



REPUBLIC OF KENYA



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**Maskini v Barkresha Grain Milling [K] Ltd (Appeal 78[B] of 2021)
[2022] KEELRC 3997 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3997 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL 78[B] OF 2021
AK NZEI, J
SEPTEMBER 22, 2022**

BETWEEN

FESTO SIVONA MASKINI ALIAS FESTO SIVANO APPELLANT

AND

BARKRESHA GRAIN MILLING [K] LTD RESPONDENT

*(An Appeal from the decision of Hon. Nyakweba delivered on 28/6/2016
in Mombasa in Senior Resident Magistrate's Court Case No. 40 of 2015))*

JUDGMENT

1. The appellant was the plaintiff in Mombasa chief Magistrate's Court Civil Suit No 40 of 2015 whereby he sued the respondent herein vide a plaint dated January 13th, 2015. The appellant claimed damages against the respondent arising from work injuries allegedly sustained by the appellant on or about November 12, 2014 in the course of his employment by the respondent. The appellant pleaded, inter-alia:-
 - a. that at all times material to the suit, the appellant was employed by the respondent as a casual labourer.
 - b. that on or about November 12, 2014, the appellant was lawfully and carefully in the course of his duties as a casual labourer instructed by his supervisor to off-load 90 Kg bags of wheat from a track onto a wagon, and that while in the process, a heap of bags fell from the truck and caused his left leg to be entangled between the bags and the truck body, as a result of which the appellant sustained a serious injury, loss and damage.
 - c. that the said accident and consequential injuries were occasioned by negligence, recklessness and/or carelessness or breach of safety on the part of the respondent.
 - d. the appellant prayed to be paid general and special damages, costs of the suit and interest.



2. In its statement of defence dated February 27, 2015, the respondent denied the appellant's claim and put the appellant to strict Proof thereof. The respondent admitted the trial court's jurisdiction.
3. After a full trial, the trial court dismissed the appellant's suit with costs vide a judgment delivered on June 28, 2016.
4. Aggrieved by the trial court's said judgement, the appellant filed an appeal in the High Court of Kenya at Mombasa on July 26, 2016, being the said Court's Civil Appeal No 99 of 2016, whereby the respondent raised some eight grounds of appeal. The said appeal was subsequently transferred to this court for final determination vide the High Court's orders contained in its ruling that was delivered on November 18, 2020, in which the High Court declined jurisdiction over the appeal.
5. When the appeal came up for directions before me on January 19, 2022, Counsel for the respondent told the court that she had earlier raised the issue of jurisdiction before the High Court and that the High Court did not determine the same but transferred the appeal to this court. I directed parties to file written submissions on the appeal, which I have considered. Both parties have addressed the issue of whether or not this court has jurisdiction to hear and to determine the appeal herein.
6. I will proceed to address the issue of jurisdiction first. In the case of *Owners Of Motor Vessel "Lilian S" v Caltex Oil [kenya] Limited* [1989] KLR, it was stated (Nyarangi, JA) as follows:

“... 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.”
7. The Supreme Court of Kenya in *Samuel Kamau Macharia v KCB & others* [2012] eKLR stated as follows:-

“A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
8. As can be discerned from paragraph 1 of this judgment, the suit before the subordinate court (trial court) was purely a work injury claim, in which the appellant prayed for general and special damages, costs of the suit and interest.
9. Section 16 of the *Work Injury Benefits Act* 2007 provides as follows:-

“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 constitutionality of section 16 of the *Work Injury Benefits Act*, among other sections of the Act, was upheld by the Court of Appeal in Civil Appeal No 133 of 2011 – *Attorney General v Law Society*



of Kenya & Another. The Court of Appeal's decision was upheld by the Supreme court of Kenya in *Law Society of Kenya v Attorney General & another* [2019] eKLR.

