



REPUBLIC OF KENYA



KENYA LAW
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**Kimiyu v Career Directions Limited & another (Miscellaneous Application
E001 of 2022) [2025] KEELRC 173 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 173 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
MISCELLANEOUS APPLICATION E001 OF 2022
MA ONYANGO, J
JANUARY 23, 2025**

BETWEEN

PAUL MBITHI KIMIYU APPLICANT

AND

CAREER DIRECTIONS LIMITED 1ST RESPONDENT

BAMBURI SPECIAL PRODUCT LTD 2ND RESPONDENT

JUDGMENT

1. Vide an application dated 1st March, 2022, the Applicant seeks orders that this court be pleased to adopt the award of the Director/Principal of the Occupational and Safety Office awarded on 15th September, 2019 as an order of the Court and for costs of the application to be in the cause.
2. The application is supported by the grounds on the face thereof being that the Director awarded the Applicant Kshs. 115,437 which amount is yet to be remitted to the Applicant.
3. In the supporting affidavit of Paul Mbithi Kimiyu, the Applicant sworn on 1st March, 2022 he states that he was an employee of the 1st Respondent deployed at the 2nd Respondent's premises. That he got injured while working at the 2nd Respondent's premises under directions of the 1st Respondent.
4. He deposes that the Director of Occupational Safety and Health assessed the payments to be made by the 1st Respondent on 15th September, 2019. That by the time of filing the instant application the 90-day period for making the payment had lapsed. That he instructed his advocate to demand the payment, which the advocate did by letter dated 15th July 2020. That by the time of filing the instant application no payment had been remitted by the Respondents.
5. The 1st Respondent filed a replying affidavit of Rodgers Wafula, its legal officer sworn on 13th June 2022 in which the 1st Respondent states that it retained the services of the Applicant on or about April,



- 2017 as a reliever to work as a production assistant at the 2nd Respondent's premises to report to work on a needs basis when other employees were either on leave or absent from work.
6. That on 25th April, 2017 while performing his duties at the 2nd Respondent's premises the Applicant was involved in an accident. He was hit by a precast plant mixer arm while cleaning it and sustained a fracture on the right leg. He was rushed to Nairobi West Hospital where he was treated for quite a while before being discharged. The hospital bill was borne by the 1st Respondent.
 7. That the accident was reported by the 1st Respondent to the Director of Occupational Safety and Health in the prescribed form while the 1st Respondent continued paying the Applicant his earnings/ commission until September, 2018 when the contract between the 1st Respondent and the 2nd Respondent upon which the Applicant was engaged was terminated. That during this period the Applicant did not report to work.
 8. That unknown to the 1st Respondent the Applicant lodged a claim for compensation under the *Work Injury Benefits Act* and was awarded Kshs. 115, 413 on 15th September, 2019. That the 1st Respondent was served with a demand letter on 15th July, 2020. The award was based on loss of earnings and degree of injury.
 9. That 1st Respondent was served with the instant application on 3rd March, 2022.
 10. It was the 1st Respondent's position that the Applicant did not suffer any loss of earnings during the period he was indisposed and the award of Kshs. 54,727 on account of loss of earnings is untenable.
 11. It was further the 1st Respondent's position that although the Applicant was earning a gross of Kshs. 12,597 and net of Kshs. 11,876 the award was based on a salary of Kshs. 15,810 which is incorrect.
 12. That the 1st Respondent paid the Applicant a total of Kshs. 257,369 for 18 months. That an employer is permitted to deduct from the salary of an employee any amount paid in error and/or in excess where the employee absents himself from the place of work as is the case of the Applicant herein, which the 1st Respondent by way of the affidavit counterclaimed.
 13. It was further the position of the 1st Respondent that the payment of compensation was only applicable to a contract of service and not a contract for service. That in the instant case the contract being a contract for service the claim for compensation was not applicable.
 14. It was on the basis of the averments in the replying affidavit that the 1st Respondent opposed the adoption of the award of the Director of Occupational Safety and Health.
 15. The Application was disposed of by way of written submissions.

Submissions

16. In the Applicant's submissions dated 27th September, 2022 he sets out the issues for determination to be whether this court can adopt the award of the director of Occupational Safety and Health Services and who should pay costs.
17. It is submitted for the Applicant that this court adopted the award of the Director of Occupational Safety and Health in *Samson Chweya Mwendabole v Protective Custody Limited*; *Joash Shisisa Cheto v Thepot Patrick Charles*; *Elijah Kisyanga Ndede v Manager zakhem International Construction Ltd* and in *Stephen Wangusi Nyongesa v Dot.Com Bakery Limited*. The Applicant urged the court to adopt the award in similar manner as the cases cited.
18. For the 1st Respondent, the issues for determination are synthesized as follows:



