



Luseno v China Communication & Construction Company Limited (Miscellaneous Application E135 of 2023) [2024] KEELRC 2326 (KLR) (25 September 2024) (Ruling)

Neutral citation: [2024] KEELRC 2326 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E135 OF 2023
NJ ABUODHA, J
SEPTEMBER 25, 2024**

BETWEEN

JOHN ANDOLE LUSENO APPLICANT

AND

CHINA COMMUNICATION & CONSTRUCTION COMPANY LIMITED RESPONDENT

RULING

1. The Applicant filed application dated 21st June, 2023 seeking for orders of this court to adopt the assessment of the Director of Occupational Safety and Health Services (hereinafter DOSH) of Kshs 1,162,270/= made on 2nd July, 2020 as the judgment of this Honourable Court, a decree do issue for the above amount being balance of unpaid compensation as assessed by DOSH and costs.
2. The application is supported by the grounds set in the application and the Affidavit of John Andole Luseno the Applicant herein who averred that he was employed by the Respondent in 2016 as a tipper driver and worked diligently until he got injured on duty while working for the Respondent on 30th March, 2019.
3. The Applicant averred that the matter was reported to police and later to DOSH where the Director by his letter dated 2nd July, 2020 assessed compensation due to him at Kshs 1,274,270/=. That on or about 9th September, 2022 the Respondent partially paid a paltry Kshs 112,468/= of the assessed amount of Kshs 1,274,270/= leaving a balance of Kshs 1,162,270/= outstanding to date.
4. The Applicant averred that the efforts to have the Respondent pay the balance have not been fruitful as the Respondent has failed, neglected and or refused to pay the same. The Applicant therefore seeks this court to issue decree for the balance of Kshs 1,162,270/= for the Respondent to pay him.



5. The Applicant averred that the Respondent has to date not preferred an appeal against the Director's assessment. That the Respondent terminated his employment thereafter and as a bread winner of his family the family has suffered tremendous distress.
6. The Respondent through its Replying Affidavit sworn on 24th January, 2024 admitted that the Applicant was their employee since 2016 and he got injured in March 2019. That DOSH assessed compensation to the Applicant at Kshs 1,274,270/=.
7. The Respondent averred that on 25th March, 2021 DOSH subjected the Applicant to work injury evaluation clinic and on 7th April, 2021 DOSH revised the compensation due to the Applicant from Kshs 1,274,270/= to Kshs. 686,145/=. That the Respondent already paid the Applicant Kshs 480,000/= for sick leave and Kshs. 112,000/= for permanent incapacity. That the outstanding balance owing to the Applicant was Kshs 83,573/= as confirmed by the letter dated 14th September,2023 by Kajiado County Occupational Safety and Health Officer.
8. The Respondent further averred that it has always been willing and ready to pay the Applicant the outstanding amount but the Applicant has persisted in demanding payment of Kshs 1,162,270/= That it is willing and able to pay the Applicant the outstanding sum of Kshs 83,573/=
9. The Respondent averred that the Application seeking payment of Kshs 1,162,270 is a waste of judicial time and gross abuse of court process. That the Applicant's application should be dismissed with costs and the court order the Applicant to accept the Kshs 83,573/=
10. The Applicant filed a further affidavit sworn on 21st March,2024 and averred that the Respondent in collusion with the DOSH have made numerous attempts to deny him his rights and dues following the workplace injury. That by a report dated 25th March,2021 the DOSH in collusion with the Respondent made attempts to reduce the award to Kshs 686,145/= after claiming permanent disability had reduced to 5%. That the injuries referred therein do not belong to him as they referred to right lower limbs and knee yet he sustained injuries on left leg.
11. The Applicant averred that the pay slips alleged by the Respondent were made in the year 2019 and 2020 way before the assessment and have no reference to the demand by the DOSH. That they were normal monthly payments as per labour laws and were not payments made pursuant to injury assessment and demand by DOSH.
12. The Applicant averred that the Respondent insistence on the assessment dated 25th March,2021 was mischievous and in bad faith as the Director by his letter dated 27th October,2022 recalled the said assessment terming it erroneous. That the Respondent being aided by Kajiado County Directorate to insist on the said assessment was another evidence of Respondent's misuse of its might to marshal and overrun government labour offices all in a bid to subdue the rights of poor workers like him and therefore requested the court to come to his aid.
13. The Applicant further averred that the Respondent was using all tactics and the purported assessment of 25th March,2021 together with demand of 7th April,2021 to evade payment of his award. That the initial assessment of 2nd July,2020 remained uncontroverted as no appeal on the said award has been preferred by the Respondent.
14. The Application was dispensed of by written submissions.



