



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1332 OF 2015

[Before Hon. Mr. Justice Ocharo Kebira on 21st March 2022]

SAMUEL OTIENO MUSUMBA.....CLAIMANT

VERSUS

INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION.....RESPONDENT

JUDGMENT

INTRODUCTION

1. Through a Statement of Claim herein dated 30th July 2015, the Claimant sued the Respondent seeking for the following reliefs and orders.

- a) Kshs. 529,033.00.
- b) General damages.
- c) Costs of the suit.
- d) Any other order and or reliefs that the Court may deem fit to grant.

2. The Statement of Claim was filed contemporaneously with his witness Statement of even date, and a list of documents, under which the various documents that he intended to place reliance on in support of his case were filed.

3. Upon being served with summons to enter appearance, the Respondent did, and filed a Memorandum of Response dated 21st September 2015.

4. Through his Notice of Motion Application dated 31st January 2018, the Claimant sought leave to amend his Statement of Claim, leave which was eventually granted. Consequently, the Claimant filed an amended Statement of Claim on the 2nd February 2018. In the Amended Statement of Claim he sought:

- (i) Kshs. 529,033.00 for special damages.
- (ii) General damages as set out under paragraph 11, Kshs. 1,789,171.
- (iii) Claimant to be paid terminal benefits as set out under paragraph 18.
- (iv) Costs of the cause.

5. In reaction to the amendment, the Respondent filed an Amended Memorandum of Response on the 15th October 2018, wherein it denied the Claimant's Claim in toto. Contemporaneously with the filing, the Respondent's Witnesses' Statements were filed, plus documents that it was to rely on in its defence.

6. The Claimant's case was heard on the 12th October 2021, when he testified in Court. He urged the Court to adopt the contents of his Witness Statement as his evidence in chief, and the documents filed in Court as his documentary evidence. The contents and documents were so adopted without objection by the Respondent.

7. The Respondent's case was taken on the 26th October 2021, where its two witnesses, the Assistant Human Resource manager, and a doctor were heard. Equally, the witnesses adopted their Witness Statements as their evidence in chief, choosing only to highlight a few areas of the Statements that they considered it was imperative to do.

8. At the close of the parties' respective cases, the Court directed that they file written submissions. The direction was obliged.

The Claimant's case.

9. It was his case that he came into the employment of the Respondent in 1992 as a Driver. Over years he rose through the ranks to a Senior Office Assistant / Driver. The nature of his work required him driving the Respondent's officers to various destinations for long hours without enough rest.

10. On or about the 11th July 2017 in the course of employment, he started developing back problems, at this time he was discharging his service as a driver.

11. The Claimant contended that the injuries were a product of the Respondent's negligence and or breach of statutory duty in that:

- (i) It failed to avoid the need for him to undertake driving for long hours.
- (ii) It failed to make a suitable assessment of the task of driving the motor vehicle for long hours.
- (iii) It failed to provide him with sufficient rest or recovery periods.
- (iv) Failed to take appropriate steps to reduce the risk of injury arising out of driving for long hours.

12. The Claimant contended that after visiting several specialists, it was concluded that he was suffering from a work-related ailment. Upon this, he reported the matter to the Director of Occupational Safety and Health Services under Claim Reference Number WIBA/NBI/884/2013 on the 9th August 2012.

13. On the 14th August 2012, under the care of Dr. K. Toroitich and Dr. Musau he underwent a surgery of the Lumbar Spine and the Doctor recommended a claim for partial disability at 30%.

14. He stated that in the course of his employment he visited several specialists over this problem. He tendered medical documents. On 22nd January 2008, he visited Dr. Fallbhy at Agha Khan Hospital, 13th March 2008, he visited Professor Mulumba: on 15th May 2009, Dr. Saroj Patel; on 13th July 2010, Dr. S.O. Owinga; on 6th March 2012 Dr. Thomas M. Adagala and on 14th August 2012, Dr. Musau for the surgery aforesaid.

15. He contended that he was diagnosed with; mild disc bulge-osteophyte complex with right unco-vertebral joint hypertrophy at (C3-C4) level; Degenerative disc desiccation at multiple levels; Moderate broad-based posterior and right paracentral disc protrusion-osteophyte; and posterior longitudinal ligament.

16. The Claimant asserted that he was constrained to incur expenses on various dates in relation to the work injuries, a sum of Kshs. 529,033.00.

