



REPUBLIC OF KENYA



KENYA LAW
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Wafula v Robamach Building & Construction Co. Ltd & another (Petition E009 of 2023) [2023] KEELRC 3477 (KLR) (11 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3477 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
PETITION E009 OF 2023

JW KELI, J

DECEMBER 11, 2023

IN THE MATTER OF ARTICLES 2,10.,19,20, 21,22 23,2841,47,48 AND 258 OF THE CONSTITUTION OF KENYA, THE CONSTITUTION OF KENYA(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)PRACTICE AND PROCEDURE RULES 2013, WORN INJURY BENEFITS ACT NO. 13 OF 2007, EMPLOYMENT ACT,2007, EMPLOYMENT AND LABOUR RELATIONS COURT ACT NO. 20 OF 2011, EMPLOYMENT AND LABOUR RELATI8ONS COURT(PROCEDURE) RULES, 2016, WORKMEN'S COMPENSATION REGULATIONS

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 28,41 AND 47 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTIONS 10, 18, 22, 30, 47,48 OF THE WORK INJURY BENEFITS ACT NP. 13 OF 2007 AND SECTION 44 OF THE EMPLOYMENT ACT 2007

BETWEEN

JAMESON WAMALWA WAFULA PETITIONER

AND

ROBAMACH BUILDING & CONSTRUCTION CO. LTD 1ST RESPONDENT

EMMANUEL SIMIYU BARASA 2ND RESPONDENT



((Before Hon. Lady Justice Jemimah Keli))

RULING

1. The Petitioner states that he was employed in early 2022 as a Carpenter by the 1st Respondent through the 2nd Respondent. On 31st August 2022, the 2nd Respondent assigned him duties to work at Our Lady of Grace and Compassion Mundika Primary School in Busia, where the Respondent had secured a contract to build classrooms and dormitories.
2. While he was working, he was hit by a heavy metal that was used to support lifting concrete. He states that he was injured due to the negligence and breach of statutory duty on the Respondents' part; arising from their failure to provide him with protective gear and failing to properly maintain the lifting concrete machine. He filed the instant Petition dated 23rd May 2023 on 25th May 2023 seeking the following reliefs: -
 - a. A Declaration that the conduct and actions of the Respondents are in violation of the Petitioner's inherent dignity and right to have that dignity respected and protected as under Article 28 of the Constitution of Kenya, 2010
 - b. A declaration that the Respondents violated the petitioner's rights under Article 47 of the Constitution of Kenya.
 - c. General Damages for violation of the petitioner rights Articles 28, 41, and 47 of the Constitution of Kenya 2010.
 - d. A declaration that the Respondents have contravened section 10,18,22,30,47 and 48 of the Working Injury Benefits Act No. 13 of 2007.
 - e. Punitive damages for contravention of sections 10, 18,22,30,47, and 47 of the WIBA 2007;
 - f. Compensation for the injuries sustained at the Respondent workplace.
 - g. A refund of Kshs. 17,300 for the medical expenses incurred by the Petitioner.
3. Accompanying the Petition was the affidavit in support of the Petition sworn on 22nd May 2023 and the annexures thereto and the Petitioner's Witness Statement dated 22nd May 2023.
4. The Petition was opposed. The Respondents filed a joint response to the Petition dated 7th June 2023 and an affidavit in support of the response sworn by the 2nd Respondent on an even date, and all were received in court on the 8th of June 2023.

Directions

5. The court on 27th July 2023 directed the Petitioner to reconsider his petition before the court as the same relates to WIBA matters, and on 17th October 2023 directed parties to address the court on the issue of jurisdiction.

Written submissions

6. The court directed that the issue of jurisdiction in the Petition be canvassed first by way of written submissions. The petitioner's written submissions drawn by Calistus & Co. Advocates were dated 1st November 2023 and received in court on an even date. The Respondents' written submissions drawn



by Wamalwa Simiyu & Company Advocates were dated 27th November 2023 and received in court on an even date.

Petitioner's case in summary

The case as per affidavit in support of petition on 22nd May 2023

7. The Petitioner was employed by the 1st Respondent through the 2nd Respondent (JWW-4) in early 2022 as a carpenter, but he was never issued with an appointment letter.
8. He stated that on 31st August 2022, the 2nd Respondent assigned him duties to work at Our Lady of Grace and Compassion Mundika Primary School in Busia, where the Respondents had secured a contract to build classrooms and dormitories. While he was working, at around 9.00 am, he was hit by a heavy metal that was used to support lifting of concrete.
9. He states that he was injured due to the Respondent's negligence and breach of statutory duty arising from their failure to provide him with protective gear and failing to properly maintain the lifting concrete machine; which prompted him to seek medical attention at Busia County Referral Hospital on various dates(JNM-5 & JWW-9) and incur medical costs of Kshs. 17,500(JWW-6).
10. He stated that he reported the accident on 6th September 2022 at Korinda Patrol Base under the Occurrence Book (O.B)Report(JWW-7) and stated that the respondents despite demand(JWW-8) failed to report the accident to the Director as required under section 22 of the [Work Injury Benefits Act,2007](#); which prompted the Petitioner to seek the intervention of the Director of Occupational Safety Services vide his letter of 27th February 2023(JWW-10) and yet no action was taken since then, prompting him to file the instant petition.

