



**Nderi v Shieli (Employment and Labour Relations Appeal E005 of 2024)  
[2024] KEELRC 2593 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2593 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E005 OF 2024**

**JW KELI, J  
OCTOBER 24, 2024**

**BETWEEN**

**DOMINIC WAMUGI NDERI ..... APPELLANT**

**AND**

**MARGARET MURENDE SHIELI ..... RESPONDENT**

*(An Appeal from the decision of the Occupational Safety and Health Officer in  
Ref: ML & SP /DOSHS/WIBA/KKM/3001/24, delivered on 5th February 2024)*

**JUDGMENT**

1. The Appellant, being dissatisfied with the decision of the Occupational Safety and Health Officer in Ref: ML & SP /DOSHS/WIBA/KKM/3001/24, delivered on 5<sup>th</sup> February 2024 as relates to the Late Bernard Kayi Makhuyi filed a Memorandum of Appeal dated 5<sup>th</sup> March 2024 and received in Court on the 25<sup>th</sup> March 2024; seeking the following orders: -
  - a. This Appeal be allowed, the judgement of Secretary to Occupational Safety and Health Services Ref. NO. WIBA/KKM/3001/24 be set aside and substituted with an orders dismissing the suit.
2. The Appeal was premised on the following grounds:-
  1. The County Occupational Safety and Health Officer erred in law and fact in making decision against the Appellant, including that the dependants of the employee were entitled to compensation yet the timeline for filing a claim for compensation had lapsed as per Section 27 of the [Work Injury Benefits Act](#) as this claim was brought close to 2 years after the death of the deceased and the same was brought as an afterthought.
  2. The appellant was never accorded an opportunity to be heard as he was only served with the decision of the County Occupational Safety and Health officer. At the time of filing an



objection the Appellant had not been served with any documents and he did not know who the Complainant was and hence was forced to respond to the scanty information that was available on FORM DOSH/WIBA 4 which basically was already a decision against him.

3. The Secretary to Occupational Safety and Health Services erred in law and fact in finding that the deceased was the Appellant's employee an allegation which is not true as the deceased had visited the Appellant's garage on the material date to seek for work when he collapsed and was rushed to the hospital where he died after sometime in the course of 21.5.2022.
  4. The County Occupational Safety and Health Officer erred in law and fact in finding that the cause of death was Asphyxia secondary to external chest due to compression by a heavy load. The secretary never gave the Appellant an opportunity to examine /interrogate the evidence if any that were available to him. The Appellant had on several occasions asked for the documents the Secretary relied on but the same were not availed to him.
  5. Further to the foregoing, it is the Appellant's position that the deceased collapsed upon arrival at the work place and was rushed to Kakamega County Referral Hospital and died later on at the hospital on the same date and the cause of death is not related to his work or working environment hence the reason why his family including his wife, brother by the name Alex Makhuyi Mukhati preferred not to conduct a post mortem and did an affidavit to that effect. Had the secretary availed the post-mortem report to be conducted as the present when the deceased collapsed and died and the same was not due to a heavy object as alleged at all.
  6. The County Occupational Safety and Health Officer erred in law and fact in finding that it was the Appellant's duty to avail the documents especially the statements at the police file and the post-mortem report shifting the burden of proof to the Defendant who was to defend himself (sic) against the claim. To date, the Appellant has not been supplied with statements from the police file.
  7. The county occupational safety and health officer erred in law and fact in failing to serve the Appellant with the certificate of dependants and despite being asked to supply the same and upon service, after the Appellant wrote to him through the firm of Fwaya, Masakhwe Were & Advocates after making his decision noted that the secretary included adults as dependants without any proof of their dependency. In fact, the only minor in the said certificate is a minor aged 12 by the name Hendrika Musavi.
  8. The County Occupational Safety and Health Officer erred in law and law in awarding the dependents of the deceased Kshs. 1,152,000/-as compensation for compensation for fatal accident at the work place which amount was not calculated in accordance with the scale provided by the Act.
3. The Appeal was canvassed by way of written submissions. The Appellant's written submissions drawn by Fwaya Masakhwe Were & Advocates were dated 25<sup>th</sup> July 2024. The Respondent's written submissions drawn by Abok Odhiambo & Company Advocates were dated 27<sup>th</sup> May 2024.

