



Shikuku v Metro-Poly Kenya Limited & another (Miscellaneous Cause E013 of 2023) [2024] KEELRC 2601 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2601 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
MISCELLANEOUS CAUSE E013 OF 2023
MA ONYANGO, J
OCTOBER 24, 2024**

BETWEEN

BENARD SHIKUKU APPLICANT

AND

METRO-POLY KENYA LIMITED 1ST RESPONDENT

**DIRECTORATE OF OCCUPATIONAL HEALTH AND SAFETY
SERVICES 2ND RESPONDENT**

JUDGMENT

1. Vide a Notice of Motion dated 30th March 2023 filed under Article 159, Article 162(2) of [the Constitution](#), section 22, 24, 25, 26 and 53 of the [Work Injury Benefits Act](#), section 12 of [Employment and Labour Relations Court Act](#), the Applicant seeks the following orders against the Respondents: -
 - a. Spent
 - b. That the Honourable court be pleased to adopt as a judgment of this court the award of the Directorate of Occupational Safety and Health Services
 - c. That judgment be entered for the Applicant against the 1st Respondent for Kenya Shillings Six hundred and forty thousand one hundred and twenty-seven shillings (Kshs. 640,127) being the sum assessed under the [Work Injury Benefits Act](#)
 - d. That this Honourable court be pleased to award interest on the amount from the date of assessment until payment in full
 - e. That this Honourable court be pleased to award any other relief this court may deem fit and just to grant
 - f. Costs of this application be provided for.



2. The grounds in support of the application are that-
 - a. That the Applicant was a bonafide employee of the 1st Respondent
 - b. That the Applicant was injured in the cause of employment on 26th July 2022
 - c. That on 14th September 2022, he was able to get assessment from the 2nd Respondent and the award of Kshs 640,127 was notified to the 1st Respondent
 - d. That the Applicant is in context with the award of the 2nd Respondent and the time span for appeal by the Respondent has lapsed.
 - e. That this was followed by a reminder which was ignored
 - f. That over 6 months later, the 1st Respondent has not made any efforts to settle the amount
 - g. That the statutory timeline for the payment has lapsed and no appeal has been preferred by the 1st Respondent
 - h. That the application is made in good faith and in the interest of justice to allow the applicant enforce the award by the 2nd Respondent as an order of the court.
3. The application is further supported by the affidavit of Benard Shikuku, the Applicant herein in which he reiterates the grounds at the foot of the application. The applicant avers that he was employed by the 1st Respondent as a machine operator on 25th September 2019; that on 26th July 2021 he was involved in an accident in the course of his employment; that he was taken for treatment and thereafter, the 2nd Respondent assessed the injury, the medical documents and all other factors required by law and prepared a report.
4. The Applicant deposes that upon consideration of all factors, the 2nd Respondent issued the statutory notices and a demand for payment dated 14th September 2022 for the sum of Kenya shillings six hundred and forty thousand one hundred and twenty-seven shillings only (Kshs. 640,127).
5. It is the Applicant's contention that in arriving at the award, the Director assessed his injury at 45% equivalent to Kshs 618,408 for permanent disablement and temporary disablement was awarded at Kshs. 21,719 totaling to Kshs 640,127
6. According to the applicant, six months have since lapsed and no appeal has been preferred against the award of the 2nd Respondent and further, the statutory timelines of 90 days for the appeal has lapsed, a clear indication that the 1st Respondent does not intend to contest the assessment.
7. The Applicant therefore urged this Court to grant the prayers he is seeking.
8. The application is opposed. The 1st Respondent filed a Replying Affidavit sworn by Karan Sagar, its Director on 4th May 2023. In that affidavit, the 1st Respondent admits that the 2nd Respondent awarded the Applicant Kenya Shillings six hundred and forty thousand, one hundred and twenty-seven shillings (Kshs 640,127) being compensation for the injuries the Applicant sustained while in the course of employment with the Respondent. However, according to the 1st Respondent, it later referred the Applicant for a 2nd medical exam which indicated that the Applicant had suffered a 7% incapacity which report was taken to the 2nd Respondent and as a result, the initial award of Kenya shillings six hundred and forty thousand, one hundred and twenty-seven shillings was revised on 19th January 2023 to Kenya shillings one hundred and twenty thousand, four hundred and twenty-one (Kshs 120,421).



9. The 1st Respondent contends that through its insurer, Mayfair Insurance Company Ltd, it paid the award of Kshs 96,196 less, Kshs 5,000 withholding tax, in respect of permanent disability as evidenced by annexure REX-5 attached to the Replying affidavit. It is averred that the 1st Respondent through its insurer, is processing the balance of the award of Kshs 24,225.
10. The 1st Respondent urged the court to dismiss the instant application in its entirety.
11. The Application was canvassed by way of written submissions. The Applicant's submissions were filed on 20th July 2023 while the 1st Respondent filed its submissions on 24th July 2023.

Determination

12. Having considered the Application, the rival affidavits of the parties as well as their submissions, the only issue that presents itself is whether the court should confirm the award of the Director as an award of this court and enter judgment accordingly.
13. From the submissions of the parties, I have noted that neither of the parties has denied that the award of Kenya shillings six hundred and forty thousand, one hundred and twenty seven initially awarded by the Director of Occupational safety and Health on 14th September 2022 was reviewed downwards pursuant to the 2nd medical report dated 12th October 2022 to Kenya shillings one hundred and twenty thousand, four hundred and twenty one. This is evidenced by the award dated 19th January 2023 annexed to the 1st Respondent's Replying affidavit.
14. What is in issue is whether the 1st Respondent has settled the amount awarded to the Applicant.
15. The 1st Respondent has maintained that it has paid the Applicant Kshs 96,196 less Kshs. 5,000 withholding tax in permanent disability. It has also submitted that it is in the process of paying the balance of Kshs 24,225 to the Applicant. In support of the position that the 1st Respondent has paid the Applicant Kshs 91,196, the 1st Respondent attached a cheque dated 24th March 2023 marked as REX-5 in its Replying Affidavit.
16. On his part, the Applicant has vehemently denied receiving any money from the 1st Respondent.
17. From a cursory look of the cheque marked REX-5, it is clear that the cheque is drawn in favour of 1st Respondent and not the Applicant herein. No evidence has been tendered before court to show that the money was forwarded to the Applicant at any point.
18. On this basis, I am inclined to believe the Applicant's version that he has never been paid the award by the 1st Respondent.
19. In the end, I make the following orders
 - i. The assessment of the Director of Occupational Safety and Health Services in its award dated January 19, 2023 is hereby adopted as a judgment of this court.
 - ii. Judgment be and is hereby entered for the Applicant against the Respondent in the sum of Kshs 120,421.
 - iii. The Respondent shall pay the Applicants costs.
 - iv. Interest from date of filing application at court rates.
20. The Respondent shall pay the Applicant's costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 24TH DAY OF OCTOBER, 2024



MAUREEN ONYANGO
JUDGE

