



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

MISCELLANEOUS APPLICATION NO E156 OF 2021

ABDIRAHMAN ABDULLAHI MOHAMED.....APPLICANT

VERSUS

FREEDOM AIRLINE EXPRESS LIMITED.....RESPONDENT

RULING

1. By an *ex parte* Originating Summons dated 30th August 2021 and filed in court on 7th September 2021, the Applicant seeks leave to file a claim against the Respondent, with the Director of Occupational Safety and Health Services out of time.

2. The application is supported by the Claimant's affidavit and further affidavit and is based on the following grounds:

a. That on 26th September 2016, the Applicant, while undertaking his duties as an employee of the Respondent, sustained debilitating injuries, which was attributable to the negligence of the Respondent;

b. That due to the debilitating nature of the Applicant's injuries, the Applicant has been under treatment in the country and in India;

c. That 12 months after the accident have since lapsed and therefore, the Applicant's claim now stands statute barred;

d. That the Applicant flew to India for treatment soon after the accident and has been under treatment and could not therefore file his claim within the statutory one-year period;

e. That the Applicant is still undergoing such treatment, 1 year and 9 months after the said accident;

f. That the employer, the Respondent herein was made aware/notified of the accident and even paid part of the hospital bill, when the Applicant was rushed to hospital at the first instance;

g. That the employer, the Respondent herein, having been notified ought to have reported to the Director, Occupational Safety and Health, but failed to do so;

h. That the Director, Occupational Safety and Health, neither has the jurisdiction nor power to grant the enlargement/extension of time; only this Court has that power;

i. That this Court is an equal of the High Court, with regard to employment matters, and can therefore grant the relief sought by the Applicant;

j. That it is in the interest of justice that this application be allowed and that the Applicant is compensated for the injuries occasioned on him;

k. That the damages claimed by the Applicant are in respect to of negligence leading to personal injuries;

l. That the delay in filing claim was caused by the Applicant's absence and nature of injuries as he sought treatment in India;

m. That there is no inordinate delay in filing this application.

3. In his affidavit in support of the application, the Applicant states that he was employed by the Respondent on 1st October 2018, as an Aircraft Technician.

4. The Applicant depones that on 26th September 2019, while working on Aircraft SY-FAV, at Wilson Airport, he was injured by a plane propeller of the Aircraft.

5. The Applicant further depones that he sustained debilitating injuries, including severe injury to the face and upper limb, causing a persistent right eyelid defect, with temporary loss of consciousness, which was attributable to the negligence of the Respondent.

6. In this Motion, the Applicant seeks extension of time to file a claim before the Director of Occupational Safety and Health Services out of time.

7. Section 21 of the Work Injury Benefits Act provides as follows:

21. Written or verbal notice of any accident provided for in section 22 which occurs during employment shall be given by or on behalf of the employee concerned to the employer and a copy of the written notice or a notice of the verbal notice shall be sent to the Director within twenty-four hours of its occurrence in the case of a fatal accident.

8. Section 22 (1), (2) & 5 of the Act states the following:

22. (1) Subject to the provisions of this section, an employer shall report an accident to the Director in the prescribed manner within seven days after having received notice of an accident or having learned that an employee has been injured in an accident.

(2) For purposes of this section, an accident includes any injury reported by an employee, to his employer, if the employee when reporting the injury, alleges that it arose out of and in the course of his employment and irrespective of the fact that the employer is of the opinion that the alleged accident did not so arise out of and in the course of employment.

(3).....

(4).....

(5) The provisions of this section do not prevent an employee from reporting an occupational accident or disease to the Director at any stage.

9. Regarding claims for compensation, Section 26 of the Act provides:

26.(1) A claim for compensation in accordance with this Act shall be lodged by or on behalf of the claimant in the prescribed manner within twelve months after the date of the accident or, in the case of death, within twelve months after the date of death.

(2) If a claim for compensation is not lodged in accordance with subsection (1), the claim for compensation may not be considered under this Act, except where the accident concerned has been reported in accordance with section 21.

10. Section 27 of the Act provides for lapse of right to benefits in the following terms:

27.(1) A right to benefits in accordance with this Act shall lapse if the accident is not reported to the employer within twelve months after the date of such accident.

(2) Notwithstanding the provisions of subsection (1), the failure to report an accident to an employer as required in subsection (1) is not a bar to compensation if it is proved that the employer had knowledge of the accident from any other source.

(3) Subject to section 26, failure to report an accident to an employer as required in subsection (1), or any error or inaccuracy in such a notice, is not a bar to compensation if-

a. the employer is not or would not be seriously prejudiced by such failure, error or inaccuracy if notice is then given or the error or inaccuracy is corrected; or

b. if such failure, error inaccuracy was unforeseeable or was caused by the employee's absence from Kenya.

11. The foregoing provisions suggest that the time set for reporting of an occupational accident is not cast in stone. Moreover, the responsibility to report an occupational accident is dual; on the employee and on the employer.

12. In this case, the Applicant states that due to the nature of the injuries sustained and the consequent course of treatment, certain timelines

were missed. Moreover, from the Applicant's pleadings on record, it appears that the employer became aware of the accident and the resultant injuries right at the time of incident.

13. In the circumstances of this case, as presented by the Applicant, I am inclined to extend time for reporting of the accident to the Director of Occupational Safety and Health Services. The said report shall be filed with the Director within the next seven (7) days from the date of this ruling.

14. I make no order for costs.

15. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF MARCH, 2022

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JUDGE

Appearance:

Mr. Kiarie Mungai for the Applicant

No appearance for the Respondent