



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

APPEAL NO. 18 OF 2020

(Formerly High Court Civil Appeal No.160 of 2016 at Mombasa)

(Being an appeal from the Judgment of Hon. H. Nyakweba, Principal Magistrate in Civil Case No. 1873 of 2015 at

Mombasa, Harrison Kahindi Said –Versus- Perfect Scan Limited delivered on the 19.10.2016)

PERFECT SCAN LIMITED.....APPELLANT

- VERSUS -

HARRISON KAHINDI SAID.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 4th June, 2021)

JUDGMENT

The appellant filed the memorandum of appeal on 17.11.2016 in the High Court and through V.N. Okata & Company Advocates. It was stated that the appellant appealed against the judgment delivered on 18.10.2016 (but the record shows 19.10.2016) by Hon. H. Nyakweba, Principal Magistrate, upon the grounds that the learned Magistrate erred in law and fact as follows:

- 1) By apportioning liability against the respondent (initially plaintiff) at only 15% and not more and finding the appellant 85% liable.
- 2) By finding that the appellant (initially defendant) provided the respondent with worn gloves whilst there was no evidence to that effect.
- 3) By failing to grant the appellant an adjournment on the 07.06.2016 to call its' witnesses at the first hearing of the suit.
- 4) By failing to address the appellant's submission on the contradictory evidence given by the respondent vis-à-vis his pleadings.
- 5) By ignoring the evidence that the respondent had pleaded that he was a technician and not a welder.
- 6) By failing to address the applicant's concerns on the oral amendments made to the pleadings on the 07.06.2016 on one portion of paragraph 5 to read "a poisonous thorn pierced" instead of "electric wire pierced".
- 7) By finding that the respondent was injured by a poisonous thorn and yet the pleadings were that he was injured by an electric wire.
- 8) By failing to find that paragraph 5 of the plaint was in total variance with the evidence presented by the respondent.
- 9) By failing to find that the pleadings and the evidence presented being at variance, the respondent was on a frolic of his own and had abandoned his work as a welder.
- 10) In finding the respondent had proved the case on a balance of probabilities.
- 11) In failing to make any or any proper findings bon the facts placed before him in light of the written submissions.
- 12) In failing to make any or any proper finding on the contributory negligence on the basis of evidence adduced before him I the light of submissions.

13) In failing to find that the respondent should have shouldered a higher proportion on liability in light of the evidence.

14) In awarding damages of Kshs.310, 000.00 and special damages of Kshs.2, 000.00 plus costs and interest as prayed in the plaint in light of the alleged injuries sustained.

The appellant prayed for orders as follows:

- 1) The appeal is allowed.
- 2) The learned Magistrate's judgment be set aside and/or varied as the Honourable Court may deem fit.
- 3) That damages awarded to the respondent herein in the lower Court be set aside or varied as the Honourable Court may deem proper.

The record of appeal was filed in the High Court on 29.11.2018. The appellant filed submissions on 04.06.2019 and the respondent filed submissions on 17.06.2019 through Ameli Inyangu & Partners Advocates. The submissions were filed in the High Court. The appeal was set for highlighting submissions before the High Court on 03.10.2019 before P.J.O.Otieno J who upon perusing the file invited the respective Advocates for the parties to address the issue of jurisdiction because the matter in the trial Court had been disclosed to be an injury claim. The Judge, in a ruling delivered on 08.05.2020 held, **"7. From the foregoing, this Court has no hesitation that work injury claim is an employment underpinned matter and is a reserve of the exclusive jurisdiction of the Employment and Labour Relations Court and not the High Court. It is a reserve for that Court because the entire claim was grounded upon alleged breach of contract leading to the injury pleaded. Accordingly, I decline jurisdiction to hear this Appeal and therefore order that the same be transferred to the Employment and Labour Relations Court, Mombasa, for hearing and determination. 8. Costs shall abide the outcome of the appeal because the issue was raised at the instance of the Court and both parties took common stand that the Court is vested with jurisdiction."**