### **Background To The Appeal**

9. By a letter dated 29<sup>th</sup> December 2023(pg. 26 of the Record), the Appellant was notified of his obligation to have reported the fatal accident that had occurred at his garage where one Bernard Kayi Makhuyi suffered fatal injuries occasioned by compression by a heavy load. Through the said letter the appellant was directed to comply and fill the relevant form attached thereon.



10. The Appellant filed form ML/DOSH FORM1 DATED 5/1/2024 (PG. 11-15 of Record of Appeal) notifying of the said accident which occurred at Maraba, and stated what the deceased, Bernard Kayi Makhuyi, was doing at the time of the accident, being repairing a vehicle and that the deceased had worked for two years for the appellant earning Kshs. 12,000 per month.
11. Thereafter, the Kakamega County Occupational Safety and Health Officer filed DOSH/WIBA /3 Form dated 10<sup>th</sup> January 2024(Pg. 27 of the Record) addressed to the Appellant notifying him of the death of Bernard Kayi Makhuyi caused by asphyxia secondary to external chest due compression by Heavy Load as per the death certificate(pg. 21 of record) and Post Mortem form (pg. 22-25 of record) and concurrently issued a compensation assessment award through the demand for payment of work injury benefits dated 10th January 2024(Pg. 28 of Record) for a sum Kshs. 1,152,000.00 against the appellant.
12. The Appellant filed an objection through DOSH/WIBA/12 dated 26<sup>th</sup> January 2024(pg. 6-9 of record).
13. The Director issued its decision on the objection, the subject of this appeal on 5<sup>th</sup> February 2024(Pg 4-5 of Record) as follows:-
  - a. That pursuant to letter Ref: ML/DOHS/4/AFA/10/34 dated 29<sup>th</sup> December 2023 from C.O.S.H.O-Kakamega County, you filled the accident Notification Form (ML/DOSH FORM1) ON 5/1/2023 affirming your designation as employer and submitted it to the office on 05/01/2024 settling the issue on whose employee the deceased was under Section 5 of Work Injury Benefits Ct, 2007.
  - b. That the duty to notify the Director of Work Injury Benefits is OBLIGATORY to the employer in compliance with Section 22 of Work Injury Benefits Act, 2007.
  - c. That the claim did not lapse and you can't seek refuge in section 27 of Work Injury Benefits Act,2007 while you know you did not comply with section 22 of Work Injury Benefits Act, 2007 within the timeline accorded to you to do so.
  - d. That the bona vide dependants have been identified as required by section 6 of the Work Injury Benefits Act, 2007.
  - e. That what you have sought in the appeal lacks merit in law and the questions you sought as relief have all been answered.
  - f. That, therefore, the DECISION communicated by letter.Ref No. WIBA/KKM/3001/24 dated 10<sup>th</sup> January 2024 in which BERNARD KAYI MAKHUYI was awarded compensation sum of Kenya Shillings One million one Hundred and Fifty -two Thousand(Kshs.1,152,000/.00) is UPHELD. This should be paid to the dependants on or before 09/01/2024 and be witnessed by County Occupational Safety and Health Officer-Kakamega County.”

## DETERMINATION

### Issues for determination

14. The Appellant in his written submissions globally submitted that the County Occupational Safety and Health Officer erred in entertaining the claim for compensation which was brought out of time, that the compensation was calculated outside the scale provided under the Act, and in finding the Appellant liable to pay the dependents of the deceased yet the deceased was not his employee.



15. The Respondent in his submissions identified the following issues for determination in the appeal:-
  - a. Whether the deceased was an employee of the appellant.
  - b. Whether the appeal is merited in its entirety.
16. The court perused the record of appeal and the written submissions of the parties and found that the issues placed by the parties for determination in the appeal were as follows:-
  - i. Whether the deceased was an employee of the appellant injured at the workplace.
  - ii. Whether the claim before the Director was time-barred.
  - iii. Whether the objection by the Appellant on the award was merited.
  - iv. Whether the process by the Director was fair and lawful.
  - v. Whether the award was proper.
  - vi. Whether the appeal is merited in its entirety.

