



**Mitan v Teachers Service Commission (Miscellaneous Application
E176 of 2023) [2024] KEELRC 1738 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1738 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E176 OF 2023**

NJ ABUODHA, J

JULY 5, 2024

BETWEEN

HASSAN HUSSEIN HASSAN MITAN APPLICANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

RULING

1. The Applicant filed application dated 23rd August, 2023 seeking for orders of this to court adopt the Director of Occupational Safety and Health Services (hereinafter DOSH) award of Kshs 876,038.40/= made on 13th January, 2023 as the judgment of this Honourable Court and the costs and interests from the date of assessment until payment in full.
2. The application was supported by the Affidavit of Hassan Hussein Hassan Mitan the Applicant herein who averred that he was an employee of the Respondent. That he was awarded by the DOSH a sum of KSHS 876,038.40/= on 13th January, 2023.
3. The Applicant averred that the Respondent had been adamant and refused to pay the award since it was made as provided for under section 26(4) of the WIBA.
4. The Applicant averred that the Respondent did not object to the director's award, appeal or challenge it in any manner as provided in the WIBA Act.
5. The Applicant averred that since the Respondent has not objected, appealed or challenged the award it had an obligation and duty to pay the award summarily as assessed by the Director.
6. The Respondent on the other hand through its Replying Affidavit sworn on 1st December, 2023 averred that the Applicant had in possession two conflicting DOSH Forms 1's, making it hard to discern the genuine and /or accurate DOSH Form.



7. The Respondent averred that on 22nd February the Applicant submitted to the Respondent a DOSH Form 1 dated 12th January,2023 which did not indicate any details of permanent incapacity and / or percentage of permanent incapacity. That the form was signed by a Dr. Warsame Hussein from Mandera County Referral Hospital.
8. The Respondent further averred that there was no assessment by DOSH noting that there was no incapacity suffered by the Applicant. The form was indeed endorsed by DOSH.
9. The Respondent averred that the Applicant in an effort to derive an undue financial benefit from the Respondent, again procured a medical report from the DOSH vide a work injury evaluation clinic report dated 9th January,2023 where he was assessed and awarded a 10% incapacity.
10. The Respondent averred that on 25th May,2023 the Applicant in a twist of events submitted a second DOSH Form 1 dated 13/1/2023 filled by a different doctor but from the same Mandera County Referral Hospital alluding that the Applicant had suffered 30% incapacitation.
11. The Respondent averred that no DOSH form 4 has been filled with respect to this assessment to date hence the assessment was illegal and unfounded.
12. The Respondent further averred that the Director erred in conducting a medical examination on the Applicant without giving a corresponding notice to the Respondent as provided for under section 25 of WIBA.
13. The Respondent averred that the Director erred in endorsing a subsequent degree of incapacity in the absence of an objection to the 1st assessment. That the Director erred in upholding the 195 incapacitation to assess an award which degree had not been recognized by the first doctor and which was in variance with the second assessment of DOSH Form of 13th January, 2023.
14. The Respondent further averred that from the reports the doctor alleges that the Applicant was treated both as inpatient and outpatient yet there was no discharge summary report attached to Applicant's pleadings or submitted to DOSH to confirm such admission at Mandera County Referral Hospital.
15. Through the Applicant's further affidavit sworn on 16th January, 2024 the Applicant in response to the Respondent's Replying Affidavit of 1st December,2023 averred that on 3rd August,2021 he was involved in an accident while at work and he sustained serious injuries on his right hand.
16. The Applicant further averred that he reported the accident to Mandera Police station and he was issued with P3 form.
17. The Applicant averred that on 10th December,2021 he was issued with a DOSH form 1 which was filed on 10/12/2021 by Dr.Hussein.
18. The Applicant averred that he was first treated at Mandera County Referral Hospital then Bliss Hospital in Nairobi and an MRI done at Nairobi Hospital since his right hand was not improving.
19. The Applicant averred that after submitting the MRI to Bliss Hospital he was referred to Lifecare Hospital Kikuyu for an operation on his right shoulder but he did not undergo the same operation due to lack of finances.
20. The Applicant averred that following the further treatment sought and the proposal for him to undergo operation he informed the Respondent who advised him to attend to DOSH for a proper assessment on the incapacity on his right hand. That he did attend DOSH on 13th January, 2023 and DOSH Form 1 was filled.



