



REPUBLIC OF KENYA



Otieno v Director of Occupational Safety & Health Services & another (Appeal E106 of 2023) [2024] KEELRC 374 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 374 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E106 OF 2023
M MBARÚ, J
FEBRUARY 22, 2024**

BETWEEN

EVANS OCHIENG OTIENO APPELLANT

AND

DIRECTOR OF OCCUPATIONAL SAFETY & HEALTH SERVICES 1ST RESPONDENT

NANAK MECHANICAL ENGINEERING LIMITED 2ND RESPONDENT

(Appeal from the judgment of the Director, Occupational Safety and Health Services delivered on 9 June 2023)

JUDGMENT

1. The appeal arises from the decision of the Director, Occupational Safety and Health Services (DOSHS) delivered on 9 June 2023, because the decision that the appellant is entitled to Ksh. 112,666.67 as compensation for the work injury accident was in error. The finding that the appellant suffered 10% permanent incapacity failed to consider the appellant's objections through a letter dated 4 August 2023. Deciding to review the decision or give reasons thereof was a fundamental error and in breach of the statutory provisions of the law and therefore the decision taken was wrongful and the same should be reviewed.
2. The appellant is seeking judgment in the following terms;
 - a) The judgment of DOSHS delivered on 9 June 2023 be reviewed and or set aside;
 - b) Judgment be entered against the 2nd respondent for general damages and future medical expenses of Kshs. 120,000;
 - c) The costs of the appeal and the claim before DOSHS be awarded to the appellant;



- d) Any other orders the court may deem fit to grant.
3. The appellant and 1st respondent attended and agreed to address the appeal by way of written submissions.
 4. The appellant submitted that he was employed by the 2nd respondent as a general labourer on 14 February 2020 and on 3 July 2021, while on duty, he sustained a work injury. This was reported to the 2nd respondent and the same was reported to the Labour Office who issued DOSH1 form on 20 January 2023.
 5. The 1st respondent in disregard to the injuries sustained by the appellant issued a judgment on 9 June 2023 and directed the appellant be paid Ksh. 112,666.69 which was not commensurate to the injuries by the appellant. Dissatisfied with the assessment, the appellant was examined by Dr. Kiama who prepared a medical report dated 10 February 2023. Through a letter dated 18 February 2023, the appellant objected to the award but the 1st respondent refused to make a review.
 6. The appellant submitted that following work injury the Doctor assessed his injuries and found that he had suffered;
 - 1) fracture of left distal radius bone with significant displacement;
 - 2) Fracture of right distal radius bone with slight displacement;
 - 3) Blunt trauma to the left knee;
 - 4) 25% permanent partial incapacity and as a result of the injuries sustained, these will lead to;
 - a) Post-traumatic stiffness and arthritis in both wrists joint;
 - b) Reduced power grip on both hands;
 - c) A lifetime of recurring post-traumatic at fracture sites especially during times of cold weather and when cooking;
 - d) Fracture sites have become a point of weakness and can easily fracture;
 - e) Diminished capacity to work and undertake other activities of daily living.
 7. The Doctor assessed the appellant and established that he suffered 15% permanent disability due to fractures he sustained during the accident an award of Ksh. 900,000 by way of general damages would be a fair and reasonable compensation. In the case of *Joseph Njuguna Gachie v Jacinta Kavuu Kyengo* HCCC No. 31 of 2017, the court assessed less severe injuries than what the appellant sustained and awarded Ksh. 600,000 general damages.
 8. The appellant will require future medical expenses to remove metal plates as assessed by Dr. Kiama. These procedures will require Ksh. 120,000. The 1st respondent failed to take into account this aspect of future earnings and the judgment should be reviewed with an additional award of Ksh. 120,000 and costs.
 9. The 1st respondent submitted that the appellant was injured at work on 17 August 2022 and a medical report was filed by Dr. Arif Adamn from Mewa Hospital. The appellant was assessed at 5% permanent disability. The 1st respondent processed to calculate work injury using DOSH/WIBA 4 dated 3 February 2023 for Ksh. 64,667. The appellant was dissatisfied with the assessment and filed an objection on 21st February 2023 and attached a medical report by Dr. Darius Wambua Kima who assessed permanent disability at 25% as the basis of objection.



