**Ndiritu v Kimotho (Miscellaneous Cause E120 of 2024)**
**[2024] KEELRC 1942 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1942 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**MISCELLANEOUS CAUSE E120 OF 2024**

**NZIOKI WA MAKAU, J**

**JULY 26, 2024**

**BETWEEN**

**PAUL TUMUTI NDIRITU ..... CLAIMANT**

**AND**

**WILFRED KIMILI KIMOTHO ..... RESPONDENT**

**RULING**

1. Before me is the Applicant's notice of motion application dated 13th March 2024. In it, the Applicant seeks that the Respondent fills the DOSH FORM 1. It also seeks that a declaration do issue that the Respondent had committed a criminal offence contrary to section 22(4) of the *Work Injury Benefits Act* for failing to issue a notice of an accident of an employee. The Applicant further sought that the Honourable Court commits the Respondent to one year in jail or fine him Kshs. 200,000/- or both. The motion was premised on the Applicant's affidavit sworn on 13th March 2024. The grounds of the motion were that the Applicant was an employee of the Respondent when he was injured on 22nd August 2010 following a road traffic accident involving a Toyota matatu registration KBA 074Q while working for the Respondent. It was asserted that the Respondent failed, neglected and/or refused to fill a notice by employer of an occupational accident of an employee to report the accident to the Director of Occupational Safety and Health. The Applicant asserts he had sought treatment at Kijabe Hospital and was admitted on the date of the accident till discharge on 10th September 2010. He states that he has approached the Director of Occupational Safety and Health who has informed him that the employer never filed the DOSH Form 1. He asserts this situation has necessitated the instant application.

2. The Respondent on his part filed grounds of opposition to the effect that the Application had been brought against the wrong party. It is asserted that the motion offends section 4 of the *Work Injury Benefits Act* as the Respondent does not fit in the description of an employer as provided for under the *Act*. The Respondent asserts the Applicant has failed to attach any document that he has ever been in

the employ of the Respondent. It is asserted that the Applicant has brought this application 14 years after the alleged accident and alleged employment. It is asserted the Applicant is guilty of laches.

3. The Applicant filed a further affidavit sworn on 27th May 2024 in which he asserted that he was an employee of the Respondent. He attached a Police abstract dated 22nd May 2012, a P3 form dated 25th August 2011. He deponed that the documents show the Respondent as the owner of the motor vehicle in question.

4. The motion was disposed of by way of written submissions. The only submissions on record were those of the Applicant as at the time of penning the Ruling. The Applicant submitted that the issues for determination were:

    a. Whether this Court has jurisdiction to issue an order directing the Respondent to report an occupational accident of an employee?

    b. Whether the Respondent should be fined and or committed to civil jail for this infraction?

5. The Applicant argued that the Respondent failed to report the accident to the Director and to assist the Director, during his inquiry under section 23 of the *Work Injury Benefits Act*, to determine whether or not the Applicant was the Respondent's employee. The Applicant submits that the Respondent has been exhibiting wanton disregard of section 22(1) of the *Act* since the date of the accident and that this refusal necessitated the Applicant to request the Labour Office to intervene. The Applicant submits that the Labour Office by its letter to the Respondent dated 8th December 2023 directed him to file a notice of the accident that occurred on 22nd August 2010 (DOSH 1) involving the Applicant and that despite receipt of the said letter, the Respondent has never taken any action and has failed neglected and/or refused to report the said accident.

6. The Applicant submitted that the question that arises is, what happens to an employer who fails to comply with the provisions of the *Work Injury Benefits Act*? He posits that given the circumstances above, the answer is shockingly in the negative. The Applicant submits that the Director's office has no enforcement powers of its own directives hence nothing happens to such errant employers. He asserts that such employers end up going scot free after contravening the law to the detriment of innocent employees. The Applicant submits that there is no mechanism provided under the *Work Injury Benefits Act* for enforcing directives of the Director of Occupational Safety and Health Services such as the one issued on 8th December 2023 and for prosecuting defaulting employers who fail to give notice of occupational accidents to the Director as mandated by section 22 of the *Act*. It is submitted that this lacuna provides has led to the mushrooming of an errant behaviour by employers who refuse to ensure compliance with the *WIBA* as no punishment ensues from the breach of the said provisions. It is submitted that this has left many injured employees such as the Applicant without recourse in law. He asked, does this then mean that employees should be left with no recourse when it comes to enforcement of such directives? And answered, absolutely not. It was submitted that the Employment Court has been pivotal in protecting employee rights enshrined under the *Work Injury Benefits Act* and in bringing to effect the objects and purpose of the *Act*. The Applicant submits this Court has exclusive jurisdiction in all employment matters and has a constitutional mandate to protect rights of employees from denial, infringement and violation by their employers.

