



**Republic v Directorate of Occupational Safety and Health Services; Genjoy Food Product Limited (Interested Party); Ikuni (Applicant) (Judicial Review Application E031 of 2023) [2024] KEELRC 580 (KLR) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 580 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
JUDICIAL REVIEW APPLICATION E031 OF 2023**

**B ONGAYA, J  
MARCH 15, 2024**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW  
FOR AN ORDER OF MANDAMUS AGAINST DIRECTORATE  
OF OCCUPATIONAL SAFETY AND HEALTH SERVICES**

**-AND-**

**IN THE MATTER OF ARTICLES 162(2) AND  
165(5) OF THE CONSTITUTION OF KENYA, 2010**

**-AND-**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE  
LAW REFORM ACT, CAP 26 LAWS OF KENYA**

**-AND-**

**IN THE MATTER OF RULE 7 OF THE EMPLOYMENT AND  
LABOUR RELATIONS COURT (PROCEDURE) RULES, 2016**

**-AND-**

**IN THE MATTER OF ORDER 53 RULE 3 OF THE CIVIL PROCEDURE RULES, 2010.**

**BETWEEN**

**REPUBLIC ..... REPUBLIC**

**AND**

**DIRECTORATE OF OCCUPATIONAL SAFETY AND HEALTH  
SERVICES ..... RESPONDENT**

**AND**

**GENJOY FOOD PRODUCT LIMITED ..... INTERESTED PARTY**

**AND**



## JUDGMENT

1. The applicant filed the Notice of Motion dated 31.10.2023 through Namada & Company Advocates. The application was under order 53 rule 3 of the *Civil Procedure Rules* and all other enabling provisions of the law. The applicant prayed for orders as follows:
  - i. An order of mandamus against the Respondent compelling him to hear and assess compensation payable to the Applicant.
  - ii. The respondent herein be directed to compel the interested party to duly fill in the DOSH FORM 1 to enable assessment of compensation as per order (1) above.
  - iii. The costs of the application be in the cause.
2. The application was based upon the grounds set out in the application, the statutory statement, as well as, the ex-parte applicant's verifying affidavit and exhibits thereto filed together with the application and sworn on 31.10.2023. The applicant's case is as follows:
  - a. That the interested party employed the ex-parte applicant on the 6<sup>th</sup> of June 2020.
  - b. That on the 27<sup>th</sup> September, 2021 while at work and operating the sachet packing machine, the machine broke down and clipped back together, crushing and chopping off his right thumb.
  - c. He was rushed to Mama Lucy Kibaki hospital and received treatment for a month. He annexed the medical documents as TMI-1.
  - d. That he reported the matter to the Safety and Labour offices and issued with a DOSH Form 1, which he was to submit to his employer, the interested party herein, to fill the prescribed part. He exhibited the form as TMI-2.
  - e. That the interested party has since failed or refused and neglected to facilitate compensation for the injuries and also declined to fill in Part 1 of the DOSH 1 form.
  - f. That he engaged his advocates Namada & Co. Advocates to help with the process but in vain. He exhibited a copy of the letter sent to both the respondent and interested parties as TMI-3.
  - g. That the judicial review application herein is made in order to protect his rights and he urged that it is in the interest of justice that the orders sought are granted.
3. The interested party filed the replying affidavit of Kelvin Kamau Mwangi, the Manager to the interested party, sworn on 21.11.2023 and through Chimei & Malenya Company Advocates. It was stated and urged as follows:
  - a. The interested party confirmed that the ex-parte applicant was its employee from 6<sup>th</sup> June 2020 as a casual general worker.
  - b. That in 2021, the ex-parte applicant underwent training conducted by their head trainer and transitioned to the role of an operator working on the packaging machine.
  - c. That on 27<sup>th</sup> September 2021, the machine broke down and the ex-parte applicant defied the training and attempted to fix the machine by himself and which led to the occurrence of the accident.