10. The 1st respondent submitted that upon the appellant's objection, he was subjected to a further assessment by Dr. Nelson Mpekethu and awarded permanent disability at 10% and the compensation assessed at Ksh. 112,666.67. the 1st respondent followed the law in arriving at this assessment and based on a second assessment. In the case of *Ahmed Abdulabi Musa v Director of Occupational Safety & another* [2021] eKLR and *Maridadi Flowers Limited v Director of Occupational Safety and Health Service; Khisa (Interested party)* Appeal 29 of 2018 [2021] eKLR.
11. The 1st respondent submitted that this appeal was filed out of time and the same should be dismissed with costs. The director's award was issued on 9 June 2023 and the said appeal filed on 18 October 2023 is contrary to Section 52(2) of *WIBA* and should be dismissed with costs.
12. Under the *Work Injury Benefits Act*, 2007 (WIBA), a party aggrieved by the decision of the Director is allowed to file objections and appeal. the appeal should be filed within 60 days from the date the subject decision was issued under Section 51 of *WIBA*:
 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, object 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.
13. The 1st respondent submitted that the appeal herein is filed out of time and that the appellant failed to address his appeal in time and the appeal is time-barred. Indeed, the appellant submitted that the director's award was issued on 9 June 2023 and he lodged his appeal on 18 October 2023 over 60 days.
14. The appellant has not addressed the lapse in failing to file his appeal in time.
15. Under *WIBA*, Section 52(1) and (2) have double effects. An objector or appellant has the right of appeal within 60 days of the Director's decision. to an objector and not to a party on the opposite side nor to an affected person wishing to vary an award made by the Director.
16. The appellant has challenged the Director's decision delivered on 9 June 2023 relating to the assessment of work injury awarded at 112,666.67 compensations.
17. On the award, the appellant filed objections through a letter dated 4 August 2023. The Act does not contemplate a second objection but an appeal to the court within 30 days from the date of the Director's review or rejection of the objection according to Section 52 of the *WIBA*.
18. The appellant filed the instant appeal on 18 October 2023 challenging the decision issued on 9 June 2023. The appeal is outside the timeline stipulated under Section 51 of 60 days and Section 52 of 30 days. The Supreme Court in the case of *Law Society of Kenya v Attorney General & COTU* Petition No. 4 of 2019 in addressing the provisions of Sections 16, 51, and 52 of *WIBA* held that;

... the intention of Section 16, and the purpose it fulfills is apparent. That purpose is revealed in Section 23 which calls for initial resolution of dispute via the Director and this can be deemed as an alternative dispute resolution mechanism. But what if one is still aggrieved by the decision of the Director? The answer to that question lies in Section 52 of the Act which allows aggrieved parties to seek redress in a court process. In the circumstances, access to justice cannot be said to have been denied...



... Section 16 cannot be read in isolation because if read with Sections 23 and 52 of the Act, the Act provides for legal redress to the Industrial Court (now the Employment and Labour Relations Court), and therefore judicial assistance can be sought by aggrieved parties from decisions of the Director and the court can determine concerning all relevant matters arising from those decisions. ...

Whereas under Section 25 of WIBA, an employee is allowed a second medical assessment upon request, the same should be submitted and processed by the Director. Based on the assessment of the director, an appeal should be lodged within the law, Section 52 of WIBA.

19. The appeal herein is filed outside time. no explanation is given for such a lapse.
20. The assessment and award of the 1st respondent are lawful and hereby confirmed at Ksh. 112,666.67 vide award of 9 June 2023. No orders on costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 22 DAY OF FEBRUARY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

