



**Hamasi v Capital Reef [CO] Ltd (Appeal 22 of 2022)  
[2022] KEELRC 3998 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3998 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL 22 OF 2022  
AK NZEI, J  
SEPTEMBER 22, 2022**

**BETWEEN  
MILTON KHAMASI ANORL ALIAS MILTON HAMASI ..... APPELLANT  
AND  
CAPITAL REEF [CO] LTD ..... RESPONDENT**

*(An Appeal from the judgment of Hon Rabera delivered on 2nd  
March, 2018 in Mombasa SRM's Court case No. 577 of 2015))*

**JUDGMENT**

1. Vide a plaint dated March 25, 2015 and filed in the Chief Magistrate's Court at Mombasa on March 31, 2015 being the said court's Civil Suit No 577 of 2015, the appellant sued the respondent herein and pleaded as follows:-
  - a) that at all times material to the suit, the plaintiff was employed by the respondent as a casual labourer.
  - b) that it was a term or implied term of the employment contract between the appellant and the respondent that the respondent would take all reasonable precautions for the safety of the appellant whilst he was engaged on his work, not to expose him to a risk of damage or injury which the respondent knew or ought to have known, to provide and to maintain adequate and suitable machine tackle, apparel and appliances to enable the appellant to carry out his said work in safety, to take all reasonable measures to ensure that the place where the appellant carried out his work was safe and to provide and to maintain proper and safe system of work.
  - c) that on or about February 5, 2015, the appellant was lawfully and carefully in the course of his employment with the respondent as a casual laborer instructed by his supervisor to load 90 Kg bags of sesame seeds and while in the process, a bag fell off a stake above and landed on his back, as a direct result whereof the appellant sustained a serious injury, loss and damage.



- d) that the said accident and consequential injuries to the appellant were occasioned by negligence, recklessness and carelessness on the part of the respondent.
2. The appellant claimed general and special damages, costs of the suit and interest against the respondent.
  3. The respondent entered appearance and subsequently filed a statement of defence dated June 22, 2015, denying the appellant's claim and putting him to strict proof thereof. The respondent admitted the said court's jurisdiction over the appellant's suit.
  4. After a full trial, the Magistrate's Court (the trial court) delivered its judgment on March 2, 2018, whereby it dismissed the appellant's suit with costs. The trial court rendered itself as follows:-

“...the law of evidence requires that he who alleges must prove before the burden shifts to the other party. I find that the plaintiff has failed to prove his case on a balance of probability....I proceed to dismiss the case with costs to the defendant.
  5. Aggrieved by the said judgment, the appellant preferred an appeal to the High Court at Mombasa, being the said court's Civil Appeal No 37 of 2018. The appellant raised eleven grounds of appeal in his memorandum of appeal dated March 15, 2018. The appeal was subsequently transferred to this court by the High Court *vide* its orders contained in a ruling delivered on February 22, 2022. The High Court (Olga Sewe, J) stated as follows in the said ruling:-

“ [2] Both parties herein agree that the cause of action arose from a work-related injury. Accordingly, Mr Shikely, learned counsel for the respondent herein raised the issue of jurisdiction in his written submissions dated October 27, 2021. It is therefore imperative that the issue of jurisdiction be determined first, hence this ruling instead of a judgment on the merits of the appeal.

[14] Hence, this being an appeal arising from a work injury, is a dispute between an employer and employee. Accordingly, it is my finding that the court with jurisdiction to hear and determine this appeal is the Employment and Labour Relations Court. In the premises, it is hereby ordered, in the larger interest of justice, that this appeal be transferred to the Employment and Labour Relations Court, Mombasa, for hearing and determination. It is so ordered.”
  6. The appeal is now before me for determination. Advocates for both parties having filed written submissions on the appeal pursuant to the High Court's directions in that regard given on July 2, 2021. Submissions on behalf of the appellant were filed on November 3, 2021 while those on behalf of the respondent were filed on November 2, 2021.
  7. The respondent raised the issue of jurisdiction by referring the court to section 16 of the [Work Injury Benefits Act](#) which 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.”
  8. Counsel for the respondent submitted that the appellant having pleaded in paragraphs 3,4, and 5 of his plaint (as filed in the trial court) that he was at all material times an employee of the respondent as



a casual labourer, and the suit having been a WIBA matter, the court has (had) no jurisdiction to hear the same. That courts do not have jurisdiction to hear matters that fall under the *Work Injury Benefits Act*, or disputes arising therefrom.