Respondents' case in summary

(The case as per the Replying affidavit of Emmanuel Simiyu Barasa sworn on 7th June 2023)

11. It is the Respondents' case that the Petitioner was working as a carpenter on the material date of 31st August 2022, and the 2nd Respondent received a call from his foreman at the site(Our Lady of Grace and Compassion Mundika Primary School) informing him that the Petitioner had taken himself to hospital claiming to have been injured.
12. The Petitioner went to Busia Plaza Imaging Center and the documents from the said center (ESB-II) showed that he had not been injured. The respondent stated that the petitioner intentionally left out the report from Busia Plaza Imaging Center from his documents before the court knowing that he never went to Busia Referral Hospital.
13. The 2nd Respondent stated that the Petitioner has not stated where he was injured and medical notes produced are forgeries. He stated that the metal object(ESB-III) alleged to have hit the Petitioner is very huge weighing (75kgs) and if the Petitioner had been hit he could be dead.
14. The 2nd Respondent states that the Petitioner reported to DOSH on 27th February 2023 and he received a call from DOSH. He submitted the Medical report of the petitioner, and upon investigations, DOSH concluded there was no claim to be paid to the petitioner.
15. The Respondents state that the Petitioner is a dishonest man who is reported to have initiated false claims of having been injured against various companies and seeks the Petition to be dismissed.



Determination

Issues for determination.

16. The Petitioner in his submissions addressed the following issues:-
 - a. Whether the Petitioner has exhausted the mechanisms enshrined under the [Work Injury Benefits Act, 2007](#)
 - b. Whether this court has jurisdiction to entertain this matter.
17. The Respondents in their submissions addressed the issue of the jurisdiction of the court to issue a relief for compensation as well as a refund of the medical expenses incurred by the Petitioner purporting to have been injured while working for the respondents.
18. The court discerned that the issue for determination under the Petition:-
 - a. Whether the Petition meets the threshold of a constitutional Petition
 - b. Whether the court has jurisdiction to determine the Petition.Issue a). Whether the Petition meets the threshold of a constitutional Petition
19. The Respondents argue that the petition does not specify the constitutional provisions allegedly violated and how the same have been violated by the Respondents contrary to the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules 2013](#) vide Legal Notice No. 117 of 2013 (Mutunga Rules. To buttress this argument they relied on the decisions in [Anarita Karimi Njeru](#) (1979) eKLR and [Mumo Matemu v Trusted Society of Human Rights Alliance](#)(2013)eKLR.
20. The court in [Anarita Karimi Njeru v Attorney General](#) [1979] eKLR case, held:

“Where a person is seeking redress from the High Court on a matter which involves a reference to the [Constitution](#), it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”
21. This same tenet was echoed by the Supreme Court in the case of [Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others](#) [2014] eKLR, thus:“..... although Article 22 [1] of the [Constitution](#) gives every person the right to initiate proceedings claiming that a fundamental right[s] has been violated, denied or infringed a party invoking that Article has to show the rights said to be infringed as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in [Anarita Karimi Njeru - v- Republic](#) [1979] eKLR 154: the necessity of a link between the aggrieved party, the provisions of the [Constitution](#) alleged to have contravened and the manifestation of the contravention or infringement.”
22. The petitioner in his grounds of the petition stated that his right to fair labour practices included the right to fair remuneration and reasonable working conditions and stated that the Respondents having failed to provide them they violated his rights under Article 41.
23. The Petitioner went further to state that under Article 47 of the [Constitution](#), his right to fair administrative action was violated by the respondents’ unreasonable, unlawful, and unprocedural unfair actions such as subjecting the petitioner to unreasonable working conditions and failing to pay the petitioner’s medication costs and compensation.



