



REPUBLIC OF KENYA



**Masila v Director of Occupational Health and Safety Services; Sukra
Salah Limited (Interested Party) (Judicial Review E020 of 2023)
[2024] KEELRC 2350 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2350 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW E020 OF 2023
MN NDUMA, J
SEPTEMBER 26, 2024**

BETWEEN

DOUGLAS MUSYOKA MASILA APPLICANT

AND

**DIRECTOR OF OCCUPATIONAL HEALTH AND SAFETY
SERVICES RESPONDENT**

AND

SUKRA SALAH LIMITED INTERESTED PARTY

JUDGMENT

1. The applicant Douglas Musyoka Masila suing as dependent of Augustine Mutuva Masila (Deceased) has sued the Director of Occupational Health and Safety Services and Sukra Salah Limited former employer of the deceased seeking for orders:-
 1. That an order of mandamus do issue compelling the respondent to accept investigation, hear and determine a work injury claim placed before it by the applicant on 29/9/2021 and costs of the suit
2. The application is premised on grounds set out on the face of the application which may be summarized that the deceased is a former employee of the interested party. That the deceased suffered fatal work injury on 22/3/2020 as a result of a road traffic accident while in the course of his employment with the interested party. That he was driving Vitz vehicle KCS 927P. That on 10/6/2021 and 29/9/2021 respectively, the applicant gave notice of the fatal work injury to the respondent and furnished the respondent with all the necessary documents but despite that the Director unfairly and unreasonably neglected, ignored and or refused to enquire into and investigate the deceased claim against the interested party.



3. That the respondent is mandated to make an assessment of work injury benefits under the [work Injury Benefits Act, 2007](#) but has failed to do so which conduct is not only a breach of public duty but also an affront to the deceased's dependents' right to access justice and compensation.
4. That the applicant has the right to fair administrative action to access justice as enshrined under Article 47 and 48 of [the Constitution](#) of Kenya 2010 hence the suit.

Response

5. The respondent has responded to the application. The applicant notified the respondent of the death of the deceased by a letter received on 29/9/2021 which was 18 months from the date of the stated death on 22/3/2020 through a road traffic accident.
6. That the respondent serves within the confines of the provisions of the [Work Injury Benefits Act, 2007](#) and in particular sections 21 and 22 in as far as notification of occupational accident is concerned.
7. That the [Work Injury Benefits Act, 2007](#) does not provide for processing of injury compensation claims whose accident notification was more than a year and half late and was outside the contours of the law.
8. That in giving notice of the accident, the applicant did not attach any order issued from court granting leave to give notice of an occupational accident out of time.
9. That the applicant did not also furnish the respondent with all relevant information to enable the respondent to compute and/or review the claim. In particular, pay slips of the deceased were missing which could help ascertain the emolument of the deceased. That the respondent had actually attempted to assist the applicant by requesting for the said documents, but same were not furnished.
10. The respondent sets out in detail the steps that ought to have been followed by the applicant in the replying affidavit dated 28th March 2024. The respondent reiterates that the list of documents to be furnished include:
 - i. Certified copies of pay slips; letter of employment, certificate of dependency, DOSH/WIBA 6 (in case of fatalities) and copies of:-
 - ii. Death certificate
 - iii. Deceased burial permit
 - iv. Deceased identification card
 - v. Police abstract
 - vi. Motor vehicle search
 - vii. Company search
 - viii. Chief's letter (with a list of surviving dependents)
 - ix. Post-mortem report
11. The respondent states that the applicant submitted the above documents except current pay slips/certified copies of pay slips; copy of letter of employment and certificate of dependency Dosh/Wiba.
12. The respondent states that absence of the said documents could not allow computation/assessment of the amount of compensation; identification of dependents to whom the compensation amount was



to be apportioned and could not allow proper identification of the employer and/or insurance from whom the compensable amount could be demanded.

13. Respondents states that it is therefore not true that the applicant provided all relevant documents.
14. Respondent states that notification of injury must be done within 7 days in respect of non-fatal injuries and within 24 hours for fatalities. That 90 days period has been set for settlement of injury claims by the employer.
15. That the statute has also set a 60 days period for lodging of disputes by aggrieved party and 15 days for responses to be made to the filed disputes
16. That the delay in bringing the claim would have been cured by the applicant obtaining a court order authorizing extension of time limit.
17. That in the circumstances it is not true that the respondent unfairly and unreasonably neglected, ignored and/or refused to exercise his statutory mandate to assess the deceased claim.
18. That the application lack merit and it be dismissed

Submissions

19. The parties filed written submissions which the court has carefully considered together with the deposition before court
20. The court observes that it has supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function but not over a superior court.
21. That the Director of Occupational Safety and Health Services as defined under section 2 of the Act, is a quasi-judicial authority established under the [Work Injury Benefits Act](#) and this court has jurisdiction to supervise its operations.

