



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT NAIROBI**

**ELRC CASE NO. 2009 OF 2017**

**YVONNE DAMARIS KIMANTHI &**

**LINCOLN KARWINGO NJERU(SUING AS THE ADMINISTRATORS OF THE**

**ESTATE OF NEWTON MUGENDI NJERU (Deceased).....CLAIMANTS**

**VERSUS**

**PATHOLOGISTS LANCET KENYA LIMITED.....RESPONDENT**

**RULING**

1. On 11.3.2019, the respondent filed a Notice of Preliminary Objection and prayed for the Memorandum of claim dated 7.10.2012 to be struck out with costs for the following grounds:

- a. That the suit offends the provisions of Section 2 (3) of the Law Reform Act Cap 26 Laws of Kenya.
- b. That the suit offends the provisions of Section 3 of the Fatal Accident Act Cap 32 Laws of Kenya
- c. That the continuance of the claim would be an absolute contravention of Article 162(2) of the Constitution, Part (s) III,IV and V of the Work Injury Benefits Act, and Section (s) 29 (3) & (4) of the Employment & Labour Relations Court Act as read together with Gazette Notice No. 9243 of 2011;
- d. That the Honourable court lacks the primary jurisdiction to hear and determine the said claim.

**BACKGROUND**

2. The respondent employed Mr. Newton Mugendi Njeru (now deceased) as a Medical Technologist on 18.4.2012. On 24.2.2015 the deceased was a pillion passenger on the respondent's motorcycle while in the course of his employment when he perished in an accident involving the motorcycle, a lorry and a tractor. As a result the claimants brought this suit on 9.10.2017 claiming the deceased's salary for 23 years which he would have worked before reaching retirement age of 60 years. They further sought general damages under the Workman Compensation Act and Work Injury Benefits Act; Fatal Accidents Act and the La Reform Act.

3. The respondent filed defence on 8.12.2017 contending that the deceased was neither a lawful passenger on the motorcycle on the fateful day nor was he in the course of his employment when he perished in the said accident. She further contended that she paid the claimants the deceased's lawful dues and the rest was payable by third parties including NSSF, Pension Fund and an Insurance Company. On the other hand she contended that the court lacked jurisdiction to determine the suit both under the Employment and Labour Relations Court Act, and the Fatal Accidents Act on the Law Reform Act.

4. I have carefully considered the submissions made by both parties and I now proceed to determine the grounds raised by the respondents Notice of Preliminary Objection.

**(a) Whether the suit offends Section 3(3) (b) of the Law Reform Act.**

5. Section 2 (3) (b) of the Law Reform Act provides that;

***“No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this Section has .....against the estate of a deceased person unless either***

(a) ...

**(b) proceedings are taken in respect thereof not later than six months after his executor and administration took out representation.”**

6. In this case Grant of Letters of Administration *ad litem* annexed to the statement of claim was taken on 3.8.2015 and the suit was filed on 9.10.2017. A simple calculation shows that the suit was filed 14 months after the grant was issue. It follows therefore that claimant suit offends Section 2 (3) of Law Reform Act.

Whether the suit offends the provisions of Section 3 of the Fatal Accidents Act

7. Section 3 of the Fatal Accidents Act provides as follows:

**“whenever the death of a person is caused by a wrongful act, neglect or default and the act, neglect or default is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, then in every such case the person who would have been liable, if death not ensued, shall be liable for damages notwithstanding the death of the person injured and although the death was caused under such circumstances as amount in law to felony.”**

8. The respondent submitted that the claimants did not blame the respondent for the death of the deceased. Have perused the statement of claimant and for sure the claimants have neither blamed the respondent for the death of the deceased nor have they pleaded any particulars of negligence. Consequently I agree with the respondent that, the suit as pleaded does not fall within the tall walls of the provisions of Section 3 of the Fatal Accidents Act.