**Whether the deceased was an employee of the appellant injured at the workplace.**

17. The ground of appeal against the decision of the Director of Occupational Safety and Health under the issue was that the Secretary to Occupational Safety and Health Services Kakamega County erred in law and fact in finding that the deceased was the Appellant's employee, an allegation which they said was not true as the deceased had visited the Appellant's garage on the material date to seek for work when he collapsed and was rushed to the hospital where he died after sometime in the course of 21.5.2022.
18. By a letter dated 29<sup>th</sup> December 2023 (pg. 26 of the Record), the Appellant was notified of his obligation to have reported the fatal accident that had occurred at his garage where one Bernard Kayi Makhuyi suffered fatal injuries occasioned by compression by a heavy load. Through the said letter the appellant was directed to comply and fill the relevant form attached thereon.
19. The Appellant filled form ML/DOSH FORM1 DATED 5/1/2024 (PG. 11-15 of Record of Appeal) notifying of the said accident which occurred at Maraba, and stated what the deceased, Bernard Kayi Makhuyi, was doing at the time of the accident being repairing a motor vehicle and that the deceased had worked for two years as a Mechanic for the appellant earning Kshs. 12,000 per month. The submissions that the appellant had not been explained of what he was signing is baseless as it is trite that submissions are not pleadings and the advocate drawing the submissions was not a witness. The submissions on facts only amount to marketing gimmicks to sell the story of the appellant.
20. The court returns that, the Appellant by fact of information disclosed in form ML/DOSH FORM1 DATED 5/1/2024 (PG. 11-12 of Record of Appeal) admitted to be the employer and the happening of the accident while the deceased employee was working as a mechanic earning Kshs. 12,000 per month.
21. The ground of appeal is held to be unfounded.

**Whether the claim before the Director was time-barred.**

22. The appellant challenged the award on the following ground:- The County Occupational Safety and Health Officer erred in law and fact in making decision against the Appellant, including that the dependants of the employee were entitled to compensation yet the timeline for filing a claim for compensation had lapsed as per Section 27 of the *Work Injury Benefits Act* as this claim was brought close to 2 years after the death of the deceased and the same was brought as an afterthought.



23. Section 27 of the *Work Injury Benefits Act* reads:- ‘27. Lapse of right to benefits
- (1) A right to benefits in accordance with this Act shall lapse if the accident is not reported to the employer within twelve months after the date of such accident.
  - (2) Notwithstanding the provisions of subsection (1), the failure to report an accident to an employer as required in subsection (1) is not a bar to compensation if it is proved that the employer had knowledge of the accident from any other source.
  - (3) Subject to section 26, failure to report an accident to an employer as required in subsection (1), or any error or inaccuracy in such a notice, is not a bar to compensation if—
    - (a) the employer is not or would not be seriously prejudiced by such failure, error or inaccuracy if notice is then given or the error or inaccuracy is corrected; or
    - (b) if such failure, error or inaccuracy was unforeseeable or was caused by the employee’s absence from Kenya.”
24. The court returns that section 27 of WIBA (supra) relates to the reporting of the accident to the employer by the employee. Subsection 2 is relevant to the instant appeal as it states:-
- “(2) Notwithstanding the provisions of subsection (1), the failure to report an accident to an employer as required in subsection (1) is not a bar to compensation if it is proved that the employer had knowledge of the accident from any other source.”
25. When the appellant filed objection to the award, the response of the Director in part was as follows:-
- “That pursuant to letter Ref: ML/DOHS/4/AFA/10/34 dated 29<sup>th</sup> December 2023 from C.O.S.H.O-Kakamega County, you filled the accident Notification Form (ML/DOSH FORM1) ON 5/1/2023 affirming your designation as employer and submitted it to the office on 05/01/2024 settling the issue on whose employee the deceased was under Section 5 of Work Injury Benefits Ct, 2007. The court returns that the appellant having completed the accident notification form with respect to the deceased employee cannot seek refuge under section 27 of WIBA as the same only applies where the employer had no knowledge of the accident or the accident was not reported to the employer within 12 months of the same happening.”
26. It follows that the appellant knew about the fatal accident that occurred at his workplace at all material times hence section 27 of WIBA could not apply to defeat the claim. The ground of appeal fails.