The background to the appeal is as follows. The respondent filed the plaint on 25.09.2015. The respondent alleged that on 20.12.2013 he was the appellant's employee as a technician when upon instruction to install an electric fence an electric wire pierced his left ring finger and he suffered serious injuries. The respondent alleged particulars of negligence and breach of the contract of the employment against the appellant. He prayed for judgment against the appellant for general damages; special damages of Kshs.2, 000.00; costs of the suit; and interest. The appellant opposed the suit and filed the defence on 16.10.2015. The appellant denied that the respondent was employed as a technician and that he had been instructed to install an electric fence. In alternative, the appellant stated that the accident had been wholly or in part caused by the respondent, if at all the respondent was its employee. The appellant pleaded particulars of contributory negligence on the part of the respondent. The appellant pleaded that the respondent voluntarily accepted the risk or injury resulting from each and every one of the acts or omissions complained of in carrying out the work in issue. The appellant prayed that the respondent's suit be dismissed.

The learned Magistrate delivered the judgment on 19.10.2016 for the respondent against the appellant for:

- a) General damages Kshs.310, 000.00 less 15% contribution Kshs. 45, 500.00 balance Kshs. 263, 500.00.
- b) Special damages Kshs.2, 000.00.
- c) Total payable 265, 500.00.
- d) Costs of the suit and interest from the date of the judgment till payment in full.

The appellant filed submissions on 04.06.2019 and urged the grounds set out in the memorandum of appeal. The respondent's submissions similarly on the merits of the appeal were filed on 17.06.2019. On 28.04.2021 the appeal came up for directions. The Court considered that the Supreme Court and the Court of Appeal had since made decisions which had an impact on the jurisdiction of both the Court and the trial Court and the Court ordered as follows:

- 1) The respondent's submissions be availed on record in 2 days.
- 2) Highlighting of submissions on 02.06.2021 9.00am or soon thereafter for 15 minutes.
- 3) Parties may file and serve further authorities and submissions.

The parties' advocates attended Court on 02.06.2021 and confirmed filing of further submissions and particularly on the issue of jurisdiction.

The preliminary issue for determination in this appeal is whether the trial Court had the necessary jurisdiction to hear and determine the suit and more important, whether the Court enjoys the necessary appellate jurisdiction to hear and determine the suit.

It is submitted for the appellant that section 16 of the Work Injury Benefits Act, 2007 (WIBA) provides that no action shall lie by an employee or any 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'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. The Court of Appeal's judgment delivered on 17.11.2017 in **Nairobi Civil Appeal No. 133 of 2011 – Attorney General –Versus- Law Society of Kenya & Another [2017] eKLR** found that the section was not unconstitutional. In particular, the Court of Appeal upheld the constitutionality of sections 4, 16, 21(1), 23(1), 25 (1) (3), 52 (1) (2) and 58 of

the Work Injury Benefits Act, 2007 (WIBA). The provisions under WIBA require injuries under the WIBA to be adjudicated upon by the Director of Occupational Safety and Health Services (the Director) and expressly bars institution of court proceedings by an aggrieved employee save under the provisions of the Act. The right to approach the courts as of first instance is curtailed and the Employment and Labour Relations Court is designated as an appellate court from the decision of the Director per section 52 (2) of WIBA. The Supreme Court delivered its judgment in **Law Society of Kenya –Versus- Attorney General & Another [2019]eKLR** (Maraga CJ & P, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ) on 03.12.2019 in which it dismissed the appeal and upheld the decision by the Court of Appeal.

The appellant submits that the respondent's cause of action accrued on 20.12.2013 per the respondent's pleadings in the plaint. The same was long after the coming into operation of WIBA on 02.06.2008 by Gazette Notice No. 60 of 23.05.2008. In view of section 16 of WIBA, the claim made for the respondent in the suit was to proceed within the procedure set out in WIBA and the lower Court lacked jurisdiction to hear and determine the suit.

