



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 75 OF 2021

ARAFAMIN MOHAMED (SUING AS THE LEGAL REPRESENTATIVE TO THE ESTATE OF OMAR KHATIB ABDULKADIR –DECEASED).....CLAIMANT

- VERSUS -

DOLA FEEDS (K) LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 18th March, 2022)

JUDGMENT

The claimant filed the memorandum of claim on 05.08.2021 through Kitoo & Associates Advocates. The claimant is the widow of Omar Abdulkadir (deceased) who was in employment of the respondent and who died in a road accident on 08.02.2019 while on duty. The death was reported to the County Occupational Safety & Health Officer by letter Ref. No. WIBA/MBA/10491/19. On 15.10.2019 the Officer assessed the amount payable to the claimant as a result of the accident at **Kshs. 2, 457, 600.00**. The claimant's case is that the respondent has failed to settle the amount as assessed. The claimant prays for payment of the amount plus interest and costs. The claimant's case is that she lodged her claim for assessment as per section 26(1) of the Work Injury Benefits Act, 2007 (WIBA). Further section 51 of WIBA entitles a person dissatisfied with the assessment to lodge an objection with the Director within 60 days but the respondent has not lodged such objection. Further, the claimant's case is that under section 26(4) it amounts to an offence for the respondent having failed to settle the claim within 90 days of the lodging of the claim and, upon conviction, is liable to a fine not exceeding Kshs.500, 000.00 or to imprisonment for a term not exceeding one year or to both. The claimant prayed for a declaration that the respondent had committed the offence.

The claimant further urges that the Court has jurisdiction to hear and determine the enforcement suit per holdings in **Ruth Wambui Mwangi and Another –Versus- Alfarah Wholesalers Limited [2017]eKLR; Virginia Wangari Muita –Versus- Nyoro Construction Company Limited [2020]eKLR; and Richard Akama Nyambane –Versus- ICG Maltauro Spa [2020]eKLR.**

The statement of response was filed on 03.11.2021. The respondent pleaded that it could not confirm the averments made in the memorandum of claim. The respondent denied being notified of the award. Thus the proceedings were premature.

Final submissions were filed for the parties. The claimant testified to support her case. The respondent relied on pleadings and documents on record without calling a witness. The Court has considered all the material on record and returns as follows.

First, the evidence is that the respondent employed Omar Khatib Abdulkadir (deceased). The claimant is the widow and duly appointed legal representative of the said Omar Khatib Abdulkadir (deceased).

Second, the assessment consequential to the death of Omar Khatib Abdulkadir (deceased) was assessed at Kshs. 2, 457, 600.00 in accordance with WIBA. The assessment on the prescribed DOSH/WIBA4 is duly exhibited and signed on 15.10.2015.

Third, there is no reason to doubt the claimant's evidence that she served the assessment as notified by the County Occupational Health and Safety Officer's letters dated 05.03.2020 and 10.07.2020 duly exhibited for the claimant. The claimant's evidence in that regard is not rebutted at all and she testified, "**The case at labour I acted personally. I have evidence I served respondent. I served Salim the Manager. I swear before Allah. I served. Am saying the truth. I served the respondent. I served Salim...**" In any event, the respondent has since been served in the present suit and there is no established reason for failure to pay on the part of the respondent. Further the respondent has not suggested that it was pursuing an objection to the assessment.

Fourth, the Court has considered the authorities cited for the claimant. The Court has also considered its later decision **Edwin Songoroh and Another –Versus- Amony Koech Yatich and Another [2021]eKLR** where it was held thus, "**The Court holds that the Magistrate Court is vested with the jurisdiction of first instance to hear and determine the criminal case with respect to the offence under section 26(6) and the section therefore essentially vests in the Magistrate Court the necessary jurisdiction (even by implication) to**

adopt and enforce the Director's decision. The Court therefore considers that the learned Principal Magistrate had the jurisdiction to adopt and enforce the Director's award herein and despite the Court's earlier findings and opinion in Virginia Wangari Muita – Versus- Nyoro Construction Limited [2020]eKLR thus, “ Second, the WIBA does not provide for the procedure for enforcement of the decision by the Director. It is the Court's considered view that such procedure ought to be provided for in the regulations to be made by the Cabinet Secretary under section 56 of the WIBA or the rules of this Court made under Part V of the Employment and Labour Relations Court Act, 2011 (ELRCA). The Court considers that such regulations having not been made, it is proper that this judgment be served upon the Cabinet Secretary responsible for labour, the Attorney General and the Registrar of the Employment and Labour Relations Court (in his capacity as Secretary under section 26 of the ELRCA) for appropriate action. For the time being that the procedure is not expressly provided, the Court considers that the Director's decision would be enforceable by way of a miscellaneous application or memorandum of claim and exhibiting the Director's decision for enforcement by this Court.” Thus, in absence of rules or regulations or statutory procedure on enforcement of the Director's decision, the Court holds that the 1st respondent was entitled to move the Principal Magistrate's Court by way of a miscellaneous application as was done.”

It should appear that in absence of a statutory intervention on how to enforce the director's award under WIBA and in view of section 159 of the Constitution, the Court will continue to entertain cases of overlapping jurisdiction of this Court and the lower Courts towards enforcement of the director's decision under WIBA. In any event under section 12 of the Employment and Labour Relations Court Act, 2011 the Court appears to enjoy a general original jurisdiction over the instant suit. The Court finds despite the apparent statutory lacuna or silence the jurisdiction indeed exists and the claimant was entitled to move the Court as was done.

Fifth, the Court considers that a finding of criminal liability as urged for the claimant would need to go through and follow, as the case may be, the appropriate criminal justice proceedings before the lower Court with competent criminal jurisdiction and with the standards of proof being, beyond reasonable doubt. That not being the proceeding in the instant case, the prayer in that regard will be declined.

Sixth, the claimant has established her case and is awarded an order for enforcement of the award plus costs and interest. In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) The award herein of **Kshs. 2, 457, 600.00** be enforced as a judgment of the Court and the respondent to pay the claimant that money by 01.05.2022 failing interest to be payable thereon at court rates from the date of filing the suit till full payment.
- 2) The respondent to pay the claimant's costs of the suit.
- 3) A decree to issue accordingly.

Signed, dated and delivered by video-link and in court at Mombasa this Friday 18th March, 2022.

BYRAM ONGAYA

JUDGE