis and which damages were inordinately high as to amount to a gross overstatement of the loss suffered.

2. In support of the appeal counsel for the appellant Ms. Odwa submitted inter alia that the trial Court had no jurisdiction to hear the matter. Although the issue of jurisdiction was not canvassed at the trial, counsel contend that the issue of jurisdiction can be raised at any time even an appeal. In this

regard counsel relied on the case of *Kenya Ports Authority v Modern Holdings* [EA] Ltd [2017] eKLR. Counsel further relied on the cases of Lilian S. and *S.K. Macharia v KCB* on the issue of jurisdiction of a Court.

3. According to Counsel, the respondent's claim arose out of alleged injuries he sustained in the course of employment and at the time of filing the claim the legal regime governing work injury related claims was *Work Injury Benefits Act*, 2007 (WIBA) which prohibited proceedings other than as provided by the Act. (Section 16). Ms. Odwa therefore submitted that the forum for lodging claims was before the Director, Occupational Safety and Health Services as provided under section 22 and 23 of the WIBA. The trial Court therefore had no jurisdiction to hear and or determine the matter.

4. Counsel further relied on the decision of the Supreme Court in Petition 4 of 2019 in which according to Counsel, that Court stated that the claimants in the affected cases had 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 an even more progressive statue, as the Court had shown it was best that all matters were finalized under Section 52 of the Act.

5. Ms. Odwa further submitted that the respondents case was filed during the existence of the WIBA 2007 but at a time when the provisions of WIBA had been suspended, having been declared unconstitutional. However, the fact that there was an appeal in a superior Court ought to have been sufficient reason for the trial Court not to proceed with the matter. In this connection, counsel relied on the case of *Jumbo North (EA) Ltd v Wilder Wangira* [2020] eKLR.

6. On the issue of liability. Counsel submitted that the respondent knew very well that the job he undertook to perform entailed risks. It was also not disputed that the respondent was in control of the work he was doing however according to the appellant, the respondent did not sustain any injuries while at work since none was reported on the material day. According to Counsel, the appellants witness (DW1) testified, and which the respondent never rebutted, by producing any documentary evidence or calling eye witnesses to corroborate his evidence. According to counsel the respondent in his statement stated that the accident took place at 3 pm on 10th January, 2015 however the job card he produced in Court showed that his shift ended at 12pm as he worked from 8am – 12pm. Further the respondent failed to show the appellant was to blame when he had already stated that one of his colleagues tripped hence the accident.

7. On the question of quantum Counsel submitted that the trial Magistrate erred in awarding a sum of Ksh.400,000/= as general damages which was excessive in the light of the injuries sustained. According to counsel the prevailing awards as at 2018 for similar injuries could not fetch more than Ksh.100,000/=.

8. The role of the Court as the first appellate Court has been settled by several authorities. The main principles are that an appeal to the Court is from a trial Court is by way of a retrial and principles upon which the Court acts in such appeal are well settled. Briefly put they are that the Court must consider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen not heard the witnesses and should make due allowances in this respect.

9. However, before the Court considers the merit of the appeal, Counsel raised an important question of jurisdiction of the trial court to have entertained the matter in the first instance. According to Counsel, the claim arose out of injures allegedly sustained in the course of employment and at the time the legal regime governing work injuries was WIBA 2007. This Act according to Counsel, prohibited any claim brought arising from work related injuries, from being commenced other than as provided in the Act. That is to say all work related injuries were to be filed with the Director Occupation Safety and Health.

10. The High Court decision on the WIBA matter was delivered on 4th March, 2009 declaring the material sections of WIBA unconstitutional. The Attorney General being dissatisfied appealed to the Court of Appeal which delivered its judgment on 17th November, 2017.

11. The matter subject of this Appeal was filed on 12th May, 2017. It is not clear to me whether the High Court judgment (Ojwang J.) was stayed pending appeal. However, the declaration that sections of WIBA were unconstitutional remained the correct legal edict until overturned by the Court of Appeal. The Court therefore does not agree with the counsel for the appellant that the trial Court should have waited the decision of the Court of Appeal before proceeding with the matter before it. In any event the matter before the Court of Appeal though of general public interest, did not bind other parties not subject of the matter before Court of Appeal.

