



**Chobogo v Kenya Ports Authority (Miscellaneous Application
E036 of 2024) [2024] KEELRC 1573 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1573 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E036 OF 2024**

**M MBARŪ, J
JUNE 20, 2024**

BETWEEN

KADZUMBA MCHARO CHOBOGO APPLICANT

AND

KENYA PORTS AUTHORITY RESPONDENT

RULING

1. The applicant filed an application dated 2 April 2024 seeking orders;

The court be pleased to adopt as judgment of the court, the assessment/award of the Director of Occupational Safety and Health Services, Mombasa made on 1st July 2022 as a judgment of the court.

A decree do issue for;

- a. The sum of Ksh.1,790,837.30 being the director’s award/assessment made on 1st July 2022; and
- b. Interests thereon at court rates from the date of the award, 1st July 2022 until payment in full

Costs for this application be awarded to the applicant.

2. The application is supported by the affidavit of the applicant and on grounds that the application herein relates to the enforcement of the director’s award to enforce payment of the director’s award which remains unpaid despite the demand being issued.

3. The applicant has been an employee of the respondent as a security officer/guard. He sustained work-related injuries on 8 May 2022. The incident was reported to the director and an assessment found



- he had suffered 15% incapacity on 1st July 2022 notice was issued to the respondent to pay Ksh.1,790,837.30.
4. The respondent was required to pay within 90 days after which the director was to pay the applicant within 30 days. The respondent did not lodge objections or an appeal as required under the law.
 5. The respondent was notified of the assessment on 1st July 2022. Through letters dated 26 January 2023 and on 1st March 2023, the director demanded payment of the award on the basis that there were no objections. Instead, the respondent through its insurer MS Geminia Insurance and insurance brokers MS Liaison Group subjected the applicant to a further medical examination which suggested that the applicant had not suffered any temporary permanent disability and only paid his sick off for 47 days which is equivalent to Ksh.173, 000 and declined to compensate him per the director's award. The payment was made through the applicant's Bandari Sacco Account and was never channelled through the director's office as by law required.
 66. The applicant avers in his Affidavit that the request to subject him to a further medical examination was never presented to the director or presented to the director through an objection as by law required. Only the director is by law equipped with the requisite powers to assess damages payable to an employee injured at work under Sections 23 and 26 of the Work Injury Act (WIBA) and the manner of calculating the damages and/or earnings as provided for under Section 37 of WIBA.
 7. Despite the respondent being served with notice on 1st July 2022, 26 January 2023 and 1st March 2023, there is no payment or any submissions to the director within the timelines under the law. This amounts to a failure to obey the director's directions which is a criminal offence under Section 26(6) of WIBA which upon conviction, the respondent is liable to pay a fine of Kshs.500, 000 or face imprisonment.
 8. In reply, the respondent filed the Replying Affidavit of George Ochieng the principal insurance officer and under such position has access to the insurance records of the respondent and the applicant. He avers that the applicant is an employee of the respondent as a security operative. While on duty, he was assaulted by a third-party port user and was treated at the respondent's Bandari clinic and Mombasa hospital and discharged within 3 days. He recorded a statement on 11 May 2022 and narrated the events leading to his injury.
 9. For work injury, the respondent took out an insurance cover for its employees under Section 7 of WIBA. Jubilee Allianz Insurance Co. of Kenya Limited was contracted to provide the insurance cover. Jubilee referred the applicant to a second medical examination by D. Salim K. Noorani whose report confirms that the applicant never suffered any permanent total disability as a result of the work injury. The Doctor's report dated 2 November 2022 addressed to Jubilee indicates the applicant had no permanent injury and was entitled to compensation assessed at ksh.173, 212. The applicant was paid in compensation.
 10. Ochieng avers that the court has no jurisdiction in the matter as far as work injury benefits are concerned. The court has no jurisdiction to enforce the DOSH award in the absence of express provisions of the law and the applicant should be dismissed.
 11. The applicant filed a Supplementary Affidavit and aver that the respondent never compensated him per the Director's assessment on the grounds that he suffered temporary incapacity. Under Sections 23 and 37 of WIBA, the power to examine the circumstances leading to injury and incidents of work-related injury is by law in the mandate of the Director. This is the office required to compute liability and assess the award to be paid by the employment.