17. He contended further that on the 4th July 2013, the Inspectorate of Occupational Health and Safety Office forwarded to the Respondent form ML/DOSH/WIBA 4 in respect of Claim No. WIBA/NBI/884/2013 notifying it of an award for compensation in the sum of Kshs. 1,789,171.00.

18. The Respondent did not compensate the Claimant to the extent of the award or at all. It did not challenge the award. That on the 13th August 2014, they informed the Inspectorate of Occupational Health and Safety Office that the matter was an insurance matter and that they were consequently to refer the same to the insurer.

19. He stated that, this did not happen, as a result, he got constrained to approach the office of the Commissioner of Administrative justice [Office of the Ombudsman]. Through their letter dated 10th December 2014, the Commissioner demanded for payment of the awarded sum. The Respondent did not oblige the demand contending that the injury was not a work-related injury.

20. He stated that he has continued to go for physiotherapy sessions and seek constant medical attention.

21. Cross examined by Ms. Guserwa for the Respondent, the Claimant stated that he retired from employment in the year 2016. He did not apply to be retired on medical grounds. His retirement was as a result of a recommendation by a panel of doctors. He only communicated the recommendation to his employer, the Respondent.

22. The Claimant stated that according to his Witness Statement, he started developing the problem in the year 2007. Referred to the report by Dr. Nyabanda, he stated that the report indicated Lumbar cordosis as normal.
23. The medical report by the Doctor who treated him in India does not show that the problem was caused by driving.
24. He further stated that the report from the Directorate of Occupational Safety and Health Services indicated that the cause of the injury was unknown. The type of the injury too.
25. The Claimant stated that he visited Dr. Kagode. Dr. Kagode's report did not attribute the back problem to driving.
26. The Claimant contended that he blames the employer for the reason that despite knowing his problem, it continued assigning him long distant driving duties.
27. He contended that whenever advised by the doctor, the Respondent used to allow him sick off.
28. The employer [Respondent] attended to his medical bills for Nairobi Hospital. The medical bills for the treatment in India were paid out of fundraising proceeds.
29. The Claimant stated that he was a member of a pension scheme. By virtue of his retirement, contributions to the scheme stopped. He has not made any demand to the scheme for his contributions. At the time of his retirement, he was 50 years old.
30. The Claimant maintained that the panel of doctors, found that the back problem was related to his work. The problem was caused by the nature of the work.
31. Under re-examination, the Claimant stated that it is the Respondent who referred him to Dr. Timothy Kagode for a report and it paid him for the service.
32. At the doctor's opinion, at one time the Claimant was redeployed to work as an office messenger. The doctor had opined that he was not fit to continue driving.

The Respondent's case.

33. The Respondent presented Sophia W. Mbogo as its first witness. The witness presented herself as the Assistant Human Resource Manager of the Respondent.
34. She stated that the Claimant was in the employment of the Respondent as a driver. He applied for retirement on medical grounds in the year 2016, the application got accepted by the Respondent.
35. She stated that prior to his retirement the Claimant was undergoing treatment for a back problem.
36. That in the month of January 2014, the Respondent referred the Claimant for review by Dr. Byakika, who examined him and gave a report to the effect that he was suffering from cervical spondylosis, which was as a result of degenerative causes.
37. The witness asserted that the Claimant's claim under WIBA is misplaced as he was not injured while working for the Respondent. The claim is not work related, it cannot be expected of either the Respondent or the Insurance to settle it.
38. Cross examined by counsel Oruenjo for the Claimant, the witness stated that as at the time she was joining the Respondent, the Claimant had already worked with it for a couple of years.
39. She stated that the Claimant was redeployed to Office Assistant upon a doctor's advice. That he should be given lighter duties.
40. The witness stated that from the Respondent's record, the Claimant started complaining about the problem in the year 2006. At the time she was joining the Respondent, the Claimant had already undergone one surgery.
41. The Respondent was aware that he had lodged the matter with the director. It responded to the director, through a form that was filled by its Human Resource manager, Faith Munene. In the form the Respondent indicated that it did not know about the injury.
42. The witness stated that the outcome of the process was that the Respondent was directed to pay Kshs. 1.7 Million to the Claimant as compensation.
43. The Respondent did not challenge the decision in Court in or any forum of appeal. She stated that they were justified not to pay the sum that was awarded in favour of the Claimant.
44. The Respondent wrote to the Director, who insisted that they had to honour the award. In his letter dated 3rd March 2015, he advised the Respondent to move to Court if it was not satisfied with the decision to award.