- d. That despite the ex-parte applicant's negligence, the interested party rushed him to hospital and settled all the bills including for subsequent clinics and check-ups.
  - e. That the interested party continued to pay his salary until when he resumed work where he continued working for two months and then absconded and failed to resume in January 2022.
  - f. The occurrence of the accident is solely as a result of the ex-parte applicant's negligence and wilful misconduct and hence he is not entitled to any compensation.
  - g. That the interested party is a private body whereas Judicial Review orders are a public law remedy sought against public bodies performing private functions and hence they are not a necessary party to this suit.
  - h. It was prayed that the application be dismissed with costs.
4. The ex-parte applicant filed a further replying affidavit sworn on 22.01.24 and in response to the replying affidavit of the interested party. The applicant stated as follows;
- a. The ex-parte applicant denied the issues raised in the replying affidavit and particularly denied ever repairing the sachet-packaging machine by himself.
  - b. That the day before the accident, the machine had broken down and the head operator repaired it.
  - c. That during his employment, the interested party had failed to provide him with protective gear exposing him to danger.
  - d. That the [Work Injury Benefit Act](#) is a no-fault statute and the inquiry on liability is moot.
  - e. That in January 2022, the Interested Party's manager told the ex-parte applicant that there was reduction of work and that he should not report to work until he was called but which has never happened.
  - f. That the interested party has failed or refused to fill the requisite form for investigation and assessment of compensation and as such, the interested party is a proper party to this suit.
5. The respondents on their part did not file any documents.
6. The ex-parte applicant and the interested party filed final submissions. The Court has considered all the material on record. The Court returns as follows:
- a. There is no dispute that the parties were in employment relationship. Further, the accident in issue occurred.
  - b. As submitted, for the ex-parte applicant the [Work Injury Benefits Act](#) institutes a no fault system of reporting work related accidents, occupational diseases and deaths. There is no requirement to establish fault, negligence or contributory negligence for assessment or compensation to issue under the Act. The submission for the ex-parte applicant in that regard is upheld.
  - c. There is no dispute that the respondent is under a statutory duty to assess the ex-parte applicant and make an award per provisions of [Work Injury Benefits Act](#). The evidence is that the interested party had full knowledge of the accident as at the time it occurred on 27.09.2021 and as envisaged in section 21 of the Act. The interested party was required to report the accident to the respondent within 7-days of its occurrence having learned that the applicant was injured



in the accident and per section 22 (1) of the Act. While the interested party did not report to the respondent as required, the respondent learned about the injury by the letter dated 02.03.2023 from the ex-parte applicant's Advocates on record and received for the respondent on 06.03.2023. Under section 23, upon receiving the letter dated 02.03.2023, the respondent was required to make such inquiries as are necessary to decide upon any claim in accordance with the Act. Thus, whether the interested party made a report to the respondent or not, once the accident and injury were notified to the respondent, the respondent was required to make the assessment and compensate for injuries sustained by the claimant. Thus section 23(2) and (3) provides that an inquiry by the respondent under subsection 23(1) can be conducted concurrently with any other investigation and subsection 22(3) provides that an employer or employee shall, at the request of the Director, furnish such further particulars regarding the accident as the Director may require. By those statutory provisions, it is elaborate that the respondent has wide statutory powers and duties to ensure the ex-parte applicant is assessed and compensated. The respondent appears to have been moved to act per the statutory powers and duties by the letter dated 02.03.2023 but has failed to do so. The Court finds that the ex-parte applicant has satisfied the test for grant of mandamus as prayed.

- d. The Court finds that under Article 159 of the Constitution, the Court is guided to prioritise substantive justice over procedural technicalities. It is now settled that judicial review orders are available in proceedings initiated independent of the judicial review proceedings under order 53 of the *Civil Procedure Rules*. Are other remedies unavailable under proceedings initiated for judicial review proceedings under order 53 of the *Civil Procedure Rules*? It appears to the Court that time has come for remedies that aid judicial review orders in order 53 of the *Civil Procedure Rules* to be available in such proceedings without requiring the parties to file separate proceedings for that purpose. In the instant case, the interested party had a strict statutory duty to report the accident and injury to the respondent failing which the interested party was liable in criminal liability as prescribed under the Work Injury Benefits Act. It appears that where a statute imposes an express duty on a person, then an exceptional window for judicial review opens up as against such a person, as it happens to public or state officers and public bodies, even where the person is acting in private capacity, but in pursuance of such imposed statutory duty. In view of those considerations, the relief prayed for the respondent to compel the interested party to act and to provide relevant information will issue. In any event, the relief as worded is in the nature of the judicial review order of mandamus to compel the respondent to act per statutory duty already elaborated in this judgment and to require the interested party to discharge the imposed statutory duty with respect to the occupational accident and injury in issue. While making that finding the Court observes that by the letter, dated 02.03.2023, the interested party was asked to perform the imposed statutory duty to report the accident and by copy of that letter, the respondent was notified of the interested party's failure or refusal to so perform. The order will therefore issue as prayed.
- e. The ex-parte applicant has succeeded and the respondent will pay costs of the judicial review proceedings.

In conclusion, judgment is hereby entered for the ex-parte applicant for the following orders:

1. The judicial review order of mandamus hereby issued compelling the respondent to hear and assess compensation payable to the ex-parte applicant with respect to the accident and injury on 27.09.2021 while the applicant was on duty in employment of the interested party.
2. The respondent is hereby directed to compel the interested party to duly fill in the DOSH FORM 1 to enable assessment of compensation as per order (1) above.



3. The respondent to pay the ex-parte applicant's costs of the application and the other parties to bear own costs of the proceedings.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS  
FRIDAY 15<sup>TH</sup> MARCH 2024.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

