Munandi v Hewson Company Limited (Employment and Labour Relations Cause E015 of 2023) [2024] KEELRC 460 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 460 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA

EMPLOYMENT AND LABOUR RELATIONS CAUSE E015 OF 2023

JW KELI, J

FEBRUARY 29, 2024

BETWEEN

HENRY MUNANDI ..... CLAIMANT

AND

HEWSON COMPANY LIMITED ..... RESPONDENT

JUDGMENT

1. The Claimant on 11th September 2023 filed the Statement of Claim dated 8th September 2023 supported by the Verifying affidavit sworn on even date seeking an order in the following terms:-
   a. Adoption of The Director's award of Kshs. 244,600/- as the judgment of this court.
   b. Costs and interest of this claim.
   c. Any other and/or further relief this Honourable court may deem fit and/or just to grant.
2. Also filed together with the Statement of Claim was the Claimant's list of witnesses dated 8th September 2023; his witness statement dated on even date, his list of Documents of even date, and his bundle of documents.
3. The Respondent filed a Response to Claim dated 16th October 2023 and received in court on 17th October 2023. Accompanying the Statement of Response was the Respondent's filed list of witnesses dated 16th October 2023; the witness statement of Mathews Ouma Otieno dated on even date, its list of Documents of even date, and its bundle of documents (Attaching 10 documents).

Written submissions

4. The Court, with concurrence of the parties, on the 20th November 2023 directed that the claim be canvassed by way of written submissions. The Claimant's written submissions dated 18th January 2024

were filed on an even date by Were Lukoko & Co. Advocates. The Respondent's submissions dated 30th November 2023 were filed on 11th December 2023 by Abok Odhiambo & Company Advocates.

Claimant's Case

5. The Claimant submits that he was employed on 10th November 2020 as a security guard by the Respondent, and on 8th October 2021 while on duty at Dashama Wholesalers in Kakamega Town, he was attacked by unknown persons at 2.00 am and sustained injuries. He submits that he was taken to hospital and thereafter in line with the provisions of WIBA, he reported his injuries to the Director of Occupational Safety and Health Services, who on enquiry, assessed the degree of his injuries and awarded commensurate compensatory damages at Kshs. 244,600/- which were to be paid by the Respondent.

6. The Claimant submits that the Respondent ignored the County Occupational Safety and Health Officer's award despite a further letter of 5th June 2023, which prompted the Claimant to engage his advocates who issued a demand letter to the Respondent and yet the same never yielded any response.

7. The Claimant submits that the Respondent having neglected to pay the calculated compensation, he approached the court asking it to adopt the Director's award of Kshs. 244,600/- of 10th January 2023 as a judgment of this Court, grant costs and interest of this claim and other reliefs the court may deem just to grant.

Respondent's Case

8. The Respondent submitted that the Claimant had been injured on 8th December 2021, it dispatched its response team who rushed the Claimant to Lumino Nursing and Maternity Hospital where he was treated.

9. The Respondent submits that the Claimant was issued with the Work Injury Form dated 10th January 2023 that computed the compensation at Kshs. 244,600/-. The Respondent submitted that in a follow-up letter from the County Occupational Safety and Health Officer dated 5th June 2023, seeking progress on the settlement of the compensation, the Respondent was allowed to object to the award in writing.

10. That the Respondent through a letter of 13th June 2023 to the County Occupational Safety and Health Office raised its objection to the Claim and requested that the Claimant be subjected to a second medical opinion from another doctor. That further on 12th July 2023, the Respondent wrote to the County Occupational Safety and Health Officer informing them that the Claimant had refused to visit Sabatia Eye Hospital for a second medical examination.

11. The Respondent submits that the Claimant additionally filed his claim with the Kenya National Private Security Workers Union which also wrote to the Respondent regarding the Claimant's claim and further a Demand letter dated 17th July 2023 was issued to the Respondent, and the Respondent issued his response on 24th July 2023, notifying the advocate that the matter was before the County Occupational Safety and Health Office and the Kenya National Private Security Workers Union.

12. The Respondent submits that on 30th August 2023, the Claimant withdrew its complaint before the County Occupational Safety and Health Office and the Kenya National Private Security Workers Union and stated that he would pursue the claim through its advocate.

13. The Respondent submits that the Claimant had been treated at West Hill Eye Clinic in Kakamega and the medical notes of 20th December 2022 and the Medical report of 6th July 2023 indicated that

the Claimant had a pre-existing eye condition before the attack incident, a probable reason why the Claimant did not want to undergo a second medical examination.

