



**Muriithi v Maf Carrefour Retail Limited Kenya (Cause E532 of 2022)
[2024] KEELRC 2855 (KLR) (18 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2855 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E532 OF 2022
JW KELI, J
NOVEMBER 18, 2024**

BETWEEN

NELLY GAKII MURIITHI CLAIMANT

AND

MAF CARREFOUR RETAIL LIMITED KENYA RESPONDENT

RULING

1. The Claimant upon resignation from the employment of the Respondent filed the instant suit dated 20th July 2022 as amended on 19th March 2024 and filed on 3rd April 2024 seeking the following orders:-
 - a. A declaration that the respondent's action in failing to assign lighter duties to the claimant following the injuries suffered and fully facilitating her treatment made it intolerable for her to continue working, thus constructive dismissal.
 - b. A declaration that failure to report to the Director WIBA of the claimant's injury within the prescribed period was unlawful.
 - c. A declaration that the respondent's failure to maintain an insurance policy for the claimant with respect to section 7 of the WIBA Act was unlawful.
 - d. Payment of used costs by our clients that remains unfunded at Kshs. 5000.
 - e. Compensation for the work injury and treatment at Kshs. 500,000/- for failure to take an insurance policy for our client and failing to notify the Director WIBA of the Injuries within 7 days after the injury occurred.
 - f. Compensation for damages at 12 months' salary for the unlawful and flawed termination being Kshs. 32,280/ x 12 months at Kshs. 387,360/-.
 - g. Costs of this suit.



- h. Interest on (d)(e)(f) and (g).
- i. Any other relief or further order as may be just, expedient, and necessary in the circumstances of this suit.

The Notice Of Preliminary Objection

2. Following the amendment of the statement of claim the respondent filed an amended statement of response dated 16th April 2024 together with a notice of preliminary objection of even date. The preliminary objection raised the following points: -
 - i. This Honorable Court lacks the jurisdiction to entertain and /or determine at the first instance any claims related to work injuries under section 16 of the *Work Injury Benefits Act*, No. 13 of 2007, the Judgment of the Supreme Court in Petition 4 of 2019 Law Society of Kenya v Attorney General and another (2019)e KLR and paragraph 8 of the Practice Directions dated 24th April 2023 issued by Chief Justice in the Gazette Notice on work related injury claims.
 - ii. Under the Work Injury Benefit Act, all work injury-related claims fall within the jurisdiction of the Director of Occupational Safety and Health Services.
 - iii. The part of this suit that is founded on an alleged work injury claim should be dismissed with costs.
3. The Court directed the Notice of Preliminary Objection to be canvassed through written submissions. The parties complied. The Respondent's written submissions drawn by Hamilton Harrison & Mathews were dated 24th May 2024 and received in Court on the 27th May 2024. The Claimant's written submissions drawn by Kinyua Mbaabu & Company advocates were dated 8th June 2024 and received in Court on 7th October 2024.

Decision

4. The cause of action as disclosed in the amended statement of claim was excruciating pain on the claimant's back related to an incident/injury that was alleged to have happened on 3rd December 2020 while she was arranging soda for delivery.
5. The Respondent objected to the jurisdiction of the Court to deal with the claim which it states is related to work injury claims. The Respondent contended that the Honorable Court lacks the jurisdiction to entertain and /or determine at the first instance any claims related to work injuries according to section 16 of the *Work Injury Benefits Act*, No. 13 of 2007, the judgment of the Supreme Court in Petition 4 of 2019 Law Society of Kenya v Attorney General and another (2019)e KLR and paragraph 8 of the Practice Directions dated 24th April 2023 issued by Chief Justice in the Gazette Notice on work related injury claims.
6. Relying on WIBA Act, the judgment of the Supreme Court in Petition 4 of 2019 Law Society of Kenya v Attorney General and another (2019) e KLR, and paragraph 8 of the Practice Directions dated 24th April 2023 issued by Chief Justice in the Gazette Notice on work related injury claims, the respondent submitted that the Court had no jurisdiction on work related injuries.
7. The respondent further relied on the decision in Paul Mutuku Mulwa V Board Of Management Mbooni Boys High School (2020)e KLR where the Court declined jurisdiction in a claim founded on work-related injuries.



