



Maisha Mabati Mills Ltd v Ondari & another (Employment and Labour Relations Appeal 152 of 2022) [2022] KEELRC 12932 (KLR) (25 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12932 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL 152 OF 2022**

**BOM MANANI, J
OCTOBER 25, 2022**

BETWEEN

MAISHA MABATI MILLS LTD APPELLANT

AND

SHEM ONKWARE ONDARI 1ST RESPONDENT

JOKALI HANDLING SERVICES LTD 2ND RESPONDENT

*(Appeal from the decision of the trial magistrate in Thika
CMCC No. 404 of 2018 delivered on 25th March 2021)*

JUDGMENT

Introduction

1. This is an appeal from the decision of the trial magistrate in Thika CMCC No 404 of 2018 delivered on March 25, 2021. In the decision, the trial magistrate allowed the claim for compensation by the 1st Respondent herein following an alleged injury whilst on duty.
2. The trial court found the appellant and 2nd respondent wholly liable (jointly and severally) for the injury that the 1st respondent sustained. Consequently, the court awarded the 1st respondent damages of Kshs 303,500 plus interest and costs of the suit.

Facts of the Case

3. It was the 1st Respondent's case before the trial court that he was hired by the 2nd Respondent in May 2015 to work for the Appellant. His position was that of a Crane mechanic.
4. That on February 6, 2017 whilst assisting in the repair of a generator, the 1st Respondent suffered injury when a metal bar fell from above the generator onto his head. The 1st Respondent blamed the



Appellant and 2nd Respondent for the injury allegedly because the two failed to provide him with protective apparels which would have prevented the said injury.

5. Although the Appellant filed a defense denying liability for the accident, it did not call evidence in the cause. On the other hand, the 2nd Respondent neither entered appearance in the matter nor filed a defense.

Trial Court's Decision

6. After hearing the 1st Respondent, the trial magistrate rendered her judgment in his favour. The court noted that the defense did not offer evidence to controvert the 1st Respondent's case against them. Consequently, it was the court's view that the 1st Respondent had established his case against the Appellant and 2nd Respondent to the required standard.
7. Proceeding on this ground, the learned trial magistrate found the Appellant and 2nd Respondent 100 percent liable for the accident in question. She proceeded to award damages as alluded to in the introductory part of this decision. It is this finding that triggered the current appeal.

The Grounds of Appeal

8. The appeal raises a total of seven (7) grounds of appeal. These can be summarized into the following three issues:-
 - a. Whether the trial court failed to consider the pleadings, evidence and submissions by the Appellant and 2nd Respondent and the applicable law in arriving at its decision.
 - b. Whether the trial court erred in law and fact in finding the Appellant and 2nd Respondent jointly and severally 100% liable for the accident in issue.
 - c. Whether the trial court failed to apply the appropriate principles for assessment of damages in assessing the damages awarded to the 1st Respondent thereby entering judgment for damages that were so inordinately high in the circumstances.

Jurisdiction

9. When the matter came up for mention on October 6, 2022 to fix a judgment date, the court noted that only the Appellant's submissions were on record. The 1st Respondent was directed to place his submissions on record by the close of business on October 7, 2022. Meanwhile, it was directed that judgment will be read on October 25, 2022.
10. While fixing the judgment date, the court raised the issue of jurisdiction from a two pronged perspective:-
 - a. Whether the trial court had jurisdiction to entertain the action in view of the provisions of the [*Work Injury Benefits Act*](#) (WIBA).
 - b. Whether the Employment and Labour Relations Court (ELRC) had jurisdiction to entertain an appeal from the impugned decision by the trial magistrate outside the purview of section 52(2) of the [*WIBA*](#).
11. From the record, I note that the question of jurisdiction was raised before the trial court and a ruling delivered on November 18, 2020. In the ruling, the trial magistrate relied on the Court of Appeal decision in [*Attorney General v Law Society of Kenya & another*](#) [2017] eKLR to assert jurisdiction to hear the case. It appears that the Appellant did not appeal against the decision.



12. It is apparent from the Memorandum of Appeal that the Appellant has not expressly contested jurisdiction of the magistrate's court to hear the matter. However, in her submissions, the Appellant's counsel has revisited her earlier position that the trial court was not seized of the requisite jurisdiction to entertain the dispute.
13. Although there is no mention of jurisdiction in the Memorandum of Appeal, this issue is nevertheless indirectly raised when in ground four (4) of the said memorandum, the Appellant asserts that the trial court failed to consider its submissions in arriving at the final judgment. A perusal of the submissions filed by the Appellant before the trial court discloses that the question of jurisdiction was revisited notwithstanding that the matter had been ruled on in the ruling delivered on November 18, 2020. From the court's judgment, it is evident that the trial magistrate made no comment on this attempt by the Appellant to re-introduce this question through its submissions.
14. The issue of jurisdiction having been revisited by the Appellant for the third time at the stage of submissions in the appeal, it became imperative for the court to raise the matter during the mention date of October 6, 2022 in order to flag it as one of the live issues in the cause. The reason for this approach was so that the 1st Respondent may, if he so elects, make observations on the issue in his final submissions which were, at the time, yet to get onto the court's record.
15. I have raised this issue because of the need to properly frame the manner in which it is to be addressed having been taken up in the manner that the appellant has done. In the case of *Kenya Ports Authority v Modern Holding [EA] Limited* [2017] eKLR, the Court of Appeal underscored the primacy of determining the question of jurisdiction to handle a case once it is raised. The court emphasized that as a result of the significance of the issue, the question of jurisdiction can be raised at any stage of the proceedings including at the stage of appeal and in any manner howsoever. In underscoring this fact, the court stated as follows:-