12. To this extent the Court does not agree that the trial Court lacked jurisdiction. This issue though not one of the grounds of appeal, is rejected.

13. On the issue of liability, the appellant complained that the trial Court did not properly consider the evidence before it before holding the appellant liable. According to Counsel, the respondent was aware the work he was undertaking had risks and ought to have been more careful and further that there were inconsistencies in the respondent's evidence when he said he got injured around 3.00pm yet his shift card showed he worked from 8.00 am – 12.00pm. Further that if it was true that one of the respondent's colleagues fell and he got injured, the appellant was not therefore to blame.

14. The respondent in his statement found at page 9 of the record of appeal stated that on the material date he reported to work at 7.00 am and was to work until 7.00pm although his shift card indicated that he was to work form 8.00am – 12pm.

15. The respondent further stated that.

> " we used to bundle 40 – 50 bars instructed by the supervisor. We would then use sisal sacks to hold on to the bars and place them on to our shoulders to avoid getting burnt. Eight of us one standing behind the other would then ferry the rods to the twisting area. I was the last on the line behind my seven colleagues... as we were now moving towards our destination, my colleague who was directly in front of me stepped on metallic square bars which were scattered and littered all over the floor. This caused him to slip and lose balance and he fell down. As a result, the weight of the metal weighed down on me and my colleagues and without any notice my colleagues dropped the metal rods to the ground. Being the last one on the line, the impact caused me to fall and the rods fell on me, burning me on my left lateral chest. My colleagues removed the rods off me and alerted my supervisor who came and witnessed my injuries and formally received my accident report. The supervisor then administered first aid on me by applying oil on the burnt area and instructed me to go seek proper medical treatment.

16. The respondents witness Mr. Zacharia Ngaira in his witness statement dated 16th March, 2018 stated in the main that he was on duty on 10th January, when the plaintiff alleged he was injured and he never received any report of injury or accident involving the plaintiff. According to him if at all the plaintiff was injured, the injuries must have been sustained elsewhere and not at the defendant's promises. He further stated that the circumstances leading to the accident did not add up because by the time the metals reach the Goods Transfer Section they were usually cold.

17. In cross –examination during the trial Mr. Ngaira stated that the supervisor was informed of an accident and notes taken and that Lawrence was the Supervisor and he kept registers. He did not have the register in Court.

18. The learned trial Magistrate in his judgment observed as follows:

> " The plaintiff said when he was injured, he reported to the supervisor Lawrence. The defendant (*sic*) who is Ngaira is not the one who keeps the register and would therefore (*sic*) know about the incident. The defendants were served with notice to produce the various records but did not do so. They have not said why indeed they have something to indicate (*Sic*).

19. The learned trial Magistrate's observations though could be having some typographical errors raises important questions of evidence. First he notes that Ngaira was not the supervisor who attended to the respondent Ngaira according to the witness statement was a Human Resource Manager. Second, the respondent served the appellant with notice to produce documents but they never honoured the request.

20. From the foregoing, the respondents account of the events on the material day remain uncontroverted. The learned trial Magistrate was therefore right to find the appellant liable. This ground of appeal therefore fails.

21. On the issue of quantum this Court will only interfere with an award of damages by a trial Court if it is sufficiently demonstrated that the award is so high or so low as show that the trial Court must have made an error in assessing the same.

22. The Court has noted that whereas the respondent submitted the case of *Philip Musambi v Coastal Tyre Retreading Co. Ltd* HCCC 196 of 1993 per Wambilyanga J in which the Learned Judge awarded Ksh.120,000/= for burns on the right hand. The authorities submitted by the appellant only dealt with cases where the Court was reviewing damages awarded by a trial Court. The appellant never submitted any authority to support their proposed award of Ksh.50,000/=.

23. The learned trial Magistrate in awarding Ksh.400,000/= noted that taking into account inflation the Court found the amount as adequate general damages. The Court agrees with the learned Magistrate.

24. In conclusion the Court finds the appeal without merit and the same is dismissed with costs.

25. It is so ordered

DATED AT ELDORET THIS 29TH DAY OF JULY, 2022

DELIVERED THIS 29TH DAY OF JULY, 2022

ABUODHA JORUM NELSON

JUDGE