



**Kalimoni v Powerful Construction Limited (Miscellaneous Cause
E041 of 2023) [2023] KEELRC 2991 (KLR) (10 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2991 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CAUSE E041 OF 2023
AN MWAURE, J
NOVEMBER 10, 2023**

BETWEEN

STEPHEN MUSHIRA KALIMONI APPLICANT

AND

POWERFUL CONSTRUCTION LIMITED RESPONDENT

RULING

1. The Applicant filed a Notice of Motion dated 23rd February 2023 seeking the following orders that:
 1. the Honourable Court do award of the Directorate of Occupational Safety and Health Services in the sum of Kshs 446,400/= granted in favour of the Applicant against the Respondent as the judgment of the Court.
 2. a decree do issue accordingly for execution.
 3. the Respondent do equally pay the costs of this Application.
2. The Applicant avers he was employed by the Respondent from the year 2017 to 2020 as a Steel Fixer.
3. The Applicant avers on 24th May 2018, he suffered injury in the course of his employment when a metal slid from a lorry and fell on his hand leading to fractures on his right forearm.
4. The Applicant avers that he reported and processed the injury under the Work Injury and Benefits Act which was initially assessed at Kshs 271,938/-, to which he objected and sought for review.
5. The Applicant avers that the Director of Occupational Safety and Health Services reviewed his initial assessment and increased the compensation to Kshs 446,400.
6. The Applicant avers that the Respondent never lodged an objection disputing either the initial award or the reviewed award by the Director.



7. The Applicant avers that he made demand payment but the Respondent has not bothered to pay as assessed.
8. Despite being served the application herein and the Director's award contained in ML/Dosh/ WIBA/ Form 4 dated 16th February 2021 by the Applicant's advocate, the Respondent has failed and/or refused to respond to the same.
9. The Respondent has never appeared before this court despite being served with the relevant mention and hearing notices.

Analysis and Determination

10. The Applicant was injured and his injuries were evaluated by DOSH at 20% permanent incapacity and awarded Kshs 446,440 as compensation and DOSH form WIBA/NBI/065/2021- dated 16th March 2021 was issued.
11. The Respondent herein never objected to the Director's aforementioned award to the proceedings herein. In *Elijah Kisyanga Ndende v Manager Zabkem International Construction Ltd* [2022] eKLR the court held:

“The *Work Injury Benefits Act* is silent on the procedure to be followed in enforcing the Director's decision made on assessment of compensation payable to an employee for work injuries. In my view, the legislature never intended that an employee whose employer fails and/or refuses to pay the amount of compensation assessed by the Director of Occupational Safety and Health Services under *WIBA* would be without civil remedy, and particularly so where the employer never objected to the Director's decision on assessment of compensation payable to the employee.

12. It was held in the case of *Samson Chweya Mwandabole v Protective Custody Limited* [2021] eKLR as follows:-

“...However, this Court being endowed with unlimited original and appellate jurisdiction in disputes related to employment and labour relations pursuant to Article 162(2) of the *Constitution* and Section 12 of the *Employment and Labour Relations Court Act*, the Court has inherent jurisdiction to adopt as judgment the Director's award for purposes of execution. This jurisdiction should not be confused with appellate jurisdiction which is expressly donated under Section 52(2) of the *WIBA* in respect of the director's reply to objection made under Section 51(1) of *WIBA*. It would appear that the former jurisdiction, which I now invoke, can be exercised by the Court where there is no challenge mounted against the Director's award by any party by way of objection or appeal under Sections 51(1) and 52(2) of the *WIBA* respectively. In this case, it is common ground that the Respondent did not object to the award under Section 51(1) of the *WIBA*...”

13. Flowing from the foregoing this court allows the Notice of Motion dated 23rd February 2023 on the following terms:
 - a. the assessment made by the Director of Occupational Safety and Health Services in the sum of Kshs 446,400 granted in favour of the Applicant against the Respondent is hereby adopted as a Judgment of this Court.



- b. a decree is hereby issued for Kshs 446,400 in accordance with the assessment of the Director of Occupational Safety and Health Services dated 16th February 2021.
- c. costs of the application are awarded to the Applicant.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 10TH DAY OF NOVEMBER, 2023.

ANNA NGIBUINI MWAURE

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 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.

ANNA NGIBUINI MWAURE

JUDGE