45. In her evidence under re-examination, the witness admitted that the Respondent did fill the DOSH form. The Respondent did not settle the award because the injury was not work-related.
46. She contended that before the Respondent could move to Court to challenge the decision by the Director, the Claimant lodged this claim.
47. Professor Timothy Byakika [RW2] stated that he examined the Claimant in January, 2014 at the request of the Respondent corporation. He carried out extensive medical examination and analysis touching on the severe low back pain he had been experiencing over some time. That from the records the Claimant had complained of persistent severe low back pain to the lumber region since 2012 which necessitated a surgery to be done.
48. The Doctor stated further that at the time the Claimant was retiring he was undergoing treatment involving decompression and fusion of the spine at levels L4 and S1. He assessed injuries and gave a report to the effect that he was suffering from cervical spondylosis caused by degenerative causes to his back.
49. What the Claimant was suffering from is a degenerative disease, which was not as a result of his occupation.
50. Cross examined, the witness stated that he examined the witness twice. However, the occasions were not before the 1st surgery. He relied on the documents that the Claimant gave him.
51. Cervical refers to the neck. In his first report he only referred to cervical condition. However, in the 2nd report he refers both to the cervical and back condition.
52. There are other predisposing factors for the condition for example heavy contact activities such as rugby. Vehicular movement too can be a factor.

The Claimant's submissions

53. Counsel for the Claimant identifies three issues as those that emerge for determination in this matter.
- (i) Whether the Respondent is liable for the Claimant's injuries?
 - (ii) Whether the award by the Director of Occupational Safety and Health is legal and enforceable.
 - (iii) Whether the Claimant is entitled to the prayers sought in the Amended Statement of Claim.
54. One the first issue counsel submitted that the liability question was determined by a competent entity which had the authority to pronounce itself as such after an inquiry. The decision by the entity, Directorate of Occupational Safety and Health Services DOSH was not challenged. Its decision should be upheld.
55. Counsel submitted that the Claimant's claim arose under the Work Injury Benefits Act. Section 2 thereof defines an injury and/or accident thus;

“An accident arising out of and in the course and scope of an employee's employment resulting in a personal injury.”

The injury does not need to be instant, it can be gradual.

56. It was submitted that there is a clear acknowledgment in the letter dated 15th August 2013, the Respondent's exhibit, that the Claimant started having the back problem on 11th July 2007, due to driving on bad weather roads.
57. It was contended that it is trite law that the work injuries and remedies in Kenya are regulated under the WIBA Act, which Act provides in its preamble as; “An Act of Parliament to provide for compensation to employees for work related injuries and disease contracted in the course of their employment and for connected purposes.”
58. The Claimant's counsel submitted that the case of **Longonot Horticulture Limited -vs- James Wakaba Maina [2019] eKLR**, answers the question as to when an accident/injury/disease which occurs in the course of an employee's employment gets declared as an occupational accident/injury/disease and who declares it, thus:

“Part IV [four] of WIBA lay out the provisions to follow once there is an industrial accident. A report must be made to the employer by the employee and upon which a report must be made to the Director of Occupational Safety and Health Services [the Director] and who must do an inquiry into the matter for assessment of compensation due to the employee. All these are provided for under section 21, 22, 23, 24, 25 and 29 of the WIBA Act.”

59. According to the Claimant's counsel, the mandate to assess and declare any injury as being a work-related injury under the WIBA Act lies entirely with the Director established under section 53 of the Act. The Director is obliged in mandatory terms under section 23 of the Act to conduct an independent inquiry and decide on the claim by an employee.

60. In the instant matter, the Directorate of Occupational Safety and Health Services made inquiries, subjected the Claimant to medical examination and decided on the claim on the 4th July 2013.

61. It was further submitted the RW.2, Dr. Byakika admitted that apart from age and genetics, occupational activities such as vehicular movements can cause injuries like those the Claimant was complaining of. That the doctor did not examine the Claimant before the 1st surgery and whatever he dealt with was the illness of the 1st injury that developed to cervical spondylosis.

62. On whether the award of DOSH is legal and enforceable it was submitted that the award which was made as the 4th July 2013 under the WIBA Act has not been set aside by any Court of law. That section 19 of the Act highly protects an award made under the Act.

63. The award of Kshs. 1,789,171.00 has not been set aside by any Court of law with competent jurisdiction. The award accrued to the Claimant as a right therefore.

64. It was further submitted that section 26 [4] of WIBA Act states:

“An employer and 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.”

