



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)
CIVIL CASE 815 OF 2005

GEORGE ONYANGO OYOOPLAINTIFF

V E R S U S

SECURICOR SECURITY SERVICES (K) LTDDEFENDANT

R U L I N G

In this suit the Plaintiff, who was at all material times the Defendant's employee, has claimed damages on account of gunshot injuries received at the hands of robbers in the course of his employment as a security guard.

Hearing of the suit had commenced before Mutungi, J on 28th March 2007 when the respective counsels for the parties gave opening statements. On 3rd December, 2007 the Plaintiff fully testified before me. When the case came up for further hearing on 9th April, 2008, learned counsel for the Defendant, Mrs. Wachira, brought to the attention of the court **The Work Injury Benefits Act, 2007** (hereinafter called the **Act**). The statute had originally come into operation on 20th December, 2007 by **Legal Notice No. 7 of 2008** which was subsequently revoked by **Legal Notice No. 20 of 2008** by which the Minister for Labour appointed **2nd June, 2008** as the date on which the Act would come into operation. In the view of Mrs. Wachira the Act affects this suit, which cannot proceed any further. She said that she had given notice of intention to seek appropriate directions from the court.

Mr. Jaoko, learned counsel for the Plaintiff, stated that the statute had caused problems in claims, such as the one in this suit, pending before various courts in the country, especially because of its retrospective effect. He agreed that it was best that the High Court give guidance regarding the operation of the statute. I directed that the court be formally moved.

Indeed the court was formally moved by the Defendant by **amended notice of motion dated 27th June, 2008** (the original application was dated 22nd April, 2008). Two main orders were sought as follows:-

1. That the court be pleased to find that in view of the enactment and coming into operation of the Act, further proceedings herein be stayed, and the Plaintiff's claim be transferred to the **Director of Occupational Safety and Health Services** under the Act for assessment of the compensation due to the Plaintiff from the Defendant, if any.

2. That the court be pleased to give its interpretation and/or directions as to application of the Act in respect of suits pending in court for hearing and determination, and in particular this present suit.

Three grounds for the application are given on the face thereof.

1. That the Act was enacted and came into operation effectively to provide for compensation to employees for work-related injuries and diseases contracted in the course of their employment, and for connected purposes.

2. That the Plaintiff suffered his injuries whilst he was in the course of his duties. He suffered permanent disability assessed at 100%, a situation envisaged and specifically provided for under the Act.

3. That though this case is partly heard, the provisions of **section 58(2)** of the Act provide that any claim in respect of an accident or disease occurring before the commencement of the Act shall be deemed to have been lodged under this Act.

The supporting affidavit is sworn by one **JENIPHER CATHERINE OMBONYA**, an advocate in the firm representing the Defendant in this matter. There is also an affidavit by one **BEATRICE AMOLO ALUOCH**, the head of legal services of the Defendant.

The Plaintiff has opposed the application as set out in his replying affidavit sworn and filed on 7th July, 2008. The main points taken are:-

1. That the retrospective application of the Act is unconstitutional and contrary to fundamental principles of the rule of law.

2. That the provisions of the Act are unconscionable, unreasonable, oppressive and intended to unfairly defeat claims such as the Plaintiff's.

3. That in any event the Defendant's application has been overtaken by the judgment of Ojwang', J in **Nairobi High Court Petition No. 185 of 2008**.

The learned counsels for the parties chose to file written submissions. I have carefully considered them, including the authorities cited. I have also read the aforesaid judgment of Ojwang', J.

The petition that Ojwang', J dealt with was brought by the **Law Society of Kenya** (in exercise of its mandate under its parent statute) against the **Attorney- General** as respondent and the **Central Organisation of Trade Unions (K)** as an interested party. The petition sought declarations that various sections of the Act are unconstitutional and therefore null and void. In a detailed judgment dated and delivered on 4th March, 2009, Ojwang', J declared the following sections of the Act to be unconstitutional and therefore null and void:-

(i) **Section 4 which gives the meaning of "employer".**

(ii) **Section 7(1) & (2) which require every employer to obtain and maintain an insurance policy with an insurer approved by the Minister in respect of any liability that the employer may incur under the Act to any of his employees.**

(iii) **Section 10(4) which deems an occupational accident or disease resulting in serious disablement or death of an employee to have arisen out of and in the course of employment notwithstanding that the employee was then engaged in conduct that would otherwise exonerate the employer under common law.**

(iv) **Section 16 which extinguished all other legal remedies for compensation for work-related injuries or disease and substituted therefor compensation under the Act.**

- (v) **Section 21** which provides for a very short notice of accident to the employer and Director of Occupational Safety and Health Services.
- (vi) **Section 23(1)** which mandates the Director to make necessary inquiry to decide upon any claim or liability in accordance with the Act.
- (vii) **Section 25 (1) & (3)** which compel an employee who claims compensation or to whom compensation has been paid or is payable to submit himself for medical examination by a medical practitioner designated by the Director or employer.
- (viii) **Section 52** regarding objections and appeals.
- (ix) **Section 58 (2)** that brought under the Act all claims in respect of an accident or disease occurring before the commencement of the Act, and thus applied the Act retrospectively.

Ojwang', J also found that the Act “...**failed to meet the professional standards of draftmanship and scrutiny ...**”. The learned Judge further observed that if the statute has to function as an integral law, the Attorney-General must “**appreciate the need for a comprehensive drafting scrutiny and reformulation**” of the Act. This decision of Ojwang', J ofcourse does not bind me. But I find it to be of good persuasive value. I respectfully and wholly agree with the observations and findings of the learned Judge. So far as I am aware, the judgment has not been overturned on appeal.

Upon the basis of the **judgment of Ojwang', J dated 4th March, 2009** in **Nairobi HC Petition No. 185 of 2008**, which judgment I wholly agree with, I must refuse the Defendant's **amended notice of motion dated 27th June, 2008**. It is hereby dismissed. I direct that hearing of the suit herein do proceed to its logical conclusion. The costs of the application shall be in the cause. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF MAY, 2009

H. P. G. WAWERU

J U D G E

DELIVERED THIS 15TH DAY OF MAY, 2009