



**Signon Group v Onyonka (Appeal E12 of 2020)
[2023] KEELRC 230 (KLR) (27 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 230 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E12 OF 2020
SC RUTTO, J
JANUARY 27, 2023**

BETWEEN

SIGINON GROUP APPELLANT

AND

LINUS ONYONKA RESPONDENT

(An appeal from the decision of the Director of Occupational Safety and Health Services under Section 52(1) of the Work Injury Benefits Act, delivered on January 20, 2020)

JUDGMENT

1. The appeal arises from the decision of the director of occupational safety and health services (hereinafter the director) delivered on January 20, 2020 in which he awarded the respondent the sum of kshs 712,236.00. This award was equivalent to an assessment of permanent disability at 20%.
2. The genesis of the instant dispute is that the respondent was involved in a work related injury on March 11, 2015. That at the material time, he was on duty driving the appellant's truck registration number KBQ 689K from Kitale. That he had made a stop over at Burnt Forest and as he was opening the driver's door to resume his journey, a motor cyclist who had lost control, knocked him onto the driver's door and vanished. That as a result, he sustained bodily injuries.
3. The appellant's discharge summary from Mediheal Hospital and Fertility Clinic dated August 11, 2018, indicates that the respondent sustained a pelvic fracture and was admitted in the hospital from March 12, 2015 to March 16, 2015. The attending doctor (Dr Nyabera) further assessed the respondent's permanent incapacity at 25%.
4. Thereafter, the appellant reported the matter to the director who upon enquiry, entered compensation in form DOSH WIBA 4 in favour of the respondent at a sum of kshs 852,348.00. The respondent's permanent incapacity was assessed at 25%.



5. Subsequently, the appellant referred the respondent for further medical examination by Dr Wambugu, who in his report dated May 17, 2018, found that he had sustained skeletal and soft tissue injuries from which he had made adequate recovery and proceeded to assess his permanent disability at 2%.
6. Following this medical evaluation, the respondent was paid kshs 330,597.00 by the appellant's insurer, Heritage Insurance Co Limited.
7. Prior to this, the respondent had been examined by Dr Udayan R Sheth and in his report dated April 11, 2017, opined that he had fully recovered and there is no deformity and no permanent incapacity.
8. On November 18, 2019, the Work Injury Evaluation Clinic (WIEC) assessed the respondent's disability at 20%. This translated to compensation equivalent to kshs 712,236.00. The appellant was dissatisfied with this assessment and consequently, it lodged an objection contending that the same was 18% higher than the assessment done by Dr Wambugu. The appellant stated that the huge disparity had not been explained and called for a review.
9. The director considered the appellant's objection and pursuant to section 52(1) of the *Act*, upheld his earlier decision. Therefore, the assessment at 20% permanent disability was sustained and consequently, the compensation of kshs 712,236.00.

The appeal

10. The appellant was aggrieved by the decision of the director as communicated through his letter dated January 20, 2020, hence filed a Memorandum of Appeal raising the following three grounds:
 - i. The director's re-assessment of the claimant(sic) failed to appreciate the previous assessment done by Dr P M Wambugu on May 17, 2018 as well as the provisions of section 25(1) and 33(1) *WIBA*.
 - ii. The director's award failed to explain the huge disparity in assessment of 18%.
 - iii. The director failed to consider the compensation awarded to the claimant (sic) in accordance with the Act.
11. The appellant prays for orders that:
 - i. The appeal is allowed.
 - ii. The assessment by the director county occupational safety and health office done on November 18, 2019 be reviewed in light of the huge disparity.
 - iii. Costs of this appeal be provided for.
12. The appeal was canvassed through written submissions.

Appellant's submissions

13. It was the appellant's submission that the director's assessment failed to consider the provisions of section 25(1) and 33(1) of the Act. That he failed to consider the two preceding reports which ultimately formed the basis for compensation. That further, the assessment did not consider that the respondent had made adequate recovery. The appellant further argued that it was incumbent upon the doctors to examine the respondent's current circumstances, conditions prevailing since the cause of action and his condition in reaching his decision. That the huge variance was not based on the respondent's current condition and was not satisfactorily explained.



14. The appellant further submitted that the respondent is not entitled to further payments having been duly compensated.

Respondent's submissions

15. On his part, the respondent submitted that he was following the directions of the appellant, who happens to be his employer. That he was in no position to decline and or refuse to be examined by either parties. That in addition, he is no position to determine what percentage ought to be awarded as permanent injury. The respondent further submitted that the whole process was carried out by experts who he believes relied on precedents. He stated that he is entitled to compensation as awarded by the Director and any attempt to compromise it would greatly prejudice him.

