



**Mutegi v Teachers Service Commission & another (Cause E140 of 2023)  
[2023] KEELRC 2720 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2720 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E140 OF 2023  
K OCHARO, J  
OCTOBER 26, 2023**

**BETWEEN**

**SIMON MUTEGI ..... APPLICANT**

**AND**

**TEACHERS SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF OCCUPATIONAL SAFETY AND HEALTH SERVICE, NAIROBI  
COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Vide a notice of motion dated June 17, 2023, the Applicant seeks the following orders. Thus;
  - a. That this Honourable court be pleased to adopt the award by the 2<sup>nd</sup> Respondent in favour of the Applicant against the 1<sup>st</sup> Respondent in accordance with the decision in WIBA/TSC/5163
  - b. That this Honourable court be pleased to order that the balance of award for compensation by the 2<sup>nd</sup> Respondent in favour of the Applicant in the sum of Kshs 913,675 be and is hereby adopted as a judgment of this court
  - c. That interest from the time the 2<sup>nd</sup> Respondent's award be paid by the 1<sup>st</sup> Respondent within 14 days from the date hereof
  - d. That the cost of this application be paid by the 1<sup>st</sup> Respondent in any event
2. The application is supported by the affidavit of Simon Mutegi sworn on 17<sup>th</sup> June 2023 that reiterates the grounds in support of the application which are-
  - a. That the Applicant is currently working as a security officer 111 with the 1<sup>st</sup> Respondent.



- b. That on the 15<sup>th</sup> June 2021 along Kaare-Keria road an accident occurred involving a Motor Cycle Reg. No. KBC 517M while the applicant was lawfully travelling as a passenger and as a result of the accident he sustained grievous injuries and incurred huge hospital bills.
  - c. By a report dated 20 June 2022 the Assistant Director of Occupational Health and Safety services confirmed that the applicant suffered 15% permanent disablement and was entitled to compensation which was accessed at Kshs 1,113,379, under the Work Benefits Act No. 13 of 2007.
  - d. That the 1<sup>st</sup> Respondent failed to pay the Applicant the said amount in full and only paid Kshs. 199,704 thus withholding a balance of Kshs. 913,675
  - e. That the 1<sup>st</sup> Respondent has not appealed against the decision of the 2<sup>nd</sup> Respondent which leaves the court with no other option save to adopt the award of the 2<sup>nd</sup> Respondent.
  - f. That the Applicant accepted less pay under duress and fear of victimization and losing his job.
3. In Response to the application the 1<sup>st</sup> Respondent filed a replying affidavit sworn by Dr Julius Olayo the Director of Human Resource Management and Development.
- a. The affiant stated that the Claimant is an employee of the Commission designated and performing his duties as a security Officer at the commission's Headquarters.
  - b. Further, they received a notification of an accident that occurred along Kaare- Magutini- Keria Road in which the Applicant was involved while aboard a motorcycle. The Applicant alleged that the accident occurred while he was heading to work
  - c. It was further stated that the Applicant's workstation is at TSC headquarters therefore the accident occurred outside his station.
  - d. The affiant further stated that the commission has taken a Group Personal Accident Cover. After the notification regarding the accident, the Applicant filled out forms for compensation on account of a personal accident, not a workplace injury accident.
  - e. It was contended that the Applicant was subsequently paid for the personal injury claim. Upon the settlement, he was advised that he was not eligible to be compensation pursuant to the *Work Injury Benefits Act*. Despite the advice, the applicant went to the office of the Director of Occupational Safety and Health and lodged a claim. He concealed a material fact, that the accident did not occur while he was in the course of duty.
  - f. The Commission paid the Applicant in accordance with the existing contractual terms and no amount has been withheld nor any law breached.
  - g. It was asserted that the accident didn't fall under WIBA. Consequently, the 1<sup>st</sup> is not obligated to pay the amounts demanded. The Court shouldn't adopt the award.

### **Submissions**

4. The application was disposed of by way of written submissions.
5. The Applicant submitted that the 1<sup>st</sup> Respondent has raised matters that are irrelevant to the instant application. The matters raised could only be relevant to the proceedings before the Director, and or in an appeal against the Director's award.



