



Kenya Kazi Security Limited v Wanyoike (Employment and Labour Relations Appeal 192 of 2022) [2024] KEELRC 13580 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13580 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL 192 OF 2022**

**MN NDUMA, J
DECEMBER 19, 2024**

BETWEEN

KENYA KAZI SECURITY LIMITED APPELLANT

AND

HENRY WANYOIKE RESPONDENT

(Being an Appeal against the entire Ruling and Orders of the Chief Magistrate Court made on 28th September 2022 by Hon. G. OMODHO (P.M.) in CMCC No. 61 of 2018 – Kiambu)

JUDGMENT

1. The appeal is brought against the judgment dated 28/09/2022 in CMCC No. 61 of 2018 by Hon. Chief Magistrate G. Omodho at Kiambu Court.
2. The lower court considered a suit by the Respondent against the Appellant in which the Respondent sought general damages in respect of work injury claim suffered by the Respondent on 26/05/2015 in the course of duty when the Respondent was bitten by one of the dogs he was handling. The injury was on his right hand. The Respondent's case was that the Appellant had a duty of care not to expose him to any risk of injury while at work. That the Appellant failed in that respect by failing to provide a safe and proper system of work as a result of which the Respondent suffered loss and pain from the dog bite wound. That the Appellant was also in breach of contract and was negligent.
3. The Appellant denied the particulars of claim and demanded strict proof from the Respondent.
4. The suit proceeded on 27/4/2022 in the absence of the Appellant despite having filed a defence to the suit.
5. In its judgment the court considered whether it had jurisdiction to entertain the claim which had been raised by the Appellant in its defence. The objection was opposed on grounds that the suit was filed on 29th January 2018 at the time when the Supreme Court had not determined Petition No. 4 of 2019



Law Society of Kenya versus Attorney General & another [2019] eKLR in which the court upheld the Court of Appeal decision in Appeal No. 133 of 2011 Attorney General versus Law Society of Kenya & another [2017] which had found that the claims under WIBA should be handled by the Director of Occupational Safety.

6. The learned trial magistrate found that the Supreme Court had found that all persons who had pending WIBA cases in the Kenya law courts had legitimate expectation that the same would be heard and finalized by the courts.
7. The trial magistrate relied on the directions by the Hon. Chief Justice David Maraga, (as he then was) dated 15/9/2020, in which the Hon. Chief Justice clarified that those claims that had been filed and were pending in magistrate courts should be heard and determined.
8. The learned trial magistrate further followed a decision in West Kenya Sugar Company Limited versus Tito Lucheli Tangale [2021] eKLR in which the High Court held that magistrate courts had jurisdiction to hear and determine disputes filed from between 22/5/2008 and 3/12/2019 on the grounds of legitimate expectation.
9. The magistrate therefore found that the cause of action in this matter arose on 26/2/2015, and the suit was filed on 29/1/2018 and that the suit fell within the defined window when magistrate courts had jurisdiction.
10. The trial court assumed jurisdiction in the matter and found in favour of the Respondent as against the Appellant in that the Appellant had failed in upholding the duty of care it had over the Respondent while at work not to be exposed negligently to injury by first failing to equip the Respondent with the necessary protective gear to minimise any unforeseen accidents and by failing to provide safe system of work; failing to warn the workers on dangers in handling the dogs which danger was well within the knowledge of the Appellant.
11. The court awarded the Respondent general damages in the sum of Kshs. 693,144.00 as already assessed by the Director of Occupational Safety and Health Safety. The court found that there was already an amount pending enforcement and awarded the Respondent accordingly. The court found that no special damages were proved and disallowed the claim of special damages. The court also awarded costs of the suit.
12. The Appellant in the memorandum of appeal faults the decision by the learned trial magistrate citing lack of jurisdiction by the court to determine the matter and failing to first make a ruling on the preliminary objection raised by the respondent and filed on 29/8/2022. That the trial court erred in failing to grant adjournment to the Appellant despite request on 21/8/2022 as counsel for the Respondent who was in conduct of the matter was indisposed and needed to attend to an emergency and therefore could not proceed with the defence hearing.
13. That the trial court denied the Appellant the inalienable right to a fair hearing provided under Article 50 (1) of *the Constitution*.
14. That the judgment and the award be set aside with costs.
15. The court must first deal with the issue of jurisdiction before embarking on a consideration of the Appeal on the merits.
16. Whereas, a court has obligation to consider a preliminary objection in the first instance as was stated by Nyarangi J. A in owners of the motor vehicle “Lilian S” versus Caltex Oil (Kenya) Ltd [1989] eKLR, in the present case, the court proceeded to hear the suit on the merits but in the end considered in



the final judgment whether it had jurisdiction to determine the matter before embarking on merit determination. That manner of proceeding was not fatal to the proceedings and judgment of the court.

17. What is of paramount importance is to determine whether the court assumed jurisdiction over the matter correctly. The appellant relies on the same case by the Supreme Court being Petition No. 4 of 2019 versus Law Society of Kenya versus Attorney General and another and selectively picks on the assertion by the Supreme Court at paragraph 8 that:-

“[85] --- WIBA not being unconstitutional and an even more progressive statute, as we have shown we opine that it is best that matters are finalized under section 52 aforesaid.”