**Whether the objection by the Appellant on the award was merited.**

27. The appeal raised other issues against the award outside the two addressed above (issue 1 and 2) being:-
- (a) The county occupational safety and health officer erred in law and fact in failing to serve the Appellant with the certificate of dependants and despite being asked to supply the same and upon service, after the Appellant wrote to him through the firm of Fwaya, Masakhwe Were & Advocates after making his decision noted that the secretary included adults as dependants without any proof of their dependency. In fact, the only minor in the said certificate is a minor aged 12 by the name Hendrika Musavi.
  - (b) The County Occupational Safety and Health Officer erred in law and law in awarding the dependents of the deceased Kshs. 1,152,000/-as compensation for compensation for fatal accident at the work place which amount was not calculated in accordance with the scale provided by the Act.



The appellant contended that a post-mortem was done contrary to the agreement with the family not to do it and relied on the affidavit of Alex Makhuyi Muhati the brother to the deceased (at page 31 of the Record of appeal was the affidavit of Alex Makhuyi Muhati). The Respondent submits that the Appellant did not attach documents in support of his objection.

28. It was not in dispute the appellant filled the accident Notification Form (ML/DOSH FORM1) on 5/1/2023 affirming your designation as employer and submitted it to the office of the Director settling the issue on whose employee the deceased was under Section 5 of Work Injury Benefits Ct, 2007(Page 11 of the record).
29. The appellant took issue with the certificate of dependants which included persons over 18 years. On this issue, also subject of the objection, the Director stated in response:- “That the bona vide dependants have been identified as required by section 6 of the Work Injury Benefits Act, 2007”(page 5 of the Record).
30. In the certificate of dependency dated 30<sup>th</sup> January 2024 and signed by Ngalia Ndaya, Kakamega Central, District Commissioner, the following were listed as the dependants of the late Bernard Kayi Mukhuyi (deceased employee) with each 100% dependency.
  - a. Margaret Murende Shieli, widow.
  - b. Lauryan Makhaya Makhuyi, 26 years old, daughter.
  - c. Dalmas Kayi Makhuyi, 23 years old, son.
  - d. Cornelius Shieli, 20 years, son.
  - e. Hendrica Musavi, 12 years, daughter.
31. The appellant contended that the Secretary (WIBA) included adults as dependants without any proof of their dependency. That in fact, the only minor in the said certificate was aged 12 by the name Hendrika Musavi.
32. Under Section 6 of WIBA a dependant is defined as follows:-
  - “6. Meaning of dependant
    - (1) In this Act “dependant” means—
      - (a) the widow or widower of an employee;
      - (b) a child of the employee who has not attained the age of eighteen years including a posthumous child, a stepchild and an adopted child, adopted prior to the accident, but excluding a child who is married or who is self-supporting;
      - (c) a parent, step-parent or an adoptive parent who adopted such employee if he adopted prior to the accident or death;
      - (d) a child of the employee not contemplated by paragraph (b);
      - (e) a brother, sister, half-brother, half-sister or parent, grandparent, or grandchild of an employee; and
      - (f) any other person who at the time of the accident was wholly dependent upon the employee for the necessities of life.