65. The Claimant submitted that the award dated 4th July 2013, is legal and enforceable. This Court has jurisdiction to enforce an award by DOSH under the Act. This was confirmed by the Court in **Jared Ingling Obuya -vs- Handicap International [2021 eKLR]**, when it held;

“..... applying purposive interpretation of Word Injury Benefits Act; Article 162 [2] of the Constitution as read with section 12 [1] of the Employment and Labour Relations Court Act, this Court finds that Employment & Labour Relations Court has jurisdiction to enforce awards of compensation by the Director.”

66. On the relief sought, Kshs. 1,188,000.00 the Claimant submitted that he testified that he retired following the recommendation by the Ministry of East African Community, Labour and Social Protection Directorate of Occupational Safety and Health Services on 7th March 2016.

67. That on cross-examination his evidence was that his claim for retirement benefits found basis on the fact that upon recommendation by the Ministry, he requested the Respondent and the Respondent accepted to retire him. The Respondent ought to have paid him his full retirement benefits, as though he had retired at the retirement age. Reliance was placed on the decision in the case of **East African Airways -vs- Knight [1975] E.A. 165**.

The Respondent's Submissions.

68. The Respondent's counsel singled out two issues as those that commend themselves for determination in this matter, thus:

- a) Whether the Claimant sustained the injuries leading to his disability from his duties while working for the Respondent.
- b) Whether the Respondent is responsible to pay for the Claimant's disability as assessed by the Director Occupational Safety and Health.

69. It was submitted that the Respondent does not dispute that the Claimant retired on medical grounds based on a degenerative condition to his back that had nothing to do with his duties. That this is reinforced by the contents of the Respondent's document, WIBA FORM No. NBI/884/2013 that it tendered before Court. Further that the evidence of Dr. Byakika also confirmed that the Claimant's injury could not be attributed to the nature of his work.

70. It was further submitted on behalf of the Respondent that the assessment of the Director of Occupational Safety and Health Services may be correct/true save that the same can only be satisfied by a party who is found to be responsible for the injury. The Respondent was exonerated by a qualified medical Doctor. The Claimant's Doctor who allegedly attributed the injury to the nature of his work as a driver did not attend the Court to confirm his evidence nor prove to the Court the basis thereof.

71. The Respondent's counsel concluded that the Claimant's injuries were not work related nor covered under the WIBA Act. Therefore, the recommendation by the Director was misplaced. The cases of **Samuel Mula Mbindu -vs- Steel Makers Limited ERLC Civil Appeal No. 13 of 2013 and Tobias Ouma Otieno -vs- Mattan Contractors Limited, ELRC Cause No. 516 of 2017**, were cited to buttress counsel's submissions that since the Claimant did not prove that the injuries were work related the cause should meet the fate of dismissal.

Analysis and Determination.

72. From the material placed before this Court by the parties the following issues emerge as the issues for determination in this matter, thus:

- a) Whether the matter relating to the Claimant's injuries was dealt with by the Director of Occupational Safety and Health Services, and a decision made thereon.

- b) If the answer to (a) above is in the affirmative, whether this Court can order enforcement of the award emanating from the decision.
- c) What reliefs are available to the Claimant, if any.
- d) Who should bear the costs of this suit.

Whether the matter relating to the Claimant's injuries was dealt with the Director of Occupational Health and safety Services and a decision made thereon.

73. The Work Injury Benefit Act No. 13 of 2007 is an Act that became effective on the 2nd June, 2008, with the objective as expressed in its preamble to provide for compensation of employees for work related injuries and diseases contracted in the course of their employment and for connected purposes.

74. Section 10 of the Act, provides for employees' right to compensation, and an obligation upon the employer to compensate, thus:

"1. An employee who is involved in an accident resulting in the employee's disablement or death, is subject to the provisions of this Act, and entitled to the benefits provided for under this Act.

(2) The employer is liable to pay compensation in accordance with the provisions of this Act to an employee injured while at work."

75. Section 16 of the Act forbids an employee or any dependant of an employee from commencing recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against the employee's employer, other than in the forum and manner provided for in the Act. Courts have no jurisdiction to receive such matters as first ports of call and this was affirmed by the Supreme Court of Kenya in the **Law Society of Kenya -vs- Attorney General & another [2019] eKLR**.

76. It is apparent that, having in mind the provisions of sections 10 and 16 of the Act, and holding that his condition was work related, the Claimant reported the matter to the Director of Occupational Safety and Health Services. The Respondent does not deny that the matter was such reported. In fact, from the material placed before this Court, it is clear that the Respondent was aware of the same.

