



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MALINDI
CAUSE NO. E005 OF 2021

JOASH SHISIA CHETO.....CLAIMANT

VERSUS

THEPOT PATRICK CHARLES.....RESPONDENT

JUDGMENT

1. This is a claim to enforce an award by the Director of Occupational Safety and Health Services (the Director) under the provisions of the Work Injury Benefits Act, 2007(WIBA). The said award was made in favour of the Claimant against the Respondent.
2. The Claimant asserts that sometime in February 2019, he was employed by the Respondent as a gardener. That on 7th February 2019, he sustained injuries while executing his duties under the aforesaid contract of service.
3. It is the Claimant's case that in line with the provisions of the WIBA, the injury was reported to the Director who assessed the degree of injury the Claimant had suffered and the commensurate compensatory damages the Respondent was to pay him. That despite this assessment, the Respondent has failed to pay the compensation estimated at Ksh. 624,000/=. As a consequence, the Claimant has sought this court's intervention in the manner proposed in the Memorandum of Claim filed.
4. The Respondent has opposed the claim. According to the pleadings filed by the Respondent, the Claimant's claim is a fabrication. That the Claimant was never the Respondent's employee. That around 7th February 2019, the Respondent hired one Kazungu Katana to prune plants around the Respondent's compound. That Kazungu came in with his own team of employees who included the Claimant. That while undertaking the work, the Claimant fell off a tree and suffered injury.
5. The Respondent blames the Claimant for the injury he suffered. It is the Respondent's defense that Claimant, who was not his employee, acted negligently by failing to adhere to Kazungu's instructions not to climb on the tree that was being cut and by hanging on the tree that was too small to withstand the Claimant's weight.
6. However, in the very same defense, the Respondent simultaneously denies that the accident ever occurred. This assertion is repeated in the statement filed by the Respondent and which was made under oath.
7. The defense as drafted presents alternative defenses that are contradictory and inconsistent. It cannot be that on the one hand one asserts that an accident occurred but was caused by the negligence of the Claimant whilst on the other hand he pleads that no such accident ever occurred. Such defense runs the risk of embarrassing a fair trial.
8. The parties gave evidence and filed written submissions. In arriving at my conclusion in this judgment, I have considered all the evidence on record together with the written submissions.
9. In his evidence, the Claimant reiterates his case as presented in his pleadings. He asserts that he was a casual labourer of the Respondent together with one Katana Kazungu. That around February 2019, they were hired for a temporary assignment of pruning trees in the Respondent's compound and were to be paid an agreed wage at daily rate.
10. The Claimant mentioned that they used the Respondent's tools to execute the work. Specifically, the Respondent provided them with saws for pruning and felling the trees.
11. On the first day, the Claimant and Kazungu begun pruning the tree branches but were stopped by officials of the County Government as they did not have a license to undertake the work. That the Respondent paid them Ksh. 2,500/= each for that day.

