



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**APPEAL NO. 6 OF 2020**

**LINET OSEBE MOMANYI**

**CHARLES MAGETO OKONGO**

**(suing as personal representatives & legal administrators of the estate of**

**DOUGLAS ONSARIO MAGETO.....APPELLANTS**

v

**KISII COUNTY GOVERNMENT.....RESPONDENT**

**(Appeal from the judgment and order of Hon S.K. Onjoro**

**dated 8<sup>th</sup> day of May 2020 in Kisii CMCC No. 605 of 2018)**

**JUDGMENT**

1. Linet Osebe Momanyi and Charles Mageto Okongo (the Appellants) sued the Kisii County Government (the Respondent) before the Magistrates Court alleging breach of statutory duty of care/negligence in the workplace leading to the death of Douglas Onsario Mageto (the deceased).
2. In a judgment delivered on 8 May 2020, the Magistrate dismissed the suit for lack of jurisdiction.
3. The Appellants were aggrieved, and they filed a Memorandum of Appeal in this Court on 27 May 2020 contending:
  - (i) THAT the learned trial Magistrate fundamentally and grossly erred in dismissing the Plaintiffs suit.
  - (ii) THAT the grounds upon which the learned Magistrate relied in dismissing the Plaintiffs suit are untenable.
  - (iii) THAT the Learned Trial Magistrate fundamentally and grossly erred in dismissing the Plaintiffs suit on the basis of submissions filed by the Respondent.
  - (iv) THAT the learned trial Magistrate fundamentally and grossly erred when he dismissed the Plaintiffs' suit on the basis of submissions filed by the Respondent without according the Plaintiffs an opportunity to be heard.
  - (v) THAT the learned Magistrate grossly and fundamentally erred when he dismissed the Plaintiffs suit, which in itself was in contravention of Article 50(1) of the Constitution of Kenya, 2010.
  - (vi) THAT the learned Magistrate grossly and fundamentally erred when he refused, failed and/or neglected to comprehend, apprehend, appreciate, understand and apply the concept and principles that are outlined in Article 159 of the Constitution of Kenya in particular 159(2)(d).
  - (vii) THAT the learned Magistrate grossly and fundamentally erred when he failed, refused and/or neglected to comprehend, appreciate and apply the provisions of the Work Injury Benefits Act.
  - (viii) THAT the learned Magistrate grossly and fundamentally erred when he dismissed the Plaintiffs suit when the Plaintiffs lodged their claim on 20 September 2018, which was pursuant to the subsisting law at the time.

(ix) THAT the learned Magistrate grossly and fundamentally erred in dismissing the Plaintiffs suit by partially relying on the provisions of the Supreme Court decision and disregarding subsequent orders with respect to work injury matters.

(x) THAT the learned Magistrate grossly and fundamentally erred in not indicating the amount of damages that the estate of the deceased ought to have been awarded.

(xi) THAT the learned Magistrate grossly and fundamentally erred when he failed, refused and/or neglected to comprehend, appreciate and apply the provisions of section 1, 1A, 1B, 3 and 3A of the Civil Procedure Act.

(xii) THAT the judgment of the learned trial Magistrate has occasioned a failure of justice and/or resulted in a gross miscarriage of justice.

4. The Appellants filed a Record of Appeal on 28 August 2020, and the Court gave directions on 15 February 2021.

5. Pursuant to the directives, the Appellants filed their submissions on 18 March 2021, in which they concentrated in Grounds 7, 8, 9 and 10 of the Memorandum of Appeal whilst the Respondent filed its submissions on 5 May 2021.

6. The Court has given due consideration to the record and the submissions.

#### **Failure to accord the parties opportunity to submit on the jurisdiction question**

7. In Grounds (iv) and (v) of the Memorandum of Appeal, the Appellants challenged the judgment of the Magistrates Court on the basis that the Court raised the jurisdiction question *suo moto* and did not afford them an opportunity to be heard.

8. In support of the ground, the Appellants relied on a passage in *Kenya Ports Authority v Modern Holding (EA) Ltd* (2017) eKLR to the effect that:

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, even by the Court itself provided that where the Court raises it *suo moto*, parties are to be accorded the opportunity to be heard.

9. The Respondent did not raise the question of the Magistrates jurisdiction in respect to claims under the Work Injury Benefits Act in its Defence or witness statements but submitted on the question in the submissions.

10. The submissions were filed on 13 January 2020, and the same were served on the Appellants on 23 January 2020. The judgment was delivered on 8 May 2020.

11. It is therefore not correct that the Court raised the jurisdiction question *suo moto*.

12. In the view of the Court, the Appellants had more than sufficient time to seek leave of the Court to file supplementary submissions on the jurisdiction question.

13. On the state of the record, the Court finds no error on the part of the Court in addressing its mind to and making a determinative finding on the ground of jurisdiction.

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

14. In the view of the Court, the Appeal will fail or succeed upon a determination of the question, what was the subsisting law in 2018, when the Appellants lodged the claim with the Court.

15. This Court addressed that question at some length in *West Kenya Sugar Co Ltd v Tito Lucheli Tangale* (2021) eKLR.

16. Although it is not a good practice for a Court to quote or rely on its own decision, due to the similarity of the jurisdictional question in that decision and this case, the Court will beg to be allowed to reproduce what it stated therein:

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 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 judge 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.

17. The Appellants herein lodged their suit in the Magistrates Court on 20 September 2018. As of that date, the subsisting law was the order of the High Court, staying the operation of section 16 of the Work Injury Benefits Act. The High Court order was not stayed by the Court of Appeal, and it only ceased to subsist upon the determination by the Supreme Court on 3 December 2019.

18. The Magistrate, therefore, fell into error of both law and fact in declining jurisdiction.

19. The Court will therefore order:

(i) The Appeal is allowed.

(ii) The judgment of the Magistrates Court delivered on 8 May 2020 is set aside.

(iii) The suit before the Magistrates Court be heard afresh to a logical conclusion.

(iv) Each party to bear its own costs of the Appeal.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 26<sup>TH</sup> DAY OF MAY 2021.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

For Appellants Ochoki & Co. Advocates

For Respondent Kennedy Chweya Onsembe, Advocate County Attorneys Chambers

Court Assistant Chrispo Aura