



**Musoma v Tulsi Construction Limited (Cause E051 of 2021)  
[2023] KEELRC 1361 (KLR) (2 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1361 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E051 OF 2021**

**AK NZEI, J  
JUNE 2, 2023**

**BETWEEN**

**WYCLIFFE MKOKO MUSOMA ..... CLAIMANT**

**AND**

**TULSI CONSTRUCTION LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant sued the respondent vide a memorandum of claim dated May 17, 2021 and filed in court on May 18, 2021, and pleaded:-
  - a. that the claimant was employed by the Respondent as a general worker and that on 3/4/2019 while on duty at the Kenya School of Government in Mombasa County, the Claimant's left hand got stuck in a mixer machine whereby it was crushed completely.
  - b. that the Respondent notified the Director of Occupational Safety and Health Services of the accident through the requisite dosh from I which it forwarded to Mombasa Occupational Safety and Health Office on 13th October 2020.
  - c. that the Mombasa County Occupational and Health Officer assessed the amount payable to the Claimant as a result of the accident at 1,309,550 and notified the Respondent of the same.
  - d. that the Respondent did not settle the assessed compensation, hence the enforcement suit.
2. Other documents filed by the claimant included an affidavit in verification of the claim, the claimant's witness dated 17/5/2021 and an evenly dated list of documents. The listed/filed documents included a duly filled Doshi Form 1, DOSH/WIBA 4 addressed to the Respondent dated 26/10/2020 and a letter dated 24/2/2021 by the County Occupational Safety and Health Officer to the respondent, referring to the DOSH/WIBA 4 dated 26/10/2020 and reminding the respondent that it had not paid the



assessed compensation within ninety days pursuant to section 26(4) of the Act (WIBA), and asking the Respondent to make submissions within seven days on why it had not paid within the ninety days.

3. The claimant sought the following reliefs:-
  - a. a declaration that the Respondent is liable to settle the assessment (sic) of Ksh. 1,309,550 in favor of the Claimant as advised by the Mombasa County Occupational Safety and Health Officer on 26<sup>th</sup> October 2020.
  - b. an order directing the Respondent to pay the Claimant ksh. 1,309,550 together with interest at Court rates from 26<sup>th</sup> October 2020 until payment in full.
  - c. a declaration that by failing to settle the assessment (sic) of ksh. 1,309,550 as advised by the Mombasa County Occupational Safety and Health Officer on 26<sup>th</sup> October 2020, the Respondent committed an offence under Section 26(4) of WIBA, and the Court should subsequently sentence the Respondent as appropriate.
  - d. costs of the suit together with interest.
4. The respondent filed response to the memorandum of claim on August 17, 2021, dated August 16, 2021, and denied the claimant's claim. The Respondent further pleaded:-
  - a. that the Claimant was employed by the Respondent as a casual earning ksh. 400 per day, and that upon the Respondent being made aware of the alleged injuries, the Respondent helped the Claimant to meet hospital expenses as follows:-
    - i. Ksh. 150,000 paid on 12/4/2021
    - ii. Ksh. 189,300 paid on 12/5/2021
  - b. that after the Claimant was discharged from hospital, the Respondent continued to pay his daily dues as soon as he resumed duty.
  - c. that although the Respondent was willing to cater for all expenses of the clamant, the Claimant reported the matter to the County Occupational Safety and Health Office without involving the Respondent, and in total disregard of the good faith by the Respondent in meeting all his hospital bills and reinstating him after a long period of recovery.
  - d. that the county Occupational Safety and Health Office proceeded and computed dues owed to the Claimant without involving the Respondent, and that the level of injury was exaggerated.
5. On 5/10/2021, the respondent filed a notice of motion application asking this Court to review, vary or set aside the Occupational Safety and Health Officer's Orders dated 26/10/2020. The application was considered by this Court, and was dismissed vide the Court's Ruling delivered on 10<sup>th</sup> February 2022. Reasons for the dismissal are contained in the said Ruling.
6. Other documents filed by the Respondent are a written witness statement by one Ramesh Patel and a list of documents dated 23/6/2022. The listed documents include hospital payment receipts, hospital invoice, copies of cheques to the hospital (Pandya Memorial Hospital), and copies of Daily Casual Workers Petty Cash Vouchers.
7. When trial opened on 31/10/2022, the Claimant adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraph 2 of this Judgment. The Claimant further told the Court that the Respondent never objected to the Director's award of Ksh. 1,309,550.