12. That on the fateful day in February 2019, the Claimant and Kazungu were working at the Respondent's premises when the Claimant fell off a tree that they were cutting thereby suffering injury.
13. In cross examination, the Claimant maintained that he was employed as a casual by the Respondent. That the Claimant and Kazungu were both casuals working for the Respondent on contract basis. That their payments would either be given to them individually, or to Kazungu to settle the Claimant or vice versa. The Claimant denied that he was Kazungu's employee.
14. Although in his pleadings the Respondent, in the alternate defense denied that the Claimant got injured in his compound, RW2 called by the Respondent confirmed that the accident indeed occurred and the Claimant suffered some injuries. However, it was the evidence of the defense that the Claimant was an employee of one Kazungu Katana who was an independent contractor hired by the Respondent to prune trees in the Respondent's compound. Therefore, the Respondent had no responsibility over the accident.
15. The central question in the case in my view is whether the Respondent ought to be compelled to settle the award made by the Director as more specifically set out in exhibit 4 (document 4 on the Claimant's list of documents). According to the document also referred to as DOSHI/WIBA 4, the Claimant is to be paid Ksh. 624,000/=. The assessment was completed on 5th September 2019. It was undertaken by the Director following submission of DOSH 1 (see document 3 on the Claimant's list of documents).
16. The Respondent denies responsibility to pay this amount principally on the ground that the Claimant was not his employee. Under the arrangement set out under the WIBA, I doubt that it is open to the Respondent to raise this objection at this stage of the dispute. I shall come back to this issue later on in this judgment.
17. For now, assuming that it was open to the Respondent to raise the defense aforesaid, has he presented evidence to sustain it? I think not.
18. The Employment Act recognizes various forms of employment contracts. These include: contracts for an indefinite term; fixed term contracts; and casual employment contracts. Section 2 of the Act defines a casual employee as a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time. From the Claimant's evidence, he was engaged by the Respondent on casual basis. It was the Claimant's evidence that the parties agreed to make payments based on a daily rate. This arrangement, in my mind, fits the definition of a casual employee as set out in the Employment Act.
19. The Respondent of course disputes the Claimant's assertion on this aspect. According to the Respondent, the Claimant was an employee of Kazungu who had an independent contract with the Respondent. The Respondent relies on document number one (1) in the Respondent's list of documents, a handwritten note between Kazungu and the Respondent to advance this defense.
20. I have looked at the said note. First, it does not state that the arrangement between the parties was one of an independent contract. It merely sets out the work that was to be done and the amount to be paid. It does not tell us that Kazungu was to undertake this work either as an independent contractor or as a casual employee.
21. Second, nowhere in the document is the Claimant mentioned as an employee of Kazungu if at all. Neither is it shown that Kazungu was to have his own staff.
22. Third, the fact that Kazungu was hired as an independent contractor does not rule out the fact that the Respondent separately hired the Claimant to undertake similar work at the same time as Kazungu. No cogent evidence was presented to dispel this probability. RW1 and RW2 who testified that the Claimant was not an employee of the Respondent but of Kazungu, the independent contractor, can only have been speculating on the issue. There was no evidence that they were directly involved in concluding whatever contract(s) that there were between the Respondent, Kazungu and the Claimant.
23. In my view, since the Respondent's defense was that the Claimant was Kazungu's employee and that Kazungu and the Respondent were working under an independent contract, it would have been helpful for the Respondent to call Kazungu to testify on this aspect of the case. Unfortunately, he did not. The evidential burden lay with the Respondent to establish his defense.
24. I have considered the Claimant's evidence that he was to be paid daily. I have considered his evidence that both Kazungu and the Claimant were engaged by the Respondent as casuals. I have considered the evidence that both Kazungu and the Claimant were paid differentially. And I have also considered the evidence that the Respondent provided the Claimant and Kazungu the tools of trade.
25. This evidence is contrasted with the defense evidence aforesaid. Worth of noting is that the Respondent did not dispute the fact that he supplied the Claimant and Kazungu with the work implements. This evidence tends towards establishing an employer-employee relation as opposed to an independent contractor relation between the Claimant and Kazungu on the one hand and the Respondent on the other.
26. I therefore decline to find that the Claimant was working at the Respondent's premises under an independent contract arrangement involving the Respondent and Katana Kazungu. I find that the Claimant was engaged by the Respondent as a casual employee within the meaning of section 2 the Employment Act.
27. While the fore-stated appears straight, whether the provisions of the WIBA apply to some categories of casual employment is where the law seems unclear. Section 5 of the Act says this regarding the meaning of an employee: -

i. In this Act, "employee" means a person who has been employed for wages or a salary under a contract of service and includes an apprentice or indentured learner.

ii. Subsection (1) applies irrespective of whether the contract is expressed or implied, is oral or in writing, and whether the

remuneration is calculated by time or by work done and whether by the day, week, month or any longer period and whether the payment is in cash or recognised legal tender.

iii. The following persons shall not be regarded as employees for purposes of this Act: -

a. a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business;

