Malongo v Abbysinia Iron & Steel Company Ltd (Appeal E004 of 2021)
[2022] KEELRC 12895 (KLR) (13 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12895 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL E004 OF 2021

CN BAARI, J

OCTOBER 13, 2022

BETWEEN

KENNEDY ADIKA MALONGO ..... APPELLANT

AND

ABBYSINIA IRON & STEEL COMPANY LTD ..... RESPONDENT

(Being an appeal from the Ruling and Order of Hon. Nyaberi Senior Principal Magistrate delivered on 11th December, 2020, at Winam in PMCC NO. 62 OF 2019)

JUDGMENT

1. The appeal herein arises from a ruling delivered on December 11, 2020, by Hon HM Nyaberi (SPM), on a Preliminary Objection by the respondent dated May 13, 2019. The Appellant being dissatisfied with the ruling and subsequent orders of the court, filed this appeal on January 20, 2021.

2. The Preliminary Objection from which the ruling arose, was premised on the following grounds: -

    i. The cause of action in this suit arose as a result of an occupational accident and as a result compensation for damages ought to be pursued under *work Injury Benefits Act* No 13 of 2007.

    ii. Pursuant to the provisions of Section 16 of the *Work Injury Benefits Act*, the suit is incompetent before this court because the action for recovery of damages for occupational accident or disease has not been pursued as provided for under the Act.

    iii. The present proceedings have been filed in contravention and in direct affront to and in violation of the provisions of Sections 16, 23(1) and 52(1) of the *Work Injury Benefits Act* No 13 of 2017.

3. The appeal is premised on the grounds that:

i. The Learned Trial Magistrate erred in fact and in law in failing to appreciate the findings of the Court of Appeal at Nairobi, Civil Appeal No 133 of 2011 and the Supreme Court decision in Petition No 4 of 2019.

ii. The learned magistrate erred in fact and in law in striking out the appellant's entire suit against the weight of evidence and relevant decisions annexed in response to the respondent's preliminary objection.

iii. The learned magistrate erred in fact and in law in failing to appreciate the grave injustice visited upon the appellant by so penalizing the litigant despite the supreme court decision with regard to how *WIBA* matters were to proceed in Petition No 4 of 2019.

iv. The learned magistrate erred in law by failing to critically analyze the evidence and oral submissions on the respondent's preliminary objection dated 13/5/2019, together with the authorities submitted by the parties, consequently coming to a wrong conclusion on the same.

v. The learned magistrate erred in law and in fact in writing a ruling which is at variance with the pleadings and against the weight of evidence and contrary to the principles as established by precedent.

vi. The learned trial magistrate erred in law and fact by sacrificing substantive justice at the alter of expediency.

4. The appellant prays that the appeal be allowed and the ruling and order of the trial court set aside, and Winam PMCCC No 62 of 2019 be reinstated to be heard by a court of competent jurisdiction.

5. Parties canvassed the appeal through written submissions. Both parties filed their submissions.

The Appellant's Submissions

6. It is submitted for the appellant that the trial court erred both in law and in fact in failing to appreciate the fact that the appellant's claim is one which arose out of an accident that occurred on the May 25, 2016, and the suit filed on the April 9, 2019, which period the trial magistrate should have evaluated the state of law and the law applicable as at the time.

7. The appellant submits that the trial court ought to have addressed its mind to the legal status of claims which arose in the period when there was a pending appeal by the Law Society at the Supreme Court, which is the period before the December 3, 2019.

8. The appellant submits that his claim having been filed within the period of stay is an exception, and was validly within the court's jurisdiction-a position which the trial magistrate failed to appreciate. The appellant had reliance in *West Kenya Sugar Co. Ltd v Tito Lucheli Tangale* [2021] eKLR where Justice Radido stated thus: -

> "...all claims which were lodged with the courts from 22 May, 2008, to 3 December, 2019 being claims underpinned by judge-made or judge declared law were validly within the jurisdiction of the Courts."

9. The appellant submits that having filed his suit under the judge made law, which was operational law as at the time, he has the legitimate expectation that his claim would be heard and concluded under the legal regime which he had invoked. He sought to rely in *Law Society of Kenya v Attorney General & Another* [2019] eKLR to support this position.

10. It is submitted for the appellant that the trial court sacrificed substantive justice by striking out the appellant's suit. He further submits that sending him away from the court is akin to sending him from the seat of justice and denying him his Constitution right of access to justice provided for under Article 48 of the *Constitution of Kenya, 2010*

11. The appellant submits that the *Work Injury Benefit Act* prescribes the time limit within which an industrial accident ought to be reported to the director of occupational safety and health, and which time limit had already elapsed even at the time that the trial court was making its ruling.