18. The court accepts that some amount of uncertainty arose over this decision and in particular as to whether matters already pending before the magistrate courts had to be withdrawn and or transferred to the Director of Occupational Safety and Health for assessment under section 52 of WIBA or to be finalized before the court, where they had been filed.
19. The Supreme Court as earlier observed had expressed itself over this matter stating that litigants who had matters filed before the court and were pending determination while the Law Society matter was pending determination before the High Court, Court of Appeal and the Supreme Court had legitimate expectation that those matters would be heard and determined by the magistrate courts where they were pending.
20. The court cannot fault the decision by the learned trial magistrate for having found that it had jurisdiction to hear and determine the suit that had been filed before it on 29/1/2018 while the Law Society matter was pending at the Supreme Court. We conclude as the trial magistrate did that the trial court had jurisdiction to hear and determine the matter.
21. This court is now guided by the case of Mwana Sokoni versus Kenya Bus Service Ltd (1982-88) IKAR 278 and Kiruga versus Kiruga and another (1988) KLR 348 relied upon by the Appellant on the role of the first appeal court in hearing and determining an appeal where the Court of Appeal expressed itself thus:-

...As this is the Appellant’s first appeal, the role of this court is well settled. This court is duty bound to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. This court nevertheless appreciates that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings.”

22. The court has embarked on a consideration of the entire record of proceedings before the trial court and has evaluated the same independently having in mind that it did not have the advantage of hearing the witness directly. The court has also evaluated the judgement by the court to find out if the trial magistrate misdirected itself in material respects as to arrive at a grossly erroneous decision resulting in injustice to the Appellant.
23. The court has perused the record of proceedings before the trial court at page 83 of the record and has established that on 27/4/2022 when the hearing of the Plaintiff’s case commenced the Appellant was represented by advocate Wanjeri while the Respondent was represented by advocate Njehia. That the hearing commenced at 1:10 p.m. when the respondent, Henry Wanyoike Kihara, testified in chief in the presence of both advocates. The Respondent was cross-examined by Wanjeri advocate for the Respondent at length. The Respondent had relied on a witness statement in his evidence in chief. He told the court that on 26/2/2019, while he tied dogs at the Appellant’s work place, one dog attacked



- him on his right hand. That he suffered injury to the right hand. That he was granted leave and was treated at the company hospital and was referred to Kiambu Hospital subsequently. That the doctor recommended light duties but the Appellant declined and relieved the Respondent of employment on 1/7/2016. The Respondent produced medical records.
24. Under cross-examination the Respondent stated that his injuries were assessed by the Director DOSH. He said he was not provided with gloves by the Appellant. The Respondent insisted that the Doctor had recommended that he be given light duties due to hand injury sustained at work but the Appellant terminated his employment.
 25. The court finds that on 24/8/2022, the matter was to proceed for defence hearing. The date was set in court in the presence of both advocates. On that day, one Chepchumba, advocate held brief for M/s Wanjeri for the Appellant. Chepchumba told the court that Wanjeri was not ready to proceed because she was ill. Chepchumba stated that the Appellant had filed a preliminary objection on the jurisdiction of the court and sought adjournment of the matter so that the preliminary objection could be dealt with first. Mr. Njehia for the Respondent objected to the application for adjournment stating that he had not been served with any preliminary objection and that the adjournment was not sought in good faith.
 26. The court found that no preliminary objection was in the court file and set the matter for hearing at 12:00 noon. The court said she believed that the application for adjournment was a delaying tactic in view of the age of the matter.
 27. At 1:10 p.m. counsel for the Appellant had not shown up nor was Mr. Chepchumba who had held her brief that morning in court appeared. The court proceeded in the absence of the Appellant and the claimant produced original documents as had been requested by the counsel for the Appellant and closed Respondent's case. The court deemed the defence case closed in the absence of the Appellant.
 28. From the record, it is clear that Appellant failed to prosecute its defence by failing to appear in court without any justifiable reason. In particular the counsel who held brief of Wanjeri deliberately failed to turn up for hearing at 12:00 noon as directed in the morning by the trial court.
 29. There is no evidence on record that Wanjeri had notified the advocate for the Respondent that they would not be ready to proceed with the matter on 24/8/2022 and there is no explanation why Kipchumba failed to turn up in court at 12:00 noon as directed by the court in the morning. This court finds that the trial court was justified to proceed with the matter in the absence of the Appellant. The Appellant has failed to demonstrate that it had a valid defence to the suit and that its right under Article 50(1) of *the Constitution* had been violated by the trial magistrate.
 30. The trial court evaluated the non-contested evidence before it in its judgment and upheld the assessment that had already been made by the Director of Occupational Safety and Health which the trial court found to be adequate compensation for the injury sustained by the Respondent in the course of his work.
 31. The court finds that the Appellant has not demonstrated that it has a sound appeal both on the issue of jurisdiction of the court and on the award of damages by the court having found that the Appellant had failed in its duty of care to the Respondent in the course of duty.
 32. Accordingly, the appeal lacks merit and it is dismissed in its entirety.
 33. The court upholds the award by the trial magistrate in the sum of Kshs. 693,144.00 being general damages for the loss, pain and suffering sustained by the Respondent due to the negligence and breach of duty of care by the Appellant to the Respondent in the course of duty.



34. The Appellant to meet the costs of the suit before the trial court and before this court.

DATED AT NAIROBI THIS 19TH DAY OF DECEMBER 2024

MATHEWS NDUMA

JUDGE

Appearance:

M/s. Oseko for Appellant

Mr. Njehia for respondent

Mr. Kemboi – Court Assistant