28. It does appear to me that section 5 (3) (a) of the Act covers only those casual employees who are engaged in the employer's trade or business. Any other engagement in work which does not relate to the ordinary business or trade of the employer appears to disqualify one from the application of the Act. If my interpretation be correct, then it becomes necessary for persons claiming under the WIBA and who were engaged on casual basis to prove that the engagement was in the trade or business that the employer ordinarily undertakes. However, as will be seen later, these matters can only be deliberated upon before the Director while considering an award or on appeal against the award under section 52 of the WIBA to the Employment and Labour Relations Court (ELRC).

29. Another issue for consideration in respect of the case is whether the Respondent was aware of the Claimant's claim to the Director. The Claimant denies this. He says he only came to learn of the existence of the claim on 23rd March 2021 yet it was rendered on 5th September 2019. In essence, by this evidence, the Respondent is simply saying that he was unaware of the process resulting in the assessment now sought to be enforced. That he was not involved in it.

30. Under section 22 of WIBA, the duty to report an occupational accident or disease is placed on the employer. However, a copy of the employee's notice of the accident to the employer is by virtue of section 21 of the Act to be lodged with the Director. As well, under section 22 (5) of the Act, an employee may report an occupational accident or disease directly to the Director. It appears therefore that either party to a contract of service may report the accident.

31. From the evidence provided, a notice of report of the accident involving the Claimant was made to the Director. This appears as exhibit 3 on the Claimant's list of documents. However, it is not clear from the document when this report was lodged and by whom. The suggestion by the Respondent in his submissions that the report was lodged on 5.9.2019 therefore appears unfounded. Apparently, the report was then acted on and a medical report completed as appears on the flipside of exhibit 3 of the Claimant's documents.

32. From this, the assessment of compensation was made as appears from Claimant's exhibit 4. It is however contested whether the Respondent was made aware of this development.

33. Whilst the Respondent asserts in evidence that he learned of the assessment in March 2021, the Claimant suggests that the Respondent was made aware of the award by the Director immediately it was made but declined to honour it.

34. I have considered the evidence on this aspect of the dispute. I note that before the Claim was filed, the Claimant's Advocates issued a demand to the Respondent for settlement of the dispute. This demand is dated 19th September 2019 and appears as Claimant's exhibit 5. This demand elicited a response from the Respondent's Advocates dated 24th September 2019 in which liability was denied. On 26th January 2021, the Claimant's Advocates again demanded for payment this time round sending out a copy of the Director's award. The letter was sent by email to the Respondent's Advocates (see Claimant's exhibits 6 and 7). It elicited no response. In March 2021, the Claimant filed this claim. On 26th May 2021, the Respondent filed a defense to the Claim after having entered appearance in March 2021.

35. I have looked at the Respondent's defense and witness statement. Apart from the general denial in the defense, I see nowhere in the Respondent's statement prepared under oath where he specifically denies knowledge of the fact that this matter had been forwarded to the Director for assessment. In fact, if this was the case, the Respondent would have immediately reacted to the issue once a copy of the Director's assessment was sent to his lawyers in January 2021. The first time the Respondent denies knowledge of the assessment is during his oral testimony on 25th January 2022.

36. In cross examination, the Respondent confirmed that the details in the DOSHI forms correspond with his actual details. That the residence set out in the form was his and that the telephone number in the form was his. It should be noted that at the trial, these forms were produced as exhibits without objection by the Respondent. Their authenticity was not challenged. The need to verify entries in them was not raised by the defence. On the basis of the foregoing and having regard to the demeanor of the witnesses, who appeared before me on the issue, I am inclined to believe the Claimant's position that the Respondent was made aware of the award earlier than he now suggests.

37. But the challenge in this matter is not so much what has so far been discussed. Rather, it is whether the Respondent can at this stage of the dispute, seek to challenge the award in the manner that he has done. Put differently, the question is whether the court has jurisdiction to open up and examine the Director's award at this stage.

