



REPUBLIC OF KENYA



KENYA LAW
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**Wahome v Lupran Manpower and HRM Services & another (Cause
924 of 2017) [2023] KEELRC 3091 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3091 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 924 OF 2017
JK GAKERI, J
NOVEMBER 30, 2023**

BETWEEN

HENRY WACHIRA WAHOME CLAIMANT

AND

LUPRAN MANPOWER AND HRM SERVICES 1ST RESPONDENT

BASCO PRODUCTS KENYA LIMITED 2ND RESPONDENT

JUDGMENT

1. The Claimant commenced the instant suit by a Memorandum of Claim on 17th May, 2017 claiming compensation on account of an accident while on duty on 11th August, 2016 which occasioned his absence from work for 42 days.
2. The Claimant testified that he was a goods lifter at the 2nd Respondent's Head Office from the 1st floor to the ground floor by pulling a trolley to the lift.
3. That he fell on his back from the first floor to the ground floor due to improperly parked goods and was taken to Nairobi West Hospital where he spent 5 days and visited the hospital several times for check-ups.
4. The Claimant testified that the 2nd Respondent paid the hospital bill of Kshs.70,000/=.
5. That his condition does not allow him to engage in tasks that require heavy effort.
6. The Claimant prays for;
 - a. Declaration that the Respondent's actions jointly and severally were unfair.
 - b. Order to compel the Respondent to pay;
 - i. Salary arrears from 22nd August to 3rd October, 2016 Kshs.26,280.00.



- ii. Medical expenses Kshs.70,532/=
- Total Kshs.96,812.00
- iii. Total disablement
- c. Costs of this suit.
- d. Interest on (b) and (c) above.
- e. Any other and/or further relief the court may deem just to grant.

Respondent's case

- 7. In its Statement of Defense filed on 21st July, 2017, the 1st Respondent denies all the allegations made by the Claimant save for paragraphs 1.1, 1.2, 1.3 and 1.5 of the Memorandum of Claim and prays for the striking out of its name from the proceedings.
- 8. The 2nd Respondent neither filed a response or participate in the proceedings nor file submissions.

Claimant's evidence

- 9. On cross-examination, the Claimant confirmed that he was employed by Basco Products Ltd from 2009 to 2014 and the 1st Respondent came in in 2014.
- 10. He also confirmed that the letter from Basco Products Ltd to the Nairobi West Hospital dated 11th August, 2016 confirmed that he was working for Basco Products Ltd in 2016 and was taken to hospital by a driver working for Basco Products Ltd and the vehicle belonged to Basco Products Ltd which has not objected to the claim for injuries and if the company paid, he had no other claim.
- 11. CWII, a medical doctor testified that the Claimant had no external injury but had a scar on his lower back and had problems bending. The doctor assessed the Claimant's disability to 20%.
- 12. The 2nd Respondent tendered no evidence.

Claimant's submissions

- 13. Counsel submitted that evidence on record showed that the Claimant was an employee of Basco Products Ltd by the time he was injured at the workplace and the 2nd Respondent catered for the medical expenses and the doctor assessed the Claimant's disability at 20%.
- 14. Counsel relied on Section 28(3) of an unnamed statute on assessment of damages for permanent disablement.
- 15. According to counsel, the Claimant was entitled to Kshs.1,796,448/=.
- 16. The decision in Samuel Otieno Musumba V Industrial and Commercial Development Corporation & another (2022) eKLR was relied upon to urge that Kshs.1,789,171/= was for a 30% disability.
- 17. Counsel submitted that the court had jurisdiction to make the award as per Direction No. 7 of the Gazette Notice No. 5476 of 28th April, 2023 on WIBA claims.