- a. Whether the Respondent was notified and/or heard in the process leading to the issuance of the award by the Directorate.
 - b. Whether the award was issued in compliance with the law.
 - c. What is the proper recourse that this court can issue?
19. On the 1st issue it is submitted for the 1st Respondent that the process leading to the issuance of the award was opaque and the 1st Respondent was not involved and/or notified for it to be heard. The 1st Respondent relied on the decision in *Egal Mohammed Osman v Inspector General of Police & 3 Others* where the court referred to the case of *The Management of Committee of Makondo Primary School and Another v Uganda national Examination Board* in which the Ugandan Supreme Court stated as follows regarding the rules of natural justice:
- “It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase ‘audit alteram partem’ literally translates it to ‘hear the parties in turn’, and has been appropriately paraphrased as ‘do not condemn anyone unheard’. This means a person against whom where is a complaint must be given a just and fair hearing.”
20. The 1st Respondent submitted that allowing the application would be tantamount to trial by ambush where the party adversely affected by the orders was never accorded an opportunity to be heard.
21. It was submitted that by the time the 1st Respondent learned about the award the statutory period for objection and/or appeal contemplated under section 51 of the *Work Injury Benefits Act* had lapsed.
22. On the second issue it is submitted for the 1st Respondent that the Applicant is not entitled to the award for loss of earnings under section 28(4) of the *Work Injury Benefits Act* as he received full salary during the period of temporary disablement. That the 1st Respondent continued to pay the Applicant his monthly salary even though he did not return to work after the injury. That under section 19 of the *Employment Act* the 1st Respondent is entitled to recover the amount paid to the Applicant in excess. That the demand for payment was in disregard of the magnanimity of the 1st Respondent.
23. The 1st Respondent submitted that it is against the rules of equity to allow the Applicant to enforce a flawed award when he was compensated in excess of his claim. That the court should apply substantive justice and dismiss the application relying on Article 159 of *the Constitution* which gives this court unfettered powers to ignore procedural technicalities.

Analysis and Determination

24. I have considered the application and the grounds and supporting affidavit of the applicant, the opposing replying affidavit of the 1st Respondent and the rival submissions filed by the parties. The issues arising for determination are whether or not this court should adopt the award of the Director of Occupational Safety and Health as sought in the instant application.
25. The Respondent objects to the adoption of the award on grounds that it was never given an opportunity to be heard before the award was made, that it learned about the award after the statutory period of filing objection and/or appeal had lapsed and that the award is unconscionable as the



- Applicant received full salary during the period of temporary incapacity. The 1st Respondent also seeks to recover what in its view was paid in excess and in error to the Applicant.
26. I will start with the issue of recovery of the amount alleged to have been paid in excess to the Applicant. The prayer was made in a replying affidavit. There is no substantive prayer moving the court to make such a finding. Secondly, even if there was a valid application, there is no evidence that the payment was in error as alleged. From the evidence on record, the 1st Respondent on its own volition, voluntarily continued paying the salary of the Applicant during the period he was incapacitated. The 1st Respondent cannot ask for payment only because the Applicant was awarded compensation for the injuries he sustained.
27. On the substantive application, section 22 of *Work Injury Benefits Act* provides as follows:
22. Notice of injury or accident by employer to Director
- (1) Subject to the provisions of this section, an employer shall report an accident to the Director in the prescribed manner within seven days after having received notice of an accident or having learned that an employee has been injured in an accident.
 - (2) For the purposes of this section, an accident includes any injury reported by an employee, to his employer, if the employee when reporting the injury, alleges that it arose out of and in the course of his employment and irrespective of the fact that the employer is of the opinion that the alleged accident did not so arise out of and in the course of employment.
 - (3) An employer shall, at the request of an employee or the dependant of an employee, furnish the employee, or dependents with a copy of the notice of the accident furnished by the employer to the Director in respect of a claim for compensation by such employee or dependant.
 - (4) An employer who fails to comply with subsection (1) commits an offence.
 - (5) The provisions of this section do not prevent an employee from reporting an occupational accident or disease to the Director at any stage.
28. It was thus the responsibility of the 1st Respondent as employer of the Applicant to report the accident. The 1st Respondent attached a copy of The Notice By Employer Of An Occupational Accident/disease Of An Employee. At paragraph 6 of the Replying Affidavit it is deposed that:
- Soon after the accident was reported to us, the 1st Respondent reported the accident to the Director of Occupational Health and Safety Officer in a prescribed form in compliance with the law. (Annexed herein and marked as RW – 02 is a duly filled ML/Dosh Form 1)
29. Since it is the one who reported the accident it is fallacious for the 1st Respondent to claim that it was condemned unheard.
30. It is further fallacious for the 1st Respondent to allege that the salary used to compute compensation was higher than that earned by the Applicant when it is the 1st Respondent who provided the same in the Dosh Form 1 at its annexure RW-02.
31. Further, if the 1st Respondent desired to object to and/or appeal against the award of the director it should have done so immediately upon being notified of the award by the Applicant's advocates. Instead, it requested for particulars and upon being supplied with the same, went mute until the instant application was served upon it. It cannot be heard to complain that it had no opportunity to object or



appeal when it never even attempted to do so. The 1st Respondent's letter dated 28th July, 2020 does not reflect any desire to appeal or object to the award of the Director.

32. Sections 51 and 52 of the Act provide that-

51. Objections and appeals against decisions of the Director

- (1) Any person aggrieved by a decision of the Director on any matter under this Act, may within sixty days of such decision, lodge an objection with the Director against such decision.
- (2) The objection shall be in writing in the prescribed form accompanied by particulars containing a concise statement of the circumstances in which the objection is made and the relief or order which the objector claims, or the question which he desires to have determined.

52. Director's reply

- (1) The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.
- (2) An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such decision.

33. Having failed to file any objection to the award within the prescribed period or at the earliest opportunity after becoming aware of the same or at all, the 1st Respondent is estopped from objecting to the same at this stage. For clarity, the court notes that even after being served with the instant application the 1st Respondent did not make any application to the court to refer the matter back to the Director for purposes of it making objections thereto or seek leave to object or appeal against the award out of time.

34. The court therefore adopts the award of the Director of Occupational Safety and Health as an award of this court and enters judgment against the 1st Respondent herein in the sum of Kshs. 115,437 with costs.

35. Interest shall accrue from the date of filing the application in this court.

36. Orders accordingly.

DATED, SIGNED AND VIRTUALLY AT ELDORET ON THIS 23RD DAY OF JANUARY 2025

MAUREEN ONYANGO

JUDGE