That the Act, confers a right to

- (1) An employee who is involved in an accident resulting in the employee's disablement or death is subject to the provisions of this Act and entitled to the benefits provided for under the Act" and
 - (2) "An employer is liable to pay compensation in accordance with the provisions of the Act to an employee injured while at work."
22. According to section 22 of the Act, the primary obligation to report an occupational injury or accident to the Director is by the employer as follows:-
- (1) "Subject to the provisions of this section, an employer shall report an accident to the Director in the prescribed manner within seven days after having received notice of an accident or having learned that an employee has been injured in an accident.

23. In the present case, the employer who is named as an interested party has not responded to the application nor has the respondent indicated that he took any steps to obtain the documents he states were required from the employer to enable the officer to assess this claim.
24. It is important to note that this is a fatal accident and the responsibility on the employer was even greater to ensure not only the accident is reported but also that all relevant documents in its custody were availed to the director to enable it to assess the claim. The particulars of employment including



the contract of employment, the pay slips, particulars of the insurance coverage the employees of the respondent were all within the reach of the Director from the employer upon a written request. No such effort by the director has been demonstrated vide any written request by the Director on behalf of the applicant.

24. It is pertinent to note that the Act under section 23 obliges the director to make inquiry upon receipt of notice of accident or injury or death of an employee necessary to decide upon any claim or liability in accordance with the Act.
25. This inquiry under section 23(1) may be done concurrently with any other investigation. Furthermore, the Director is obliged under section 23(3) to request the employer or employee to furnish such further particulars regarding the accident as the Director may require.
26. The respondent has not demonstrated any such effort made by himself so as to process this claim. Instead, the director took shelter in the fact that the applicant lodged the claim at Dosh out of time on behalf of the deceased.
27. Section 24(1) empowers a dependent of an injured or deceased employee to furnish all relevant documents at the request of the employer or director.

Most importantly under section 24(2)

"An employer shall within seven days after having received a claim, medical report or other document of information concerning such claim, submit the claim report document or information to the director."

Section 26(1) of the Act provides:

- (1) "A claim for compensation in accordance with this Act shall be lodged by or on behalf of the claimant in the prescribed manner within twelve months after the date of the accident or in the case of death within twelve months after the date of death.
 - (2) If a claim for compensation is not lodged in accordance with subsection (1) the claim for compensation may not be considered under this Act, except where the accident concerned has been reported in accordance with section 21."
28. This being a fatal accident the obligation to send a verbal or written notice to the Director under section 21 fully lay with the employer, the interested party herein.
 29. The respondent has not stated whether any such notice, verbal or written was made to him by the interested party.
 30. The interested party has opted to remain num and not respond to the suit.
 31. This court is left with no choice but to make a presumption that indeed this is a claim that the Director was mandated to process in terms of section 26(2) of the Act, the claim having been lodged by a dependent of the deceased 18 months after the date of the fatal accident.
 32. Accordingly, this court finds that this is a proper case for the court to compel the Director to process the claim by the applicant in terms of section 26(2) of the Act and award compensation to the dependents of the deceased.
 33. Furthermore, the interested party is compelled to furnish all the relevant documents and information to the Director, necessary for the Director to make a conclusive assessment of the claim lodged by the applicant.



34. The court notes that under section 27 of the Act a right to benefits in accordance with the Act shall lapse only if the accident is not reported to the employer within twelve months of the date of the accident but such failure to report the accident is not a bar to compensation if it is proved that the employer had knowledge of the accident from any other source.
35. The facts of this case are res ipsa loquitur. The deceased died pursuant to an accident at the work place and from a motor vehicle KCS 927P owned by the interested party, the employer. It follows that the interested party having failed to respond to this suit is deemed to admit all the particulars set out in the application.
36. The Director is thus fully mandated to proceed with assessment of the claim and compensate the dependents of the deceased employee.
37. In the final analysis the court makes the following final orders:
 - a. An order of mandamus is issued compelling the respondent to accept, investigate, hear and determine the work injury claim placed before it by the applicant on 29/9/2021.
 - b. The interested party is compelled to provide all necessary documentation and information necessary to enable the respondent to carry out the assessment and award compensation accordingly.
 - c. The interested party is obligated to pay compensation to the dependent of the deceased in terms of the assessment and award made by the director in terms of order (a) above.
 - d. The interested party to meet the costs of the suit.

DATED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2024

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Mr. Maina for applicant

Mr. Bosire for respondent

Mr. Kemboi - Court Assistant