“We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings 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, even by the court itself.”
16. This point is further made by the Supreme Court in *Geo Chem Middle East v Kenya Bureau of Standards* [2020] eKLR when the learned Judges of the court stated as follows on the matter:-

“We further note, from a reading of the judgment of the Court of Appeal and the submissions before us by the Petitioner that, it can be conclusively determined that there was no objection to the decision in the application for leave in Civil Application No NAI 132 of 2018 by the Petitioner, and therefore, the jurisdiction of the appellate Court to determine the appeal was not initially challenged. It is only at the hearing of the substantive appeal that the Petitioner raised the issue of the jurisdiction of Court of Appeal. It is our view however that it matters not when an objection to jurisdiction is raised because jurisdiction is everything and without it, a Court acts but in vain.”
17. It is without doubt that no court can assume jurisdiction where none is donated by law. Any attempt to do so is an exercise in futility and any decision reached as a result is a nullity. This position was



eloquently stated in the often quoted Court of Appeal decision of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR where Nyarangi, J is quoted as saying as follows:-

“Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

18. Jurisdiction can neither be conferred by agreement nor acquiescence of the parties to a dispute. And neither can it be acquired through misapprehension of the law or judicial precedent. Where a court of law or tribunal lacks jurisdiction, it will be of little help that the parties permitted it to adjudicate on the dispute.

19. Commenting on the issue, the Supreme Court in *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* [2019] eKLR said as follows:-

“However, as it was well elucidated in the case of *Kagenyi v Musiramo & another* (1968) EALR 43, an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it. It is therefore irrelevant as parties cannot consent to confer jurisdiction to a Court/tribunal where it is not provided by law.”

20. The dispute giving rise to the case before the trial magistrate relates to an alleged injury to the 1st respondent on February 6, 2017 while he was working for the Appellant. For all purposes and intents, it was a dispute that fell for resolution under the *WIBA* which had come into force on June 2, 2008.

21. Under the *WIBA*, such disputes ought to be filed before the Director of Occupational Safety and Health Services. By this provision, the jurisdiction of courts to entertain work injury claims is ousted save for appeals under section 52(2) of the *Act*.

22. It is true that provisions of the *WIBA* ousting the court’s jurisdiction to entertain work injury claims were declared unconstitutional in the High Court decision of *Law Society of Kenya v Attorney-General & another* [2009] eKLR delivered on March 4, 2009. However, this holding was overturned by the Court of Appeal on November 17, 2017 in its decision in *Attorney General v Law Society of Kenya & another* [2017] eKLR. This holding by the Court of Appeal was to later be affirmed by the Supreme Court in its decision in *Law Society of Kenya v Attorney General & another* [2019] eKLR delivered on December 3, 2019.

23. The record shows that the trial court adjudicated on the question of jurisdiction and suggested that the import of the pronouncement by the Court of Appeal in the *Attorney General v Law Society of Kenya* case on November 17, 2017 was to permit trial courts to entertain work injury suits that were pending before them as at the date of the Court of Appeal decision irrespective of when they were filed or when the cause of action arose. The learned trial magistrate’s position was apparently informed by a passage in the decision in which the court observed as follows:-

“With respect, we agree that claimants in those pending cases have legitimate expectations that upon the passage of the *Act* their cases would be concluded under the judicial process which they had invoked.”

24. Relying on this passage, the trial court posited that the Court of Appeal had resolved the issue of courts’ jurisdiction over pending work injury cases and that she was not going to revisit the matter.



