# REPUBLIC OF KENYA

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT MERU**

**CIVIL APPEAL NO. 4 OF 2018**

**(Formerly Meru High Court Civil Appeal 97 of 2017)**

**REYNOLDS CONSTRUCTION COMPANY LIMITED.....APPELLANT**

**VERSUS**

**ROBERT MATANO KAMWARA.....RESPONDENT**

**JUDGMENT**

1. The Appeal was transferred to this court by order of the High Court (Majanja J.) on 30th May 2018 as the High Court was of the considered view that the matter subject of the appeal falls within the jurisdiction of the Employment & Labour Relations Court, the appeal is to heard and disposed of by this Court. The Appeal was consequently brought before me for directions on 2nd October 2018 and the parties indicated that they would abide the determination of the appeal by this court as they had already filed all the requisite papers. The judgment was accordingly set for delivery today.

2. The appeal is from a Ruling of the learned trial Senior Resident Magistrate C. Kemei at Githongo in Civil Case No. 32 of 2017 made on 24th May 2017. The grounds of appeal were 12 in total and are reproduced below as follows. That: –

1. The learned Magistrate erred in law and in fact in finding that the Appellant draft defence dated 10th April 2017 did not disclose any triable issues.

2. The learned Magistrate erred in law and in fact in failing to find that the Appellant herein will be condemned unheard and a failure of justice will be occasioned by dismissing the Application.

3. The learned Magistrate erred in law and fact by failing to consider the constitutional requirement of Article 159 of the Constitution to the extent that court matters ought to be determined on merit and not through unreasonable technicalities.

4. The learned Magistrate erred in law and in fact in declining to give leave to the Appellant to issue a third party notice to the intended Third party, First Assurance Company and that the Plea that the claims in the Plaint were payable by the third party as stated in the Appellants draft defence was a triable issue in law that ought to have been determined at the full hearing.

5. The learned Magistrate erred in law and in fact and misdirected herself in failing to take cognisance of the plea that the court lacked jurisdiction to hear the matter in the draft defence dated 10th April 2017 constituted a triable issue of law that could not be proved by way of affidavit evidence but by way of a full hearing.

6. The learned Magistrate erred in law and in fact and misdirected herself in upholding the exaggerated and erroneous amounts allegedly assessed by Director of Occupational Safety under Work Injury Benefits Act and at the same tome fail to take cognisance of the mandatory insurance for all employers under the same Act.

7. The learned Magistrate erred in law and in fact in failing to take cognisance of the procedure provided for under Section 25 of the Work Injury Benefits Act to be subjected to a further medical examination in regard to the compensation awarded by the Director of Occupational Safety and Health which was referred to in the Appellants draft defence that explained the procedure to be followed before compensation is awarded which is a triable issue that ought to have been determined at the full hearing of the suit.

8. The learned Magistrate erred in law and in fact by finding that the Appellant's delay was a deliberate act by the Appellant and misdirected herself by failing to take cognisance of the practice by insurers to defend such suits having paid a premium as envisaged under the WIBA Act.

9. The learned Magistrate erred in law and in fact by misdirecting herself on the law and the facts and failing to find that the Appellant's draft defence dated 10th April 2017 disclosed a reasonable defence in law.

10. The learned Magistrate failed in law in refusing to uphold the Appellant's right both under the Constitution of Kenya 2010 and the Civil Procedure Act to defend themselves against the Plaintiff's unmeritorious claim which rights should be protected by this honourable court by granting them an opportunity to be heard.

11. The learned Magistrate erred in law and fact and misdirected herself in finding that the Appellant ought to have entered appearance in the suit without considering that the Respondent/Plaintiff had engaged with the Insurer (First Assurance Company) with a view of compensating the Respondent/Plaintiff.

12. The learned Magistrate wholly erred in law and fact in arriving at her said decision consequently causing a miscarriage of justice.

The Appellant therefore sought the interlocutory judgment entered on 21st December 2016 be set aside pending the hearing and determination of this Appeal; the said Ruling be set aside and substituted with an order allowing the Appellant to issue a third party notice to the insurer First Assurance Company and the draft defence dated 10th April 2017 be deemed duly filed and the matter be remanded back to the Chief

Magistrates' court for hearing before another Magistrate other than Honourable C. Kemei. The Appellant filed submissions in support of the appeal while the Respondent failed to. The hefty bundle the Appellant produced reiterates the grounds above and cites various court decisions in support of the grounds.

3. I need not delve into them because of the decision of the Court of Appeal in **Hon. Attorney General *v* Law Society of Kenya *&* Another [2017] eKLR** (Waki, Makhandia, Ouko JJA) in the appeal against the decision of Ojwang J. (as he then was) where the learned superior court judge held various sections of the Work Injury Benefits Act inconsistent with the former Constitution. The learned Judges of Appeal held as follows:-

*We, on the other hand, do not find anything offensive of the Constitution or discriminatory in the provisions of sections 16, 23 and 52(2). Section 16 restricts claims for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of an employee to the procedure laid down under the Act. The Director, as we observed earlier has enormous adjudication powers from the point a report is filed, award of compensation through to a review of the decision. It is now well settled on the authority of the Supreme Court in the decision of Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 others, S.C. Civil Application No. 2 of 2011, and in a long line of others, that a court's jurisdiction flows from either the Constitution or legislation or both; that it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law; and that jurisdiction goes to the very heart of the dispute and that it is equally accepted that;*

***"…….where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed".***

*See also Speaker of the National Assembly v. James Njenga Karume, Civil Application No. Nai. 92 of 1992. The jurisdiction donated to the Director is therefore not unique. In our view, it is lawful. The quarrel with section 23, according to the learned Judge is that it grants to the Director an unlimited judicial powers in "making inquiries" in relation to a work-related accident, and in making awards; that after receiving the complaint he alone is required to proceed to determine the question, and to resolve the claim on liability; that since personal injury and death in the workplace is, by nature so litigious, such a claim ought to go through a judicial process. For the same reasons we have given above in respect of section 16, we do not find anything in this section that is inconsistent with the Constitution. The powers of the Director are donated by statute and are legitimate. The exercise of that power is circumscribed and it is not arbitrary. For example the objective of the inquiry and investigation by Director is to verify the report in order to decide upon any claim or liability. The Director retains power to review his decision in the event a party is thereby aggrieved. There is even an appellate avenue to the Employment and Labour Relations*

*Court.*

*……*

*In the end, we allow the appeal to the extent that we set aside the learned Judge's orders declaring sections 4, 16, 21 (1), 23(1), 25 (1)*

*(3), 52 (1) (2) and 58(2) to be inconsistent with the former Constitution. The result is that only sections 7 (in so far as it provides for the Minister's approval or exemption) and 10 (4) are inconsistent with the former and current Constitution.*

4. The upshot of the foregoing is that the Appeal is unmerited as the Director of Occupational Safety and Health is the person to determine the injuries sustained. As he has already made a finding the matter will be referred to the Director Occupational Safety and Health for him to exercise his prerogative as per the law. The decision of the learned Magistrate is therefore not dislodged and the status of the claim is that the Director of Occupational Safety and Health is the one to determine the quantum per Section 23 of the Work Injury Benefits Act, 2007. There will be no orders on costs in this appeal.

It is so ordered.

**Dated and delivered at Meru this 9th day of November 2018**

**Nzioki wa Makau**

**JUDGE**