Further, in **Owners of Motor Vessel "Lilian S" –Versus- Caltex Oil (Kenya) Limited (1989) e KLR** it was held thus, "**Jurisdiction is everything. Without it, a court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....**" Accordingly, it is submitted that the trial Court lacked jurisdiction and the judgment should be set aside and the suit struck out as a nullity for want of jurisdiction. The appellant relies on **Abraham Mwangi Wamigwi – Versus- Mary Njeri Mbiriri Wanjiku & Another [2012] eKLR** thus, dealing with the same issue of jurisdiction, J.B. Ojwang (as he then was) in **Boniface Waweru Mbiyu –Versus- Mary Njeri & Another** expressed himself as follows, "**Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the Court, the matter thus filed is so defective as to be transferred to any other Court. It is the duty of the Court or tribunal before which such matter is first brought to declare its status as a nullity.**"

It is submitted for the respondent that the issue of jurisdiction has been raised at the appeal stage. The appellant did not raise the issue of jurisdiction and object to the trial Court's jurisdiction. The appellant undisputedly submitted to the trial Court's jurisdiction and participated in the entire trial. Thus, the appellant is thereby estopped from invoking the issue of jurisdiction before the Court at this late stage in the appeal. The respondent cited **Owners of Motor Vessel "Lilian S" –Versus- Caltex Oil (Kenya) Limited (1989) e KLR** cited in **Kiplangat Korir –Versus- Dennis Kipngeno Mutai [2006] eKLR** thus, "**.... A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon that is done, the Court shall hear and dispose of that issue without further ado....**"

It was further submitted for the respondent that in **Kiplangat Korir –Versus- Dennis Kipngeno Mutai [2006] eKLR** (Kimaru J) it was held, "**This court is of the opinion that the issue of jurisdiction was cleverly raised by the appellant in his attempt to scuttle the hearing and determination of this appeal on merits. In this case, the appellant has raised the issue of jurisdiction so much later in the day. Substantial justice frowns upon a party who invokes provisions of the law unduly and at a later stage of a proceeding to take undue advantage against an opponent. In any event, this court would be placed in an awkward situation were it to uphold the argument of the appellant where it is been called upon to decide on an issue which is raised for the first time on appeal. If this Court were to make a determination on the issue of jurisdiction on this appeal as urged by the appellant, this court would not be sitting on an appeal but be acting as a court of the first instance. This is because the issue of jurisdiction was not raised before the trial resident magistrate's court. I say no more on that score. I will disallow the grounds of appeal on jurisdiction.**"

Again it was submitted for the respondent that Njoroge J in **Kirimi and Another –Versus- Florence Thirindi [2013]eKLR** held that a party who fails to question jurisdiction of Court may not be heard to raise the issue after the matter is heard and determined. Further, parties are bound by their own pleadings and the issue of jurisdiction was not pleaded and the issue should be left to rest as it was not before the Court.

Further, Ojwang J in **Law Society of Kenya –Versus- Attorney General & Another, Petition 185 of 2008 at Mombasa** delivered judgment on 04.03.2009 declaring section 16 of WIBA as unconstitutional. Following that declaration and prior to the decision by the Court of Appeal on 17.11.2017 in **Nairobi Civil Appeal No. 133 of 2011 – Attorney General –Versus- Law Society of Kenya & Another [2017] eKLR** which found section 16 of WIBA as constitutional and binding, the decision of the High Court prevailed. It was submitted for the respondent that as per the holding by the Court of Appeal in **Nation Media Group Limited –Versus- Onesmus Kilonzo [2015]Eklr**, for the benefit of certainty and consistency, the declaration of invalidity (of a statute which has been declared unconstitutional) must apply from the date of commencement of the statute; and the Court of Appeal in that case cited with approval Justice Kriegler (for the majority) in **Sias Moise –Versus- Transitional Local Council of Greater Germiston, case CCT 54/00** thus, "**If a statute enacted after the inception of the Constitution is found to be inconsistent, the inconsistency will date back to the date on which the statute came into operation in the face of the inconsistent constitutional norms. As a matter of law, therefore, an order declaring a provision in a statute such as that in question here invalid by reason of its inconsistency with the Constitution, automatically operates retrospectively to the date of inception of the Constitution.**" Further, in **Suleiman Said Shabbal –Versus- Independent Electoral & Boundaries Commission & 3 others [2014] eKLR** the Court of Appeal held, "**At a time when the Constitution of Kenya is still in its early years of interpretation, the idea that statutory enactments contrary to the Constitution can claim even fleeting validity should not be countenanced, let alone entertained. Holding otherwise would be contributing to the erosion of the supremacy and pre-eminence of the Constitution in the hierarchy of legal norms.**" Again, it was submitted for the respondent that in **Law Society of Kenya –Versus- Kenya Revenue Authority & Another [2017] eKLR** Mativo J held that once a law has been declared unconstitutional, it has no business remaining in the statute books and the fundamental issue that followed was, under what circumstances, if at all, a court could suspend an order declaring a legislation to be invalid. It was submitted that on the basis of the cited judgment by Ojwang J delivered on 04.03.2009 (but which had thereafter been set aside by the Court of Appeal as affirmed by the Supreme Court) the respondent thereby acquired a legitimate expectation to file the suit as he did in the trial Court and in accordance with the prevailing law prior to WIBA. Thus in **West Kenya Sugar Co. Ltd –Versus- Tito Lucheli Tangale [2021]eKLR** Radido J held that until the decision by Ojwang J had been set aside and vacated its declaration on unconstitutionality of section 16 of WIBA was the prevailing judge-made law and a litigant or citizen was entitled to order his or her life in the firm belief that the declared law prevailed at the material time – so that relevant suits filed in courts from 22.05.2008 (when High Court gave stay orders) to 03.12.2019 (when the Supreme Court affirmed decision of Court of Appeal setting aside the High Court's judgment of 04.03.2009) were validly within the jurisdiction of the Courts.

