



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

MISC. CAUSE NO. 045 OF 2021

STEPHEN WANGUSI NYONGESACLAIMANT

VERSUS

DOT.COM BAKERY LIMITED.....RESPONDENT

RULING

1. The application before me is the Applicant's Notice of Motion dated 23rd September 2021. The application is expressed to be brought under Sections 87 and 90 of the Employment Act 2007 and Rule 17 of the Employment and Labour Relations Court (Procedure) Rules 2016. The following orders are sought:-

a) that the Court be pleased to adopt as a judgment of this Court the award of the Directorate of Occupational Safety and Health services.

b) that judgment be entered for the Applicant against the Respondent for the sum of ksh.724,802 with interest at 14% per annum from 26.02.2022.

c) costs of the application be assessed and awarded by the Court.

2. The application sets out the grounds upon which it is predicated. These grounds are further set out and replicated in the Applicant's affidavit sworn in support of the application. It is deponed, *inter alia*:-

a) that the Applicant was employed by the Respondent from the year 2011 and continues to be in employment with the Respondent.

b) that on 23/9/2019, the Applicant was involved in an accident that led to removal of his left eye and currently uses replaceable plastic eye for cosmetic purposes.

c) that the Applicant was treated and the matter was reported to the Directorate of Occupational Safety and Health Services whereupon the Claimant's permanent incapacity was assessed at 30% and compensation payable to him assessed at ksh.724,802.

d) that the Respondent did not appeal the Director's decision within the time set out in law, but instead proceeded to engage its insurer, Britam insurance, to pay the claim

e) that the Respondent's Insurer remitted to the Respondent ksh.321,822 for transmission to the Applicant on understanding that the balance would be borne by the Respondent.

f) that the Respondent did not pay a single cent to the Applicant who requires further check up on his left eye and replacement of the plastic eye, but cannot undertake the course due to lack of sufficient funds.

3. The application was first placed before me under a Certificate of urgency on 24th September 2021 and I directed that the same be served on the Respondent. Service was subsequently effected and the Respondent filed a Replying Affidavit on 14th January 2022, sworn by one Seif Mohammed Seif on 12th January 2022. It is deponed in the said affidavit, *inter alia*:-

a) that the Applicant is yet to resume work despite having received treatment.

b) that the Applicant was initially examined by one Dr. Ibrahim Matende who assessed the percentage of permanent incapacity at

thirty (30) percent which formed the basis of the assessment of the Directorate of Occupational Safety and Health Services.

c) that upon the Respondent forwarding the claim to Britam (“the Insurance”), the Insurance opted to conduct an independent assessment and directed that the Applicant undergo a Second medical evaluation by a different doctor, who assessed the percentage of permanent incapacity at twenty (20) percent.

d) that relying on the second assessment, the insurance arrived at ksh.321,822 as the compensation due to the Applicant.

e) that on 1st October 2020, the Applicant wrote a letter to the Respondent indicating that he was in agreement with the figure of ksh.321,822 in final settlement.

f) that upon receipt of the Applicant’s letter, the Respondent wrote to the Insurance authorizing payment of the claim.

g) that the Respondent has fully settled the amount of ksh.321,822.40 that was paid by the Insurance and the same was paid through the Respondent’s Agents, Yasser Abdalla Seif and Teresia Kimeu.

4. There is on record a further affidavit sworn by the Applicant on 15th October 2021 and filed in Court on 19th October 2021, in which the Applicant deponed that the Respondent paid a cheque for ksh.170,000 into the Applicant’s bank account after the application herein was served, and without the Applicant’s knowledge. The Applicant has not denied having so far received a total of ksh.321,822.40 out of the ksh.724,802 assessed and awarded by the Director.

5. On 26th January 2022, I directed parties herein to file and to exchange written submissions on the application. Submissions have since been filed, and I have considered the same.