- Consequently, she proceeded to hear and determine the dispute under the doctrine of legitimate expectation.
25. Several cases have considered the effect of the decisions by the Court of Appeal and Supreme Court on the fate of work injury claims that were pending in court as at June 2, 2008 when the *WIBA* came into force and those that were filed between March 4, 2009 and November 16, 2017 after key provisions in the *Act* had been declared unconstitutional. The two central issues in the cases have been as follows:-
 - a. Whether matters that were filed in courts before the *WIBA* came into force but were still pending resolution after the *Act* became operational could still be prosecuted before the said courts under the principle of legitimate expectation; and
 - b. Whether those matters which were filed in courts after sections of the *Act* had been declared unconstitutional can be saved under the principle of legitimate expectation (See for instance *Heritage Insurance Company Limited v David Fikiri Joshua & another* [2021] eKLR, *Hesbon Machano Makboba v Tarmal Wire Products Ltd* [2022] eKLR and *Jumbo North (EA) Limited v Wilder Wangira* [2020] eKLR).
 26. From the decisions, it is clear to me that there is general agreement that only those causes of action which accrued before June 2, 2008 and in respect of which cases were pending in court as at June 2, 2008 can benefit from the principle. Any other case including those filed between March 4, 2009 when the High Court declared portions of the *WIBA* unconstitutional and November 17, 2017 when the Court of Appeal set aside the High Court's decision, does not benefit from the principle of legitimate expectation. Consequently, no court is entitled to assume jurisdiction over the latter set of matters.
 27. Indeed, this position appears clear from the above decisions by the Court of Appeal and Supreme Court. The two courts, in my view, appear to state, albeit not explicitly, that only those claimants whose cases were pending in court when there was change in law on June 2, 2008 are entitled to expect that their cases will be adjudicated through the forum that was legitimately constituted to adjudicate on the matters at the time they were filed (the courts).
 28. The trial magistrate's view that she had jurisdiction over the suit notwithstanding that it related to a cause of action that arose in February 2017 when the *WIBA* had been enacted was in my view a misreading of the Court of Appeal decision. Therefore, the trial magistrate had no jurisdiction to hear the case. Inevitably, the resultant decision of the trial is a nullity.
 29. The other concern relates to this court's jurisdiction to hear this appeal in view of the provisions of the *WIBA*. The jurisdiction of the ELRC is provided for under section 12 of the *Employment and Labour Relations Court Act*. It is both original and appellate but confined to matters specified under article 162(2) of the *Constitution*, section 12 of the *ELRC Act* and any other law that donates such jurisdiction to the court.
 30. The only provision in the *WIBA* that extends appellate jurisdiction of a civil nature to the ELRC is section 52(2). This provision is confined to appeals arising from the decision of the Director of Occupational Safety and Health Services. Nowhere does the *Act* suggest that appeals may lie from a decision of a magistrate's court exercising civil jurisdiction to the ELRC except perhaps from proceedings contemplated under section 17 thereof. It is therefore my position that this court has no jurisdiction to entertain this appeal.
 31. The 1st respondent has challenged the propriety of the Appellant's plea on jurisdiction at this stage of the proceedings. It is the 1st respondent's position that the Appellant raised its objection on jurisdiction before the trial court and lost. That despite this loss, the appellant did not appeal against the decision.



32. In the 1st Respondent's view, if the Appellant wished to pursue the issue further, it ought to have challenged the trial court's ruling through appeal. As the record shows, no such appeal was preferred against the ruling. Therefore and according to the 1st Respondent, the Appellant lost the opportunity to pursue this issue through acquiescence.
33. This argument is undoubtedly attractive. However, the danger of falling for it is to imply that a court without jurisdiction over a matter in the first instance can acquire such jurisdiction merely because a challenge on its assertion of jurisdiction has not been pursued on appeal. Such a suggestion, in my view, will set a dangerous precedent. This will, in effect open a window for decisions made in excess of a court's jurisdiction to stand on account of a legal technicality.
34. In my view, notwithstanding that the Appellant did not challenge the trial court's finding on appeal and may thus appear as undeserving of pursuing the matter in the manner it has been raised in this appeal, the court is nevertheless entitled to take up the issue in exercise of its supervisory jurisdiction under article 165(6) of the *Constitution*. By dint of this provision, the High Court and court's of equal status have a constitutional obligation to exercise supervisory jurisdiction over courts and tribunals subordinate to them in order to ensure they do not act outside their statutory mandates. Such power is exercisable by the court of its own motion in order to prevent grave miscarriage of justice (see *Republic v Magistrates Court, Mombasa; Absin Synergy Limited* (Interested Party) (Judicial Review E033 of 2021) [2022] KEHC 10 (KLR), *Samuel Nyaga Kamaru v Janet Nyaguthi Njoroge & 2 others* [2019] eKLR and *Duncan Nduracha v Fuad Mahmoud Mohammed & 2 others* [2015] eKLR).
35. In my view, to allow the impugned decision by the trial court to stand when it is clear to me that it was rendered in excess of the court's jurisdiction merely because the appellant did not pursue the matter on appeal will occasion a grave miscarriage of justice against the appellant. The appellant will be bound to satisfy a decree that is otherwise a nullity.

Determination

36. Based on the foregoing, I find that the trial court lacked jurisdiction to entertain the dispute that is the subject of the current appeal. Similarly, this court has no jurisdiction to entertain this appeal except within the limited window under section 52(2) of the *WIBA*. Inevitably, the decision by the trial court is a nullity and incapable of conferring any rights on the 1st respondent. At the same time, the appeal is incompetent for want of jurisdiction by this court to entertain it.
37. Consequently, I strike out the appeal.
38. I issue a declaration that the judgment delivered on March 25, 2021 in Thika CMCC No 404 of 2018 is a nullity and incapable of conferring legal rights or burden on the parties to the action.
39. I make no order as to costs.

DATED, SIGNED AND DELIVERED ON THE 25TH DAY OF OCTOBER, 2022

BOM MANANI

JUDGE

In the presence of:

Njehia for the Appellant

Njogu for the 1st Respondent

ORDER



In light of the directions issued on July 12, 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with rule 28 (3) of the [ELRC Procedure Rules](#) which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

BOM MANANI