It was submitted for the respondent that Azangalala J in in Geology Investments Ltd –Versus- Rogonyo Njuguna & Others in HCCC No. 1067 of 2002 (Unreported) cited in Jackline Ombongi –Versus- Agnes Nyanchama & Another [2016]eKLR held, “From the authorities, I see a trend to sustain suits rather than strike them out. This is as it should be as courts lean in favour of doing substantial justice to parties rather than straight jacket adherence to rules of procedure.”

It was finally submitted for the respondent that in Cyrus Ombuna Machina –Versus- Safaricom Limited [2020]eKLR, Onesmus Makau J held, “Dismissing the claim without considering the merits would be miscarriage of justice. I will also not strike it out because as at 2017 when the suit was filed, the law in place allowed him to file the suit in court by dint of the judgment of the High Court in Petition 15 of 2008. I therefore refer the dispute to the Director under WIBA to hear and determine it under the relevant provisions of WIBA.”

The Court has considered the elaborate submissions made for the parties. The Court makes findings as follows:

First, it is true that the issue of jurisdiction was not disputed before the Magistrate’s Court or in the memorandum of appeal. It is also true that the parties submitted themselves to the jurisdiction of the Magistrate’s Court and they pleaded as much. It was not an issue urged before the learned Magistrate but upon this Court’s directions, parties filed further submissions on that point. The Court considers that as undisputed between the parties, jurisdiction is everything and once it is established that the Court lacks jurisdiction, then the Court or other decision maker must down its tools. That which is done without jurisdiction is a nullity. The court considers that the issue of jurisdiction is preliminary and a crucial point of law which every decision maker must bear in mind and where appropriate, address and decide upon it prior to substantively embarking to consider merits of the dispute at hand. In the instant case, both parties have been given an opportunity to address the issue of jurisdiction in view of the difficult legal and historical circumstances of the present appeal. To that extent the Court considers that none of the parties is prejudiced for want of pleading or submission in that regard; particularly on whether this Court enjoys necessary jurisdiction to hear and determine the present appeal. As already pointed out, the issue of jurisdiction goes to the Court’s foundation to embark and decide the appeal. The Court considers that it does not enjoy inherent appellate jurisdiction and a party invoking the Court’s appellate jurisdiction must establish the constitutional or statutory basis for doing so. In any event, the Court further considers that of its own motion it is bound to ascertain existence of its jurisdiction in any matter that comes before it. Accordingly, the Court will address the jurisdictional concerns and whether the Court enjoys the necessary jurisdiction to determine the appeal.

Second, it is clear from the authorities cited that a declaration that a statute is unconstitutional operates retrospectively from the date of commencement of the statute. The converse principle must be that where a statute is challenged on account of alleged unconstitutionality and it is declared constitutional, the declaration of constitutionality (like in the instant situation of the relevant sections of WIBA like section 16 that had been impugned) of the statute is retrospective from the time the statute commenced.