9. On their part, counsel for the appellant responded on the issue of jurisdiction and submitted that the appellant's work injury claim was lodged on March 31, 2015 and that there was no law barring him from lodging the claim in court in view of the High Court's decision in *Petition No 185 of 2008* (J B Ojwang J) whereby the court on March 4, 2009 declared sections 4,7(1)(2), 10(4), 16,21(1), 23(1), 25(1) (3), 51(1) (2) and 58(2) null and devoid of the status of law vis-vis the *Constitution* of Kenya. That the matter proceeded on appeal all the way to the Supreme Court in the case of *Law Society of Kenya v Attorney General & another* [2019] eKLR whereby the Supreme Court made the following finding on December 3, 2019:-

“ [85] In agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of this act, litigation relating to work injuries had gone on and a number of the suits had progressed upto the decree stage; some of which were still being heard, while others were still at the preliminary stage. All such matters were being dealt with under the then existing and completely different regimes of law. We thus agree with the appellate court that claimants in those pending cases have 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 statute, as we have shown above, we opine that it is best that all matters are finalized under section 52 aforesaid...”

10. It was counsel's submission that the Supreme Court made its decision on December 3, 2019, way after the appellant had filed the suit and that the appellant had legitimate expectation in filing the same. It was counsel's further submission that the Supreme Court's decision had been interpreted in the cases of *Manuchar Kenya Limited v Dennis Odhiambo Olwete* [2020] eKLR and *West Kenya Sugar Co Ltd v Tito Lucheli Tingale*, Civil Appeal No 4 of 2019 – Kisumu which have two divergent views with the latter court stating that the matters which were pending in courts before the ruling of the Supreme Court should proceed for full hearing and determination and the former court stating that they should not. That it would be unfair not to determine the appeal herein by virtue of the doctrine of legitimate expectation, and that this court has jurisdiction to hear the appeal by virtue of the aforesaid doctrine.
11. The issue which automatically pops up is whether this court is seized of jurisdiction to determine the appeal herein. This is a primary issue which this court must address before it can consider the grounds of appeal raised. It was stated in the case of *Owners of Motor "Vessel Lilian S" v Caltex Oil [Kenya] Limited* [1989] KLR (Nyarangi, JA) that:-

“ ... 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 straight 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 the proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”



12. In my view, and as correctly held in the case of *Manuchar Kenya Limited v Dennis Odhiambo Olwete* [2020] eKLR (Ndolo J), all work injury claims arising after the enactment of the *Work Injury Benefits Act* 2007 were to be processed and dealt with as set out in the said Act, as the court’s jurisdiction was ousted by the said Act.
13. The suit filed by the appellant in the trial court in 2015 cannot be said to have been filed in a court with jurisdiction based on a High Court decision that was subsequently overturned on appeal by both the Court of Appeal and the Supreme Court, and when a statute expressly and unambiguously ousting jurisdiction of the court over work injury claims had been enacted way back in the year 2007. In the case of *Charo Karisa Sathine v KK Security* [2020] eKLR, this court stated as follows:-
- “ 17. True, judges do 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.
18. In my view, judge-made law or case law cannot supercede and/or replace the statute. The appellant herein should have pursued his claim in the manner provided in the *Work Injury Benefits Act*. He wrongly filed his claim in a court that had no jurisdiction to either entertain or hear and determine the same. The judgment rendered by the lower court on November 23, 2016 without jurisdiction is a nullity and I so find. This court cannot be called upon to sit on appeal over an invalid judgment.”
14. The foregoing position holds true and valid in the present appeal, and applies thereto. This court cannot sit on appeal over a decision made by a trial court that had no jurisdiction over the subject matter in the suit before it. Further, this court is itself without jurisdiction to entertain the appeal herein by virtue of section 16 of the *Work Injury Benefits Act*.
15. Although the issue of jurisdiction was not raised before the trial court, the same was validly raised before this court, and counsel for both parties duly submitted on the same. The court of appeal held as follows in the case of *Kenya Ports Authority -us- Modern Handling [E.A] Limited* [2017] 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.”
16. Having made a finding that this court is without jurisdiction to hear and to determine the appellant’s appeal, I will not consider the grounds of appeal raised. I must down my tools.
17. Consequently, the appeal is hereby dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 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:**

Miss Osino for Appellant

Mr. Shikely for Respondent

