



**M'Rimberia v Meru Central Dairy Co-operative Union (Cause 43 of 2018) [2023] KEELRC 1520 (KLR) (9 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1520 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU  
CAUSE 43 OF 2018  
ON MAKAU, J  
JUNE 9, 2023**

**BETWEEN**

**TIMOTHY MWENDA M'RIMBERIA ..... CLAIMANT**

**AND**

**MERU CENTRAL DAIRY CO-OPERATIVE UNION ..... RESPONDENT**

**RULING**

1. This ruling relates to the claimant's Notice of Motion dated 20<sup>th</sup> September, 2022 seeking the following orders:-
  - a. That this application be certified as urgent and be heard on priority basis.
  - b. That the Honourable court be pleased to adopt the assessment of the Director of Occupational Health and safety as an order of the Court.
  - c. That the Honourable court be pleased to issue an order for the sum of Kshs.2,222,524/- be adopted as order/decreed of this court together with interests until payment in full which amount is tabulated as hereunder;
    - i. Kshs.1,049,664/- in accordance with the assessment of the Director of Occupational Safety and Health.
    - ii. Kshs.1.172,850.00 as claimant tabulation of dues owed.
  - d. That the costs for this Application be provided for.
2. The application is supported by the claimant's affidavit sworn on 19<sup>th</sup> September, 2022 and 6<sup>th</sup> October 2022. The application is opposed by the respondent vide the replying affidavit sworn by its HR Manager Mr.Benjamin Munyao Kasioni on 5<sup>th</sup> October, 2022. Both parties have also filed written submissions to dispose of the motion.



## Background

3. The claimant was employed by the respondent as a Heavy Commercial Driver on 1<sup>st</sup> February 2011 and worked until 26<sup>th</sup> February, 2016 when his services were terminated. On 30<sup>th</sup> March 2014 while in the course of employment driving motor vehicle Registration No.KBR 779K to deliver respondent's milk from Meru to Nairobi he had an accident and suffered serious injuries. He was then admitted in MP Shah and Chogoria Hospital up to 14<sup>th</sup> June 2014 when he was discharged.
4. On 1<sup>st</sup> March, 2016 his employment was terminated for the reasons that he had suffered permanent disability on the right lower limb and that he had developed poor vision with incapacity to see at night. Aggrieved, he brought this suit seeking reinstatement and compensation for the injuries suffered in the said accident.
5. On 5<sup>th</sup> May 2017, Ongaya J delivered a judgment in the matter in which he reinstated the claimant to employment with full benefits. He further directed the claimant to compute his claim benefits awarded plus claim for leave allowance and annual leave from 1<sup>st</sup> February 2011 to 1<sup>st</sup> March 2016 when the termination had been done. The computation was to be filed within 7 days for recording a quantum. The court also declared that the claimant was entitled to compensation under Work Injury Benefit Act (WIBA) for injuries suffered on 30<sup>th</sup> March, 2014. Finally the claimant was awarded costs of Kshs.40,000.00. The judgment sum was to be paid by 1<sup>st</sup> July, 2017 and in default attract interest at court rates from the date of the judgment.
6. Seems that the claimant was reinstated to employment and failed to compute the claims awarded by the court. However, the respondent vide the letter dated 9<sup>th</sup> June, 2016 (sic) computed the claimant's dues including salary owing from March 2016 - April 2017 as Kshs.588,798.00, leave of 154 days equaling Kshs.124,693.00, leave allowance and staff bonus of Kshs.13,000.00 totaling to Kshs.733,991.00. The claimant agreed with the computation of all the above items except annual leave which he denied having taken leave of 28 days in 2011 and 11 days in 2012. He further contended that his leave entitlement for 2011 was 31 days and not 28 days.
7. The parties did not settle the matter and the claimant instituted contempt proceedings vide notice of motion dated 11<sup>th</sup> October 2017. In the alternative the claimant urged the court to employ any other measure to enforce compliance with the judgement.
8. Before the application was heard, the respondent moved the court with a motion for review dated 30<sup>th</sup> November 2017. Nzioki Makau J allowed the application for review to the extent that the computation of the dues payable to the claimant would be undertaken by both parties before the Deputy Registrar of the court based on the salary which the claimant was earning and not what he anticipated to earn. The court also directed the claimant to go for medical examination before a doctor of the respondent's choice for purposes of computation of damages under WIBA.
9. It seems from the record that the Deputy Registrar never computed the employment dues as directed by the court but the claimant presented himself to MP Shah Hospital for a medical examination as requested by the respondent and the Director Occupational Safety and Health assessed his compensation under WIBA as Kshs.1,049,664.00 based on monthly earning of Kshs.31,808.00 and permanent disability of Kshs.25%.
10. The claimant now wants the court to adopt the said assessment by the Director of Occupational Safety and Health and his new computation of employment dues and costs awarded in the judgment dated 5<sup>th</sup> May, 2017.



11. Before I proceed further I wish to note that the mess in this case has been caused by the claimant's advocate who instituted the suit with poor pleadings. Had the counsel set out the claimant's financial claim with precision, the trial court could have determined the suit with finality on 5<sup>th</sup> May, 2017 when it declared the rights and liabilities as between the parties in its judgment.
12. I consider the claimant lucky to have persuaded the trial court to keep entertaining his uncomputed claims. It is now well settled by judicial precedents that parties are bound by their pleadings and the court can only travel as far as the pleadings are drawn.
13. Without prejudice to the foregoing I have considered the instant application, the supporting affidavits, the Replying affidavit and the rival submissions in order to see how to bring this matter to a final rest. The following issues arise for determination;
  - a. Whether the court should adopt the award of Kshs.1,049,664.00 by the Director of Occupational Safety and Health as orders of the court.
  - b. What should be the correct computation of claimant's employment dues awarded in the judgment herein on 5<sup>th</sup> May, 2017?

