Anguso v DPL Festive Limited (Appeal E040 of 2025)
[2025] KEELRC 2524 (KLR) (22 September 2025) (Judgment)

Neutral citation: [2025] KEELRC 2524 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL E040 OF 2025

JK GAKERI, J

SEPTEMBER 22, 2025

BETWEEN

BENSON CHRIS OWIRO ANGUSO ..... APPELLANT

AND

DPL FESTIVE LIMITED ..... RESPONDENT

JUDGMENT

1. This appeal arose from the Judgment of Hon. V. Adhiambo delivered on 20th November, 2024 at Kisumu in Kisumu MCCC/158/2018 Benson Chris Owiro Anguso V DPL Festive Ltd.

2. The brief and uncontroverted facts of the case were that the appellant was injured at the workplace on 10th January, 2017 in the course of performance of his duties on account of the respondents negligence and the Director of Occupational Safety and Health Services assessed compensation at Kshs.536,121.60 which the respondent did not pay the appellant filed a suit at the Chief Magistrate's court, Kisumu claiming judgment against the respondent for Kshs.536,121.60, costs of the suit and interest.

3. The respondent denied the claim contesting the manner in which the award was made in light of the injuries sustained.

4. After considering the documentary and the oral evidence adduced by the parties and submissions by counsel, the learned trial magistrate found and held that the court had no jurisdiction to hear and determine the suit and downed its tools.

   This is the decision appealed against.

   The learned trial magistrate is faulted on five (5) grounds.

5. According to the appellant the trial court erred in law and fact by:

1. Holding that it had no jurisdiction to hear and determine the claim.

2. Disregarding practice directions on the *Work Injury Benefits Act* issued by the Chief Justice Vide Gazette Notice 28th April, 2023 for cases to proceed to conclusion.

3. Disregarding the decisions in Attorney General V Law Society & another [2017] eKLR and Petition No. 4 of 2019 Law Society of Kenya V Attorney General & another [2019] KESC 16 (KLR) on the principle of legitimate expectations.

4. Disregarding the principles of legitimate expectation and not holding that it applied to all claims already filed before the Magistrate's Court.

6. The appellant prayed that the judgment of the trial court be set aside and the award by the DOSHS adopted and awarded as an Order of the court.

7. When the matter came up on 21st July, 2025 counsel for the appellant indicated that he would not file submissions.

8. Mr. Mattah for the respondent was accorded 7 days as requested but had not filed submissions by 13th August 2025 when the court retreated to prepare this judgment.

Analysis and determination

9. The only issue for consideration and determination in this appeal is whether the trial court had jurisdiction to adopt the award of Kshs.536,121.60 by the DOSHS as its judgment.

10. Before delving into the issue, it is essential to restate the role of the first appellate court as captured in earlier decisions of the Court of Appeal which is to conduct a retrial as the court is required to reconsider, re-evaluate and analyse the evidence adduced by the parties and make its own conclusions bearing in mind that it neither saw nor heard the witnesses, a benefit the trial court had.

11. (See Peters V Sunday Post Ltd [1958] EA 424, R. G. Patel V Lalji Makanji [1957] EA 314, Selle & Another V Associated Motor Boat Ltd & Others [1968] EA 123, Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR, Mwanasokoni V Kenya Bus Services Ltd [1985] KLR 931 and Abok James Odera t/a Abok & Co. Advocates V John Patrick Machira t/a Machira& Co. Advocates [2013] eKLR.

12. The appellant faulted the decision of the learned trial magistrate for disregarding practice directions, decisions of superior courts and the principle of legitimate expectations.

13. However, neither the practice directions or the decisions nor the doctrine of legitimate expectation determined the question of jurisdiction to adopt awards of the DOSHS which was the issue before the court as opposed to assessment of damages for the injuries sustained.

14. In its decision in Law Society of Kenya & Another V Attorney General dated 4th March, 2009, the High Court declared the provisions of Sections 4; 7(1)(2); 10(4); 16; 23(1); 25(1)(3); 52(1)(2) and 58(2) of the *Work Injury Benefits Act* (WIBA) unconstitutional for being inconsistent with *the Constitution* of Kenya.

15. However, in its decision in Attorney General V Law Society of Kenya & Another [2017] eKLR delivered on 17th November, 2017 the Court of Appeal allowed the appeal and set aside the declaration of the provisions of Section 4, 16, 21(1), 23(1), 25(1)(3), 52(1)(2) and 58(2) of WIBA as inconsistent with *the Constitution* of Kenya.

16. The court upheld the finding that Section 7 of WIBA was inconsistent with the former Constitution with respect to Ministerial Approval or exemption.

17. Thus, effective 17th November, 2017, the provisions of WIBA, save Section 7 were the operational framework for compensation for work related injuries and diseases and all such claims ought to have been filed under the relevant provisions and the appellant proceeded accordingly.

