



**DAO (Suing on her own behalf and as the next friend to the minor JLM)  
v Directorate of Occupational Safety and Health & 3 others (Petition  
E200 of 2023) [2024] KEELRC 1276 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1276 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E200 OF 2023**

**B ONGAYA, J  
MAY 24, 2024**

**BETWEEN**

**DAO ..... PETITIONER  
SUING ON HER OWN BEHALF AND AS THE NEXT FRIEND TO THE  
MINOR JLM**

**AND**

**THE DIRECTORATE OF OCCUPATIONAL SAFETY AND  
HEALTH ..... 1<sup>ST</sup> RESPONDENT  
THE MINISTRY OF LABOUR AND SOCIAL PROTECTION .... 2<sup>ND</sup>  
RESPONDENT  
CHIROMO MENTAL HEALTH HOSPITAL LIMITED ..... 3<sup>RD</sup> RESPONDENT  
THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner through Advocate John Mwariri for Kituo cha Sheria filed the petition dated 19.10.2023 seeking the following orders:
  - a. A declaration that the process leading to the decision contained in the letter dated 17<sup>th</sup> January 2023 (Ref:WIBA/Nrb/01328/222) violates Articles 47(1), 10, 53 of the Constitution of Kenya section 4(3)(1) of the Fair Administrative Act, section 36 of the Work Injury Benefit Act section 8 of the Children Act and the legitimate expectation of the Petitioner.
  - b. A declaration that the actions and omissions of the of the respondents violate Articles 47(1), 10 35, 41, 53 of the Constitution of Kenya section 4(3)(1) of the Fair Administrative Act,



section 36 of the of the Work Injury Benefit Act section 8 of the Children Act and the legitimate expectation of the Petitioner.

- c. An order of *Certiorari* to move into this Court for purposes of being quashed, the decision of the 1<sup>st</sup> respondent contained in the letter dated 17<sup>th</sup> January 2023 (WIBA/Nrb/01328/2022).
  - d. An order directed to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents to forthwith release the amount of Kshs. 2,181,818.00 due to the minor JLM to the mother and next friend, DAO.
  - e. A declaration that as a result of the breach of rights enumerated above, the petitioner has suffered damages, pain and suffering.
  - f. A declaration that the petitioner is therefore entitled to general and exemplary damages against the respondents herein jointly and/or severally.
  - g. An order for compensation as enshrined and provided for under Article 23(e) of the Constitution pursuant to the declaration prayed in prayer a) and b) above.
  - h. An order that the costs of this suit be awarded to the petitioner with interest thereon at court rates from the date of filing of the petition.
  - i. Any other relief as the Court would deem just and expedient to grant.
2. The petition was based upon the supporting affidavit of the petitioner and exhibits thereto filed together with the petition and sworn on 19.10.2023. The petitioner's case is as follows:
- a. That she is a widow to Faustine Mwaighacho Mwadilo (deceased) who died of head injuries due to gunshot while attending a psychiatric patient at Chiromo Mental Health Hospital Limited, the 3<sup>rd</sup> respondent herein on 06.12.2017 and where he was working as a nurse.
  - b. That at the time of his death they had two children.
  - c. That upon her husband's death she made several visits at the 1<sup>st</sup> and 3<sup>rd</sup> respondents' offices in attempt to obtain his work injury compensation to no success.
  - d. That she then approached Kituo cha Sheria who did several letters to the 1<sup>st</sup> and 3<sup>rd</sup> respondents seeking information on compensation but the respondents did not respond. She annexed the said letters.
  - e. That this left her suffering, as she had no stable source of income.
  - f. That it is in June 2023 that she was able to obtain work injury assessment from the 1<sup>st</sup> respondent vide a letter dated 17.01.2023 which she then approached the 3<sup>rd</sup> respondent to make payment but they did not respond.
  - g. That she then filed Nairobi Misc Application No. 158 of 2023 *DAO and Another vs Chiromo Mental Health Hospital Limited* seeking among others to compel the 3<sup>rd</sup> respondent to pay compensation due to the deceased.
  - h. That it is upon the said application that the 3<sup>rd</sup> respondent issued cheques.
  - i. That she was shocked that an amount of Kshs. 2,181,180 due to her son John Lamont Msagha was to be channelled to the Public Trustee.