11. It is clear from the foregoing that the suit filed in the trial court in the year 2015 was filed in a court without jurisdiction. The trial court lacked jurisdiction to entertain, to hear and to determine the suit before it. The suit was one that never was. It was a nullity at its inception. This court recently stated in the case of *Charo Karisa Sathine v Kk Security* [2022] eKLR, as follows:-

“out of nothing flows nothing. The trial court’s judgment cannot, therefore, stand. It matters not that the respondent had submitted to and admitted the said court’s jurisdiction in its defence. As already stated in this judgment, a court’s jurisdiction is conferred by the constitution and by the statutes. It cannot be conferred by parties to a suit by their pleadings.”
12. The next question is whether this court has jurisdiction to hear and to determine an appeal against the trial court’s decision that was made without jurisdiction. Counsel for the appellant submitted that the issue of jurisdiction was raised by the respondent before the High Court, and cannot be raised again before this court. In its ruling delivered on November 18, 2020, the High Court stated:-
 9. From the foregoing, this court has no hesitation but to find that a work injury claim is an employment underpinned matter, hence a reserve of the exclusive jurisdiction of the Employment and Labour Relations Court and not the High Court. It is a reserve of that court because the entire claim was grounded upon alleged breach of contract leading to the injury pleaded.
 10. accordingly, this court declines jurisdiction to hear this appeal because the issue of jurisdiction had been raised at the instance of the court.”
13. The issue of whether or not the appellate court (this court) has jurisdiction to hear and to determine the appeal was not determined by the High Court before which the appeal was initially filed. I will, therefore, proceed to address that issue.
14. Counsel for the appellant submitted that the appellant’s suit in the trial court was filed on 15/1/2015 when there was no law barring the filing of work injury claims in court in view of the High Court’s decision in petition No 185 of 2008 whereby the constitutionality of section 7(1)(2), 10(4), 16,21(1), 23(1), 25(1)(3), 51(1)(2) and 58(2) of the *WIBA* had been challenged and the court declared them null and void of the status of law vis-a-vis the Constitution of Kenya . That the decision was appealed all the way to the Supreme Court of Kenya which made its decision overturning the High Court’s decision on December 3, 2019 in *Law Society of Kenya v Attorney General & another* [2019] eKLR, way after the appellant’s suit had been filed. That the appellant had legitimate expectation in filing the suit.
15. It was the appellant’s 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 with two divergent views, with the latter court stating that the matters which were pending in court before the Supreme Court’s decision ought to proceed and the former Court stating that they should not.
16. In the West Kenya sugar Company Case (supra), the court was of the view, and indeed found, that litigants who had filed their disputes with the courts between May 22nd, 2008 and December 3, 2019 on the firm belief that the judge declared law was the valid law in place then were entitled to successfully assert legitimate expectation in having the claims heard to a conclusion before the courts where they were lodged.



17. On its part, the respondent submitted that this court has no jurisdiction to hear matters relating to work injury claims, and addressed the court on the import of sections 16,51,52 and 58 of the *Work Injury Benefits Act*.
18. 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 as set out in the said Act, as the court’s jurisdiction over such claims had been expressly and unambiguously ousted by the said statute.
19. This court recently stated as follows in the Charo Karisa Sathine case (supra)
 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.”
20. The foregoing position obtains in the present appeal. This court cannot be called upon to sit on appeal over a decision made by a court without this Jurisdiction. Further, this court is itself without jurisdiction to entertain the appeal by virtue of section 16 of *WIBA*.
21. The issue of Jurisdiction was correctly raised by the respondent on appeal. The Court of Appeal held as follows in the case of *Kenya Ports Authority v Modern Handling [ea] 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.”
22. Both parties were accorded an opportunity to be heard on the issue of this court’s jurisdiction over the appeal herein, and they did so in their respective written submissions.
23. Having made a finding that the judgment appealed against was made without jurisdiction and that this court is without jurisdiction over the appellant’s appeal, I will not consider the grounds of appeal raised by the appellant. I must down my tools.
24. Consequently, the appellant’s appeal is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22nd 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. Ndambuki for respondent