18. Since the instant suit was filed on 11th April, 2018 the provisions of WIBA were the applicable law.

19. Strangely, in its evidence before the trial court the respondent was contesting the award by the DOSHS, arguments it ought to have made before the DOSHS or the Employment and Labour Relations Court in a Judicial Review application to have the award set aside.

20. In its decision delivered on 3rd December, 2019 in Law Society of Kenya V Attorney General & another [2019] KESC 16 (KLR), the Supreme Court upheld the decision of the Court of Appeal and dismissed the Petition.

21. The court held:

> In agreeing with the Court of Appeal we note that it is not in dispute that prior to the enactment of the Act, litigation relating to work-injuries had gone on and a number of the suits had progressed up to decree stage; some of which were still being heard; while others were still at the preliminary stage. All such matters were being dealt with under the then existing and completely different regimes of law. We must thus agree with the Appellate court that claimants in those pending cases have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked. However, were it not for such legitimate expectation, WIBA not being unconstitutional and an even more progressive statute as we have shown above we opine that it is the best that all matters are finalized under Section 52 aforesaid"

22. An important issue to dispose of at this stage is whether the appellant had a legitimate expectation that the instant suit would proceed to conclusion before the Magistrate's court.

23. As adverted to elsewhere in this judgment, this case relates to adoption of an award by DOSHS.

24. In the court's view, since this suit was filed after the Court of Appeal decision and before the Supreme Court decision, the latter was filed in 2019, it ought to have been filed before the Employment and Labour Relations Court, in as much as the law on adoption of awards by DOSHS had not been authoritatively articulated by the Court of Appeal or the Supreme Court.

25. Under paragraph 69 of the Judgment, the court made it clear on the question of jurisdiction as follows:

> We have stated that Section 16 cannot be read in isolation because ... Section 23 and 52 of the Act, the Act provides for legal redress to the Industrial Court (now the Employment and Labour Relations Court) and therefore judicial assistance can be sought by aggrieved parties from decisions of the Director and the court can make a determination with respect to all relevant matters arising from those decisions. It cannot therefore be the case that Section 16 amounts to an ouster clause. It is in fact merely facilitative of what may end up in court"

26. The foregoing sentiments of the Court leave no doubt that a person who is dissatisfied with a decision of the DOSHS could only seek redress from the Employment and Labour Relations Court.

27. As courts have consistently observed, the provisions of WIBA are silent on enforcement of awards made by the DOSHS (see Richard Akama Nyambane V Maltauro SPA [2020] KEELRC 847 (KLR), Ruth Wambui Mwangi & another V Alrarah Wholesalers Ltd [2017] eKLR, Samson Chweya Mwendabole V Protective Custody Ltd [2021] KEELRC 1809 (KLR).

28. Without a statutorily defined enforcement mechanism, the question of enforcement of awards made by the DOSHS remained unsettled for many years.

29. The issue was whether the enforcement mechanism was domiciled in the Employment and Labour Relations Court or the Magistrate's court. The untidy outcome was that while some magistrates adopted DOSHS awards as their judgments for purposes of enforcement, others did not and the scenario was replicated in the Employment and Labour Relations Court until the Court of Appeal laid the matter to rest in Thepot Patrick Charles V Joash Shisia Cheto [2025] KECA 784 (KLR), where the court laid it bare that Employment and Labour Relations Court had the jurisdiction to enforce awards by the DOSHS.

30. The court went further and affirmed that the only way a party dissatisfied with a decision of the DOSHS could challenge it, having not objected to it before the Director under Section 52(1) of WIBA, would be by way of a judicial review motion, to have the decision set aside, which ought to be done before the award is adopted as a judgement of the court and where adoption proceedings had already been instituted, an application to stay the proceedings would be necessary.

31. Fortunately, the Employment and Labour Relations Court (Procedure) Rules, 2024 provide for the enforcement of WIBA awards by a motion filed after expiry of the duration within which any appeal to the court ought to have been filed under Section 52(2) of the WIBA.

32. Finally, and as adverted to elsewhere in this judgment, the Practice Directions dated 28th April, 2023 did not address the issue before the trial court, namely jurisdiction to adopt an award by the DOSHS for purposes of enforcement.

33. In view of the ambivalence of the Employment and Labour Relations Court on matters jurisdiction to adopt awards by the DOSHS, the learned trial magistrate cannot be faulted for having held that she had no jurisdiction to adopt the award of Kshs.536,121.60 as judgment of the court.

34. Indeed, and as confirmed by the Court of Appeal in Thepot Patrick Charles V Joash Shisia Cheto (supra), the learned trial magistrate construed the law correctly by holding that she had no jurisdiction to hear and determine the suit before the court.

35. In the end it is the finding of the court that the instant appeal is devoid of merit and it is accordingly dismissed.

    Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 22ND DAY OF SEPTEMBER, 2025.

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They

have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.