1st Respondent's submissions

18. Counsel submitted that the claim against the 1st Respondent had not been proved on a balance of probabilities. That the Claimant admitted on cross-examination that he was an employee of the 2nd Respondent who took him to hospital using its motor vehicle and settled his hospital bills.
19. That he was injured while working at the 2nd Respondent's premises and the payslips on record are all dated after the alleged injury.
20. According to the 1st Respondent's counsel, documentary and oral evidence on record show that the Claimant was an employee of the 2nd Respondent.
21. Reliance was made on the sentiments of the court in *Collince Odiwuor Obondo V Lexis International Ltd ELRC No. 596 of 2016* to urge that the suit against the 1st Respondent ought to be dismissed.

Determination

22. The issues for determination are;
 - i. Whether the Claimant was an employee of the 1st and 2nd Respondent.
 - ii. Whether the Claimant is entitled to the reliefs sought.
23. As regards the Claimant's employer, the Claimant's counsel made no specific submissions other than stating that the suit against the 2nd Respondent proceeded undefended.
24. On the other hand, counsel for the 1st Respondent maintained that the Claimant was an employee of the 2nd Respondent and had not proved his case against the 1st Respondent.
25. The court finds the counsel's submissions exceedingly persuasive as the documentary and oral evidence on record would appear to suggest that the Claimant was an employee of the Respondent.
26. The only document connecting the Claimant to the 1st Respondent are the three pay slips for August, September and November and although the Claimant testified that the 1st Respondent came in in 2014, he did not explain the relationship between the two companies and how he related to the 1st Respondent.
27. It is common ground that the Claimant was injured on 11th August, 2016 when he fell from the 1st floor to the ground floor at the 2nd Respondent's premises and the Claimant confirmed on cross-examination that at the time he was working for Basco Products Ltd, the 2nd Respondent who took him to hospital and paid his bills and did not defend the claim.
28. The Claimant confirmed that he joined the 2nd Respondent in 2009.
29. Significantly, documentary evidence on record would appear to confirm that the Claimant was an employee of the 2nd Respondent.
30. First, a letter from the 2nd Respondent to Nairobi West Hospital dated 11th August, 2016 states inter alia;

“RE: Henry Wachira Wahome

This is to confirm that the above-named is working in our organization. He has been injured today at work.



Kindly attend to him and send the bill to us.”

31. Second, a sick-off sheet from Nairobi West Hospital certifies that the Claimant was treated at the hospital from 11th August, 2016 to 15th August, 2016 and had been given 2 weeks sick-off from 16th August, 2016 and his next appointment was on 29th August, 2016.
32. Third, a letter received by the 2nd Respondent on 20th September, 2016 forwarded the invoice of Kshs.70,534/= to the 2nd Respondent for settlement.
33. In the court’s view, the Claimant’s testimony and the documentary evidence on record sufficiently establishes that the Claimant was an employee of the 2nd Respondent as at the date of the accident on 11th August, 2016.
34. For unexplained reasons, the 2nd Respondent opted not to defend the suit, service notwithstanding.
35. In undefended suits, the Claimant establishes all the facts of the claim, including the fact that he or she was an employee of the Respondent. (See *Humphrey Munyithya Mutemi V Soluxe International Group of Hotels and Lodges Ltd (2020)* eKLR, *Nicholus Kipkemoi Korir V Hatari Security Services Ltd (2016)* eKLR among others.)
36. Having found that the Claimant has established on a balance of probabilities that he was an employee of the 2nd Respondent, the next issue is entitlement to the reliefs sought.
37. On jurisdiction, counsel for the Claimant submitted that the court had jurisdiction by virtue of Direction No. 7 of the Gazette Notice No. 5476 of 28th April, 2023 that;

“ All claims with respect to compensation for work related injuries and diseases filed after the commencement of WIBA and before the Supreme Court decision at the Employment and Labour Relations Court or the Magistrates Courts shall proceed until conclusion before the said courts.”