#### **Award of Kshs.1,049,664.00 under WIBA**

14. The respondent opposes the award by the Director because the claimant has allegedly failed to submit himself for a medical examination by the Company doctor at M.P Shah Hospital, Nairobi. The respondent has produced in court letter dated 22<sup>nd</sup> May, 2018 directing the claimant to go for the medical examination. The claimant has also filed copy of receipt for medical examination at MP Shah Hospital and a medical report from the same hospital dated 17<sup>th</sup> August, 2018 that assessed the claimant's permanent disability at 30%.
15. On 6<sup>th</sup> June, 2017 the claimant's permanent disability had been assessed at PCEA Chogoria Hospital at 20%. On 13<sup>th</sup> July 2020 a team of 3 doctors including Dr.Kimani J, Dr.Kimani W, and Dr.Githiari J for the Director Occupational Safety and Health Services assessed the claimant's permanent capacity at 25%, which was used by the Director OSHS to assess the compensation payable to the claimant on 7<sup>th</sup> April, 2021 at Kshs.1,049,664.00. The assessment was then communicated to the respondent requesting it to pay the claimant.
16. The respondent denies having been served with the said report from the Director contending that had it been received, it would have made a rebuttal or concurrence. The question that arises is what respondent has done with the computation since receipt of the application in September, 2022.
17. Section 51 of the *Work Injury Benefits Act* provides that:-
  - “(1) any person aggrieved by a decision of the director on any matter under this Act, may within sixty days of such decision, lodge an objection with the Director against such decision.
  - (2) the objection shall be in writing in the prescribed form accompanied by particulars containing a concise statement of the circumstances in which the objection is made and the relief or order which the objector claims, or the question which he desires to have determined.”
18. The respondent has not done anything to object to the assessment by the Director OSHS. In any case even if it was to object to the assessment, the objection would be frivolous because the assessment by



its doctor was 30% permanent disability which was higher than the 25% assessment by the Director. Consequently, I find that the award by the Director of Kshs.1,049,664.00 on 7<sup>th</sup> April, 2021 is final and this court can only interfere with it if its appellate jurisdiction is properly invoked. As things stand now the court cannot interfere with the award by the Director but only adopt as judgment of the court which I hereby do Kshs.1,049,664.00.

### **Employment dues**

19. As I have already observed, that the failure to plead particulars of the dues claimed in the suit is the cause of the mess herein. It seems that the claimant did not know what he was claiming then, and even up to now. I say so because he never computed the dues within the 7 days given by the trial court in its judgment. Secondly in the notice of motion dated 11<sup>th</sup> October, 2017, he computed his claim at Kshs.1,453,411.00, while in the present motion he claims Kshs.1,172,850.00, based on computation made on 11<sup>th</sup> January 2019.
20. The foregoing lack of consistency is a complete departure from his agreement to the computation done by the respondent's HR Manager Ms.Dorcas Njeri vide the letter dated 9<sup>th</sup> June, 2016 which ought to read 9<sup>th</sup> June, 2017. The claimant filed a response in court dated 20<sup>th</sup> July, 2017 agreeing to the said computations by respondent's HR Manager except the computation for annual leave in respect of 2011 and 2012 only. Consequently, I will adopt the computation of Kshs.588,798.00 for salary , Kshs.7,500.00 leave allowance and Kshs.13,000.00 staff bonus as orders of the court totaling to Kshs.609,298.00.
21. As regards the issue of accrued annual leave, I reiterate that the claimant never pleaded any particulars of his claim or tendered any evidence to prove the same. On the other hand, the respondent gave a detailed analysis of leave entitlement and utilization. The annual leave per year was 31 days. The claimant joined the respondent in February, 2011 and therefore he earned 27.5 days but the respondent gave him 28 days.
22. The employer has gone to greater length of computing the amount payable using the corresponding salary in a progressive manner from 2011 to 2017. The fact that the employer has even awarded the claimant staff bonus which he had not prayed for is a demonstration of good faith and honesty. I therefore do not doubt it when it says that the claimant utilized 28 days and 11 days in respect of his annual leave for 2011 and 2012. Consequently, I adopt the computation for leave at Kshs.124,693.00 as the order of this court.
23. Having adopted the computation by the respondent in all the items above, I find and hold that the correct employment dues payable to the claimant pursuant to the judgment delivered on 5<sup>th</sup> May, 2017 is Kshs.733,991.00. There was no counterclaim by the respondent in relation to salary advances and therefore the deductions indicated in the respondent's computation letter above is not acceptable. If indeed the respondent had a genuine counterclaim against the claimant, it ought to have filed the same in court before the judgment of 5<sup>th</sup> May, 2017. The judgment was never set aside on appeal or review and therefore it binds the respondent.
24. In conclusion and pursuant to the judgment of the court entered on 5<sup>th</sup> May, 2017, the following is adopted as the quantum of damages payable to the claimant under the said judgment and the respondent is hereby ordered to pay within 30 days and in default a decree be drawn and executed against the respondent:-
  - a. Damages for bodily injuries.....Kshs.1,049,664.00
  - b. Employment dues.....Kshs. 733,991.00



c. Costs..... Kshs. 40,000.00

Total Kshs.1,823,655.00

The award is subject to statutory deductions. The award will attract interest at court rates from the date hereof, if the same is not settled within 30 days of today.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 9TH DAY OF JUNE, 2023.**

**ONESMUS N. MAKAU**

**JUDGE**

**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 15<sup>th</sup> April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N. MAKAU**

**JUDGE**