Analysis and determination

16. Having considered the grounds of appeal, the evidence on record as well as the parties' opposing submissions, I find the singular issue falling for determination being whether the director erred in assessing the respondent's permanent incapacity at 20%.
17. This being a first appeal, I am enjoined to re-evaluate and reconsider the evidence afresh and arrive at my own independent conclusion on whether or not to uphold the director's award.
18. The main contention by the appellant is that the director's reassessment failed to appreciate the previous assessment undertaken by Dr Wambugu and failed to explain the huge disparity in assessment of 18%.
19. From the record, the respondent was initially examined on August 11, 2015 and his injuries were assessed at 25% permanent incapacity. Later on, Dr Wambugu assessed the respondent's injuries at 2% while Dr Udayan R Sheth stated that he had no permanent incapacity.
20. The WIEC held on November 18, 2019, was undertaken by three doctors being Dr Kimanji J, Dr Kimani W and Dr Githiari J It was at this juncture that the respondent's disability was assessed at 20%. This is the assessment the director went by in awarding the respondent compensation in the sum of kshs 712, 236.00.
21. The director's decision of January 20, 2020 reads as follows:

“Re: Work injury evaluation on Linus Onyonka

The above named was assessed at the Work Injury Evaluation Clinic at safety house on November 18, 2019. This was because the percentages of permanent disability awarded by the attending doctor and later Dr P M Wambugu (on behalf of the insurance company) were different.

Linus suffered pelvic bone fractures for which metal implants were inserted (the implants were still in situ at the time of assessment).

He was examined by a panel of three doctors and the clinical findings forming the basis for the award of permanent disability are outlined in the medical report issued to him.

The doctors observed that the fractures occurred in close proximity to the hip joint which is a major weight bearing joint and that there was limitation of the full range of its movements more so as the metal implants are still in situ. The employer had so far not facilitated Linus



to have the implants removed. It was the opinion of the examining doctors that an award of 20% (twenty) percent would adequately compensate for injury."

22. The bone of contention is the disparity in the assessment undertaken at the behest of the Director with that of Dr Wambugu.
23. Upon the respondent being assessed by Dr Wambugu, it was his finding that he had sustained skeletal and soft tissue injuries from which he had made adequate recovery. Dr Wambugu further found that the fracture pelvis had united and the metal implants maybe selectively removed at an estimated all-inclusive costs of kshs 75,000.00 at Kenyatta National Hospital. It was his further finding that the respondent is minimally predisposed to early onset osteoarthritic changes right hip joint and awarded him 2% as the degree of permanent incapacitation.
24. It is instructive to note that the assessment by Dr Wambugu was prompted by the appellant's insurer, Heritage Insurance Company Limited. Therefore, it is obvious that the insurance company had an interest in the resultant compensation and it can very well be said that his assessment was not neutral.
25. Under the Act, the director is appointed to act as the neutral arbiter hence his assessment is expected to be independent and objective. This position was reaffirmed by the Supreme Court of Kenya in the case of the *Law Society of Kenya v Attorney General & another* [2019] eKLR, thus:

"We say so because, firstly, while the director can designate a medical practitioner to examine an employee, we agree with the 1st respondent's submissions that the director is a neutral adjudicating party who neither acts for the employer nor an employee in doing so. Secondly, and as a safeguard against the director's arbitrary use of this power, the employer can, with the approval of the director, refer the employee to its own medical practitioners. Last but not least, an employee, at his/her own expense is at liberty to have a medical practitioner of his/her choice present at the time of the examination. The effect of section 25 of the Act therefore, is to ensure that the medical examination and ensuing report is objective, fair, accurate and sound."

26. In this case, the respondent's assessment at the WIEC which was what informed the director's award, was undertaken by three doctors. Therefore, in my view, this carried more weight as compared to the assessment undertaken by Dr Wambugu, who as I have stated, was acting for the appellant's insurer.
27. In addition, it is worthy to note that upon discharge, Dr Nyabera who was attending to the respondent, assessed his permanent disability at 25% which is notably higher than the 20% arrived at following the WIEC.
28. In light of the foregoing, I find no reason to fault the assessment by the director.
29. The appellant has further challenged the director's award for not considering the compensation awarded to the respondent in accordance with the Act.
30. In this regard, the respondent has not disputed being paid the sum of kshs 330,597.00 being compensation for the injuries he sustained. This was following the assessment by Dr Wambugu.
31. Section 33 (1) of the Act is relevant to this issue as it provides as follows:

"(1) In awarding compensation to an employee in respect of permanent disablement or in reviewing an award of compensation, the director may take into account any compensation awarded to the employee in accordance



with this Act or any other law, to the employee as a result of the permanent disablement.”

32. It is not clear whether the director took into account the compensation erstwhile paid out to the respondent as a result of Dr Wambugu’s assessment as his report is silent on the issue.
33. Therefore, it is only just and fair that the sum of kshs 330,597.00, being the respondent’s initial compensation be reduced from the award of kshs 712,236.00 by the director.

Orders

34. The totality of my consideration is that the appeal is declined and the director’s assessment of 20% is sustained. Taking into account the respondent’s previous compensation by the appellant and pursuant to section 33(1) of the Act, the respondent’s final award shall be kshs 381,639.00.
35. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY, 2023.

.....

STELLA RUTTO

JUDGE

Appearance:

For the appellant Mr Kirui

For the respondent in person

Court assistant Abdimalik Hussein

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

