



**Ongoro v China Road & Bridge Corporation Kenya & another (Civil Appeal E068 of 2021) [2022] KEELRC 1282 (KLR) (14 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1282 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CIVIL APPEAL E068 OF 2021**

**MN NDUMA, J  
JULY 14, 2022**

**BETWEEN**

**JULIUS ONGORO ..... APPELLANT**

**AND**

**CHINA ROAD & BRIDGE CORPORATION KENYA ..... 1<sup>ST</sup> RESPONDENT**

**EDWARD NDOLO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the ruling of Honourable Muiru, Principal Magistrate delivered on 1st July, 2021 in the Principle Magistrate Court at Kilungu in Civil Case No. 50 of 2020 – Julius Ongoro -vs- China Road and Bridge Corporation Kenya Limited and Edward Ndolo)*

**JUDGMENT**

1. The appellant challenges the judgment of Hon. Muiru, P.M. delivered on 1<sup>st</sup> July, 2021 in Kilungu PMCC 50 of 2020 on the following grounds: -
  1. The learned Trial Magistrate erred in fact and in law by failing to appreciate that the Preliminary Objection raised by the Applicant did not meet the threshold as was highlighted in the case of *Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors* (1969) E.A.
  2. The learned Trial Magistrate erred in fact and in law by allowing the Preliminary Objection yet the facts pertaining to the existence of any employment relationship between the Appellant and the 1<sup>st</sup> Respondent were ascertained by the exercise of judicial discretion contrary to the Court decision in *Mukisa Biscuits* case (*supra*).
  3. That the learned Trial Magistrate grossly misdirected herself in ignoring the principle of stare decisis on the threshold to be met for a Preliminary Objection of this nature.



4. The learned Trial Magistrate erred in fact and in law by deciding that the suit as filed is a work-related injury claim and struck it out when in fact the same is a Road Traffic Accident Claim thereby occasioning a great injustice to the claimant.
  5. The learned trial magistrate erred in failing to appreciate that no employer – Employee Relationship existed between the Appellant and the 1<sup>st</sup> Respondent; and
  6. The learned trial magistrate erred in law and in fact by failing to properly and carefully evaluate the facts of the case hence striking off the case.
2. The facts of the case as set out in the plaint were that the plaintiff was on 1<sup>st</sup> April, 2019, on board Motor vehicle Registration No. KCL 003Y make; Isuzu NQR M/Bus owned by the 1<sup>st</sup> respondent and driven by the 2<sup>nd</sup> respondent.
  3. That the 1<sup>st</sup> defendant negligently drove the said vehicle as a result of which the same was involved in a Road Traffic Accident and the Plaintiff sustained blunt and bruise injuries on both his knees as a result of the said accident.
  4. Particulars of negligence by the 2<sup>nd</sup> defendant, injuries and special damages are set out in the plaint.
  5. That the 2<sup>nd</sup> respondent/defendant was charged in Traffic Case Number 655/2019 with careless Driving contrary to Section 49(1) of the *Traffic Act*, Cap. 403 Laws of Kenya and was found guilty and sentenced to one-year imprisonment and in the alternative pay Kshs 70,000.
  6. The plaintiff claimed special and general damages with interest and costs.
  7. The suit was defended vide a statement of defence dated 10<sup>th</sup> March, 2020 in which the claim was denied and the plaintiff put to strict proof thereof.
  8. The respondent filed a notice of preliminary objection dated 18<sup>th</sup> February, 2021 to wit; that the cause of action in this suit relates to a work injury claim that arose on or about 1<sup>st</sup> April, 2019.
  9. That pursuant to the provisions of Section 16 of the *Work Injury Benefits Act*, 2007 as read with Section 23 of the said *Act*, the Court lacks jurisdiction to hear or have this suit pending in Court.
  10. That the suit being instituted in Court at the first instance instead of complying with the provisions of the *Work Injury Benefits Act*, 2007 is in apparent want of procedure.
  11. The respondent and the plaintiff filed written submissions and the contention by the plaintiff was that he was never an employee of the 1<sup>st</sup> respondent as his claim for compensation is for injuries in a Road Traffic Accident as against the owner of the motor vehicle.
  12. The plaintiff submitted that the Preliminary Objection was not a pure point of law as it involved determination of facts which are in dispute and could only be resolved at the hearing of the main suit. The plaintiff relied on the case of Mukisa Bisquits (*supra*) that a Preliminary Objection of law is raised on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
  13. In the Ruling, the learned magistrate at page 3 found as follows: -

“The plaintiff in paragraph 4 and 5 of the plaint pleads that he was lawfully travelling as a passenger in motor vehicle KCL 003Y which he stated belonged to the defendant. The defendant on the other hand indicated at paragraph 11 that the accident occurred while the plaintiff was employed by the 1<sup>st</sup> defendant and that the said accident occurred in the



course of the said employment. It is not in dispute that the accident occurred and the plaintiff was allegedly injured. The police abstract attached to the plaintiff's documents does indicate China Communications Construction Company to be the beneficial owner of the subject motor vehicle. The plaintiff admits that he was employed by the said company the 1<sup>st</sup> defendant being the registered owner of the motor vehicle..."

14. From the above analysis by the learned magistrate, it is apparent that he was engaged in evaluation of facts beyond the four corners of the plaint.
15. Nowhere in the plaint dated 17<sup>th</sup> February, 2020 does the plaintiff admit that he was an employee of the 2<sup>nd</sup> respondent as the learned magistrate found in his ruling cited above.
16. Clearly, whether or not the plaintiff was an employee of the 2<sup>nd</sup> respondent is not a matter discernable from either the plaint or statement of defence filed by the parties.
17. The learned trial magistrate in the circumstances grossly - misdirected himself in respect of the finding that the plaintiff was an employee and therefore this was a claim falling under the Work Injury Benefits Act (WIBA) as opposed to a normal Road Traffic Accident, and by so doing misapplied the law as to the jurisdiction of the Court to hear and determine this suit.
18. On this ground alone, the appeal succeeds since the learned trial magistrate did not hear and determine the suit on the merits. The Court therefore finds that this is an appropriate case to be remitted back to the Chief Magistrates Court, Kilungu to be heard afresh by another Magistrate and not Hon. E. Muiuru P.M.
19. The respondent to pay the costs of the proceedings before this Court and the trial Court.
20. It is so ordered.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 14<sup>TH</sup> DAY OF JULY, 2022**

**MATHEWS N. NDUMA**

**JUDGE**

Appearance

M/s Muema for Appellant

Mrs Kibe for respondent

Ekale – Court Assistant