77. There is no contestation that the Director did make a decision on the 4th July 2013, in accordance with the statutory obligation bestowed on him under section 23[1] of the Act, which provides:

"23. [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 inquiries as are the necessary to decide upon any claim or liability in accordance with this Act,"

The director made the inquiry, considered the Claimant's claim and awarded him a sum of Kshs. 1,789,171.00.

78. The Respondent's [RW1] own witness in her evidence both in chief and under cross-examination made an admission that the report was made, the Respondent was aware of the same, and that the decision ensued out of the process that required the Respondent to pay the amounts hereinabove mentioned, to the Claimant. The Respondent didn't as it held that the Claimant's condition had nothing to do with the nature of the services he was rendering to Respondent.

79. No doubt the Director's decision was communicated to the Respondent on the 5th July 2013, and that thereafter there were a host of correspondences between the Claimant, the Respondent and various Government officer over the decision and the award.

80. Section 51 of the WIBA Act, requires of any person aggrieved by a decision of the Director on any matter under the Act, to challenge the same by way of an objection within 60 days of such decision, with the Director.

81. Through an objection dated 2nd December 2014, lodged on the 3rd December 2014, with the Director, the Respondent assailed the decision, on grounds similar to what it has raised in this matter.

82. Pursuant to the provisions of the section 52 of the Act, the Director gave an answer to the objection, declining to vary his decision. He advised the Respondent to consequently seize its right under section 52 [2] and move to the Industrial Court on appeal. RW1, in her evidence confirmed this.

83. Imperative to state that the objection was filed way after the 60 days provided for under the Act and the Director's decision was communicated through a letter dated 3rd December 2014, that the Claimant placed before this Court under the supplementary list of documents.

84. The Respondent did not exercise its right of appeal under section 52 [2]. The decision by the Director maintained.

85. In the upshot, I find that, the matter was dealt with by the Director who rendered himself on quantum and liability. The decision has not been assailed in any other forum legally recognised by law, it stands to date.

Of enforcement of the award

86. I am in total agreement with holding in **Glyde Khatete Okwaro -vs- Mohlal J. Chabadya t/s Ashadig Enterprises [E065 of 2021]** thus:

“In Appeal No. 36 of 2019 between Virginia Wangari Muita [Legal representative of Philip Mwangi [deceased] -vs—Nyoro Construction Company Limited, Ongonya J., citing with approval the decision of Radido J in Ruth Wambui Mwangi and another -vs- Alfarah Wholesalers [2017] eKLR, hold that in the absence of a prescribed summary procedure for enforcement of the Director’s decision, the proper Court of enforcement of the Director’s decision made under WIBA is the Employment and Labour Relations Court in exercise of the unlimited inherent jurisdiction over employment and labour relations matters.”

87. Section 10 as hereinbefore expressed bestows upon an employee a right to compensation under the Act, if the Court were to fold its hands and fail to enforce the award on account of lack of a specific mechanism in the Act regarding enforcement, where the employer deliberately neglects and or refuses to settle the Director’s award, it will amount to abdication of this Court’s duty to defend the right and constrain the Respondent to honour its statutory obligation to compensate.

Of the Reliefs

88. Having found as I have hereinabove, I enter Judgment in terms of the Director’s award in the sum of Kshs. 1,789,171.

89. The Claimant has also sought for a sum of Kshs. 529,000 being medical expenses. This is not a claim that I can award under these proceedings considering the provisions of section 16 of WIBA. The Court lacks jurisdiction to grant the same. The Claimant ought to have pursued the medical expenses against the Respondent through the mechanism provided for under the Act.

90. The Claimant made a further claim for Kshs. 1,888,000 terming the same, employee and employer pension contributions. I have carefully considered the material placed before me by the Respondent, I fear I am not able to see any contention that the Claimant was a member of some scheme or entity to which he and the Respondent were making contributions for purposes of his pension, and that the Respondent was under the arrangement under an obligation to compensate him. The claim was not proved.

91. In the upshot, Judgment is entered in favour of the Claimant in the following terms.

- a) Kshs. 1,789,171.
- b) Interest on [a] above at Court rates from 3rd December 2014, till full payment.
- c) Costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF MARCH, 2022.

OCHARO KEBIRA

JUDGE

DELIVERED IN PRESENCE OF;

MR. MUSEVE FOR GUSERWA FOR THE RESPONDENT.

MR. ORWENYO FOR THE CLAIMANT.

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.

OCHARO KEBIRA

JUDGE