Imwanok v Twiga Construction Company Limited (Appeal 001 of 2021)
[2022] KEELRC 12690 (KLR) (29 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 12690 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL 001 OF 2021

J RIKA, J

SEPTEMBER 29, 2022

BETWEEN

TWIGA CONSTRUCTION COMPANY LIMITED.....APPELLANT

AND

STEPHEN CORNEL IMWANOK .....RESPONDENT

BETWEEN

STEPHEN CORNEL IMWANOK ..... PLAINTIFF

AND

TWIGA CONSTRUCTION COMPANY LIMITED ..... DEFENDANT

(An Appeal from the Ruling of the Hon. Mrs. L.L. Gicheha, Chief Magistrate, delivered on 4th December 2020 in C.M.C.C No. 5671 OF 2015 at Nairobi)

JUDGMENT

1. The respondent filed the claim before the Chief Magistrate's Court at Nairobi, on September 22, 2015.
2. He sought special damages, general damages, costs and interest, following head injuries sustained at the workplace, in June 2015.
3. The appellant filed a statement of defence on November 8, 2015, conceding the jurisdiction of the trial court to hear the claim.
4. However, the appellant filed a notice of preliminary objection, dated July 1, 2020, challenging the jurisdiction of the trial court, based on the judgment of the Supreme Court in Petition No 4 of 2019, *Law Society of Kenya v The Attorney-General & another*.

5. The appellant, in its objection, retraced the history of litigation surrounding work injury, beginning with Nairobi HC Petition No 185 of 2008, *Law Society of Kenya v The Attorney-General* [2009] e-KLR.

6. The High Court, in a Judgment dated March 4, 2009, declared certain sections of the *Work Injury Benefits Act*, 2007 unconstitutional, among them section 58[2]. It was held that the section seeks to take away the right to legal process, in respect of matters covered by the act, and further seeks to convert suits pending in courts, into claims under the Act.

7. Section 58 [2] states that any claim in respect of an accident or disease, occurring before the commencement of the act, shall be deemed to have been lodged under the act. The High Court held that there were many claims pending in courts, and it was the fundamental right of every citizen to have such pending claims resolved in the courts, in which they were pending.

8. The High Court Petition was the subject of Court of Appeal Civil Appeal No 133 of 2011, *Attorney-General v. Law Society of Kenya* [[2017] e-KLR. The Court of Appeal overturned the decision of the High Court on unconstitutionality of section 58 [2], holding that the section was not inconsistent with the *Constitution*, but only needed further legislative intervention, to midwife smooth transition from the *Workmen's Compensation Act*.

9. The Court of Appeal endorsed the view of the High Court that, claimants with pending work injury claims, had legitimate expectation that their claims would be dealt with to conclusion, under the legal regimes under which they were initiated.

10. The Court of Appeal decision was appealed in the Supreme Court of Kenya, in Petition No. 4 of 2019, *Law Society of Kenya v The Attorney-General* [[2019]-e-KLR.

11. The Supreme Court agreed with the courts below, on legitimate expectation of litigants with pending cases, at the time the act was passed, that their claims would be heard to the end, under the legal regimes under which they were initiated.

12. The appellant submitted before the trial court that the Supreme Court also observed that, '' However, were it not for such legitimate expectation, WIBA not being unconstitutional and even more progressive statute, as we have shown above, we opine that it is best that all matters are finalized under section 52 aforesaid."

13. The appellant submitted before the trial court that the decisions of the superior courts above, were that claimants with pending cases at the commencement of the act, has legitimate expectation that their claims would be heard and concluded under the judicial processes they were initiated.

14. The appellants reiterated that the Supreme Court, and the Court of Appeal, found section 58[2] of the *Act* is constitutional, and that in the opinion of the Supreme Court, it is best that all matters are finalized under section 52 of the *Act*.

15. Legitimate expectation was in relation to parties with pending claims, before the enactment of act. The trial court was asked to decline jurisdiction, the claim before it, having been filed in 2015 after the Act came into operation.