8. Cross-examined; the Claimant testified that he was initially employed by the Respondent as a casual and subsequently became a Machine Operator, earning ksh. 400 per day, and that payment was being made to him after every six days. That he was injured, and that the Respondent had admitted that he, the Claimant, was their employee. That he stopped receiving his salary after he took the matter to the Director of Occupational Safety and Health services (DOSHS); and that he was claiming the amount assessed by the DOSHS, costs and interest.
9. The Respondent called one witness, Ramesh Patel (RW-1), who adopted his witness statement dated 23/6/2022 as his testimony, and produced in evidence the Respondent's documents referred to in paragraph 5 of this judgment. RW-1 further testified that the Respondent was on 3/4/2019 injured at the Respondent's site and that the Respondent took him to hospital whereat he was hospitalized and the Respondent paid the hospital bill amounting to Ksh. 504, 306. That from the date of injury upto 19/6/2021, the Respondent paid the Claimant ksh. 2,400 per week, and that payment was done for almost two years and three months.
10. Further, RW-1 testified that the Respondent was not served with any documents by the Director of Occupational Safety and Health Services (DOSHS), and that the Respondent never participated in any proceedings before the DOSHS.
11. Cross-examined and re-examined, RW-1 testified that he would not know whether the documents exhibited by the Claimant were received by the Respondent, though the same were not stamped to show that they were received by the Respondent. It is worthy noting at this point that RW-1 did not dispute the validity or correctness of the Respondent's postal address on the said documents. Further, the Claimant's exhibit no. 1 (DOSHS FORM 1) is shown to have been filled and duly stamped by the Respondent. The authenticity of the details and the Respondent's rubber stamp on the said document were not disputed by the Respondent (RW-1).
12. This Court stated as follows in its Ruling delivered in this matter on February 10, 2022:-

“ 11. The Respondent/applicant's grievance over the Director's assessment has not come to this Court by way of an appeal as contemplated in section 52(2) of the [Work Injury Benefits Act](#). The applicant's grievance/objection ought to have been lodged with the Director, Occupational Safety and Health Services within sixty (60) days of the assessment. This Court lacks primary jurisdiction over the subject matter in the application, and cannot be called upon to usurp the Director's administrative powers donated by the statute.”
13. Having said that, and having considered the pleadings filed and evidence adduced by both parties herein, the single issue that falls for determination, in my view, is whether this Court has jurisdiction to enforce the Director's award dated/made on 26/10/2021.
14. Before interrogating the issue of whether this Court has jurisdiction to enforce the Director's decision/award that was not objected to by the Respondent pursuant to section 51 of the WIBA, the provisions of sections 16 and 23 of the Act must be considered. Section 16 of the Act provides as follows:-

“ no action shall lie by any 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.”



15. Section 23 of the Act provides as follows:-

- “(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 enquiries as are necessary to decide upon any claim or liability in accordance with this Act.
- (2) an enquiry 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.”

16. I recently stated as follows in the case of *Millicent Akinyi Odhiambo & Another -vs- Quale Holdings Ltd t/a Guyana Guest House* [2022] eKLR regarding the import of the two aforesaid Sections of WIBA:-

“15. It is evidently clear from the foregoing Sections of WIBA that determination of liability and assessment of compensation payable thereon in work injury claims is the preserve of the Director of occupational safety and Health Services and that this Court does not have primary/original jurisdiction over these two issues.

16. Section 23 is specific that the Director shall make such enquiries as are necessary to decide upon any claim or liability in accordance with the Act. Determination of this liability and assessment of damages payable in Work Injury Claims is therefore strictly within the statutory domain of the Director, as the statute expressly takes away the Court’s jurisdiction to deal with the same.”

17. Still on the same issue, I recently stated as follows in *Amir Swaleh Omar -vs- Mackenzie Matime [E.A.] Limited* [2022] eKLR:-

“17. The Act (WIBA) is silent on how the awards of compensation made by the Director in favour of employees involved in occupational accidents or who suffer occupational diseases are to be enforced. At the same time, the Act does not expressly divest this Court of jurisdiction to enforce such awards; and especially where the award of compensation by the Director has not been objected to and the employer has refused to pay the assessed compensation. Did parliament intend that an employee caught up in such a situation would be left at the mercy of an employer who may choose either to pay or not to pay the assessed sum? I do not think so.

18. What would be the purpose of the Director making or undertaking inquiries in order to determine the issue of liability and proceeding to assess the compensation payable if the compensation assessed by the Director was not meant to be paid to the injured employee? In my view, once the Director assesses the compensation payable and the same is not objected to pursuant to Section 51 of the WIBA, the assessed sum becomes the injured employee’s right and entitlement regarding which the employee can move to Court and



seek enforcement of that right by seeking entry of judgment in terms of the Director's assessment, and issuance of a decree which can then be executed to realize that right.

19. Indeed, failure by an employer to pay a demanded compensation that has been assessed by the Director and to which no objection has been lodged creates a dispute over a liquidated claim, which this Court can entertain and determine. Article 50(1) of *the Constitution* of Kenya 2010 provides:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court, or if appropriate, another independent and impartial tribunal or body.”

18. The foregoing position obtains in the present suit, and in my view, this Court has jurisdiction regarding enforcement of the director's award/decision, but the Court cannot interrogate or determine any issue of liability between the employer and employee or any other issue regarding the work injury in issue which the parties may attempt to place before this Court for determination. Such matters ought to have been raised with the Director under the provisions of the *Work Injury Benefits Act* (WIBA).
19. Consequently, and having considered written submissions filed by both parties, judgment is hereby entered for the claimant against the Respondent as follows:-
- a. the Respondent shall pay to the Claimant a sum of ksh. 1,309,550 being the award assessed by the Mombasa County Occupational Safety and Health Officer on October 26, 2020. A decree shall issue accordingly.
  - b. interest on the said awarded sum shall be calculated at court rates from the date of this Ruling.
20. The claimant is awarded costs of these proceedings and interest thereon at Court rates.
21. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2<sup>ND</sup> JUNE 2023**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

**Appearance:**

..... **for Claimant**

..... **for Respondent**