6. It was submitted that the Assistant Director, of the Directorate of Occupational Health and Safety Services, confirmed and determined that the applicant suffered 15% permanent disablement. Further, he was entitled to compensation for the injury to an assessed amount of Kshs 1,113,379 under the [Work Injury Benefits Act](#) No. 13 of 2007.
7. The Applicant relied in the Holding in *Ford Amugini Kititsi v Laboratory and Allied Limited & Another* (2022) eKLR where the court held that; “....it is not in dispute that the applicant was an employee of the 1<sup>st</sup> Respondent at the time he suffered injuries.....it is not in dispute that a report of the accident that led to the work injuries was duly made and assessment done... if the 1<sup>st</sup> Respondent was not satisfied with the award of the Director would have filed an appeal to this court....accordingly....the award for compensation by the 2<sup>nd</sup> respondent in favour of the applicant is adopted as a judgment of this court.....” to support his submissions.
8. The 1<sup>st</sup> Respondents in their submissions identified the following issues for determination;
  - a. Whether the court has jurisdiction to entertain the application
  - b. Whether it is mandatory for the court to adopt an award by the Director of Occupational safety and health
  - c. Whether the court can be blind to the circumstances that payment was made and accepted under Group Personal Accident Cover
  - d. Whether the Applicant is entitled to the reliefs sought.
9. The 1<sup>st</sup> Respondent submitted that the Applicant came before the court under provisions 28,30,32 and 34 of the [Employment Act](#), the WIBA and [Labour Institutions Act](#). The provisions do not confer jurisdiction on this Court.
10. The Respondent relied on the holding in *Peter Mutua Kaloki v China State Construction & Engineering Corp (Kenya) & Another* (2022) where Justice Rika Held “There is no jurisdiction given to E&LRC under the [Work Injury Benefits Act](#) to enforce awards of the Director other than on Appeal. There is no other written law extending jurisdiction to the E&LRC in the enforcement of awards by the Director. There is no provision for enforcement through the adoption of these awards as judgments of the E&LRC. Such adoption results in judgments and decrees on work injury given by the E&LRC without jurisdiction”.
  - a. The Respondent further relied on the holding in the case of *Musembi v Great Yadoo Industry Limited Misc case no. E080 of 2022* KEELRC 13025 (KLR) where Justice Dr. Jacob Gakeri held “jurisdiction of this court analogous to any other court is core to discharge the judicial function elucidated in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 others* (2012) where the supreme court emphasized that the court derives its jurisdiction from [the constitution](#) or statute or both and cannot exercise jurisdiction not conferred by law. A court cannot arrogate jurisdiction unto itself not even on the ground of interest of justice as argued by the applicant herein..... in the end, the court is satisfied that this matter should have been presented by way of appeal. The court does not have jurisdiction to enforce awards of the director either through fresh claims or miscellaneous Application”.
11. The Court was urged to be persuaded by the cited decisions to decline jurisdiction and consequently dismiss the instant application.
12. The 1<sup>st</sup> Respondent submitted further that the Director of Occupational Safety and Health derives his mandate from the Occupational Safety & [Health Act](#), 2007 which limits his scope for computation



and authority to award compensation for injuries sustained within the workplace or in the course of employment while furthering the employer's interest.

13. It was argued that in the circumstances of this matter, the Director lacked the mandate to assess and award the applicant compensation yet the accident did not arise in the course of duty. The Applicant is not entitled to an award under the *Work Injury Benefits Act* as stipulated under section 10 of the Act. To buttress the submission that the Director lacked the mandate, reliance was placed on the case of *Republic v Cabinet Secretary, Ministry of Agriculture, Livestock, and Others [2019] eKLR*.
14. It was further submitted that the Applicant having been compensated under the group personal accident cover, the 1<sup>st</sup> Respondent remained under no duty to compensate him further. Therefore, the 1<sup>st</sup> Respondent has not withheld any award sums as claimed by the applicant.
15. On the last issue the 1<sup>st</sup> Respondent submitted that the Director acted ultra vires by assessing compensation payable and directing compensation for injuries that arose out of an accident that an accident that occurred outside the scope of employment. The Court should not adopt the award as it was erroneously made.

### **Analysis and determination**

16. Having considered the application, the response and the submissions by the parties the following are the issues for determination;
  - a. Whether the court has jurisdiction to entertain the instant application.
  - b. Whether the applicant can be granted the orders sought.
17. I will first consider the issue of the jurisdiction of the court. The Respondents contend that this court has no jurisdiction to enforce an award of the Director of Occupational Safety and Health. Section 26 of the *Work Injury Benefits Act* provides the procedure to be followed in work injury claims, thus;
  1. A claim for compensation in accordance with this Act shall be lodged by or on behalf of the claimant in the prescribed manner within twelve months after the date of the accident or, in the case of death, within twelve months after the date of death.
  2. If a claim for compensation is not lodged in accordance with subsection (1), the claim for compensation may not be considered under this Act, except where the accident concerned has been reported in accordance with section 21.
  3. If an employer fails to report an accident or to provide information requested by the Director as specified in the request, the Director may—
    - a. conduct an investigation and recover the cost of the investigation from the employer as a debt due from the employer; or
    - b. levy a penalty on the employer. CAP. 236 [Rev. 2012] Work Injury Benefits [Issue 1] 14
  4. An employer or insurer against whom a claim for compensation is lodged by the Director under this section, shall settle the claim within ninety days of the lodging of the claim.
  5. The Director shall, within thirty days of receipt of the money claimed under subsection (1), pay the money to the employee who made the claim or his dependants.



