



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
APPEAL NO. 4 of 2019
(Originally Kakamega High Court Civil Appeal No. 129 of 2018)

WEST KENYA SUGAR CO LTDAPPELLANT

v

TITO LUCHELI TANGALE.....RESPONDENT

BETWEEN

TITO LUCHELI TANGALE.....PLAINTIFF

v

WEST KENYA SUGAR CO LTD.....RESPONDENT

(Being an Appeal from the Ruling and order of Hon. Senior Resident Magistrate

E. Muleka delivered on 13/9/2018 in Butali PMCC No. 97 of 2017

between Tito Lucheli Tangale v West Kenya Sugar Co. Ltd)

JUDGMENT

1. Tito Lucheli Tangale (the Respondent) sued West Kenya Sugar Co. Ltd (the Appellant) before the Magistrates Court on 8 June 2017, alleging breach of statutory duty of care/negligence leading to an accident and injuries in the workplace on 20 October 2016.
2. The hearing commenced before the trial Magistrate, but when it reached the Appellant's opportunity to plead its case, its advocate indicated that she was not ready to proceed because of a decision by the Court of Appeal in *Attorney-General v Law Society of Kenya & Ar* (2017) eKLR.
3. The learned Magistrate heard the parties, and in a Ruling delivered on 13 September 2018, the Court held that it had jurisdiction over work injury benefit disputes under the Work Injury Benefits Act.
4. The Learned Magistrate based his decision on, among others, the conservatory orders which had been issued by the Mombasa High Court in *Juma Nyamawi Ndungo & Ors v Attorney General & Ar* (2019) eKLR.

5. The Appellant was not satisfied, and on 26 September 2018, it filed a Memorandum of Appeal before the High Court in Kakamega contending:

1. **THAT** the learned Magistrate erred in law and fact in making the aforementioned decision based on a complete misapprehension of the law.

2. **THAT** the learned trial Magistrate erred in law and fact in failing to hold that the Court did not have jurisdiction to handle claims relating to work-related injuries as provided in the Work Injury Benefits Act No. 13 of 2007, which governs claims/cases of that nature.

3. **THAT** the learned trial Magistrate erred in law and fact in making a decision based on a misapprehension of the Constitution.

4. **THAT** the learned trial Magistrate erred in law and fact in engaging in extraneous issues while making the decision which were not canvassed before him.

5. **THAT** the learned trial Magistrate erred in law and fact by failing in making the aforesaid decision without addressing himself to the law/statute from which the jurisdiction to handle work injury claims is derived from.

6. **THAT** the learned trial Magistrate erred in law and fact in making an erroneous decision that had no backing in law.

6. On 29 April 2019, the High Court, citing lack of jurisdiction, transferred the Appeal to this Court.

7. The Appellant filed a Record of Appeal before this Court on 18 August 2020, and pursuant to directions given by this Court on 18 November 2020, it filed its submissions on 29 December 2020.

8. The Respondent filed his submissions on 6 January 2021.

9. The Court has considered the Record and the submissions.

Background

10. The Work Injury Benefits Act came into operation on 2 June 2008.

11. The legal framework under the Act has been in turmoil and/or troubled waters in this country for several years. Some decisions in the interim have served to pour oil in the troubled waters.

12. Section 16 of the Act ousted the jurisdiction of the Courts in claims arising from an occupational accident or disease-causing disablement or death in the course of work. The section provides

No action shall lie by an employee or a 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.

13. Under the framework established under the Act, such claims were to be made to the Director of Occupational Safety and Health.

14. The Law Society of Kenya thought the new framework was inconsistent with the supreme law, and it moved to challenge the provision and other provisions of the Act (*Law Society of Kenya v Hon Attorney General & Ar. Nairobi* Petition No. 185 of 2008).

15. On 22 May 2008, the High Court made a Ruling which included an order:

I will order that, pending the hearing and determination of the main cause, all pending litigation which had been commenced on the basis of either the Workmen's Compensation Act or of the common law, or of a combination of both regimes of law, *shall continue to be prosecuted* and, in a proper case, finalised on the basis of the operative law prior to the entry into force of the Work Injury Benefits Act, 2007....

