REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL NO. 10 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

HELA INTIMATES EPZ LIMITED.....APPELLANT

VERSUS

LINOS NGORERE OKUYU.....RESPONDENT

(Being an appeal from the judgment of Hon. L. Kassan in Mavoko Court, SPMCC No. 181 of 2017 delivered on 29th May 2018)

JUDGMENT

The Appellant herein filed an appeal against the Judgment of Senior Principal Magistrate at Mavoko in Civil Case No. 181 of 2017. In that suit the Respondent in his Plaint filed on 13th February 2017 contended that on 11th June 2016 while at the Appellant's company he was injured by a heavy machine which fell on his right leg resulting to injuries. In its defence the Appellant denied the allegations in the Plaint and averred that the Plaintiff was not its employee and that he had trespassed restricted areas that were meant for employees of the Company and not strangers. Upon consideration of the evidence, the learned trial Magistrate found the Appellant 100% liable for the injuries sustained by the Respondent and awarded the Respondent Kshs.180,000 as General damages, Kshs.3,000 as special damages and costs of the suit.

The Appellant being dissatisfied by the judgment of the trial Magistrate seeks to set it aside on the following grounds raised in its Memorandum of Appeal:

1. The learned trial Magistrate erred in fact and in law by finding that the Respondent was an employee of the Appellant as at the date of injury when no sufficient evidence had been adduced to prove the same which finding is highly unfair and unjust.

2. The learned trial Magistrate erred in fact and law by finding that the Respondent was injured while at the Appellants employment when no sufficient evidence had been adduced.

3. That the learned trial Magistrate erred in fact and in law by finding that the matter before it was a work injury claim thereby arriving at the finding that the Respondent was injured while in the Appellant's employment which finding was unfair and manifestly unjust.

4. The learned trial magistrate erred in law by assuming jurisdiction in a non-work related injury claim.

5. The learned trial Magistrate misconducted himself by disregarded the authorities in the superior court, the evidence adduced on behalf of the Appellant and the Appellant's submissions.

6. The learned trial Magistrate erred in law and fact in assessing general damages at Kshs.180,000 which was excessive considering the injuries alleged to have been sustained by the Respondent were minor and soft tissue in nature.

The parties agreed that the appeal be heard by written submissions and each party filed its respective submissions.

Appellant's Submissions

The Appellant submitted that section 3 of the Employment Act as read together with section 2 of the Income Tax Act reflected that the Appellant being an employer of the Respondent had paid him his salary for the months of October 2016 to January 2017 after which he failed to attend to his duties. Further, that the Respondent stated that he was injured on 11th June 2016, which is false as at the time of the

injury he was not an employee of the Appellant.

It submitted that the learned trial magistrate erred by assuming jurisdiction in a work related injury matter which only the Director of Occupational Safety and Health Services has jurisdiction as provided under Section 23(1) of the Work Injury Benefits Act.

It relied on the decision in ***Peter Kariuki Njenga -V- Gabriel P. Muchira & Another [2017] eKLR*** and ***Kagi -V- Njenga [1981] KLR 186***. In respect of jurisdiction, it relied on the decision in ***Hon. Attorney General -V- Law Society of Kenya and Central Organisations of Trade Unions [2017] eKLR***.

Respondent's Submissions

It was submitted that the Respondent being the custodian of the payslips only produced payslips for the months of October to suit their case and that the payslips bore the Respondent's name but were with respect to another company, Altex EPZ Limited.

He submitted that at the time of institution of the suit before the trial Magistrate section 16 of the Work Injury Benefits Act had been declared unconstitutional in ***Law Society of Kenya v Attorney General & 3 Others [2009] eKLR***. In addition, that the trial Magistrate had jurisdiction to entertain the matter before the Court of Appeal's decision in ***Attorney General v Law Society of Kenya and Another [2017] eKLR***.

He submitted that the Appellant was not represented when the matter came up for mention on 14th March 2018 thus their submissions, which were filed on the same day, were not on record. He argued that it is unfair for the Appellant to fault the trial Court yet they have not explained why their submissions were not placed on record.

Analysis and Determination

The appellant raised 10 grounds of appeal, which I summarise into four broad grounds as follows –

1. Whether the respondent was an employee of the appellant.

2. Whether the respondent was injured in the cause of employment with the appellant

3. Whether the evidence on record and submissions support the findings and determination of the Hon. learned trial Magistrate.