- (2) In the case of an employee who leaves two or more widows, such widows shall be entitled to share such compensation as would be payable to a single widow of the deceased employee.”
33. Pursuant to section 6 of WIBA (supra) the widow of the deceased and the child of 12 years were automatically dependants at 100% and no proof of dependency was required. The other 3 were adults of 20,23 and 26 years and under section 6 of the WIBA there was need of proof of their dependency on the deceased for the necessities of life. This question was not answered by the Director with precision save to rely on the certificate.(response to the objection at page 5). The court finds that the certificate was issued by an officer of the government being the area District Commissioner. It is a common law principle that acts of public officers are presumed to be regular and valid unless sufficiently shown to be otherwise. No evidence was laid before the court by the appellant to sufficiently prove that the three adult children were not dependants of the deceased employee as certified by the District Commissioner. The court, for the foregoing reasons finds no basis to doubt the correctness of the certificate of dependency issued by a government official in the course of official duty. The said certificate of dependency is upheld.
34. On the validity of the award, the appellant contended that, “The County Occupational Safety and Health Officer erred in law and law in awarding the dependents of the deceased Kshs. 1,152,000/- as compensation for compensation for fatal accident at the work place which amount was not calculated in accordance with the scale provided by the Act. ”
35. What was the applicable scale?- The award under DOSH /WIBA 4 stated the assessment was done in accordance with the provisions of section 34 WIBA to wit:- ‘ “34. Amount of compensation in case of death
- (1) If an employee dies as a result of an injury caused by an accident, compensation shall be paid to the dependants of the employee in accordance with the provisions of the Third Schedule, subject to the maximum and minimum amount determined by the Minister after consultation with the Council.
  - (2) No amount may be deducted from the compensation awarded under this section to a dependant in respect of any compensation awarded to the employee in respect of the same or any other accident.
  - (3) For the purposes of this section, a dependant is deemed to have been wholly financially dependent upon the employee at the time of the accident, unless the contrary is proved.
  - (4) In addition to the compensation payable under this section, the employer is liable to pay reasonable expenses for the funeral of the deceased employee subject to the maximum amount determined by the Minister, after consultation with the Council.”
35. Section 37 provides the earnings to apply in the calculation of the compensation to wit:-
- ‘ 37. Manner of calculating earnings
- (1) In order to determine compensation, the earnings of an employee are deemed to be the monthly rate at which the employee was being remunerated by the employer at the time of the accident, including—...”
36. In the accident form (ML/DOSH FORM 1 ) the Appellant stated the salary of the deceased worker as Kshs. 12,000 total earnings per month (Page 11 of the appeal record.)The First Schedule of WIBA provides for degree of disablement. In the event of death as result of accident, like in the instant case,



the percentage for calculating compensation is 100%. The Director through the Kakamega County Occupational Safety and Health Officer, C. Mutoro, applied the salary of Kshs. 12,000p.m declared by the appellant in the accident reporting form (at page 11 of the record) and assessed the compensation at 100% rate of disablement (death) as follows:- Kshs. 12,000 x 96 months total earnings x100% total award Kshs, 1152,000(page 28 of the record).

37. The appellant faults the award stating the dependency by the over 18-year-old children was not proved. I already returned that the certificate was valid and gave reasons. The Appellant also contended that the application of 96 months was not explained.
38. The Director in assessment of compensation is guided by WIBA. Section 30 of WIBA provides for permanent disablement as follows:-

“30.

- (1) Compensation for permanent disablement shall be calculated on the basis of ninety six months earnings subject to the minimum and maximum amounts determined by the Minister, after consultation with the Board, and set out in the Third Schedule.
- (2) If an employee has sustained an injury specified in the first column of the First Schedule, the employee shall for the purposes of this Act, be deemed to be permanently disabled to the degree set out in the second column of the First Schedule.” For the purposes of assessment accidental death is treated under the said section ,as read together with the first schedule, as permanent disablement of 100%. The First Schedule of WIBA is under section 30 and which item( a) is death as a result of the accident where the degree of disablement is stated as 100%.

39. Section 30 of WIBA provides for calculation of compensation on death as a result of accident at work at 100% disablement on the basis of 96 months to wit:- “30.(1) Compensation for permanent disablement shall be calculated on the basis of ninety six months earnings subject to the minimum and maximum amounts determined by the Minister, after consultation with the Board..”. The court then returns that the assessment of the compensation of the deceased employee of the appellant at declared salary of Kshs. 12,000 p.m. based on 96 months and 100% disablement was in line with the Section 30 of WIBA and the court had no basis to disturb the award.

## **CONCLUSION.**

40. In the upshot the court finds no merit in the appeal and upholds the assessment by C. Mutoro , Kakamega County Secretary to Occupational Safety and Health Officer Ref. NO. WIBA/ KKM/3001/24 of 10<sup>th</sup> January 2024 being Kshs. 1,152,000/- as compensation for death as a result of accident at work of the late BERNARD KAYI MAKHUYI to the certified dependants.
41. The appeal is dismissed with costs to the Respondent.
42. It is so Ordered.

**DATED, SIGNED, AND DELIVERED ON THE 24<sup>TH</sup> DAY OF OCTOBER 2024 IN OPEN COURT VIRTUALLY AT NAIROBI**

**JEMIMAH KELI**

**JUDGE**

In the presence of

C/A Caleb



For Appellant: Ms. Masakhwe

For Respondent: Abok