12. It is submitted that the trial court's error has deprived the appellant his right of access to justice since he remains with no avenue where he can seek compensation for the injuries he suffered.

The respondent's Submissions

13. It is submitted for the respondent that courts do not have jurisdiction to handle work injury claims filed after the enactment of the *Work Injury Benefits Act*, *2007*, as the same fall within the jurisdiction of the director. The respondent further submits that jurisdiction is everything and without which the court down its tools. The respondent sought to rely in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1.

14. It is further submitted for the respondent that where there is a statute granting specific procedure, it is that procedure that should be followed. Reliance was placed in the holding in *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR where the Court observed that:

> " Where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."

15. The respondent submits that Section 16 of the *Work Injury Benefits Act* prevents an employee from instituting a court action for recovery of damages in respect of injuries arising from an accident or disease contracted in the course of employment. The respondent further submits that Section 23(1) of the same *Act*, confers upon the Director the power to make decisions on any claim as a result of injuries arising from an accident or disease contracted in the course of employment.

16. The respondent submits that the legality of Sections 16, 23(1) and 52 (1) (2) of the *Work Injury Benefits Act*, has been clear since the aforementioned Court of Appeal decision on November 17, 2017. The respondent further submits that the Supreme Court rendered its decision on December 3, 2019, where the aforementioned decision by the Court of Appeal was upheld.

17. The respondent finally submits that the decisions of the Court of Appeal and Supreme Court were binding on the trial court and are also binding on this honourable court, and as such, pray that the court does not depart from them.

Analysis and determination

18. I have considered the appellant's memorandum of appeal, the record of appeal, and the submissions by both parties. The grounds of appeal are summarized into the following three grounds:

    a. The learned trial magistrate erred in fact and in law in failing to appreciate the findings of the Court of Appeal at Nairobi, Civil Appeal No 133 of 2011 and the Supreme Court decision in Petition No 4 of 2019.

b. The learned magistrate erred in fact and in law in failing to appreciate the grave injustice visited upon the appellant by so penalizing the litigant despite the Supreme Court decision with regard to how *WIBA* matters were to proceed in Petition No 4 of 2019.

c. The learned trial magistrate erred in law and fact by sacrificing substantive justice at the alter of expediency.

19. The decision of the Trial Court was premised on the Court of Appeal decision in *Attorney General v. Law Society of Kenya & Central Organization of Trade Unions* 2017 eKLR, which decision was affirmed by the Supreme Court in *Law Society of Kenya v Attorney General & Another* [2019] eKLR, where the Court opined thus:

> "(85) In agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of the Act, litigation relating to work-injuries had gone on and a number of the suits had progressed up to 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."

20. The Appellant sought to cling on the possibility of there having been a stay of the decision of the court of Appeal, pending the decision of the Supreme Court. Nothing shows this to have been the position.

21. The appellant instituted his suit in April, 2019, when the Court of Appeal's decision was rendered in November, 2017. As correctly held by the trial, the two superior courts already pronounced themselves on the issues subject of this appeal, and which decisions are binding on this court, just as they do the trial court.

22. Having dealt with the grounds of appeal in respect of the judgments in both the Court of Appeal and the Supreme Court on the matter, the last question for this court is whether the courts in declining jurisdiction are sacrificing substantive justice at the altar of expediency.

23. Justice S.M Githinji in *Ruth Naliaka Shikami v ICG Maltauro* (2021) eKLR, made the following observation on Section 16 of WIBA:

> "I therefore find that Section 16 of the *Work Injury Benefits Act* became operational and applicable from 2.6.2008 when the Act came into force. According to the Supreme Court's decision at Paragraph 85, only those matters that were filed in court before the enactment of the *Work Injury Benefits Act* (WIBA) should be heard and concluded by the courts. However, matters that were instituted in court after 2.6.2008 when the Act came into operation should be handled by the Director of Occupational Safety and Health."

24. Further, in *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR the Court observed:

> " Where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."

25. Section 16 of the *WIBA* ousts this court's jurisdiction in respect of work injury related claims except appeals arising from the decision(s) of the Director of Occupational Safety and Health Services. This is an express provision of statute and the appellant's assertion that declining jurisdiction is sacrificing justice at the altar of expediency does not hold.

26. In sum, the court finds the appeal herein lacking in merit, and is dismissed with no orders as to costs.

27. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 13TH DAY OF OCTOBER, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Okoth Present for the appellant

Ms. Achieng present for the respondent

MS. Christine Omollo - Court Assistant.