6. The fact of the Applicant having been an employee of the Respondent at the time of the occupational accident in issue is not in dispute. The Respondent admits that the percentage of the Applicant’s permanent incapacity was duly assessed by the Director and that an award of compensation was thereon made. The Respondent did not dispute the Director’s assessment and award, either as by law provided or at all. Indeed the Respondent passed on the assessed claim to its insurers for settlement.

7. In the Respondent’s words,

“The Insurance opted to conduct an independent assessment and directed that the Claimant undergo a Second medical evaluation by a different doctor...”

8. The Respondent did not tell the Court in which law this kind of procedure is domiciled. Section 51 of the Work Injury Benefits Act provides:-

“(1) any person aggrieved by a decision of the director on any matter under this Act, may within sixty days of such decision, lodge an objection with the Director against such decision.

(2) the objection shall be in writing in the prescribed form accompanied by particulars containing a concise statement of the circumstances in which the objection is made and the relief or order which the objector claims, or the question which he desires to have determined.”

9. The Applicant annexed to the supporting affidavit referred to in paragraph 2 of this Ruling a copy of Form DOSH/WIBA4 containing the Director’s assessment and award. The said assessment is dated 26th February 2020. The Respondent did not object to the assessment pursuant to Section 51 of the WIBA. The sum assessed by the Director, ksh.724,802 became payable to the Applicant upon the lapse of sixty days from the date of the assessment. The same is payable, and must be paid by the Respondent to the Applicant unless the same is shown to have been paid to the Applicant.

10. Any process outside of the statute that is shown to have been undertaken, either by the Respondent or its agents and/or insurers to the disadvantage of the Applicant regarding the assessment and award made by the Director of Occupational Safety and Health Services was an outright illegality, which this Court cannot sanction.

11. As stated by this Court in ELIJAH KISYANGA NDEDE –VS- THE MANAGER ZAHKEM INTERNATION CONSTRUCTION LTD [2022] eKLR, the Work Injury Benefits Act is silent on the procedure to be followed in enforcing the Director’s decision made on assessment of compensation payable to an employee for work injuries. In this Court’s view, however, the legislature never intended that an employee whose employer fails and/or refuses to pay the amount of compensation assessed by the Director of Occupational Safety and Health Services under WIBA would be without civil remedy, and particularly so where the employer never objected to the Director’s decision on assessment of compensation payable.

12. The issue of adoption of the Director’s award as a judgment of this Court for purposes of execution was also addressed in the case of SAMSON CHWEYA MWANDABOLE –VS- PROTECTIVE CUSTODY LIMITED [2021] eKLR where the Court held as follows:-

“...However, this Court being endowed with unlimited original and appellate jurisdiction in disputes related to employment and labour relations pursuant to Article 162(2) of the Constitution and Section 12 of the Employment and Labour Relations Court Act, the Court has inherent jurisdiction to adopt as judgment the Director’s award for purposes of execution. This jurisdiction should

not be confused with appellate jurisdiction which is expressly donated under Section 52(2) of the WIBA in respect of the director's reply to objection made under Section 51(1) of WIBA. It would appear that the former jurisdiction, which I now invoke, can be exercised by the Court where there is no challenge mounted against the Director's award by any party by way of objection or appeal under Sections 51(1) and 52(2) of the WIBA respectively. In this case, it is common ground that the Respondent did not object to the award under Section 51(1) of the WIBA..."

13. I proceed to allow the Applicant's application in the following terms:-

- a) The award of the Director of Occupational Safety and Health Services dated 26/2/2020 is hereby adopted as a judgment of this Court, and a decree is accordingly issued for the awarded sum of ksh.724,802.
- b) The decreed sum shall be paid by the Respondent to the Applicant, less the sum of ksh.321,822 already paid to the Applicant.
- c) Costs of the application are awarded to Applicant, to be agreed or taxed.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 21ST DAY OF APRIL 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Nyongesa for Applicant

Miss Masai for Respondent