



Nyagaka v Decathlon Sports Limited (Employment and Labour Relations Cause E056 of 2023) [2023] KEELRC 2235 (KLR) (19 September 2023) (Ruling)

Neutral citation: [2023] KEELRC 2235 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E056 OF 2023**

**K OCHARO, J
SEPTEMBER 19, 2023**

BETWEEN

MICHEAL JORDAN NYAGAKA APPLICANT

AND

DECATHLON SPORTS LIMITED RESPONDENT

RULING

1. Through a Notice of Motion Application dated 22nd March 2023, the Applicant sought the following Orders, thus;
 - I. That this application be and is hereby certified as urgent and the same be heard ex-parte in the first instance.
 - II. That the Respondent be and is hereby compelled to pay the Applicant the award of Kshs 1,200,000/- plus interest at 14% PA from 3rd March 2022.
 - III. That this Honourable Court be pleased to issue any further orders as it may fit.
 - IV. That the cost of this application be borne by the Respondent.
2. The application is grounded on the prime grounds put forth on the face of the application and the supporting affidavit sworn by the Applicant on the 23rd of March 2023.
3. The Applicant's application is not difficult to comprehend. On or about the 14th of April 2021, he sustained a workplace injury while in the employment of the Respondent. Subsequently, he lodged a workman compensation claim with the Director of Occupational Health and Safety. Subsequently, the Director computed damages payable to him at Kshs 1,200,000/-, a sum which the Respondent has failed and or neglected to settle as required by law.



4. On the 27th of April 2023, this Court upon an application by the Respondent, directed That the Respondent files an answering affidavit to the application. The Court further directed That the application be canvassed by way of written submissions. The parties were given specific timelines to file their written submissions within specific timelines.
5. When this matter came up for mention on the 25th of July 2023, to check the parties' compliance with the directions, the Court was informed That the Respondent didn't file any response pursuant to the Court's directions hereinabove mentioned. Consequently, the Applicant was disabled from filing his written submissions of the application. The Court was constrained to reserve this matter for ruling.
6. The Court notes That the Applicant herein indeed did lodge a claim with the Director of Occupational Health and Safety, following a workplace injury.
7. The Court further notes That a work injury evaluation clinic was held on the 25th of November, 2021 by Dr. Kowino, Dr. Kimani. W and Dr. Kimani J, who subsequently prepared a report dated the same day. The Doctors concluded That the Applicant had suffered 20% permanent incapacity. The Doctors further opined That the Applicant would require decompressor surgery of the L5/S1 disc bulge.
8. Through his medical report dated 24th February 2022, Dr. J. O Atinga, wrote;

“..... The MRI confirmed a large L5/ S1 disc prolapse with desiccation. He needs discectomy and stabilization of the same level. The cost of the procedure including post-operation rehabilitation is Kshs 1.2 million.

Whatever assistance he can be accorded will be appreciated.”
9. On the 3rd March 2022 the Deputy Director, of Occupational, Safety and Health services wrote to the Managing Director of the Respondent Company. The letter read in part;

“..... The above-named is your former employee who developed an Occupational Surgical problem as a result of the work he was doing. He requires Kshs 1.2 million for his treatment.

Arrange to facilitate his treatment per section 47 of WIBA.

You are hereby given 21 days to organize for his medical treatment failure of which legal action shall be taken against you without any further reference.”
10. Having said this, I now turn to the provisions of Section 47 of the Work Injury Benefits Act, which provides;
 - 1] Subject to the provisions of this section, an employer shall defray any expenses reasonably incurred by the employee as the result of an accident arising out of, and in the course of the employer's employment in respect of the following matters-
 - a. dental, medical, surgical or hospital treatment;
 - b. skilled nursing services;
 - c. the supply of medicine and surgical dressing;
 - d. travelling and subsistence in connection with the employee's journey to and treatment in a place within Kenya where he was directed by his medical practitioner to go for treatment; and



- e. the supply, maintenance, repair and replacement of artificial limbs, crutches, and other applications and apparatus by persons who are physically disabled.

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3] The necessity, nature and sufficiency of any medical aid provided or to be provided in accordance with the provisions of this part shall be determined by the Council.” [Emphasis added]

- 11. One looking at the stipulations of sub-section [1], will form a wrong impression That the duty imposed on the employer under the provisions of section 47 of the Act is only limited to defraying already incurred medical expenses. In my view, the wrong impression is only possible if the sub-section is to be read; in isolation from the other sub-sections and more specifically sub-section [3]; without regard to the whole purpose of, and context under which, the Act was enacted and; without giving it a purposive approach. It is my finding That section 47 of the *Work Injury Benefits Act*, contemplates even defraying of future medical expenses by the employer. What the Applicant is claiming in the instant application is in character, future medical expenses.
- 12. The interpretive section of the Act, defines That ‘Council’ as “the National Council for Occupational Safety and Health.” This Court has carefully considered the material placed before it and concludes That the Applicant has not placed any material before it from whence it can be discerned That the Council made any decision as contemplated under sub-section [3], making the application premature.
- 13. Further, the application is premised on the wrong premise That there has been an award for the sum of Kshs 1,200,000/- by the Director, there has been none. However, and without prejudice to this, if there has been, then the same was not placed before this court by the Applicant.
- 14. It is by reason of the premises that I find but with sympathy to the Applicant, that the application herein is premature and is hereby struck out.
- 15. Orders accordingly.

READ, SIGNED AND DELIVERED THIS 19TH DAY OF SEPTEMBER, 2023.

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Mutanda for the Applicant

No appearance for the Respondent

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 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 all judgments and rulings be pronounced in open court. In permitting this course, this court has 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 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.

A signed copy will be availed to each party upon payment of court fees.

OCHARO KEBIRA

JUDGE