16. The Petition was then heard on the merits. On 4 March 2009, the High Court issued a declaration that section 16 of the Act (amongst other sections) were inconsistent with the Constitution and therefore null and devoid of the status of law.

17. The Honourable Attorney General felt aggrieved with the High Court's declarations, and he appealed to the Court of Appeal.

18. The Court of Appeal rendered itself on 17 November 2017 (*Attorney General v Law Society of Kenya & Ar* (2017) eKLR).

19. The Court set aside the High Court's declaration that section 16 of the Act was inconsistent with the Constitution.

20. Dissatisfied, the Law Society of Kenya appealed to the Supreme Court. The Supreme Court dismissed the appeal Petition on 3 December 2019 (*Law Society of Kenya v Attorney General & Ar* (2019) eKLR).

21. While dismissing the appeal Petition, the Supreme Court gave some guidance. The decision/guidance has not calmed the waters.

22. However, the decision provides authoritative guidance to the lower Courts for now. The guide is at paragraph 85, which is in the following terms:

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 a 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 even more progressive statute, as we have shown above, we opine that it is best that all matters are finalised under section 52 aforesaid.

23. The guidance/determination by the Supreme Court is still the subject of passionate debate. The debate appears to revolve around cases lodged with the Courts after the commencement of the Act on 2 June 2008.

24. The elephant in the room is, therefore, what is the status of legal proceedings instituted in the Courts after 2 June 2008.

Appellant's submissions

25. The Appellant submitted that section 16 of the Work Injury Benefits Act was operational and applicable from 2 June 2008 and that at the material time the Respondent herein moved the Court, the Courts had no jurisdiction.

26. Umbrage was sought in the Court of Appeal's judgment in *Attorney-General v Law Society of Kenya & Ar* (2017) eKLR.

27. According to the Appellant, in terms of the judgment, all cases filed in Court(s) after 2 June 2008 could only continue and be sustained before the Director of Occupational Safety and Health or, to put it

differently, the Courts could only adjudicate cases filed before 2 June 2008.

Respondent's submissions

28. The Respondent's response was that at the time he moved the Court on 8 June 2017, the prevailing judicial authority as propounded by High Court in *Law Society of Kenya & Ar v Attorney General (2009)* eKLR was that section 16 of the Work Injury Benefits Act which had ousted first instance judicial jurisdiction had been declared null and void and therefore he was within the law in filing the Cause.

29. The Respondent also buttressed his submissions by urging that the High Court's decision in *Juma Nyamawi Ndungo & 5 Ors v Attorney General, Mombasa Law Society (Interested Party) (2019)* eKLR was material.

30. On the proper interpretation to be given to the Supreme Court decision in *Law Society of Kenya v Attorney General & Ar (2019)* eKLR, the Respondent contended that it was only cases filed after the decision on 3 December 2019 which would face the prospect of being dismissed or struck down for lack of jurisdiction.

Evaluation

31. In the Court's view, the key to unravelling the uncertainty on jurisdiction can be resolved on three broad grounds.

32. It is not in dispute that the Cause the subject of this Appeal was lodged with the Magistrates Court on 8 June 2017 while the accident was said to have occurred on or around 20 October 2016.

State of the law from 22 May 2008 to 3 December 2019

33. By dint of section 16 of the Work Benefits Injury Act, from 2 June 2008 to 22 May 2008, no employee could approach the Courts with claims seeking damages for action in respect of occupational accident or disease resulting in disablement or death of the employee against the employer.

34. The Court has contextualised those dates because of the intervention of the High Court on 22 May 2008. The debate would therefore revolve on the impact of the High Court's intervention on the aforesaid date.

35. The constitutionality and or validity of the section 16 of the Act had been challenged. On 22 May 2008, the High Court, at an interlocutory stage, stayed the operation of section (among other sections).