4. Whether the trial court had jurisdiction to hear the case.

In a first appeal as the instant one, the court has a duty to evaluate the evidence recorded before that court by way of retrial and reach its independent conclusion. Refer to the decision in ***Selle -V-Associated Motor Boat Company Limited (1968) EA 123***.

On the first issue whether the respondent was an employee of the appellant, the trial court found that –

> *"DW1 confirmed that the plaintiff used to work for the respondent. He adopted his witness statement and produced all documents in his list. He said that the plaintiff did not report to work on the date of the alleged injury because he did not clock the machine that monitors those reporting. DW1 said that there are no any records to show that the plaintiff was injured. DW1 admitted in cross examination that he wasn't working closely with the plaintiff and that there was a senior executive officer called Mr. Philiph. Phillip was not called by defence despite he said that DW1 monitored him. PW1 said Philip was at work when he got injured. No reason for him calling Mr. Philiph. The plaintiff said that the clock-in machine could fail sometimes and perhaps that is why his name wasn't captured. The balance truth in favour of the plaintiff that he was injured on the material date. On liability the plaintiff said that his co-works let go the end of the machine and as a result fell on him. I hold the respondent liable at 100%."*

According to the evidence of record, the appellant did not produce records of employees covering the period when the respondent was injured. The person who was named by the respondent as is Supervisor, one Philip, was not called as a witness.

In paragraph 6 of the defence, it is pleaded that the respondent was trespassing in restricted areas. This is repeated at paragraph 6 of the witness statement of Sarah J. Abwoja and paragraph 6 of the witness statement of Elizabeth Wavinya Makani at pages 54 and 65 of the record of appeal respectively.

The respondent had stated in his witness statement, which he adopted at the trial that he started working with the appellant in April 2016. The respondent's averments were not controverted by way of evidence. No questions were put to him during cross examination in respect of the date of his employment or date of injury.

From the foregoing, I agree with the finding of the trial Magistrate to the effect that the balance tilted in favour of the respondent.

On the same evidence I find that the trial Magistrate did not misdirect himself in finding that the respondent was injured in the course of employment. I further find that the decision of the trial Magistrate is supported by the evidence and submissions on record.

In respect of whether the trial magistrate erred in failing to consider the Appellant's submissions this Court in agreeing with the Respondent finds that the Appellant was not represented on 14th March 2018, as indicated in the record of proceedings, when the Respondent's counsel

appeared in court to confirm filing of submissions. The trial Magistrate in his Judgment stated that he had considered the submissions on record. He therefore took into consideration the submissions that were present in the court file which did not include the appellant's submissions.

The final issue is on jurisdiction of the court to hear the case as a work injury matter. It is common knowledge which this court take judicial notice of that the High Court nullified several sections of the Work Injury Benefits Act on grounds that the same were unconstitutional in Petition No. 185 of 2008. The Judge however allowed suits that had already been filed to continue under the operative law under which they had been filed.

The Court of Appel in Appeal No. 133 of 201 overturned the decision of the High Court and reinstated the provisions of WIBA with the exception of Sections 7 and 10(4). The decision of the Court of Appeal was delivered on 17th November 2017.

The suit in the Magistrate's Court in respect of which this appeal has been lodged was filed on 13th February 2017. The appellant admitted to the jurisdiction of the court at paragraph 13 of the defence. The hearing of the evidence in the suit was on 31st October 2017 while the defendant's evidence was taken on 28th February 2018. The appellant did not raise any issue about jurisdiction.

The appeal herein is against the decision of the trial court based on pleadings and evidence before the court. It is trite law that parties are bound by their pleadings. An appeal cannot found a new cause of action or defence that was not pleaded or argued before the trial court. The appellant is thus estopped from raising the issue of jurisdiction as the same was not raised before the trial court. The trial court can thus not be faulted for taking cognisance and hearing the case as no objections to jurisdiction were raised before the trial court.

On the quantum, the Appellant averred that the amount of Kshs.180,000 was highly excessive considering the injuries sustained. The Appellant did not demonstrate that the award of Kshs.180,000 was inordinately high to warrant interference by this Court as held in ***Bashir Ahmed Butt vs. Uwais Ahmed Khan, By M. Akmal Khan [1982-88] 1 KAR 1***. As such there is no reason to interfere with the trial Magistrate's award.

For the foregoing reasons I find the appeal unmerited and dismiss it with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE