



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT KISUMU

APPEAL NO. 01 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

ABYSSINA IRON & STEEL LTD.....APPELLANT

VRS

DOUGLAS MOMANYI ONDARA.....RESPONDENT

JUDGMENT

This is an Appeal from the Ruling of Honourable Mr. Obutu Senior Resident magistrate delivered on 6th December, 2011 in Kisumu CMCC. No. 99 of 2011 on a Notice of Preliminary objection contesting the jurisdiction of the court to handle the case.

Background

In the Complaint filed at the Chief magistrates Court in Kisumu on 20th April, 2011 the Respondent Douglas Momanyi Ondara prayed for general damages for alleged injuries suffered in the course of employment while he was working as casual labourer for the Appellant. He alleged that the injuries arose due to the negligence and/or Statutory breach of duties by the Appellant or its servants and/or agent.

At paragraph 11 of the defence the Appellant objected to the jurisdiction of the the Chief Magistrate's Court to hear and determine the matter owing to express and mandatory provisions of Section 87(1) and (2) of the Employment Act No.11of 2007 which designates the Industrial Court as the only Court competent for determination of disputes of the nature raised in the complaint.

After hearing arguments of the parties on the preliminary objection the lower court dismissed the preliminary objection with no orders as to costs.

Being dissatisfied with the ruling on the Preliminary Objection the Appellant lodged this appeal. The parties argued the appeal by way of written submissions.

The Appeal was originally filed in the High Court at Kisumu as HCCA.No. 186 of 2011 but was transferred to this Court by an order of the High Court made on 9th December, 2013.

The appellant raised five grounds of appeal in its memorandum of appeal which were canvassed through written submissions filed on 13th March, 2013 and supplementary submissions filed on 18th

June, 2015. The grounds are the following;

1. *The Learned Trial Magistrate having correctly determined that the suit filed by the Respondent claiming damages for injuries allegedly sustained in alleged breach of the employer/employee relationship ought to be determined by the Industrial Court exclusively in accordance with the relevant provisions of the Employment Act, 2007 and the Labour Institutions Act, 2007, nonetheless, erred in law and in fact, in finding that Subordinate Courts in Kenya are deemed to be divisions of the said Industrial Court within the meaning of Sections 16(1) and (2) of the Labour Institutions Act, 2007 in so far as the Chief Justice may gazette such Subordinate Courts to hear such labour or employment disputes.*
2. *The Learned Trial Magistrate erred in law and in fact in failing to appreciate that the purported legal Notice No. 9243 of 2011 which he relied upon as the basis upon which he reached the finding that the Chief Justice had donated jurisdiction to the Subordinate Courts, had in fact ceased to be applicable when the parent statute was repealed by the new statute of the Industrial Court Act, No.20 of 2011, as at the time when the ruling was being delivered, with the result that he arrived at a wrong decision.*
3. *The Learned Trial Magistrate erred in law and in fact by failing to address or otherwise determine the question of the conflict of the provisions of articles 162(2) (a) of the Constitution of Kenya 2010 as read with article 2(1), (2) and (4) thereof, in relation to the then provisions of Section 16 of the Labour Institutions Act, 2007, despite the fact that the issue was raised and argued substantively before him for determination.*
4. *The Learned Trial Magistrate erred in law and in fact in failing to appreciate that the provisions of the said Section 16(2) of the Labour Institutions Act 2007, together with the purported legal Notice issued by the Chief Justice pursuant thereof, purporting to grant jurisdiction to Subordinate Courts to hear such a matter, was null and void and of no legal effect, in so far as it was inconsistent with the provisions of articles 162(2) (a); 2(1).(2) and (4) of the Constitution of Kenya 2010, with the result that he reached an erroneous decision.*
5. *The Learned Trial Magistrate erred in law and in fact in failing to appreciate the basic principle that even in the face of the provisions of Section 16(2) of the Labour Institution Act, or any other alternative statute purporting to grant jurisdiction to subordinate Courts to determine such a matter, the divisions of the systems of Courts as the Subordinate Courts and the High Courts in the Constitution of Kenya 2010, at articles 162, 163,164,165 as read with article 169 thereof, create such a distinct, separate and different tier of exercise of judicial authority each with its separate roles with the High Court being an appellate court to the subordinate Court, that it would be inconceivable that a Subordinate Court would be construed, within the meaning and contemplation of the letter and spirit of the Constitution, that a Subordinate Court can be deemed to stand in the same status and standing of a High Court set out at articles 162(2) (a), thereof as read with the provisions of Section 11 of the then Labour Institutions Act, 2007 and Section 4(2) of the Industrial Court Act, No. 20 of 2011 which was applicable at the time of the delivery of the ruling which consistently state that Industrial Court is a Court with the status of the High Court.*