16. In its ruling, the trial court held that it has jurisdiction, invoking the Court of Appeal and the Supreme Court decisions above, as well as a decision of this court, *Dalmec Agricultural Services Limited v Bernard Ondiek* [2020] e-KLR. The court concluded that the decisions emanating from the superior courts, allowed all suits filed as of the date of judgment [Court of Appeal?] to be addressed by the court hearing such matters.

17. The appellant raises 2 grounds on appeal which can be compressed into 1 ground: that the trial court misapprehended the decisions of the Court of Appeal and the Supreme Court, those decisions being that, all work injury claims are to be adjudicated pursuant to procedures provided for in the *Work Injury Benefits Act*.

18. Parties recorded a consent order on February 3, 2022, to have the appeal heard and disposed of through written submissions. They confirmed filing and service of submissions at the last mention on July 8, 2022.

The Court Finds: -

19. The respondent did not dispute the jurisdiction of the trial court at the inception of the claim. Jurisdiction was admitted in the statement of defence dated November 2, 2015.

20. Admission of jurisdiction by the appellant was based on the law as it were, on the date the claim was presented before the Chief Magistrate's Court in 2015.

21. The law was that the High Court, had declared the *Work Injury Benefits Act*, specifically sections 4, 7[1] and [2], 10[4], 16, 21[1], 25[1] and [3] 52[1] and [2] and section 58 [2] unconstitutional, null and void. The High Court decision is dated March 4, 2009. The claim before the trial court was filed on September 22, 2015, when the above sections were unconstitutional, null and void.

22. The High Court judgment simply meant that parties with pending claims, were at liberty to proceed with the claims before the Magistrate's courts as they had always done before the passage of the WIBA. Those with fresh claims under the common law and the workmen's compensation act, were at liberty to present their claims in the courts, the work injury claims regime under WIBA, having been rendered unconstitutional, null and void.

23. The constitutionality of the relevant, affected sections of WIBA, was restored on November 17, 2017 by the Court of Appeal. Only from this date would litigants be barred from presenting work injury claims in the magistrate's courts. The position reverted to the date WIBA was operationalized. Until the Court of Appeal rendered its decision, 9 years after the High Court decision, the impugned provisions remained unconstitutional, null and void.

24. The position of the Court of Appeal was affirmed by the Supreme Court. The Court does not think that the Supreme Court in opining that it is best, that all matters are finalized under section 52 of the *Act*, meant that all matters, pending before the Court of Appeal made its decision, should be withdrawn from the Courts, and directed to the director of Work Injury under section 52. The Supreme Court considered that Litigants already in court, did not expect their claims to be moved to a different regime, but that were it not for that legitimate expectation, it would be ideal to have all matters placed before the director of work injury. Nowhere did the Supreme Court suggest or direct, that all work injury matters pending in courts, before 2017, should be moved away from the courts, to a different forum, from that under which they were commenced. Should the claim before the trial court have been withdrawn/discontinued, and pursued under a regime which was unconstitutional, null and void, at the time the claim was filed? the appellant appears to read too much in the opinion of the Supreme Court, that it is best all matters are dealt with under section 52 of the *WIBA*, which statement, in the respectful view of this court [E&LRC] is merely an endorsement of the Court of Appeal finding, that the provisions of WIBA which were under challenge at the courts below, are constitutional and valid.

25. Both superior courts expressed the view that all existing matters, ought to be dealt with and concluded, through the judicial processes, under which they were initiated. To understand these judicial processes,

or legal regimes, Parties need to look in particular, at the dates when the WIBA was enacted; when High Court rendered its decision; when the Court of Appeal overturned the decision of the High Court; and when their respective claims were presented before the court.

26. The claim subject of this appeal, was filed after the Judgment of the High Court and before the Judgement of the Court of Appeal. That was a period when relevant sections of the WIBA, were unconstitutional, null and void, and the door open to parties to pursue work injury, under the legal regime applicable before the High Court Judgment. The respondent in this appeal approached the right jurisdiction, in the Chief Magistrate's court. There is no reason why the Chief Magistrate's court should have declined jurisdiction.

    It is ordered:-

    a. The appeal is declined.

    b. Costs to the respondent.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 29TH DAY OF SEPTEMBER 2022.

JAMES RIKA

JUDGE