- j. That upon inquiry she learnt that it was a decision that had been made by the 1<sup>st</sup> respondent vide a letter dated 17.01.2023 (Ref: WIBA/Nrb/01328/2022) which reason this petition has been brought.
  - k. That there was no prior notification issued to the petitioner and neither was she afforded an opportunity to be heard before the decision was made and no documents had been served upon her. No reasons informing the decision were either communicated to her.
  - l. That the said decision failed to consider the realities of life and for her being a widow and has struggled singlehandedly for five years.
  - m. That the decision is against the best interest of the minor.
3. Similarly, the petitioner supported her petition through the supporting affidavit of Philip Mshote Mwadilo sworn on 25.02.2024 and filed through John Mwariri -Advocate for Kituo cha Sheria . It was stated as follows:
- a. That the petitioner is his sister in law and he was making this affidavit on his behalf and on behalf of his parents – who are also dependants of the deceased.
  - b. That the deceased died and left the petitioner with three children whom she has raised singlehandedly.
  - c. That the family has no issue with the money of the minor being channelled to the petitioner instead of the public trustee and as a family they were not consulted before the decision was made.
  - d. That they visited the offices of the public trustee and were informed that the money will be released when the minor attained the age of 18 years.
  - e. That the petitioner is mature and has the best interests of the children at heart.
  - f. That the 1<sup>st</sup> respondent in giving the said directions of having the money deposited at the public trustee did not act in good faith.
4. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents appointed the office of the Attorney General & Department of Justice to act for them. The learned Senior State Counsel Ms. Beatrice Akuno appeared in that behalf. They filed the replying affidavit of Justus Bosire Nyakego sworn on 27.11.2023 whose case is as follows;
- a. That he is the Deputy Director of the 1<sup>st</sup> respondent.
  - b. That the 1<sup>st</sup> respondent received notification of the claim on 17.01.2023 on an electronic portal and commenced the compensation process notwithstanding the fact that this notification was long out of time which was computed and lodged with the 3<sup>rd</sup> respondent requiring settlement of the total amount of Kshs. 4,800,000 being money compensable to dependants of the deceased.
  - c. That upon receiving information and names of the deceased's dependants the 1<sup>st</sup> respondent apportioned the amounts and sent the letter dated 17.01.2023 to the 3<sup>rd</sup> respondent highlighting a breakdown of the amount of each dependant taking cognizance of section 36 of the WIBA, 2007 and also took cognizance that one of the dependants was a minor.
  - d. That it is for the reason that the dependant was a minor the 1<sup>st</sup> respondent saw that the Public Trustee was the most suitable agency to manage his share since the petitioner herein could decide to remarry or channel the monies to other uses.



- e. That on 21.09.2023 bankers' cheques for each dependant were issued and delivered to the 1<sup>st</sup> respondent's offices where after calls were made to the petitioner to go and collect the cheques, unsuccessfully.
  - f. That it is then the petitioner's advocate informed the 1<sup>st</sup> respondent that a case had been filed in court in dispute of channelling the minor's money to the Public Trustee.
  - g. That the petitioner made no effort to seek clarification nor raised an objection to the decision in accordance with section 51 of *WIBA*, 2007.
  - h. That the 1<sup>st</sup> respondent has never treated the petitioner unfairly or contravened any of her rights and has never refused to offer any information required by the petitioner.
  - i. That no appeal in regards to the claim had been lodged with the petitioner expressing dissatisfaction with computation or apportionment and that the decision to channel the money to the public trustee was lawful, reasonable and fair.
  - j. That as at the time of swearing of this affidavit (27.11.24) the said cheques were in the custody of the 1<sup>st</sup> respondent and there were no orders restraining payments to other dependants whose apportioned amounts have no dispute.
5. The 3<sup>rd</sup> respondent filed its replying affidavit through Mboya Wangong'u & Waiyaki Advocates sworn on 18.12.2023 by Gerald Gachuhi who reiterated the facts as stated by the other respondents and added as follows:
- a. That he is the HR business partner of the respondent and confirmed that the deceased was an employee of the respondent who was injured while at work.
  - b. That the matter was reported and referred to the 1<sup>st</sup> respondent who assessed payable damages to the dependants being the widow Dorren Akinyi Oduor (who is the next friend and petitioner herein), John Lamont Msagha his minor son of 9 years, Andrew Mwadilo Mwaighacho (father of the deceased) and Claudia Saru Mwadilo (mother of the deceased). A copy of the assessment order was attached.
  - c. That the 3<sup>rd</sup> respondent did not object to the assessment and made the payments as per the directions of the 1<sup>st</sup> respondent through their office.
  - d. That after the failed attempt to reach the petitioner and other dependants to collect the cheques and the information by their advocates on action taken as stated in the other respondent's case, the 3<sup>rd</sup> respondent also appointed their advocates and informed them of the challenges being faced with the payment.
  - e. That the petitioner's and 3<sup>rd</sup> respondent's advocates then communicated leading to the petitioner and other dependants picking the bankers' cheques on 30.11.2023 and 04.12.2023 where the 3<sup>rd</sup> petitioner was issued with a certificate of payment by the 1<sup>st</sup> respondent.
  - f. That the 3<sup>rd</sup> respondent has not violated any rights of the petitioner and has complied fully with its obligations and directions as issued by the 1<sup>st</sup> respondent.
  - g. That the petitioner's petition is defective since some of the orders sought are of judicial review division of the High Court and this court has no jurisdiction to issue judicial review orders.