7. The Applicant cited the case of *Jared Ingling Obuya v Handicap International* [2021] eKLR where the court held that: -

> " The *Work Injury Benefits Act* is silent on the manner of enforcement of the decisions by Director DOSH. It is however the Court's finding that it could not have been the intention of the legislator that beneficiaries of compensation by Director DOSH remain without a

remedy in the event an employer does not implement the decision of the Director awarding an employee compensation. The Court must bridge the lacuna to bring to effect the objects and purpose of the Act as captured in the preamble ..."

8. The Applicant submits that there being no other mechanisms of enforcing the directives and orders of the Director, this Court vested with the Constitutional and statutory imperatives, is the only proper forum that can bridge the lacuna in exercise of its exclusive and inherent jurisdiction to remedy a wrong and to compel a performance of obligation of a party and to. It was posited that this being a court of equity, the Court is obliged to ensure that equity will not suffer a wrong without remedy. It was submitted that in this particular case, the Applicant has a right of compensation pursuant to section 10 of the *Work Injury Benefits Act* for a work injury and the said right has been encumbered by the continued refusal by the Respondent to give notice. As to whether the Applicant's claim competently before the Director, the Applicant submits that the Respondent alleges that the application was brought 14 years since the occurrence of the accident. He asserts that however, the said fact defeats entirely the Respondent's argument for reason that the Respondent has been in continuous violation of section 22(1) of the *Work Injury Benefits Act* since 22nd August 2010.

9. It was submitted that section 22(1) of the Work Injury Benefit Act is couched in mandatory terms by the use of the word "shall" making it compulsory for every employer to report an occupational accident of an employee. Failure to do so constitutes an offence as per section 22(4) of the *Act* and that consequently, the current situation is a product of the Respondent's continuous contravention of the *Work Injury Benefits Act* and he cannot blame the Applicant while he persists in violation of the law. It was submitted that in any event, the Director of Occupational Safety and Health Services admitted the Applicant's claim despite the 14 years' default by the Respondent. The Applicant submits the Director by his letter dated 8th December 2023, was fully alive to the material facts of the claim, i.e. the time of the accident and the Respondent's failure to report the accident within 7 days of the accident. The Applicant submits that his claim is therefore live and competently before the Director of Occupational Safety and Health Services and payable pursuant to the provision of the *Work Injury Benefits Act*. The Applicant submits that the Respondent's attempt to defeat justice should not be allowed to succeed on occasion of his default. A cardinal tenet of justice is that one must not benefit from his own wrong.

10. The Application before the Court brings into sharp focus the provisions of Part IV of the *Work Injury Benefits Act* of which sections 21 and 22 are a prime part. The provisions of section 21 of the *Work Injury Benefits Act* are as follows:

> Written or verbal notice of any accident provided for in section 22 which occurs during employment shall be given by or on behalf of the employee concerned to the employer and a copy of the written notice or a notice of the verbal notice shall be sent to the Director within twenty-four hours of its occurrence in the case of a fatal accident. [emphasis provided]

11. Further, section 26(1) of the *Act* which deals with a claim for compensation makes provision as follows:-

> (1) A claim for compensation in accordance with this Act shall be lodged by or on behalf of the claimant in the prescribed manner within twelve months after the date of the accident or, in the case of death, within twelve months after the date of death.
>
> (2) If a claim for compensation is not lodged in accordance with subsection (1), the claim for compensation may not be considered under this Act, except where the accident concerned has been reported in accordance with section 21. [emphasis supplied]

12. The law is clear. No Constitutional provisions nor maxims of equity will aid a party who has through his own neglect or fault or otherwise, failed to move the Director as provided for in Part IV of the *Work Injury Benefits Act*. There is no proof of a report being made within 12 months of August 22nd 2010. No report was made to the Director or even to the employer within the prescribed time lines. The fact that there is a letter dated 8th December 2023 is of no consequence as the note from the Labour Office was a waste of precious resources since it cannot found a claim nor can it extend the time lines set in law. The Applicant refused and/or failed to lodge the claim on time and his application at this late juncture is not only misplaced but a waste of precious judicial time. The only option is to dismiss the Application with costs to the Respondent.

    It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2024**

**NZIOKI WA MAKAU**

**JUDGE**