In my opinion all the 5 grounds of Appeal essentially raise only one issue, whether the Magistrates Court had jurisdiction to hear the case together with the 40 other cases that were consolidated with it. That is the subject of this Appeal.

The sections relied upon by the Appellant are Sections 121,87 and 92 of the Employment Act 2007 and Section 16(1) and (2) of the Labour Institutions Act 2007.

The Appellant also refers to Kenya Gazette Notice No. 9243 which he argues is unconstitutional for being in conflict with Article 162(2) (a) which provides for the jurisdiction of this Court.

The Appellant relied on the case of International Centre for Policy and Conflict & Others v Attorney

General and others [2013] EA 141 in which a five bench of the High Court stated that interpretation of the Constitution must reflect the spirit of Article 159 which provides:

159. (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

(3) Traditional dispute resolution mechanisms shall not be used in a way that—

(a) contravenes the Bill of Rights;

(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

(c) is inconsistent with this Constitution or any written law.

The appellant further relied on the decision of the Court of Appeal in Karisa Chengo & 2 others V Republic [2015] eKLR in which the court stated as follows: -

"We are not oblivious to the fact that this decision may have serious ramifications in administration of justice. However, we are alive to the fact that in exercising the judicial authority bestowed upon us under Article 159 of the Constitution we are enjoined to observe, protect and promote the purpose and principles of the Constitution. We are also required to uphold the Constitution, the rule of law and administer justice without fear or favour. Our fidelity therefore is to the Constitution and nothing else. Much as the Chief justice acted in good faith and intention in designating the judges of the ELRC and ELC to hear and determine criminal appeals, he nonetheless violated the constitution as he had no power to confer jurisdiction except where the law specifically provides and such power must be exercised within the confines of such law. It is an established principle of law that anything done without jurisdiction is a nullity and we so find. See Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited (Supra). In other words we hold that the proceedings before the High court were a nullity to the extent that Angote, J sat in them without jurisdiction."

For the Respondents only the 35th Respondent filed written submissions in which he submits that;

i) The entire Constitution has to be read together as an integrated whole with no one particular provision destroying the other, but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution(Tinyefunza-vs-AG.Constitutional Appeal No. 1 of 1997)

ii) No one provision of the Constitution is to be segregated from the others and be considered alone, but all provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument.

iii) The widest construction possible in its context should be given according to the ordinary meaning of the words used, and each general word should be held to extend to all ancillary and subsidiary matters. In certain context, a liberal interpretation of the constitutional provisions may be called for.

iv) A constitutional provision containing a fundamental right is a permanent provision intended to cater for all times to come and, therefore, should be given dynamic progressive and liberal or flexible interpretation, keeping in mind the ideals of the people, socio economic and political cultural values so as to extend fully the benefit of the right. (South Dakota -vs- North Carolina, 1992, US 2681940 LED 448).

He submits that Article 162 must be read together with Article 169 (2) which provides that Parliament shall enact legislation conferring jurisdiction, function and powers on the Subordinate Courts established under Article 169(1), and that Parliament enacted the Industrial Court Act which at Section 29 donates jurisdiction to the Magistrates Courts,

The 35th Respondent relied on the decision in South Dakota .v. North Carolina where it was stated that *interpretation should be done in a manner that would seek to effectuate the greater purpose of an instrument.*

He further submitted that every statute enjoys a presumption of constitutionality and the courts should presume that the legislature acted in a Constitutional manner while enacting the laws (Ndyanabo .v. AG[2001] EA 495).