12. The court has jurisdiction to enforce the Director's award under WIBA under its jurisdiction in Article 162(2) of *the Constitution* and Section 12 of the *Employment and Labour Relations Court Act* and the jurisprudence of the court. The respondent did not object to the assessment or award by the Director under WIBA and hence, the payment awarded should be paid.
13. Parties agreed to address the application by way of written submissions.
14. The applicant submitted that the court has jurisdiction to hear and enforce the Director's award under WIBA under its inherent jurisdiction under Article 162(2) of *the Constitution* and Section 12 of the *Employment and Labour Relations Court Act* as held in the case of *Mutegi v Teachers Service Commission & another Cause No.E140 of 2023*. The court recognized that under WIBA, there are no enforcement mechanisms and that should not be applied as a bar to the original jurisdiction of the court to address matters relating to employer and employee rights. In the case of *Joash Shisia Cheto v Thepot Patrick Charles* [2022] eKLR the court held that there is a lacuna where the holder of the Director's award is not paid but such a party can move the court and seek for enforcement. The proceedings for enforcement are not akin to an appeal as envisaged under Section 52 of WIBA and where none is filed, the court can secure rights through an order for enforcement.
15. The applicant submitted that the director assessed the work injury placed before the officer under the provisions of WIBA and awarded Ksh.1, 790,837.30 which the respondent received notice but has refused to pay. There were no objections appeals or references for a second medical report. In the case of *Luvinzu v Timsales Limited, Misc. Appl. No.E069 of 2023*, the court held that where there was no objection made by the employer, the assessed award by the Director should be paid.
16. The respondent did not file any written submissions.

Determination

17. On the jurisdiction of the court, as correctly submitted by the applicant, WIBA has no enforcement mechanism concerning an award of the Director following work injury and assessment thereof. This is recognized by the court in several instances including in the case of *Edwin Songoroh & Another v Amony Koech Yatich & Another* [2021] eKLR and *Lameck Nyakundi Anyona v W.J.J Kenya Construction Company Limited* [2022] eKLR.
18. The court, in its overall mandate and jurisdiction under Article 162(2) (a) of *the Constitution* and Sections 3 and 12 of the *Employment and Labour Relations Court Act*, 2011 to address employment and labour Relations claims and for connected purposes, has enforced the Director's awards to achieve the overall objectives of *the constitution* and the law. See Supreme Court judgment in *Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees and 13 others SC Petition No. E004 of 2023* as consolidated with Petition No. E002 of 2023.
19. The context herein is that the applicant was injured while at work on 8 May 2022. On 28 June 2022, He reported to the Director and an assessment was undertaken the respondent was issued with a notice to pay Ksh.1, 790,837.30 through a letter dated 1st July 2022. There was no objection or appeal filed by the respondent and there is no payment to date.
20. The respondent on their part argues that it has secured an insurance policy with Jubilee, upon injury at work, an injured employee is covered and addressed therefrom. The applicant was injured at work and referred for assessment and paid for his injuries at Ksh.173, 212 on 21st February 2023.
21. Indeed, WIBA's overall objective is to provide compensation to employees for work-related injuries and diseases contracted in the course of their employment and for connected purposes.



22. Under Section 7(1) of WIBA, an employer is required to;
- (1) Every employer shall obtain and maintain an insurance policy, with an insurer approved by the Minister in respect of any liability that the employer may incur under this Act to any of his employees.
23. This put into perspective an overall application of WIBA, the office granted the legal mandate to assess and award compensation to a work-related injury is the Director as defined under Section 2 of WIBA.
24. For this purpose, Sections 21 and 22 require the employer to make a report of work-related injury to the office of the Director. Based on the report, the motions of Section 23 of the Act come into effect;
23. Inquiry by the Director
- (1) After having received notice of an accident or having learned that an employee has been injured in an accident the Director shall make such inquiries as are necessary to decide upon any claim or liability in accordance with this Act
25. Under WIBA, the Director, the office and repository of expertise on work-related injury is allowed to investigate the circumstances of an injury and make an assessment. The employer is allowed to object to any assessment and request for a second medical opinion.
26. The second opinion obtained by the respondent from D. Salim K. Noorani concerning the re-assessment of the applicant should be done within the legal protections under WIBA. To carry it outside this framework would negate the very purpose of the provisions of Section 23 of WIBA.
27. The respondent has since paid per the second assessment. This was premature. The second assessment should be regularized through the office of the Director and even though the respondent was keen to resolve the matter immediately, for the legal motions of WIBA to take effect, the motions of assessment shall be re-opened.
28. The award of Ksh.1, 790,837.30 is hereby set aside to allow the respondent 14 days to attend and file objections based on the fact that the applicant has been assessed by D. Salim K. Noorani and a payment of Ksh.173, 212 acknowledged. The Director will re-assess the award upon the objections within 30 days from the date hereof.
29. Accordingly, on the analysis above, the orders sought in the application dated 2 April 2024 will not be issued. Taking into account that the respondent has since paid the applicant who remains in employment, to maintain industrial peace, each party bears its costs. The purpose of the application is addressed.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 20TH DAY OF JUNE 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

