



REPUBLIC OF KENYA



KENYA LAW
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**Paragon Electronics Limited v Andako (Appeal 63 of 2022)
[2022] KEELRC 13422 (KLR) (2 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13422 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 63 OF 2022
MA ONYANGO & BOM MANANI, JJ
DECEMBER 2, 2022**

BETWEEN

PARAGON ELECTRONICS LIMITED APPELLANT

AND

KIZITO MWELA ANDAKO RESPONDENT

*(Being an appeal from the judgment of the Chief Magistrate's court in
Milimani Commercial Court case No 3588 of 2010 delivered on June 4, 2013)*

JUDGMENT

1. This appeal arises from the judgment of the Chief Magistrate's court in Milimani Commercial Court case No 3588 of 2010 delivered on June 4, 2013. In the decision, the trial court entered judgment for the respondent following an alleged injury at work.
2. The appellant, being dissatisfied with the decision, lodged this appeal on July 3, 2013.

Facts of the Case and the Trial Court's Finding

3. The respondent was an employee of the appellant working as a helper at the appellant's construction site along Gitanga Road within Nairobi. It was his case that while transporting stones to a building's foundation on January 8, 2010 a stone fell on him causing him injury. The respondent blamed the appellant for the accident. It was his case that the appellant had not provided him with protective gear to prevent the occurrence of the accident or lessen the degree of injury in the event of the accident.
4. The appellant filed a defense in which it denied liability for the accident. In the appellant's view, the respondent had been negligent by failing to exercise precaution to avoid the accident. The respondent was also accused of having failed to use the available protective gear while executing his duties.



5. After hearing the parties, the trial magistrate returned a verdict in favour of the respondent. The court found that the appellant failed to prove that it had provided the respondent with protective gear to prevent the occurrence of the alleged accident or if it occurred to lessen the degree of injury.
6. Proceeding on this premise, the court found the appellant 100% liable for the accident. It awarded the respondent Kshs 124,000 in damages. In addition, the respondent was awarded interest on the amount awarded and as well costs of the case.
7. The appellant was dissatisfied with the decision. This prompted the filing of the current appeal.

The Case on Appeal

8. The memorandum of appeal raises eight grounds of appeal. However, through the application dated June 6, 2022, the appellant sought the leave of the court to be allowed to include the question of the jurisdiction of the trial court to hear the matter as an additional ground of appeal. This leave was granted on July 18, 2022.
9. The grounds of appeal raise the following questions:-
 - a. Whether the alleged accident occurred and whether the respondent suffered the alleged injuries as a result.
 - b. Whether the trial court erred in relying on the medical report presented in evidence by the respondent.
 - c. Whether the trial magistrate failed to address all the issues in dispute in the cause and whether he relied on unsubstantiated matters in reaching his decision.
 - d. Whether the trial magistrate used the correct principles in assessing the quantum of damages he awarded.
 - e. Whether the trial magistrate erred in finding the appellant wholly liable for the alleged accident.
 - f. Whether the trial court had jurisdiction to hear the case.
10. This is a first appeal. Consequently, it is to proceed by way of a retrial. The court is to re-evaluate the evidence on record and arrive at its own conclusion on the matter. However, as the court did not hear the witnesses, it must make allowance for this.
11. Despite service of the court processes, the respondent did not appear in the appeal. Hence, the matter proceeded without his participation.
12. On July 18, 2022, the court gave directions that the appeal be heard by way of written submission. On October 11, 2022, the court, having received submission by the appellant, directed that judgment shall be delivered on notice.
13. Although the appellant raises a number of issues in the appeal, the court will first examine the issue of jurisdiction as its resolution will determine whether the rest of the issues need to be adjudicated.
14. The proceedings before the trial court were initiated through a plaint dated June 7, 2010. This was to later be amended and the amended plaint dated January 10, 2012 filed.



15. From the respondent's pleadings before the trial court, the cause of action related to an industrial injury that allegedly occurred on April 5, 2010 even though the date appears to be inconsistent with that alluded to during the respondent's oral testimony in court (October 8, 2010 and January 8, 2010). On whichever of these dates, the respondent alleges that he was hit by a falling stone that he was transporting in the course of his employment with the appellant.
16. At the time of the alleged accident the *Work Injury Benefits Act* (WIBA) had already been enacted having been assented to on October 22, 2007. It is true that the WIBA suffered initial operational challenges when portions of it were declared unconstitutional.
17. Of significance is section 16 of the act which outlawed the institution of actions to recover damages for injuries suffered or occupational diseases contracted whilst on duty except as provided for under the act. Part IV of the act provides for processing of such claims through the Director of Occupational Safety and Health Services. This part, read together with section 16 aforesaid ousts the jurisdiction of ordinary courts to hear and determine such disputes.
18. In the High Court case of *Law Society of Kenya v Attorney General & another [2009] eKLR*, the learned judge declared this and several other provisions of the *WIBA* unconstitutional. However, this decision was to later be reversed by the Court of Appeal and the decision of the Court of Appeal affirmed by the Supreme Court in their decisions in *Attorney General v Law Society of Kenya & another [2017] eKLR* and *Law Society of Kenya v Attorney General & another [2019] eKLR* respectively.
19. The cause of action in the current case arose in 2010 during the life of the *WIBA*. Several decisions have affirmed the position that work injury claims that were instituted after 2007 can only be processed under the *WIBA*.
20. The principle of legitimate expectation operates to permit courts to handle cases which were pending in court as at June 2, 2008, the commencement date of the *WIBA* (see for instance *Maisha Mabati Mills Ltd v Ondari & another (Employment and Labour Relations Appeal 152 of 2022) [2022] KEELRC 12932 (KLR)*). Consequently, it is apparent that the trial court did not have jurisdiction to entertain the case and deliver the impugned decision in June 2013.
21. The jurisdiction of this court to handle the current appeal is also doubtful in view of the provisions of section 52(2) of the *WIBA*. The trial court did not have power to render the impugned decision. Only the director had such power. And under section 52(2) of the act, this court can only assume jurisdiction over such dispute if it emanates from the decision of the director, not a trial court exercising improper jurisdiction. Consequently, this court has no jurisdiction to entertain the appeal outside the provisions of section 52 (2) of the *WIBA*.
22. That said, under article 165 (6) of the *Constitution* of Kenya 2010, the court retains supervisory jurisdiction over courts and tribunals below it. This jurisdiction is exercised in order to ensure that the subordinate courts and other tribunals do not stray outside their jurisdictional limits (see *Maisha Mabati Mills Ltd v Ondari & another (Employment and Labour Relations Appeal 152 of 2022) [2022] KEELRC 12932 (KLR)*). In exercise of this power, the court declares the decision of the trial court as invalid for want of jurisdiction and of no legal effect.
23. Having reached the conclusion that the trial court lacked the requisite jurisdiction to determine the dispute, his decision becomes a nullity ab initio. Consequently, there is no need to adjudicate on the rest of the issues that arose from the null and void judgment.



Determination

24. In view of the aforesaid, the court issues the following orders:-

- a. The decision of the trial court delivered on June 3, 2013 is declared invalid and incapable of conferring a legal right on the respondent.
- b. The appeal is struck out for want of jurisdiction.
- c. Each party to bear his/its own costs.

DATED AND SIGNED ON THE 30TH DAY OF NOVEMBER 2022

MAUREEN ONYANGO

JUDGE

DELIVERED ON THE 2ND DAY OF DECEMBER 2022

B O M MANANI

JUDGE

