



Kiphinga v Kenya Power & Lighting Company Ltd (Cause E055 of 2023) [2024] KEELRC 1791 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1791 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E055 OF 2023**

**AK NZEI, J
JULY 11, 2024**

BETWEEN

WILLIAM WAMBUA KIPHINGA CLAIMANT

AND

KENYA POWER & LIGHTING COMPANY LTD RESPONDENT

JUDGMENT

1. The suit herein was instituted by the Claimant vide a memorandum of claim dated 7/6/2023 whereby the Claimant pleaded that he sustained a work injury on 23/5/2018 while in the employment of the Respondent herein as a casual labourer; and that the matter was reported to the County Occupational Safety and Health Officer (Mombasa), upon which compensation payable to the Claimant was on 22/11/2022 assessed at kshs. 590,312.
2. That the Respondent did not settle the assessed sum, making an enforcement suit a necessity.
3. The Claimant sought the following reliefs:-
 - a. a declaration that the Respondent is liable to settle the assessment of kshs. 590,312 in favour of the Claimant as advised by Mombasa County Occupational Safety and Health Officer on 22/11/2022.
 - b. an order directing the Respondent to pay the Claimant kshs. 590,312 together with interest at Court rates from 22/11/2022 until payment in full.
 - c. a declaration that by failing to settle the assessment of kshs. 590,312 as advised by the Mombasa County Occupational Safety & Health Officer on 22/11/2022, the Respondent committed an offence under Section 26(4) of WIBA, and the Court to consequently sentence the Respondent's directors as appropriate.



4. Though shown to have been served with suit documents, the Respondent did not enter appearance and did not file any Response to the claim, either in accordance with the Employment and Labour Relations Court (Procedure) Rules, 2016 or at all. Subsequent service of a mention notice and a hearing notice on the Respondent by the Claimant on 9/8/2023 and 11/10/2023 respectively did not elicit any action on the suit herein by the Respondent. Hearing proceeded ex-parte (by way of formal proof) on 5/2/2024. The Claimant adopted his filed witness statement dated 7/6/2023 as his testimony and produced in evidence the documents listed on his filed list of documents dated 7/6/2023.
5. The aforesaid documents produced in evidence by the Claimant were copies of his identity card, a letter from the Ministry of Labour dated 9/11/2022, a duly filled DOSH Form 1, DOSH/WIBA4 dated 22/11/2022 wherein compensation payable to the Claimant was assessed by the Directorate of Occupational Safety and Health Services (the Director) at kshs. 590,312, and a letter by the Director dated 5/4/2023 requesting the Respondent to settle the said assessed sum of kshs. 590,312.
6. As I have preceded to point out in this judgment, the Claimant's suit herein is undefended and his evidence was therefore not controverted. The issues for determination, in my view, are as follows:-
 - a. whether this Court is seized of jurisdiction to hear and to determine the suit herein.
 - b. whether the Claimant is entitled to the reliefs sought.
7. On the first issue, Section 16 of the [Work Injury Benefits Act](#) (WIBA) provides as follows:-

“No action shall lie by any employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.”
8. Section 23 of the WIBA provides as follows:-
 - (1) After having received notice of an accident or having learned that an employee has been injured in an accident, the director shall make such enquiries as are necessary to decide upon any claim or liability in accordance with this Act.
 - (2) An inquiry made under subsection (1) may be conducted concurrently with any other investigation.
 - (3) An employer or employee shall, at the request of the director, furnish such further particulars regarding the accident as the director may require.
 - (4) A person who fails to comply with the provisions of Subsection (3) commits an offence.”
9. It is quite clear from the foregoing provisions of the WIBA that determination of liability and assessment of compensation (damages) payable thereon in work injury claims is the preserve of the Director of Occupational Safety and Health Services (Director), and that this Court does not have primary and/or original jurisdiction over such matters. The position is, however, different when it comes to enforcement of the Director's decision on compensation payable.



10. I stated as follows in the case of AMIR SWALEH OMAR -VS- MACKENZIE MARITIME [E.A] LIMITED [2022] eKLR:-

“ 17. The Act (WIBA) is silent on how the awards of compensation made by the Director in favour of employees involved in occupational accidents or who suffer occupational diseases are to be enforced. At the same time, the Act does not expressly divest this Court of jurisdiction to enforce such awards; and especially where the award of compensation by the Director has not been objected to and the employer has refused to pay the assessed compensation. Did parliament intent that an employee caught up in such a situation would be left at the mercy of an employer who may choose either to pay or not to pay the assessed sum? I do not think so.

18. What would be the purpose of the Director making or undertaking inquiries in order to determine the issue of liability and proceeding to assess the compensation payable if the compensation assessed by the Director was not meant to be paid to the injured employee? In my view, once the Director assesses the compensation payable and the same is not objected to pursuant to Section 51 of the WIBA, the assessed sum becomes the injured employee’s right and entitlement regarding which the employee can move to Court and seek enforcement of that right by seeking entry of judgment in terms of the Director’s assessment, and issuance of a decree which can then be executed to realize that right.

19. Indeed, failure by an employer to pay a demanded compensation that has been assessed by the Director and to which no objection has been lodged creates a dispute over a liquidated claim, which this Court can entertain and determine. Article 50(1) of *the Constitution* of Kenya 2010 provides:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court, or if appropriate, another independent and impartial tribunal or body.”

11. In view of the foregoing, and in view of the fact that the Respondent is not shown to have objected to the Director’s decision on the amount payable to the Claimant pursuant to Section 51 of the WIBA, it is my finding that this Court is seized of jurisdiction to enforce the Director’s award.

12. On the second issue, I find and hold that the Claimant is entitled to the reliefs sought save for the prayer that this Court declares that in failing to settle the assessment of kshs. 590,312 as advised by the Director on 22/11/2022, the Respondent committed an offence under Section 26(4) of the WIBA, and that the Court proceeds to sentence the Respondent’s directors as appropriate. Section 26(6) of the *Work Injury Benefits Act* (WIBA) creates an offence which, in my view, should have been dealt with under the criminal law regime.

13. Having said that, I hereby enter judgment for the claimant against the Respondent in the following terms:-

a. It is hereby declared that the Respondent is liable to settle the sum of kshs. 590,312 in favor of the Claimant as assessed by the Director of Occupational Safety and Health Services (Mombasa County Occupational Safety and Health Services Officer) on 22/11/2022.



- b. The Respondent shall pay to the Claimant the said sum of kshs. 590,312, together with interest at Court rates from the date of this Judgment.

14. The Claimant is awarded costs of the suit.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 11TH July 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Claimant

.....Respondent