Third, under the law of the case doctrine and sound application of judge- made law, the Court considers that the final position in law on the constitutionality of sections of WIBA that had been impugned is as decided by the Court of Appeal and affirmed by the Supreme Court. Thus, despite the earlier decision by the High Court declaring, *inter alia*, section 16 of WIBA as unconstitutional, the retrospective and finally binding judge-made law was that the section was constitutional from the date WIBA had commenced or come into operation is as per the decision by the Court of Appeal as affirmed by the Supreme Court. The Court’s view is that the High Court’s decision that was set aside might have created a legitimate expectation for the respondent to file the suit as was done but by reason of the decision by the Court of Appeal as affirmed by the Supreme Court, the purported legitimate expectation appears to have run into a complex situation because the Magistrate’s Court was thereby held not to have had jurisdiction once WIBA came into operation – but in circumstances whereby the judgment appealed against had already been delivered. Further it appears to the Court that jurisdiction is only conferred to Courts by the Constitution or relevant statute and not judge-made law and, in the Court’s view, judge-made law only approves or disapproves, by way of interpretation, the existence or lack of jurisdiction in view of the relevant constitutional and statutory provisions. Thus, only suits filed in courts prior to coming into operation of WIBA and under the previously prevailing statutory provisions had been saved (by the Court of Appeal decision as affirmed by the Supreme Court) to have been instituted, continued, heard and determined in accordance with that previous regime. The respondent’s suit would therefore appear not to have been one such suit but the Court also considers that the judgment subject of the appeal herein had been delivered in view of the unconstitutionality of section 16 of WIBA as had been declared by the High Court. The Court further observes that the parties have not made submissions on the fate of judgments such as the one subject of the appeal and in view of the subsequent Court of Appeal decision affirmed by the Supreme Court that the section was in law constitutional – and the Court considers that it has no basis to delve into the fate of the judgment. In any event parties have not submitted on that issues and the Court will let the issue to rest.

Fourth, section 12(1) of the Employment and Labour Relations Court Act, 2011 confers the Court with exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of the Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations. WIBA is the law that provides for resolution of disputes in the nature of injury claims by employees and employers like it was the respondent’s claims herein. The WIBA in section 52 confers the Court appellate and not original jurisdiction. The Court has found that section 16 of WIBA applied to the dispute between the parties herein by reason of the final case law being the decision by the Court of Appeal as affirmed by the Supreme Court in the cited judgments. That being the case, the Court considers that jurisdiction to entertain an appeal, in injury claims like the one herein, would only fall in accordance with provisions of section 52 of WIBA and, as envisaged in section 12 of the Employment and Labour Relations Court Act, 2011, the said section 52 of WIBA is the written law conferring appellate jurisdiction to this Court to entertain appeals in injury claims – and the appellant or the respondent has not cited to the Court the relevant written law conferring the Court the necessary jurisdiction to hear and determine the present appeal as filed before the Court. The Court therefore finds that it lacks jurisdiction to hear and determine the appeal on its merits.

Fifth, the Court has considered the submission for the respondent that the appellant would be estopped from belatedly raising the issue of jurisdiction but the Court has already found that as settled trite law, jurisdiction is everything and it would not serve ends of justice for the Court to blind itself to the all-important question of whether this Court enjoyed valid jurisdiction to decide the dispute at hand on merits and by way of the present appeal. The Court will not therefore delve into the merits of the appeal as set out in the memorandum of appeal on account of want of relevant jurisdiction. As agreed between the parties and on account of the cited authorities, the Court must down its tools once it has been established that the Court lacks jurisdiction.

Sixth, the Court has considered the complex situation the litigants found themselves in the instant case and returns that the appeal is liable to striking out with orders each party to bear own costs of the appeal.

In conclusion, the appeal herein is hereby determined with orders:

- 1) The Court lacks jurisdiction to entertain the appeal on merits upon the grounds stated in the memorandum of appeal.
- 2) The appeal is hereby struck out.
- 3) Each party to bear own costs of the appeal.

Signed, dated and delivered by video-link and in court at **Mombasa** this **Friday 4th June, 2021**.

BYRAM ONGAYA

JUDGE