24. Article 41(1) of the Constitution states that “Every person has the right to fair labour practices and Article 47(of the states that Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”
 25. The Petitioner’s petition set out with a reasonable degree of precision, that his right to a right to fair remuneration and reasonable working conditions was violated under Article 41 and Article 47.
 26. I disagree with the Respondents that the petitioner did not identify any violations in his Petition. The petition is sufficient in the content on how the fundamental rights and freedoms of the Petitioner relating to his right to a right to fair remuneration and reasonable working conditions were violated or are threatened to be violated and that thus the Petition met the threshold under Anarita Karimi case. As to whether the said rights were violated goes to the merit of the Petition.
- Issue b). Whether the court has jurisdiction to determine the Petition.
27. The Respondents argued that the Petition raised issues relating to the assessment of injuries and damages and the court lacks the jurisdiction to grant the prayers of compensation for injuries suffered by the Petitioner. The Respondents argued that the jurisdiction of the Petition is under the Work Injury Benefits Act. To buttress this assertion, the respondents relied on the practice directions relating to pending court claim regarding compensation for work-related injuries and diseases instituted prior to the Supreme Court Decision In Law Society of Kenya v. Attorney General And Another, Petition No. 4 OF 2019 ;(2019)ELR,“ issued under Gazette Notice 5476 of 28.4.2023, where the Chief Justice directed that any Matter relating to Work injury after the Supreme court Decision on 3rd December 2019 would commence before the Director of Occupational Safety and Health Services.
 28. The Petitioner’s petition had been filed on 25th May 2023 after the above Practice direction was issued. The Respondents urged that the court lacks jurisdiction which is everything and without it, the court must down its tools as enumerated by Nyarangi JA in Owners of Motor vessel “Lilian S” Versus Caltex Oil Kenya (1989)eKLR.
 29. The Petitioner on his part argued that he had exhausted the remedies available before the Work Injury Benefits Act, 2007 as the Director of Occupational Safety and Health Services failed to consider his claim raised through the letter dated 27th February 2023.
 30. The petitioner argues that the Director of Occupational Safety and Health Services who is mandated under section 23 of the Work Injury Benefits Act, 2007 to investigate and seek any further particulars from either an employee or the employer, failed to do so. He states that he is entitled to expeditious resolution of any dispute as per the provisions of Article 47 of the Constitution. He states that as it is, his claim has been treated with contempt by the Respondents and the Director of Occupational Safety and Health Services which amounts to a miscarriage of justice.
 31. He argues that the exhaustion principle can only be followed if it serves the values enshrined in the Constitution and any law and states that the dispute is within the matters to be entertained by the court under Section 12 of the Employment and Labour Relations Act. No. 20 of 2011. He relied on the decisions in Dhow House Limited v Kenya Power and Lighting Company(Constitutional Petition E058 of 2021[2022]KEHC 11840(KLR)(19 August 2022)[Ruling] and David Mugendi v Kenyatta University & 3 others (2013)eKLR
 32. He states that unless the petition is determined by the court, he will never be accorded the relief he seeks.



Analysis and decision

33. The petitioner submitted that he was hit by a heavy metal that was used to support the lifting of concrete. He stated that he was injured due to the Respondent's negligence and breach of statutory duty arising from their failure to provide him with protective gear and failing to properly maintain the lifting concrete machine. He stated that on being injured he sought medical attention at Busia County Referral Hospital on various dates(JNM-5 & JWW-9) and incurred medical costs of Kshs. 17,500(JWW-6).
34. As per the Practice Notice issued under Gazette Notice No.5746, the Petitioner was required to commence before the Director of Occupational Safety and Health Services any claims for injuries. He states that he commenced the process and has never received any response and thus came to court.
35. There is no evidence that the Petitioner tried to confirm from the Director of Occupational Safety and Health Services the outcome of the investigations into his claim.
36. The Respondents state that the Director of Occupational Safety and Health Services indeed contacted the Respondents and they gave the Director the medical report (ESB -II (A) and (b) that had been issued to the Petitioner. That the Director conducted investigations by visiting the Location of the accident and found the Petitioner was not to be compensated.
37. The Petitioner states that the Director never responded to his letter.
38. The Petitioner was obligated to confirm the position before The Director of Occupational Safety and Health Services, before filing his Petition. It is the opinion of the Court that if the Director fails to perform his obligation under provisions of WIBA the remedy is not to move the case to this Court. The Court can only exercise supervisory powers over the Director but not usurp his powers. The Petitioner in this case under guise of constitutional petitions seek the court to exercise the mandate of the Director under WIBA.
39. The appropriate legislation concerning any claims made against the Respondents is the Work Injury Benefits Act (WIBA). Under WIBA, the preamble provides 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.”
40. The Employment and Labour Relations Court can therefore only exercise its jurisdiction on the matters of injuries subject to the provisions of WIBA.
41. The only time that the Petitioner could have approached the court was under Section 52 of the Work Injury Benefits Act, 2007, which provides that “ (2) An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such decision.”
42. Work injuries and the remedies therefrom are regulated under the Work Injury Benefits Act, 2007 (WIBA) which are as enumerated by the Petition in the instant case.
43. The Employment Act, of 2007 defines the fundamental rights of employees, provides basic conditions of employment of employees, and provides for matters connected with the foregoing as set out in the preamble.
44. The court lacks jurisdiction to entertain the present petition as is tantamount to usurping the powers of the Director under WIBA to determine all work injuries and diseases claims.
45. The Petition dated 23rd May 2023 is dismissed. No order as to costs.



46. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 11TH DAY OF
DECEMBER 2023**

JEMIMAH KELI

JUDGE

In The Presence of:

C/A Lucy Macheso

For Petitioner: Manyonge h/b Nyegenye

For Respondent: absent