He submitted that in enacting section 29 of the Industrial Court Act Parliament was performing its Constitutional duty and this court should not interfere with the Legislature process. (Edward Mwaniki Gaturo .v. Hon. Attorney General & 3 Others [2013]eKLR)

The 35th Respondent submits that the Appellant has not demonstrated that ;

- a) Article 169 (2) which donates power to parliament to enact legislation that confers jurisdiction and power on the Subordinate Courts is unconstitutional;
- b) Section 29 of the Industrial Court Act which donates power to Magistrate's court to hear and determine disputes touching employment and labour relations is inconsistent with the Article 162 of the constitution;
- c) Section 18 and 29 of the Industrial Court Act which confer upon this Court jurisdiction to hear and determine Appeals from Magistrate's Court and Appeals such as this are inconsistent with the Article 162 of the Constitution.

The 35th Respondent further submits that the Legal Notice No. 9243 of 2011 does offend the provisions of Section 35 of the Industrial Court Act or that the Notice ousts the jurisdiction of the Industrial Court. He further submits that the appeal is wholly founded on way reading and interpretation of the law, is without merit and should be dismissed with costs.

Determination

The substantive issue before me for determination is whether the Chief Magistrate's Court has jurisdiction to hear cases arising from injury to an employee in the course of employment and whether the Hon. Magistrate erred in dismissing the Appellants Preliminary Objection. According to the Appellant only this court has jurisdiction to hear Employment and Labour Relations cases. The jurisdiction of this court is derived from Article 162(2) as read with Section 12(1) of the Industrial Court Act . The appellant however relied on Section 87(1) and (2) of the Employment Act. These sections provide as follows;

Article 162 (2)(a) of the Constitution:

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

Section 12(1) of the Industrial Court Act -

(1) The Court shall have 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 this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) disputes between an employer and a trade union;

(c) disputes between an employers' organisation and a trade unions organisation;

(d) disputes between trade unions;

(e) disputes between employer organisations;

(f) disputes between an employers' organisation and a trade union;

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer's organisation or a federation and a member thereof;

(i) disputes concerning the registration and election of trade union officials; and

(j) disputes relating to the registration and enforcement of collective agreements.

Section 87(1) & (2) Employment Act

(1) Subject to the provisions of this Act whenever—

(a) an employer or employee neglects or refuses to fulfill a contract of service; or

(b) any question, difference or dispute arises as to the rights or liabilities of either party; or

(c) touching any misconduct, neglect or ill-treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.

(2) No court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1).

The appellant relies on Section 16(1) and (2) of the Labour Institutions Act. The whole of part III of the Labour Institutions Act which provides for the establishment of the Industrial Court was repealed and replaced with the Industrial Court Act. Section 29(3) which donates jurisdiction to Magistrates Courts provides as follows :-

"(3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving employment and labour relations in respect of any area of the country. "

There is no contention about the jurisdiction of this court as provided in the Constitution or Industrial Court Act. What the Appellant contests is the jurisdiction of Magistrate's Courts to hear and determine cases of injury of employees while at work.

Ideally cases of injury at the workplace are not employment and labour relations cases. Such cases are supposed to be brought under the Work Injury Benefits Act. Section 87 of the Employment Act which the appellant has relied upon is therefore not applicable to injury cases. Work Injury cases are not employment disputes as envisaged under the Employment Act. This explains why they were previously dealt with separately under the Workmen's Compensation Act and now under the Work Injury Benefits Act.

The application of the Work Injury Benefits Act was however scuttled by the decision of the High Court in Petition No. 185 of 2008 which declared certain sections of the Act unconstitutional. The sections declared unconstitutional and therefore null and void are sections 4, 7(1) and (2), 10(4), 16, 21(1), 23(1), 25(1) and (3), 52(1) and (2) and 58(2). Section 52 of the Work Injury Benefits Act gives this Court jurisdiction to hear claims on work injury cases in form of appeals against the decisions of the Director of Work Injury Benefits.