38. The law on this matter is to be found in the WIBA. Under section 10 of the Act, an employee who suffers an occupational injury or disease may only be compensated under the provisions of WIBA. However, for an employee to claim compensation, the injury or disease must have arisen in the course of the employee executing his/her mandate under the employment contract.

39. By virtue of the same section, an employer is obligated to compensate an employee who suffers occupational injury or disease while undertaking a service on behalf and for the benefit of the employer. This obligation can only be avoided if it is demonstrated that the employee's injury or disease was caused by the employee's willful and deliberate conduct.

40. The process for compensation is triggered by a report of the occurrence of the accident or affliction of the employee by the occupational disease to the Director under sections 21 and 22 of the WIBA. The Director conducts an inquiry pursuant to the powers donated to him/her

under section 23 of the WIBA before determining the relief to award.

41. Once the award is made, the employer is obligated under section 26 (4) of the Act to settle the award within ninety (90) days of the claim. However, where the employer is dissatisfied with the award, he/she may within sixty (60) days of the award, lodge with the Director an objection against it. The Director will then determine the objection within fourteen (14) days in terms of section 52 of the Act.

42. Under section 52 (2) of the Act, an objector who is still unhappy with the Director's decision can approach the ELRC by way of an appeal against the decision. This must be done within thirty (30) days of the Director's response to the objection.

43. The law does not tell us what should happen should the employer elect to ignore the Director's award. Does the Director have powers to enforce his/her award against the employer? If not, can the employee move the court to adopt the award for purposes of enforcement by way of execution as if it were a court decree? And if this be so, which court ought to be moved to adopt the award? And how should the parties move the court for enforcement? Can a dissatisfied employer challenge the validity of the award at the stage of enforcement proceedings in disregard of the appeal procedure under the Act? All these questions have no obvious answers in the law.

44. Quite a bit of litigation has centered on this area of law. And as many decisions have been rendered expressing different standpoints on the various questions aforesaid. I will examine a few of them.

45. In *Richard Akama Nyambane v ICG Maltauro Spa [2020] eKLR*, the court observed that the law is silent on how to enforce the awards by the Director. And this being the case, the party wishing to enforce the award must move the ELRC under section 87 of the Employment Act but within the limitation period to enforce the award. In the court's view, the ELRC has jurisdiction to entertain such claims.

46. In *Samson Chweya Mwendabole v Protective Custody Limited [2021] eKLR*, the court appeared to take the view that once an award is made by the Director, any party aggrieved by it must follow the procedure set out under sections 51 and 52 of the WIBA to file an objection and a subsequent appeal to the ELRC. If this does not happen, the opportunity to challenge such award is lost and the beneficiary of the award may apply to the ELRC summarily for adoption of the award for purposes of its enforcement. The court will assume jurisdiction over the matter under section 12 of the Employment and Labour Relations Court Act (ELRC Act) and article 162 of the Constitution as it is essentially an employer-employee dispute. However, the court emphasized that there was a distinction between its appellate jurisdiction when handling appeals from the Director under section 52 of WIBA and its original jurisdiction under article 162 of the Constitution and section 12 of the ELRC Act when processing adoption of the Director's award proceedings.

47. In *Austin Oduor Odira v Kenya Sweets Limited & another [2021] eKLR*, the learned Judge suggests that once the Director makes an award, the parties cannot approach the court to re-open the matter except by way of an appeal to the ELRC. In other words, the parties may not approach the lower court or even the ELRC outside the appellate jurisdiction under section 52 of WIBA to for instance argue that the award was too low or unwarranted.

48. In *Lameck Nyakundi Anyona v W.J.J Kenya Construction Company Limited [2022] eKLR*, the court was of the view that the ELRC cannot be moved to enforce the Director's award as the law clothes it with jurisdiction to handle appeals from the Director only. Further, the court observed that the ELRC or indeed any other court is not the right forum, exercising its original jurisdiction, for investigating contested facts as these are the preserve of the Director before making an award. The ELRC can only be moved to re-evaluate contested facts against the award by way of an appeal under section 52 of WIBA.