14. The Respondent submits that the present suit is premature as the Claimant opted to withdraw his claim before the County Occupational Safety and Health Office which means that the claim was not conclusively determined.

15. The Respondent submits that the Claimant is merely forum shopping since he withdrew his claim before the County Occupational Safety and Health Office and thus no award is in existence for enforcement.

Determination

Issues for determination

16. The Claimant identified the following issues for determination: -

    a. Whether the Claimant lodged a claim with the Directorate of Occupational Safety and Health Services.

    b. Whether the Directorate of Occupational Safety and Health Services issued a demand for payment.

    c. Whether the Respondent's letter dated 13th June 2023 is an objection.

    d. Whether the Respondent objected to the demand within the timelines prescribed by law.

    e. Whether this court is clothed with jurisdiction to enforce an award issued by the Director Occupational Health and Safety Authority.

17. The Respondent identified the following issues for determination: -

    a. Whether the instant court has jurisdiction to adopt an award by the Director of Occupational Safety and Health Services.

    b. Whether there existed an employer-employee relationship between the claimant and respondent.

    c. Whether the Respondent objected and/or appealed to the director's award of Kshs. 244,600/-

    d. Whether the instant claim is an abuse of the court process.

18. The Court having considered the parties' pleadings and submissions was of the opinion that the following issues were due for determination in the claim: -

    a. Whether the court has jurisdiction to adopt an award by the Director of Occupational Safety and Health Services.

    b. If (a) is in the affirmative. Whether the claim is premature.

    c. Whether the Claimant is entitled to the orders sought.

Issue a). Whether the court has jurisdiction to adopt an award by the Director of Occupational Safety and Health Services.

19. The Respondent submits that the court lacks jurisdiction as there is no express provision under WIBA to enforce and adopt the award by DOSH and relied on the case of Evans Kiganane Anyiti v Dunhill Building Constructor Limited & Another (2021) e KLR.

20. The Claimant submits that in the absence of any legal position for enforcement of the Director's award, the Court apart from only one decision has agreed that the Court may be moved for enforcement of the Award by the Director by proceedings brought in a summary form for enforcement only unless it is an appeal under Section 52 of WIBA. To buttress his position, he relied on the cases of Ruth Wambui Mwangi & Another Versus Alfarah Wholesalers Limited (2017) eKLR and Joash Shisia Cheto V The Pot Patrick Charles (2022) eKLR.

Analysis and decision

21. The *Work Injury Benefits Act* does not provide a procedure on how the Director's decision on the assessment of compensation payable to an employee for work injuries is to be enforced against an Employer.

22. Justice Onesmus Makau In Samson Chweya Mwandabole –Vs- Protective Custody Limited [2021] eKLR observed that:-

> " 8. The gist of the application herein is simply that the court does adopt the award by the Director as judgment of the court for purposes of execution. There is a lacuna in law with respect to procedure for enforcement of the awards made by the Director under WIBA. However, this court being endowed with unlimited original and appellate jurisdiction in disputes related to employment and labour relations pursuant to Article 162(2) (a) of *the Constitution* and Section 12 of the *Employment and Labour Relations Court Act*, I hold that it has the inherent jurisdiction to adopt as judgement the Director's award for purposes of execution. This jurisdiction should not be confused with appellate jurisdiction which is expressly donated under section 52 (2) of the WIBA in respect of the Directors reply to objection made under section 51(1) of the WIBA."

23. Additionally, Justice Agnes Kitiku Nzei in Elijah Kisyanga Ndende v Manager Zahkem International Construction Ltd [2022] eKLR observed that: -

> " In my view, the legislature never intended that an employee whose employer fails and/or refuses to pay the amount of compensation assessed by the Director of Occupational Safety and Health Services under WIBA would be without civil remedy, and particularly so where the employer never objected to the Director's decision on assessment of compensation payable to the employee."

24. I uphold the foregoing positions of my Brother and Sister Judges. The Court has jurisdiction to adopt as a judgment of the Court the Director's award for purposes of execution where no objection or appeal is filed pursuant to section 51 of *Work Injury Benefits Act* to wit:-

> " 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." No such Objection has been produced before the Court. The Court holds it has jurisdiction to adopt the Assessment award of the Director of Occupational Safety and Health Services as lodged before it.