The section provides as follows -

52. (1) The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.

(2) An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such decision.

The section having been declared unconstitutional, it means that such claims continue to be dealt with in the manner in which they were dealt with before enactment of the Work Injury Benefits Act, which is by filing claims under common law.

The Judiciary issued practice directions to that effect on 27th June, 2011 as follows:-

"Date: 27th June, 2011

Ref: DCJ.5(1)

All Heads of Stations,

All Deputy Registrars

RE: MATTERS OF A TORTIOUS NATURE ARISING OUT OF AN EMPLOYEE/EMPLOYER RELATIONS

There seems to have been a problem with the interpretation of S.12(1) of the Labour Relations Act, 2007, specifically in respect of injuries suffered by an employee in the course of his/her employment. This has resulted in some confusion as to where litigants can file injury suits.

Kindly note that claims arising out of an employer/employee relationship that are of a tortious nature are not labour disputes and therefore fall within the jurisdiction of the courts and should be filed in the courts not in the industrial court.

Kindly, note this clarification in order that litigants of this kind are not any more sent away from the courts.

NANCY BARAZA

DEPUTY CHIEF JUSTICE

Turning to the other arguments of the Appellant on jurisdiction of Magistrates Courts, Article 162(3) provides that parliament shall determine the Jurisdiction and functions of the Courts contemplated in clause 162(2). The Industrial Court Act was enacted pursuant to the powers given to Parliament under Article 162(3) of the Constitution. Section 29(3) and (4) provide that;

3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving employment and labour relations in respect of any area of the country.

(4) Subject to Article 169(2)(a) of the Constitution, the magistrates appointed under subsection (3) shall have jurisdiction and powers to handle—

(a) disputes relating to offences defined in any Act of Parliament dealing with employment and labour relations;

(b) any other dispute as may be designated in a Gazette notice by the Chief Justice on the advice of the Principal Judge.

Article 162(3) in my view allows parliament to limit the jurisdiction of this court in legislation contemplated therein. Gazette Notice Number 9243 was issued by the Chief Justice pursuant to Section 29(4) (b) of the Industrial Court Act and is therefore legitimate. The gazette notice gives Magistrate Court's jurisdiction to hear work injury related matters. It provides as follows;

"GAZETTE NOTICE NO. 9243

THE LABOUR INSTITUTIONS ACT

(NO.12 OF 2007)

**DESIGNATION OF MAGISTRATES COURTS TO HEAR MATTERS RELATING TO
LABOUR LAWS**

In exercise of the powers conferred by Section 16(2) of the labour institutions act and in consultation with the Minister and the Principal Judge, the Chief Justice designates all courts in the 47 Counties presided over by Magistrates of the rank of Senior Resident Magistrate and above as Special Courts to hear and determine employment and labour relations cases within their respective areas of jurisdiction

The matters relate to the following specific areas;

- 1. Work injury related matters.*
- 2. Offences under the Labour Institutions Act, 2007*
- 3. Offences under the Employment Act, 2007.*
- 4. Offences under Occupational Safety and Health Act, 2007*
- 5. Offences under the Labour Relations Act, 2007*

Dated the 27th July, 2011.

WILLY MUTUNGA

Justice/President of the Supreme Court of Kenya".

I therefore find that the magistrates' courts have jurisdiction subject to their specific pecuniary and territorial limits, to hear claims under the Work Injury Benefits Act as provided both in the Act and under Section 29(3) (4) of the Industrial Court Act. I further find that Gazette Notice No. 9243 of 2011 is not inconsistent with the constitution.

For these reasons I find no merit in the appeal and dismiss it with costs.

Dated, signed and delivered this 29th day of January, 2016.

MAUREEN ONYANGO

JUDGE

cause no. 1 of 2014