- h. That the petitioner has no legal action or claim against the 3<sup>rd</sup> respondent since it has complied and paid the assessment amount in full and as directed and urged that this petition be dismissed with costs.
6. The petitioner filed a further affidavit sworn on 26.02.2024 and reiterated the facts as stated in the petition and her supporting affidavit together with the affidavit of the second deponent in the petition. She further stated as follows:
- a. That she and her brother Patrick Omondi Oduor are the legal representatives of the deceased.
- b. That the issue of her having filed an appeal on the decision to channel the money to the Public Trustee was not achievable since she came to learn of the decision way later and would be barred by time.
- c. That the 3<sup>rd</sup> respondent has not demonstrated what he did to ensure that the payments were made promptly to avoid the delay and suffering despite several attempts by the petitioner to get action taken.
- d. That as a family they indeed collected the non-contested cheques and the only cheque remaining is that written in the name of the Public Trustee and the subject of the petition herein.
7. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
8. The only issue in dispute is whether the share of the money due to the minor herein should be held with the Public Trustee or be paid to the minor's mother, Section 36 of the *Work Injury Benefits Act* Provides as follows:
- (1) Compensation payable in accordance with the provisions of this *Act* may, for reasons deemed by the Director to be sufficient, be—
- (a) paid to the employee or the dependant of an employee entitled thereto, or to any other person on behalf of such employee or dependant, in instalments or in such other manner as the Director may deem fit;
- (b) invested or applied to the advantage of the employee or the dependants of an employee;
- (c) paid to the Public Trustee to be applied for the benefit of the dependants of a deceased employee; or
- (d) applied as specified in paragraphs (a), (b) and (c).
- (2) On the death of an employee the unpaid balance of any compensation awarded to the employee does not form part of the employee's estate and shall be paid to the employee's dependants as specified in the Third Schedule.
- (3) Where there is no dependant, the Director may authorise payment of the balance of the compensation to the estate of the deceased.
- The Third Schedule by way of percentages guides the Director on how to apportion the awarded money in paying it out to the deceased employee's beneficiaries.
9. There is no dispute on the manner the Director apportioned the awarded money. Indeed some of the dependants have already been paid. Now, why should the minor's portion of the award be released to



the mother, on behalf of the minor? The Court considers that the minor has immediate needs and which the mother is best placed to take care of. The Court finds that in the best interest of the child, the cheque in favour of the minor be remitted to the trust account opened by the Public Trustee and which may be accessed in the best interest of the Child. The mother, the petitioner, or the minor, are not prejudiced at all. The submissions made for the 1<sup>st</sup> respondent in that regard are upheld. The Director is not shown to have acted outside statutory discretion or unreasonably. While making that finding, the Court further finds that the explanation of remarrying and leaving behind the minor was not in the Director's letter and further, the petitioners needed not to be heard by the Director as the decision made affected the child and not the petitioners. The alleged constitutional violation of rights has not been established.

10. The objection and appeal alluded to for the 1<sup>st</sup> respondent under provisions of section 52 of the Act cannot hold because such would be only about a dispute on the assessed amount, which is not the case in the instant case. The section 52 of the Act does not amount to unexhausted statutory procedure in the instant case.
11. There is no doubt that the minor needs protection. In the circumstances of the case the Court finds that the 1<sup>st</sup> respondent acted reasonably in directing the minor's cheque be in the name of the Public Trustee. The Public Trustee will secure the money in an account to be accessed in the best interest of the minor.
12. The 3<sup>rd</sup> respondent did everything prescribed in the law to cause assessment of the award under the Act.
13. The Court has considered the unique circumstances of the case and returns that each party to bear own costs.

In conclusion, the petition is hereby determined and judgment entered with orders:

1. In line with the 1<sup>st</sup> respondent's letter Ref. No. WIBA/Nrb/01328/2022 dated 17.01.2023 the Public Trustee shall open a Trustee Account for the benefit of the minor JLM for the due sum of Kshs. 2, 181, 818.00, which may be accessed for the benefit of the minor per the relevant statutory provisions governing operation of the account and for the benefit of the minor.
2. Each party to bear own costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 24<sup>TH</sup> MAY 2024.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

