



**Silet v Kenya Ports Authority (Miscellaneous Application E054 of 2024)
[2024] KEELRC 2456 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2456 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E054 OF 2024**

**M MBARŪ, J
OCTOBER 11, 2024**

BETWEEN

ELIZABETH MKWAJUMWA SILET APPLICANT

AND

KENYA PORTS AUTHORITY RESPONDENT

RULING

- 1 The applicant filed an application dated 28 May 2024 seeking orders that the court be pleased to adopt the assessment and award of the Director of Occupational Safety and Health Services (Director), Mombasa dated 7 March 2023 as the court's judgment.
- 2 The applicant is also seeking a decree to issue for the sum of Ksh.2, 732,104.40 being the balance of the Director's award after the respondent paid Ksh.606, 663 and interests from the date of the award and costs.
- 3 The application is supported by the affidavit of the applicant and on the ground that she is an employee of the respondent as a mooring sailor where she sustained injury on 10 July 2022. The incident was reported to the Director who assessed and found the applicant to have suffered 30% incapacity. On 7 March 2023 the Director issued notice requiring the respondent to compensate the applicant Ksh.3, 338,767.40 within 90 days. The respondent was required to within 60 days file any objections or lodge an appeal which was not done. Instead, the respondent subjected the applicant to a second medical examination and assessment without the Director's approval and made a unilateral partial payment of Ksh.606, 663 to the applicant.
- 4 The Director wrote to the respondent on 22 April 2024 noting the illegalities and that there was no objection to the assessment or application to conduct a second medical examination. The respondent was directed to settle the full award of 7 March 2023.



- 5 Under Section 26(4) of the *Work Injury Benefits Act* (WIBA), payment of the Director's award should be done within 90 day and no secondary examination should be conducted contrary to Section 25(1) of the Act. The refusal to settle the total award is contrary to the law and the orders sought should be allowed with costs.
- 6 In reply, the respondent filed the Replying Affidavit of George Ochieng the principal insurance officer of the respondent who aver that he has all the records relating to the applicant's work injuries under his employment. The applicant reported a work injury and was admitted to Pandya Hospital and discharged after 4 days. In work injuries after slipping while alighting from the pilot boat resulting in dislodged front teeth and lip laceration. The respondent took out an Insurance cover for its employees per Section 7 of WIBA. Jubilee Allianz Insurance Company of Kenya Limited was contracted to provide the cover.
- 7 In this case, Jubilee reviewed the circumstances of the work injury and the documentation under DOSH forms where Dr. C.B. Patel a dental surgeon and awarded 30% being permanent incapacity for injury sustained. The Director adopted the medical report without referring the applicant to a medical examination or making reference to the WIBA.
- 8 Upon a second medical examination by Dr. Jamlick Micheni Muthuri, the applicant was awarded 5% incapacity noting the discharge summary from Pandya Hospital which notes the applicant had suffered soft tissue injuries. There was no permanent disability. The assessment award was Ksh.606, 663 which was paid to the applicant in compensation.
- 9 Section 28 of WIBA provides that an employee who suffers temporary disablement due to an accident and is incapacitated for 3 days is entitled to receive a periodical payment equivalent to the employee's earnings based on a minimum fixed by the Minister. Having been paid Ksh.606, 663, the orders sought are not justified and the alleged 30% permanent incapacity is not supported by evidence.

Both parties filed written submissions.

Determination

- 10 On the application and affidavits and the written submissions, all these analyzed, the single issue that emerges is whether the court should adopt the award by the Director dated 7 march 2023 with interests and costs.
- 11 The applicant asserts that on 7 march 2023, the Director assessed the applicant following work related injury on 10 July 2022 and established a 30% permanent incapacity and an award of Ksh.3, 338,767.40 to be paid by the respondent. However, the respondent has only partially paid Ksh.606, 663 leaving a balance of Ksh.2, 732,104.40.
- 12 The respondent on their part assert that under Section 7 of WIBA they are required to secure insurance for work-related injuries to the employees which they did and upon the applicant sustaining injury, she was admitted in hospital and the discharge summary indicate she suffered soft tissue injuries. The second doctor assessed and made an award of Ksh.606, 663 which has since been paid.
- 13 The WIBA should be read in whole and the sole purpose is set in the preamble being to provide for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes.
- 14 Under the Act, the Director is given the authority to receive all claims following work injuries and to process the assessments and awards. Where the award allocated by the Director is challenged, an employer is allowed to lodge objections or file an appeal.



- 15 Any assessments for work injury outside the office of the Director is contrary to the WIBA. To proceed and allow any doctor to undertake a medical examination and made an award, that is invalid.
- 16 The court acknowledges that under Section 7 of WIBA upon which the respondent relied upon to base the second medical examination, it allows an employer to secure its employees under an insurance cover.
- 17 The provisions of Section 7 of WIBA should not be applied to negate the role of the Director under Sections 10 and 16 of the Act. Section 16 requires that;
16. Substitution of compensation for other legal remedies
- No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.
- 18 The rationale is that, under WIBA the Director is the one to receive all reports with regard to work injury under the provisions of Section 21 of the Act. The respondent acknowledges in the Replying Affidavit of George Ochieng dated 3 July 2024 that a report of the applicant's work injury was made to the Director. To complete the circuit of such a report, the respondent should have addressed the assessment by the Director.
- 19 To operate outside the office of the Director and make their own assessment and payment, such is invalid under the provisions of Section 16 of WIBA.
- 20 Where the respondent established disparities between the Director's award and the second medical examination, the recourse was to file objections with the Director or file an appeal. This is as contemplated under Section 23 of WIBA,
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.
- (2) An inquiry made under subsection (1) may be conducted concurrently with any other investigation.
- (3) An employer or employee shall, at the request of the Director, furnish such further particulars regarding the accident as the Director may require.
- (4) A person who fails to comply with the provisions of subsection (3) commits an offence.
- 21 Cooperation between the parties, through the office of the Director, would expedite assessment, award and payment to the employee.
- 22 In this case, the court finds the payment by the respondent in the sum of Ksh.606.663 on 14 August 2023 is premature.
- 23 It is acknowledged this is made under the provisions of Section 7 of WIBA and under the mistaken belief that this settled the matter. As noted above, the payments under WIBA should be assessed and an award issued by the Director.



- 24 Parties are to revert to the Director and submit all records necessary for the officer to make a full inquiry per Sections 23, 25 and 28 of WIBA and on this basis allocate an award within the next 30 days.
- 25 Parties are to therefore submit records in the next 7 days from the date hereon and attend before the director as required.
- 26 Where there is no cooperation by the respondent, the award of the applicant is to suffice. Where there is no cooperation from the applicant, the payment by the respondent to apply.
- 27 On the above analysis, the application dated 28 May 2024 is addressed as follows;
- a. The Director to inquire within 30 days;
 - b. The parties to submit their records within 7 days from the date hereof;
 - c. Where the respondent fails to cooperate, the award of 7 March 2023 to apply;
 - d. Where the applicant fails to comply, the payment of Ksh.606, 663 to suffice.
 - e. For these proceedings, no orders on costs.

Orders accordingly.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 11 DAY OF OCTOBER 2024.

M. MBARŪ

JUDGE