Determination

15. It is not in dispute that the Applicant was employed by the Respondent and that he got injured while at work working as a tipper driver and he suffered serious injuries on his left leg. The Director of DOSH assessed his compensation payable at Kshs1,274,270 /= after the Applicant's permanent incapacity was assessed at 20% on 2nd July,2020.
16. The Respondent on the other hand alleged that the Claimant was sent to work injury evaluation clinic in March 2021 where the permanent incapacitation was reduced to 5%. This court notes that the revised evaluation refers to injuries not sustained by the Applicant and the letter 27th October,2022 by the DOSH disowned the said evaluation as erroneous. Since the reduction was based on an erroneous medical report then the reduction could not stand.
17. In addition, this court wonders on whose directions and or instructions was the Applicant to undergo another evaluation after the DOSH award yet the same was not challenged by the Respondent. To this court the valid DOSH award remains that of 2nd July,2020 of Kshs 1,274,270 which stands not challenged or appealed by the Respondent as per Section 51 of the WIBA which requires that an objection ought to be filed within 60 days after the assessment.
18. The court notes that from the records the Respondent only made a payment of Kshs 112,000/= on September,2022 after the said assessment. The pay slips attached by the Respondent were made before the said assessment as a normal payment of salary to the Applicant. The outstanding balance therefore owing to the Applicant is Kshs 1,162,270/= which the Applicant seeks to enforce. The court notes that this is not an appeal to the court and if the Respondent felt unsatisfied with the award there was room for objection in time and if still not satisfied to appeal to court on the same and since none was preferred at this stage the Respondent cannot challenge the award.
19. This court has power to only enforce this award as judgment of court. In the case of *Joash Shisia Cheto v Thepot Patrick Charles* [2022] eKLR the court held as follows;

The general position established by a majority of these decisions is as follows: -

- a. The law does not provide for mechanisms of enforcing the Director's award against a reluctant employer.
- b. In the face of this lacuna, the holder of the award can move the court to seek for enforcement of the award. A majority of the decisions favour the view that the ELRC can be moved for this purpose pursuant to its jurisdiction under article 162 of the *Constitution* as read with section 12 of the *ELRC Act*. Only one decision holds the view that the ELRC cannot be moved for this purpose. A few share the view that the Magistrate's court may be moved where pecuniary jurisdiction allows.
- c. The proceedings for enforcement may be in summary form by way of miscellaneous causes or in the form of ordinary causes but confined to matters of enforcement only.
- d. Unless by way of appeal under section 52 of the *WIBA*, it is not open to the court to consider the merits of the Director's award or indeed go on a fact finding mission. This jurisdiction is the preserve of the Director.



20. The Applicant has therefore rightly approached this court through a Miscellaneous Application and since the Respondent has not raised any objection or appeal.
21. The issues raised by the Respondent in their Replying Affidavit could not be substantiated since no appeal or objection was filed as per the WIBA Act. The Respondent has not set aside the award or stayed the same as was held in the above case hence the Applicant should enjoy the fruits of the assessment.
22. In conclusion the Applicant's Application dated 21st June, 2023 is found merited and the court adopts the director's award of 2nd July, 2020 as decree of the court and enters judgment for the outstanding balance of Kshs 1,162,270/=.
23. The award shall attract interest at Court rates from the date of the award until payment in full.
24. Costs are awarded to the Applicant.
25. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2024 DELIVERED VIRTUALLY THIS 25TH DAY OF SEPTEMBER, 2024

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION.