21. The Applicant averred that the Director rightfully upheld 10% incapacity since the DOSH form was filed after examination of 3 medical doctors who independently assessed the incapacity at 10%. That the Director did not err as alleged by the Respondent. The Director was right in awarding him an award of Kshs 876,038.40/=.
22. The Applicant averred that the Respondent did not dispute that he sustained injuries arising from the accident which occurred on 3rd August 2021 but it is only disputing the degree of permanent incapacity assessed at 10%.
23. The Application was dispensed of by written submissions.

Determination

24. It is not in dispute that the Applicant was employed by the Respondent and that he was involved in an accident and got injured while at work and he suffered serious injuries at his right hand. The Director of DOSH assessed his compensation payable as Kshs 876,038.40/= after the Applicant's permanent incapacity was assessed at 10%.
25. The Respondent was informed of the accident by the Head Teacher Shashafey Primary School on 17th August, 2023. The Respondent acknowledged that it is them who reported the injury to the Director as per requirements of section 21 and 22 of *WIBA*. Although the form is dated 10th December, 2021 the same was not lodged within the prescribed time of 7 days after reporting the accident.
26. Whereas I note that the Director notified the Respondent of its decision of 13th January, 2023, the Respondent has not filed any objection as per section 51 of the *WIBA* which dictates that the objection be filed within 60 days.
27. The Respondent is challenging the assessment of the award at 10% incapacity, the issue of two contradicting DOSH Form 1 and faulting the Directors decision. I note that this is not an Appellate Court and if the Respondent felt dissatisfied with the award there was room for objection in time and if still not satisfied to appeal to the court on the same and since none was preferred, at this stage the Respondent cannot challenge the award.
28. This court at this point only has power to order or refuse, in appropriate cases to order enforcement of assessment by DOSH. In the case of *Joash Shisia Cheto v Thepot Patrick Charles* [2022] eKLR the court held as follows;

The general position established by a majority of these decisions is as follows:

- a. The law does not provide for mechanisms of enforcing the Director's award against a reluctant employer.
- b. In the face of this lacuna, the holder of the award can move the court to seek for enforcement of the award. A majority of the decisions favour the view that the ELRC can be moved for this purpose pursuant to its jurisdiction under article 162 of the *Constitution* as read with section 12 of the ELRC Act. Only one decision holds the view that the ELRC cannot be moved for this purpose. A few share the view that the Magistrate's court may be moved where pecuniary jurisdiction allows.
- c. The proceedings for enforcement may be in summary form by way of miscellaneous causes or in the form of ordinary causes but confined to matters of enforcement only.



d. Unless by way of appeal under section 52 of the WIBA, it is not open to the court to consider the merits of the Director's award or indeed go on a fact finding mission. This jurisdiction is the preserve of the Director.

29. The Applicant has therefore rightly approached this court through a Miscellaneous Application and since the Respondent did not raise any objection or appeal as provided in the Act the application is merited. The issues raised by the Respondent in their Replying Affidavit are not within the purview of this court as it is not sitting as an appellate Court or in its judicial review jurisdiction to quash the award. The Respondent has not sought the setting aside of the award or stay of the same.
30. In conclusion the Applicant's Application dated 23rd August, 2023 is found merited and the court adopts the director's award of 13th January, 2023 at Kshs 876,038.40/= as decree of the court and interest at court rates until payment in full.
31. Costs are awarded to the Applicant.
32. It is so ordered.

DATED THIS 5TH OF JULY, 2024

DELIVERED THIS 5TH DAY OF JULY, 2024

ABUODHA NELSON JORUM

JUDGE