6. An employer or an insurer who fails to pay the compensation claimed under this subsection commits an offence and shall on conviction be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding one year or to both.
18. Section 52 provides; -
- “ [1]. The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.
- [2]. An objector may, within thirty days of the Director’s reply being received by him, appeal to the Industrial Court against the decision.”
19. Undoubtedly, the *Work Injury Benefits Act* does not provide for enforcement of the awards of the Director of Occupational Safety and Health Services. Imperative to state that the issue as raised by the 1<sup>st</sup> Respondent has been numerously raised whenever matters of enforcement of the Director of Occupational Safety and Health Service’s awards are placed before this Court for consideration. Failing to point out that a common stand hasn’t been taken by Judges of this court over the jurisdictional issue of enforcement of the awards shall be remiss of this Court.
20. In some decisions it has been held that the court does have jurisdiction for the reason that the relevant Act of Parliament hasn’t specifically conferred any such jurisdiction on this court, and or that the court is by law an appellate court for purposes of matters under the *Work Injury Benefits Act*. The decisions cited by Counsel for the 1<sup>st</sup> Respondent are reflective of this school of thought.
21. On the other hand, in other matters it has been held that the court is seized with the jurisdiction to facilitate enforcement of the awards by adopting the same as judicial judgments. The decisions therefore point school of thought. Imperative to state that I have held before that this Court has the jurisdiction. A position that has been taken by other judges too.
22. The position taken by this Court has largely been informed by; a liberal and purposive interpretation of the wording of the jurisdictional provision of the Act establishing the Employment and Labour Relations Court, i.e. section 12 of the *Employment and Labour Relations Court Act*; reading the provisions of the *Work Injury Benefits Act*, not in isolation from other relevant Acts of Parliament; giving the *Work Injury Benefits Act* an interpretation in conformity with its overall “ purpose”; a purposive application of Article 162[2] of *the Constitution*; and, a heed to the Constitutional edict that courts should interpret *the Constitution* in a manner that promotes development of the law.
23. In Jared Ingling Obuya –v- Handicap International [2021] eKLR the court observed as follows;
- “ 24. The *Work Injury Benefits Act* is silent on the manner of enforcement of the decisions by Director DOSH. It is however this Court’s finding that it could not have been the intention of the Legislator that beneficiaries of compensation by Director DOSH remain without a remedy in the event an employer does not implement the decision of the Director awarding an



employee compensation. The court must bridge the lacuna and bring to effect the objects and purpose of the Act as captured in the preamble as follows:

“An Act of parliament to provide for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes”

24. In *Samuel Wambua Mbithuka v Metro Concepts East Africa Limited & Another* [2021] eKLR, the court observed as follows;

“5. These decisions demonstrate this Court has the authority to enforce a decision of the Director which has not been objected to nor appealed against and therefore the Applicant herein is entitled to the reliefs sought in the motion. If I were to find otherwise the import would be to drive the Applicant from the seat of justice and leave the said Applicant with nowhere to turn given that the Latin Maxim holds *Ubi jus remedium*, meaning “where there is a right there is a remedy”. This is a principle that postulates where the law establishes a right there should be a corresponding remedy for breach. Put another way the principle is simply that no wrong should be allowed to go without any remedy.....”

25. There is no contest that upon the accident and the resultant injury, the Applicant employed the procedure under the provisions of Section 26 of the *Work Injury Benefits Act*. After the Director’s assessment and award, the 1<sup>st</sup> Respondent didn’t challenge the assessment and award in any of the manners contemplated under the Act or any other statute. He didn’t lodge an objection or appeal as provided for under the Act.

26. In my view, this court has jurisdiction to hear and determine disputes arising out of work injury matters. The fact that section 52 gives the Court special jurisdiction to hear appeals from the decision of the Director of Occupational Safety and Health does not mean that the Court is stripped of its inherent jurisdiction to facilitate the enforcement of the Director’s award in the face of the silence of the Act about the enforcement.

27. The 1<sup>st</sup> Respondent argues that the was not sustained as a result of a workplace injury, or in the course of the Applicant’s duty. I am not convinced that these are matters that can be raised at this point in the proceedings. Appropriately, they could have been raised during the proceedings before the Directors of Occupational Safety and Health, or by an appeal to this Court.

28. The 1<sup>st</sup> Respondent having not filed any objection or appeal against the award of the Director, remains under obligation to settle the claim.

29. For the foregoing reasons, the application herein succeeds in terms of prayers b and c.

30. I accordingly make the following orders:

- i. The assessment of the Director of Occupational Safety and Health Services is hereby adopted as a judgment of this court.
- ii. Judgment be and is hereby entered for the Applicant against the 1<sup>st</sup> Respondent in the sum as awarded by the Director.

**READ, DELIVERED AND SIGNED THIS 26<sup>TH</sup> DAY OF OCTOBER, 2023.**



**OCHARO, KEBIRA**

**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> March 2020 and subsequent directions of 21<sup>st</sup> 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 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