38. In the absence of any contention or evidence to the contrary, the court is persuaded that it has jurisdiction to hear and determine the claim.

a. Declaration

39. Having found that the Claimant has failed to establish any relationship with the 1st Respondent and whose alleged action is unknown to the court, the declaration sought is unmerited and is declined.

b. Salary arrears

40. The Claimant admitted that the salary arrears were paid.
The prayer is dismissed.

c. Medical expenses

41. The Claimant admitted that the amount claimed was paid. The prayer is dismissed.

d. Total disablement

42. The only claim by the Claimant against the 2nd Respondent is for the injuries sustained at the work place.



43. In determining the quantum of compensation for the injuries sustained by the Claimant, the court is guided by the medical reports on record and relevant judicial authority.
44. In her report based on an examination conducted on 6th February, 2017, the Doctor notes that a CT scan of the Lubro-sacral showed fracture T-12 and was treated.
45. As at the date of examination, the Claimant complained of on and off pain on his lower back and pain when standing or walking for a long period or laying down or carrying heavy objects.
46. The examination revealed that the Claimant was in a general fair condition with no deformity and mild pain on the palpation at the thoracic 12 level of the Lumberspine region.
47. According to the Doctor, the injuries sustained were moderate, occasioned pain and blood loss and left partial disability requiring further evaluation and treatment but pain would subside overtime but osteoporosis was possible in future.
48. Subsequently, an examination conducted by Dr. Wokabi on 22nd February, 2022, reveal that the Claimant complained of pain on the back and could not lift heavy objects.
49. The examination revealed that his back was stiff and X-ray showed major wedge compression fracture of the 12th thoracic (T12) vertebra.
50. The fracture had not injured the spinal cord but the spiral column was weakened by the injuries.
51. The doctor assessed the injury as major.
52. The doctor assessed disability at 20% and predisposition to spondylosis in future.
53. The Claimant seeks compensation on the basis of this Medical Report.
54. In determining the quantum of damages to the Claimant, the court is guided by the principles enunciated by the Court of Appeal in Southern Engineering Co. Ltd V Musingi Mutia (1985) KLR 730;

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated. . . The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong, the best that can be done is pay regard to the limits of current thought. In a case such as the present, it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to the award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment. . . It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award . . . it need hardly be emphasized that caution has to be exercised when paying heed to the figures of award in other cases. This is particularly so where cases are merely noted but



not fully reported. It is necessary to ensure that in main essentials, the facts of one case bear comparison with facts of another before comparison between the awards in the respective cases can fairly or profitably be made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law, compensation for physical injury can only be assessed and fixed in monetary terms the best that courts can do so is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”

55. The court is guided by the foregoing sentiments.
56. In the instant case, the Claimant relies exclusively on the Medical Report by Dr. Wokabi who found as adverted to elsewhere in this judgement.
57. In *Charles Kimunya & Daniel Ndung’u Gitau V Rose Mueni Maina* (2019) eKLR where the plaintiff suffered intra-abdominal injuries causing a tear of the Mesentery and collapse of disc T11 and T12 occasioned by a major back injury, permanent disability was assessed at 20% and the injuries described a grievous harm, the court awarded Kshs.650,000/=.
58. In *Abdi Haji Gulleid V Auto Selection Ltd & another* (2015) eKLR where the plaintiff suffered intra-abdominal injuries and permanent disability of 25%, the High Court awarded Kshs.750,000/=.
59. In *Samuel Otieno Musumba V Industrial & Commercial Development Corporation* (Supra), cited by the Claimant’s counsel to urge the Claimant’s case, the Claimant was awarded Kshs.1,789,171.00 by the Director of Occupational Safety and Health Services (DOSHS) and the court awarded a similar sum as no appeal had been filed.
60. Evidence in that case showed that the Claimant was suffering from decompression and fusion of the spine at levels L4 and S1, Cervical Spondylosis by degenerative causes to his back and a partial disability of 30%.
61. Bearing in mind that the Claimant suffered from back pain which would reduce over time, and had neither intra-abdominal injuries nor spondylosis, the court is persuaded that the sum of Kshs.750,000/= is fair.
62. In the upshot, judgement is entered in favour of the Claimant against the 2nd Respondent for the sum of Kshs.750,000/= together with costs and interest at court rates from the date hereof till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF NOVEMBER 2023

DR. JACOB GAKERI

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 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 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 *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.

DR. JACOB GAKERI

JUDGE