8. The respondent submitted the Court had no power to award reliefs under b,c, and e of the amended Memorandum of Claim and asked the Court to strike out the portion of claims touching on work injury.
9. The claimant submitted that the Preliminary Objection was not proper as parties did not agree on facts relying on the landmark decision of the Court of Appeal in Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited (1969) EA 696 which held:- ‘A Preliminary Objection is like what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.’
10. The claimant further relied on the decision of the Court of Appeal in Honourable Attorney General & Another v Andrew Maina Githinji and one other(2015)e KLR where the Court of Appeal stated that for a preliminary objection to succeed it has to meet the threshold in Mukisa Case being:-The preliminary objection raises a pure point of lawThat there is a demonstration that all facts pleaded by the other side are correct.There are no facts that need to be ascertained.
11. The claimant contended that the responses the respondent did not agree to the facts as outlined the amended statement of claim. That the respondent denied the claim for compensation for work injury which necessitates the court to hear both parties to ascertain the facts of the matter.
12. The claimant submits that in Paul Mutuku Mulwa V Board Of Management Mbooni Boys High School (2020)E KLR Justice Onesmus Makau, while downing tool referred the matter to the relevant forum and the Court if inclined to down its tools, an Order referring the WIBA claim to the Director should be made however they reiterate the objection had not met the threshold under Mukisa decision and should be dismissed with costs.
13. Upon evaluation of pleadings by the parties the court returns that it is not in dispute that the cause of action was directly linked to a work injury-related claim. The Court holds that the points of law raised in the Notice of Preliminary Objection by the Respondent questioning the jurisdiction of the Court under WIBA met the threshold for a valid Preliminary Objection in Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited (1969) EA 696 as espoused by the Claimant (supra).
14. Under section 2 of WIBA, “injury” means a personal injury and includes the contracting of a scheduled disease;”. The claimant among others seeks the following remedies:- “Compensation of the work injury and treatment at Kshs. 500,000/- for failure to take an insurance policy for our client and failing to notify the Director WIBA of the Injuries within 7 days after the injury occurred.” Section 16 of WIBA removes from the original Jurisdiction of this court all other remedies for work injury and disease claim to wit:- “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 rise save under the provisions of this Act in respect of such disablement or death.”
15. The Supreme Court in Petition 4 of 2019 Law Society of Kenya v Attorney General and another (2019)e KLR held section 16 of WIBA to be constitutional and upheld the role of the Director in assessing damages for work related injuries claims like the instances follows:- “The intention of section 16 of WIBA was not to limit access to courts but to create a statutory mechanism where any claim by an employee under the Act was subjected, initially, to a process of dispute resolution starting with an investigation and award by Director of Occupational Safety and Health Services (the Director).



Thereafter, under section 52 of WIBA, an appeal mechanism to the Industrial Court (defunct) was provided. Where *the Constitution* or any other law established an organ, with a clear mandate for the resolution of a given genre of disputes, no other body could lawfully usurp such power, nor could it append such organ from the pedestal of execution of its mandate. To hold otherwise, would be to render the constitutional provision inoperable, a territory into which no judicial tribunal, however daring, would dare to fly.

Section 16 of WIBA could not be read in isolation so as to create the impression that it curtailed the right to immediately access the courts, because by looking at its intention, the purpose it fulfilled was apparent. That purpose was revealed in section 23 of WIBA which called for initial resolution of disputes via the Director and that could be deemed as an alternative dispute resolution mechanism. Where one was aggrieved by the decision of the Director, section 52 of WIBA allowed him or her to seek redress in a Court process. In the circumstances, access to justice could not be said to have been denied.” The Court can thus not usurp the role of the Director under WIBA to award compensation for the alleged work-related injuries.

16. In *Jecinta Waithiegeni Wambugu v Everest Enterprises Limited (Cause 55 of 2017)* [2020] KEELRC 1872 (KLR) the claimant in the said case in addition to claim for unfair dismissal sought for compensation for work injuries. Justice Nzioki wa Makau observed:- “It is the intention of Parliament that the Director Occupational Safety and Health investigates the occurrence of an alleged injury at the workplace and prepare an assessment of the injury and upon an employer not compensating the employee as directed by the company as directed the matter is referred to this Court after an appeal to the Director if the appeal does not elicit a change in determination. The Claimant had a claim quite distinct from the claim under WIBA and that is the claim I will address. After injury the LD 104 Form is to filled and the employer is bound to bring matter to attention of the Director of *Occupational Safety and Health Act*. A licenced medical practitioner assesses the injury and this forms the basis of any award that could be made or any demand for payment from the insurer of the employer or from the reserve of funds held by the company for such purpose. If there is a requirement for additional medical examination the employer may seek that and if there is a dispute the panel of doctors from the Director of Occupational Safety and Health makes a determination on the extent of the injury and this determination is pretty conclusive. I have taken the effort to indicate this in this Judgment as there is confusion which needs to be cleared, confusion that has permitted courts, advocates, employees and employers to completely misapprehend the law relating to *Work Injury Benefits Act*. That is what the Claimant was required to do in respect to her injury.” The Court in the said case upheld the role of the Director on work injury related claims.
17. In employment claims concurrently seeking compensation for work injuries Justice O. Makau in *Paul Mutuku Mulwa v Board of Management Mbooni Boys High School (Cause 842 of 2015)* [2020] KEELRC 752 (KLR) (Employment and Labour) (9 July 2020) (Judgment) held “9. Therefore, I agree with Rika J in *Saidi Muhamed v Diamond Industries Limited* [2018] e-KLR where he held that this Court enjoys only appellate jurisdiction over WIBA compensation claims and not primary jurisdiction. Consequently, I must at this juncture down my tools over the claim founded on WIBA for want jurisdiction and refer it to the relevant forum under WIBA.” The Court proceeded to consider the claim for unfair termination. I uphold the decision to apply in the instant case.
18. The Court taking into account the facts disclosed in the pleadings of the parties, the analysis of the WIBA jurisdiction and the case law holds the Notice of Preliminary Objection dated 16th April 2024 as merited and downs its tools over the claims founded on WIBA for want of jurisdiction. The claimant’s claims founded on work injury herein and as relates to prayers b, c and e of the amended Memorandum



of Claim are referred to the Director of Occupational Safety and Health for consideration under the provisions of the WIBA. The Court retains only the claims for constructive dismissal seeking compensation for unlawful and flawed termination.

19. Mention on 10th December 2024 for pretrial directions on the outstanding claims.
20. Costs in the cause.
21. It is so Ordered.

DATED, DELIVERED, AND SIGNED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF NOVEMBER, 2024.

JEMIMAH KELI

JUDGE

In The Presence Of:

C/A- Caleb

Claimant – Akinyi h/b Mbaabu

Respondent- absent – Notice to issue

