



REPUBLIC OF KENYA



KENYA LAW
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**Wainaina v Moses (Miscellaneous Application E004 of 2023)
[2023] KEELRC 2827 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2827 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E004 OF 2023**

**AK NZEI, J
NOVEMBER 9, 2023**

BETWEEN

CHARLES KARIUKI WAINAINA APPLICANT

AND

EDRIS KITAO MOSES RESPONDENT

RULING

1. The Application before me is the Applicant's Notice of Motion dated 18/11/2023, expressed to be brought under Sections 87 and 90 of the *Employment Act* and Rule 17 of the *Employment and Labour Relations Court (Procedure) Rules 2016*. The application seeks the following orders:-
 - a. that the Court be pleased to adopt as judgment of the Court the award of the Director of Occupational Safety and Health services made on 24/3/2022.
 - b. that judgment be entered for the Applicant against the Respondent for the sum of ksh. 676,000 plus interest at Court rates.
 - c. that costs of the application be provided for.
2. The application sets out on its face the grounds on which it is founded, and which are replicated in the Applicant's Supporting Affidavit sworn on 18/1/2023. It is deponed in the said supporting affidavit:-
 - a. that the Applicant was employed by the Respondent as a messenger until 15/5/2021 when the Applicant had been send by the Respondent in one of his butcheries to make mince meal using machines and in the process, the Applicant's hand was minced leading to removal of all the finders and the palm, and that the matter was reported to the Director of Occupational Safety and Health Services.
 - b. That the Applicant was admitted at Coast General Hospital and due to lack of National Identification Card, the Applicant (sic) under his father's name, George Wainaina Kariuki.



That the Director of Occupational Safety and Health Services issued an award in the name of the Applicant's father; at Kshs.676,000, as the injury led to 60% permanent incapacity, and the Applicant was earning ksh.10,000.

- c. that the Respondent did not object or appeal the Director's decision within the Prescribed period and did not pay, despite having been involved in the process of assessing the compensation, and acknowledging that the Applicant ought to be compensated.
3. The application is opposed by the Respondent vide a Replying affidavit sworn by himself on 15/2/2023. It is deponed in the said replying affidavit:-
 - a. that the Respondent objects to adoption of the award of the Director of Occupational Safety and Health Services as a Judgment of this Court as it was delivered in his absence and without notice or participation, and was not made aware of the existence of the same until belatedly.
 - b. that the Applicant sustained injuries when he was crushed by meat mincing machine belonging to a third party and at the third party's premises, that the third party should have been enjoined as a party in the proceedings herein.
 4. Section 16 of the *Work Injury Benefits Act* (WIBA) 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.”
 5. Section 23 of the said Act (*WIBA*) on the other hand 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 inquiry 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.”
 6. It is clear from the foregoing statutory provisions that determination of liability and assessment of compensation is the preserve of the Director of Occupational Safety and Health Services (Director). The WIBA does not confer primary and/or original jurisdiction on this Court to open or to fault the Director's decision or the process leading to it. Indeed, Section 51 of the *WIBA* provides as follows:-
 - “(1) Any person aggrieved by a decision of the director on any matter under this Act, may within sixty days of such decision, lodge an objection with the Director against such decision.
 - (2) The objection shall be in writing in the prescribed form accompanied by particulars containing a concise statement of the circumstances in which the objection is made and the relief or order which the objector claims, or the question which he desires to have determined.”



7. Section 52(2) of the *Work Injury Benefits Act* (WIBA) provides as follows:-
- “ An objector may, within thirty days of the Director’s reply being received by him, appeal to the Industrial Court against such decision.”
8. The summary of the foregoing statutory provisions is that the Director’s decision, if objected to, can only be interrogated and/or faulted by this Court on appeal. The Respondent did not object to the Director’s decision dated 24/3/2022 within the prescribed period. The Applicant has moved this Court to enforce that decision.
9. The Respondent has not denied the authenticity of the Director’s award contained in Form DOSH/WIBA4. The Respondent has not denied the authenticity of DOSH FORM 1, shown to have been filled by him and submitted by him to the Director, and has not denied having been the Applicant’s employer. The issues raised by him in these proceedings ought to have been issued with the Director before he determined the issues of liability and the compensation payable.
10. Of major importance is the fact that the Respondent has not denied the fact that the compensation award made by the Director on 24/3/2023 was in respect of the Applicant herein, and not in respect of any other person. Indeed, documents annexed to the Applicant’s supporting affidavit include an affidavit sworn by the Applicant on 16/11/2022 deposing to reasons why he lacked identification documents at the material time, and why the name of his father, George Wainaina Kariuki, appears on the documents regarding his injury, and requesting that his name, Charles Kariuki Wainaina be used in the claim documents herein. The Respondent has not denied and/or challenged any deposition in the said affidavit.
11. Other documents annexed to the Applicant’s supporting affidavit include the DOSH/WIBA 4 Form issued and signed by the Director on 24/3/2022, assessing the Applicant’s permanent incapacity at 60% and compensation payable to him at ksh. 676,000; and the Director’s letter to the Respondent dated 16/11/2022 requesting the Respondent to pay the assessed sum of ksh. 676,000. The said letter is shown to have been addressed to the Respondent, and bears his ID Number and phone number. The Respondent has not denied having received the said letter, and has not denied the contents/details therein. DOSH FORM 1, shown to have been filled and signed by the Respondent on 1/2/2022, is also annexed.
12. The Respondent’s allegation that he was not involved in the assessment process by the Director flies on the face of the record herein, and is, in my view, without basis.
13. In my view, once the Director assesses the compensation payable and the same is not objected to pursuant to Section 51 of WIBA, the assessed sum becomes the injured employee’s entitlement/right regarding which the employee can move to Court and seek enforcement of that right by seeking entry of judgement in terms of the Director’s assessment, and issuance of a decree which can then be executed to realize that right.
14. I stated as follows in the case of *Amir Swaleh Omar -vs- Mackenzie Maritime [e.a] Ltd [2022]* eKLR:-
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.”

15. Pursuant to Article 162(2) (a) of *the Constitution* of Kenya 2010, this Court has inherent jurisdiction over all employment and labour relations disputes, except where that jurisdiction has been expressly ousted by the statute over particular matters specified in that statute. A good example of such ouster by statute is Section 16 of *WIBA* which ousts the Court’s jurisdiction regarding determination of liability and assessment of compensation in matters involving work injuries or occupational diseases. Section 23 of the Act mandates the Director to make such enquiries as are necessary to decide upon any claim or liability in accordance with the Act; while Sections 28 and 30 of the Act (*WIBA*) provides for assessment of compensation by the Director.
16. Having said all that, I am satisfied that the Applicant’s Notice of Motion dated 18/1/2023 is merited, and I allow the same in the following terms:-
 - a. the award made by the Director of Occupational Safety and Health Services on 24/3/2022 is hereby adopted as a judgment of this Court, and, accordingly, judgment is hereby entered for the Applicant in the sum of ksh. 676,000 being the compensation award made by the Director.
 - b. the Applicant is awarded interest on the sum awarded to be calculated at Court rates from the date of this Ruling.
 - c. Each party shall bear its own costs of the application.
 - d. It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9th NOVEMBER 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 Applicant

..... Respondent

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