Issue B). If (A) is in the affirmative. Whether the claim is premature.

25. The Claimant asserts that the Respondent failed to pay the assessed compensatory award by the Director of Occupational Safety and Health of 10th January 2023. The Claimant states that as per Section 26(4) of the *Work Injury Benefits Act* (WIBA), an employer against whom a compensation claim is lodged is required to settle the same within ninety days of the lodging.

26. The Claimant states that the Claim having been lodged on 10th January 2023, the Respondent had until 10th April 2023 to settle the claim. The respondent did not either object or appeal during the said period.

27. The Claimant states that through a follow-up letter of 5th June 2023, the Director sought to know the status of the settlement, only for the Respondent through its letter of 13th June 2023 to purport to object to the award by the County Occupational Health and Safety service.

28. The Claimant states that under Section 51(1) of WIBA, an objection can only be raised within sixty days of such a decision and submits that under Section 51(2) the objection must be in the prescribed form accompanied by particulars of the circumstances leading to the objection. The Claimant states that the Respondent letter was written five months after the decision by the director and is thus time-barred and does not conform to the prescribed form. The Claimant submits that his claim should be admitted. He relied on authorities in Stephen Wangusi Nyongesa V Dot.com Bakery Limited (2022) eKLR; Hadisha Engineering Co. Ltd & Another Versus Benson Chege Karoki (2015) eKLR; Joash Shisia Cheto V The Pot Patrick Charles (2022) eKLR;

Response

29. The Respondent states that it objected to the Director's assessment through its letter of 13th June 2023 seeking the Claimant to go for a Second Medical opinion as per Section 51 of WIBA and on 12th July 2023 notified the County Occupational Safety and Health Officer that the Claimant had refused to go for a second medical examination. The Respondent states that the Claimant refused to go for a second medical examination in violation of Section 25 of WIBA which requires an employee to submit to a second medical examination at the employer's request before being compensated.

30. The Respondent produced the Medical Report dated 6th July 2023 from West Hill Eye Centre and Treatment Notes from West Hill Eye Centre dated 20/11/2022 and stated that the Claimant refused a Medical examination as he was afraid it could be revealed he had a previous injury.

31. The Respondent states that the Claimant withdrew his claim before the County Occupational Health and Safety service as per the letter produced dated 30/08/2023 and states that since it filed an objection the case is still before the Director for determination and thus the present claim is premature.

Analysis and decision

32. There was no indication of when the Director's decision was served upon the Respondent. The Director in the letter of 5th June 2023, indicates that the claim was lodged on 10th January 2023, and goes on to indicate that: -

> " Please note that where there is no objection in writing, the above Act requires that the employer shall in the prescribed procedure, settle the claim within three months following date of lodging of any claim. The purpose of this letter is to request you to furnish this office with your response on state of the claim within 14 days of this letter to enable this office take next appropriate step"

33. The Respondent in the Witness statement by Mathews Ouma Otieno dated 16th October 2023, confirms that the Director's letter was a Follow-up on the status of the compensation claim. The witness statement reads in part: -

> " That the Respondent was subsequently issued with a Work Injury Claim Form dated 10th January 2023 from the office of the Kakamega County Occupational Safety and Health Officer which computed damages payable to the claimant at Kshs. 244,600/-.
>
> That there was a follow-up letter from the said office dated 5th June 2023 seeking to get an update on the status of the claim in terms of settlement of the computed amount with the said letter also intimating the fact that the respondent had the right to object to the said award in writing. ..."

34. From the Respondent's witness statement excerpt it was clear that the Respondent was aware that the Claimant had been issued with the Claim form on 10th January 2023, and it was only after the follow-up letter that the Respondent wanted to object to the compensation award through his letter of 13th June 2023.

35. Section 51 of the *Work Injury Benefits Act* provides 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."

36. The letter from the Director of Occupational Safety and Health Services dated 5th June 2023 read: -

> " Please note that where there is no objection in writing, the above Act require that the employer shall in the prescribed procedure, settle the claim within three months following date of lodging of any claim.

The purpose of this letter is to request you to furnish this office with your response on state of the claim within 14 days of this letter to enable this office take next appropriate step"

37. The letter from the Director dated 5th June 2023(supra), did not indicate that the Respondent was required to give his objection at that point because as per the Act, an Objection can only be made sixty days after lodging the Compensation claim. As of 5th June 2023, four months and twenty-six days which is an equivalent of one hundred and forty-six days had already lapsed from 10th January 2023.

