



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CIVIL APPEAL NO 28 OF 2020

[FORMERLY MOMBASA HIGH COURT CIVIL APPEAL NO 103 OF 2020]

MAGOT FREIGHT SERVICES LIMITED.....1ST APPELLANT

MAUREEN TERESA OKACH.....2ND APPELLANT

VERSUS

SAMSON MWAKENDA MANGALE.....RESPONDENT

(Appeal from the judgment of Hon Lesootia Saitabu, PM delivered on 7th July 2020 in Mombasa CMCC No 1730 of 2018)

JUDGMENT

Introduction

1. This appeal was originally filed in the High Court at Mombasa as *Civil Appeal No 28 of 2020*.
2. The file was placed before **P.J.O Otieno J** on 25th September 2020, who declined to assume jurisdiction on the ground that the subject matter was over and about Employment and Labour Relations. The matter was thus transferred to this Court for hearing and determination.

The Appeal

3. In their Memorandum of Appeal dated 3rd August 2020, the Appellants raise the following grounds of appeal:
 - a. The learned Magistrate erred in law and in fact by hearing and determining a case in which he had no jurisdiction;
 - b. The learned Magistrate erred in law and in fact by holding that the Respondent was an employee of the Respondent;
 - c. The learned Magistrate erred in law and in fact by holding that the Respondent had adequately proved that a road accident did occur;
 - d. The learned Magistrate erred in law and in fact by holding that the Appellants' driver was liable for the alleged accident, without reliance on any evidence;
 - e. The learned Magistrate erred in law and in fact by making an assumption not supported by any evidence that the Respondent was an employee of the Appellants;
 - f. The learned Magistrate erred in law and in fact by holding that the Respondent was injured while working for the Appellants without production of the relevant documents to support such an injury claim;
 - g. The learned Magistrate erred in law and in fact in the manner he analysed the evidence and the applicable law in the case;
 - h. The learned Magistrate erred in law and in fact by failing to consider the Appellants' submissions on record.

Jurisdiction

4. The first ground of appeal is that the trial court had no jurisdiction to hear and determine the claim giving rise to this appeal. The cardinal rule is that whenever an issue of jurisdiction is raised, it must be dealt with before any other step is taken (see *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited [1989] eKLR.*)

5. My understanding is that the objection regarding jurisdiction arises from the decision of the Court of Appeal in *Attorney General v Law Society of Kenya & another [2017] eKLR* as affirmed by the Supreme Court in *Law Society of Kenya v Attorney General & another [2019] eKLR*.

6. The effect of these decisions, which are binding on this Court, is that the High Court decision (**Prof. J.B Ojwang J** [as then was]) by which Sections 4, 16, 21(1), 23(1), 25(1)(3), 52 (1)(2) and 58(2) of the Work Injury Benefits Act (WIBA) had been declared unconstitutional, was set aside.

7. Of interest is Section 16 of WIBA which provides:

16. 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 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.

8. In addressing itself specifically to Section 16 of WIBA, which denies the courts original jurisdiction in work injury claims, the Supreme Court stated the following:

"In agreeing with the Court of Appeal, we note that is not in dispute that prior to the enactment of the Act, litigation relating to work-injuries had gone on and a number of 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 finalised under Section 52 aforesaid."

9. Although the Supreme Court and the Court of Appeal were clear that work injury claims arising before the enactment of WIBA could be processed under the judicial process invoked then, they made no such exception for claims arising after the enactment of WIBA. I understand this to mean that any such claims could only be processed within the framework provided by WIBA.

10. The accident giving rise to the claim before the trial court is said to have occurred on 7th July 2017, long after the enactment of WIBA. Moreover, at the time the learned trial Magistrate determined the case, both the Court of Appeal and the Supreme Court had rendered themselves on the issue of jurisdiction.

11. My finding therefore is that the trial court had no jurisdiction to entertain the claim before it and the ensuing judgment and all consequential orders were irregular.

12. On this account, the appeal succeeds, the judgment of the trial court is set aside and replaced with an order striking out the claim.

13. Each party will bear their own costs.

14. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 8TH DAY JULY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Appellants in person

Miss Masinde for the Respondent