Whether the court lacks jurisdiction to determine the suit especially considering Section 29 (3) & (e) of the Employment and Labour Relations Court Act read with Gazette Notice No. 9243 of 2011

9. The claimants submitted that the cause of action herein arose while the deceased was in the cause of his employment by the respondent and as such, this court has jurisdiction. However the respondent contended that even if the deceased died in the course of his employment, the procedure for seeking compensation is not to bring suit to this court but to lodge a claim with the Director Occupational Safety and Health Services under Part IV of the Work Injury Benefit Act (WIBA) for determination of compensation under Section 34,36 and 37 of the Act. She contended that the court is only clothed with appellate jurisdiction in relation to the decision of the Director under Section 51 and 52 of the WIBA.

10. I have carefully considered the rival submissions. There is no doubt that this court has exclusive original and appellate jurisdiction over all Employment and Labour Relations disputes under Article 162(2) (a) of the Constitution and Section 12 of the Employment and Labour Relations Court Act. Article 159 of the Constitution however, allows the use of Alternative Dispute Resolution Mechanism. Such mechanisms include the Director Occupational Safety and Health services as was held by the Court of Appeal in **Attorney General v Law Society of Kenya & Central Organisation of Trade Union [2017] eKLR** in its decision delivered on 17.11.2017.

11. The court takes judicial notice that before the said decision by the Court of Appeal the position obtaining was that the said Section of the WIBA which gives the Director power to adjudicate over claims under WIBA had been declared unconstitutional by the High Court on 4.3.2009. It follows therefore that from the said date till the decision by the Court of Appeal on 17.11.2017, the jurisdiction to determine claims under WIBA lay in the predecessor of this court until the Chief Justice published the Gazette Notice no. 9243 of 2011 to designate senior Magistrates to determine the said dispute

12. The said Gazette Notice gave jurisdiction to Magistrates of the rank of Senior Resident and above original jurisdiction to determine claims founded on WIBA. That arrangement was obviously subject to the pecuniary and jurisdiction of the magistrate court, so that if the expected quantum of damages exceeded what the magistrates' court could award, a party was free to approach this court.

13. The suit herein was brought on 9.10.2017 before the said Court of Appeal decision. In my view therefore it was properly filed in this court unless it can be shown that the quantum of damages expected was within the magistrates' court. Without such evidence, I return that the suit was properly filed here. However in view of the Court of Appeal decision the **Attorney General vs Law Society of Kenya & another [2017]eKLR**, the circumstances have changed. The power of the Director of Occupational Safety and Health Services to adjudicate over claims founded on WIBA has been reinstated. I therefore, return that the said claim should now be determined by the said Director in line with the provision of WIBA and the said Court of Appeal decision.

**CONCLUSION**

14. I have found that the suit herein offends Section 2(3) of the Law Reform Act and Section 3 of the Fatal Accidents Act in as far as the claimants seek general damages under the said statues for the death of the deceased employee. The said claims are therefore struck out. I have, however, found that the suit was properly filed in as far as it relate to the claim for work injury benefit because it was filed during the time when the Director's power to adjudicate over such claims had been quashed by the High Court. However, due to the change of circumstances since the decision by the Court of Appeal in **Attorney General vs Law Society and Another**, aforesaid, the court has now been dispossessed of the original jurisdiction to hear and determine the claimants claim under WIBA. The said claim is therefore referred to the Director Occupational Safety and Health Services to assess and determine compensation if any under WIBA.

15. As a parting shot, I have also considered the claims for salary for the years the deceased would have worked before reaching the normal retirement age of 60 years. It is however settled by this court and the Court of Appeal that anticipatory salary cannot be awarded unless the same is specifically provided for under the contract of service. The claimants did not prove that anticipatory salary was provided for under the deceased's contract of service. I therefore see no need of keeping the file alive in this court for such claim which the court has no

jurisdiction under the law to grant. This claim is also struck out.

16. In the end the Preliminary Objection succeeds to the extent stated above and the claim under WIBA referred to the Director of Occupation Safety and Health. I make no order as to costs.

**Dated, signed and delivered in open court at Nairobi this 20<sup>th</sup> day of December, 2019.**

**ONESMUS MAKAU**

**JUDGE**