49. In *Edwin Songoroh & another v Amony Koech Yatich & another [2021] eKLR*, the learned judge made several pertinent observations. First, he held that a Director's award can be adopted by either the Magistrate's court or the ELRC subject to considerations of the court's pecuniary jurisdiction *vis a vis* the dispute at hand. Second, he held that in the absence of regulations for enforcement of the Director's awards, the proceedings to enforce them could be commenced through a miscellaneous motion or an ordinary claim. Third, he held that at the point of adoption, it was not open to the court to delve into the merits or otherwise of the award. This could only be revisited upon an appeal under section 52 of the WIBA.

50. In *Virginia Wangari Muita v Nyoro Construction Company Limited [2020] eKLR*, the court observed as follows: -

“The Court considers that enforcement of the Director's decision made under the provisions of WIBA would not amount to a labour dispute under rule 5 of the Court's Rules or a dispute to be referred to the Court under rule 4 of the Court's rules. Thus it appears to the Court that the Director having made an assessment and there being no objection and then appeal per section 52 of WIBA it is not available for a party to file a statement of claim for enforcement of the Director's decision as though a dispute exists in that regard. While making that finding, in absence of a prescribed summary procedure to enforce the Director's decision, the memorandum of claim (but limiting itself to issue of enforcement of the Director's decision) would appear to be an available process as per Radido J in *Ruth Wambui Mwangi & Another v Alfarah Wholesalers (2017) eKLR*.”

51. The general position established by a majority of these decisions is as follows: -

a. The law does not provide for mechanisms of enforcing the Director's award against a reluctant employer.

b. In the face of this lacuna, the holder of the award can move the court to seek for enforcement of the award. A majority of the decisions favour the view that the ELRC can be moved for this purpose pursuant to its jurisdiction under article 162 of the Constitution as read with section 12 of the ELRC Act. Only one decision holds the view that the ELRC cannot be moved for this purpose. A few share the view that the Magistrate's court may be moved where pecuniary jurisdiction allows.

c. The proceedings for enforcement may be in summary form by way of miscellaneous causes or in the form of ordinary

causes but confined to matters of enforcement only.

d. Unless by way of appeal under section 52 of the WIBA, it is not open to the court to consider the merits of the Director's award or indeed go on a fact finding mission. This jurisdiction is the preserve of the Director.

52. I agree with these general principles. However, in their submissions, the Respondent's Advocates raise a number of challenges posed by the current architecture of WIBA. For instance, how should a party who was not made aware of the proceedings before the Director and who only learns of them at the adoption stage move to re-open the assessment if the time for appeal has lapsed. These are just some of the weaknesses in this legislation.

53. In my view, such party must consider filing a Judicial Review motion to quash the award. However, this must be done prior to adoption of the award by the court. The Respondent ought to have done this in order to ventilate the several procedural issues he now raises. Unfortunately, this was not done. And this is despite the adoption proceedings having been pending since March 2021. Nothing stopped the Respondent from seeking to stay this cause as he pursues a Judicial Review motion to challenge the award now that the right of appeal under Section 52 of WIBA had been spent.

54. Applying the principles in paragraph 51 to the case before me, it then becomes clear that the factual contestations before me in so far as they were not raised through an appeal under section 52 of the WIBA or Judicial Review, are not matters I should delve into. I will therefore do the only thing I ought to do in the cause: adopt the Director's award of Ksh. 624,000/= as the judgment of this court. I also award interest on this sum at court rates from the date of this order till payment in full. Costs of the case are granted to the Claimant.

DATED, SIGNED AND DELIVERED ON THE 17TH DAY OF MARCH, 2022

B. O. M. MANANI

JUDGE

In the presence of:

No appearance for the Claimant

Gambo for the Respondent

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

JUDGE