36. On 4 March 2009, after hearing the Petition on the merits, the High Court declared section 16 of the Act as being inconsistent with the Constitution and therefore devoid of legal status.

37. The High Court's declaration of inconsistency would naturally raise the question of the status and or validity of judgment made or judge declared law.

38. For those who are keen on jurisprudence, it needs no restating that there are various sources of law and which sources are hierarchical.

39. These are the Constitution, legislative enactments, judicial decisions, and treaties, to mention a few.

40. The debate on the validity of judge-made law or judge declared law has been the subject of debate for hundreds of years. There are many schools of thought, including Dworkin and Hart (positivists, realists etc). It is not the intention of this Court to dabble in that debate in this judgment.

41. What is clear to this Court is that until set aside and or vacated, a Court order and this includes judge-made law or judge declared law is valid, and a litigant or citizen can order his or her life in the firm belief

that the declared law is the law at the particular point in time.

42. Therefore, in this Court's view, those citizens or employees who lodged their claims with the Courts from 22 May 2008 when the High Court issued stay orders to 4 March 2009 when a final declaration of inconsistency was made were acting on the strength of the law.

43. The Court was not informed whether the Court of Appeal stayed the declaration by the High Court but its research has shown that on 10 July 2009, the Court of Appeal dismissed a Motion seeking stay of execution (see Nairobi Civil Appl. No. 144 of 2009 (UR 97/2009) and reported as *Attorney General v Law Society of Kenya & Ar* (2009) eKLR.

44. The consequence being that the declaration by the High Court that section 16 of the Work Injury Benefits Act was still the law up to the time the Court of Appeal delivered judgment on 17 November 2017.

45. Equally not disclosed was whether the Supreme Court issued any stay orders of the Court of Appeal judgment until it rendered itself on 3 December 2019.

46. In the Court's respectful view, bar any stay orders, 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.

Access to justice

47. The judicial part of the state is not the only arbiter and/or adjudicator of justice. Article 48 of the Constitution now recognises access to justice, but it has not limited the dispensation of the right to the Courts since Article 159(2)(c) requires the promotion of alternative dispute resolution.

48. In light of this, in this Court's view, subscribing to the position taken by the Appellant that all claims lodged with the Courts after 2 June 2008 should not be entertained because of jurisdiction would be antithetical to the right to access justice since the litigants who moved the Court after 22 May 2008 did so on the assurance of judge declared law that they could present their disputes to the Courts.

49. The Court says so because the employees who moved the Court on the strength of judge declared law would be met with an insurmountable plea of limitation because section 26 of the Work Injury Benefits Act has prescribed time within which an accident should be reported to the Director of Occupational Safety and Health.

50. Sending these Claimants from the seat of justice under these circumstances would, therefore, be a source of great injustice for reasons beyond their control.

Legitimate expectation

51. The doctrine of legitimate expectation has its roots in administrative law. In this jurisdiction, it emerged with the establishment of a *permanent Constitution Court* in the 1990s. It is now well entrenched in the jurisprudence of the Country.

52. The Court of Appeal and the Supreme Court invoked the doctrine to give life and therefore render justice to the Claimants who had lodged their work-injury claims with the Courts prior to the coming into effect of the Work Injury Benefits Act.

53. In the view of this Court, these litigants who filed their disputes with the Courts from 22 May 2008 to 3 December 2019 on the firm belief that the judge declared law was the valid law in place then, are entitled to successfully assert legitimate expectation in having the claims heard to a conclusion before the Courts where they had been lodged.

Conclusion and Orders

54. It is the sincere hope of this Court that it has not thrown tinder into already troubled oily waters.

55. From the foregoing, the Court finds no merit in the Appeal. The Learned Magistrate did not fall into error of law or fact in finding that he had the jurisdiction to proceed with the suit before him.

56. The Appeal is dismissed. No order on costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 23rd day of March 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Appellant Onyinkwa & Co. Advocates

For Respondent Z.K. Yego Law Offices

Court Assistant Chrispo Aura