38. Further, it was clear in the letter from the Director that three months had already lapsed and as per section 26(4) of WIBA "An employer or insurer against whom a claim for compensation is lodged by the Director under this section, shall settle the claim within ninety days of the lodging of the claim." The Letter from the director was meant to seek a status on the settlement of the award from the Respondent and it was not a notice of the award to require him to object or not.

39. The Respondent did not object that his letter of 13th June 2023 was written after a lapse of sixty days within which an objection can be raised under WIBA. The letter dated 13th June 2023 is not as per the form prescribed under WIBA under the form DOSH/WIBA/12.

Second Medical examination

40. Section 25 of WIBA provides that "Employee to submit to medical examination (1)An employee who claims compensation or to whom compensation has been paid or is payable, shall when required by the Director or the employer as the case may be, after reasonable notice, submit himself at the time and place mentioned in the notice to an examination by the medical practitioner designated by the Director or the employer with the approval of the Director."

41. The request for a second Medical Examination by a Respondent amounts to an objection to the Award by the Director, and even then, the request for a medical examination must be sought within the Statutory timelines of sixty days after the lodging of the compensation award. The Respondent did not comply with this timeline.

42. Furthermore, the Medical Report dated 6th July 2023 from West Hill Eye Centre and Treatment Notes from West Hill Eye Centre dated 20/12/2022 provided by the Respondent to allege an existing medical condition are all issued after the accident which occurred on 8th December 2021. There is no evidence that there were any other accidents suffered by the Claimant before 8th December 2021. The Medical notes and Report are for 2022 and 2023. The accident occurred on 8th December 2021, as confirmed by the Respondent.

43. The letter dated 30th August 2023 provided by the Respondent said to have been issued by the Claimant was addressed to The Kenya National Private Security Workers Union-Kakamega and states in part: -

> " Ref:Terminationof employment and claim for work injury benefits between myself and hewson security services
>
> ..... I kindly request your good offices to close my case file concerning the above subject. I also notify the County Occupational Safety and Health Kakamega to do the same. My two cases are solely being handled by Were Lukoko & Co. Advocates Thank you.... Hope you will comply....."

44. There was no proof by the Respondent that the Award by the DOSH ref: WIBA/KKM/2877/23 lodged on 10th January 2023 was set aside or cancelled. The letter referred to by the Respondent from

the Claimant indicated that the Claimant would pursue his claim through his advocate. As to whether the said letter from the Claimant was served on the County Occupational Safety and Health Kakamega, is not also evidenced anywhere. There is no stamp or proof that the letter was either served on the County Occupational Safety and Health Kakamega.

45. The award by the County Occupational Safety and Health Kakamega against the Respondent was not set aside by the Director nor was any appeal or objection filed within the statutory timelines.

46. Accordingly, the Claim as filed is held as mature.

Issue C). Whether the Claimant is entitled to the orders sought.

47. In the upshot, there was no challenge mounted against the Director's award by Respondent within the confines of sections 51(1) and 52(2) of WIBA respectively.

48. The Claimant sought for: -

    a. Adoption of The Director's award of Kshs. 244,600/- as the judgement of this court.

    b. Costs and interest of this claim.

    c. Any other and/or further relief this Honourable court may deem fit and/or just to grant.

49. Having found that there was no objection or appeal against the assessment of damages for the Claimant by the Director of Occupational Safety and Health Services filed within the statutory timelines under Section 51 and 52 of the *Work Injury Benefits Act*, and having held the Court has jurisdiction to adopt the assessment as judgment of the Court for enforcement purpose, my role is to then adopt the assessment by the Director as judgment of the Court. In doing so I exercise the inherent jurisdiction of the Court in employment and labour relations matters.

50. In the upshot the assessment of the work injury claim for the Claimant against the Respondent by the Director of Occupational Safety and Health Services of the sum of Kshs. 244,600/- dated 10th January 2023 is Hereby adopted as the Judgment of this Court.

51. The Claimant is awarded interest on the award sum of Kshs. 244,600/- at Court rates from date of this Order till payment in full.

52. Costs of the suit is awarded to the Claimant.

53. It is so Ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT KAKAMEGA THIS 29TH FEBRUARY 2024.

J.W. KELI,

JUDGE.

In the presence of: -

Court Assistant: Lucy Macheso

For Claimant: Were

For Respondent: Absent