Machini v Safaricom Limited (Appeal E126 of 2021)
[2022] KEELRC 1463 (KLR) (15 June 2022) (Judgment)

Neutral citation: [2022] KEELRC 1463 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E126 OF 2021

JK GAKERI, J

JUNE 15, 2022

BETWEEN

CYRUS OMBUNA MACHINI .... APPELLANT

AND

SAFARICOM LIMITED .... RESPONDENT

(Appeal arising from the judgment of the Director, Occupational Safety and Health Services (DOSHS) delivered on October 18, 2021.)

JUDGMENT

1. This is an appeal arising from the judgment of the Director, Occupational Safety and Health Services (DOSHS) delivered on October 18, 2021.

2. The background of the appeal is that the appellant joined Safaricom Limited in July 2007 as a customer care representative and worked until 2012 when he resigned allegedly on health grounds. It was the appellant's case that sometime in 2008 while on night shift responding to customers, he felt numbness in his ears and had a hissing sound. That the doctors he consulted recommended that he be redeployed away from the noisy headphone working environment. That overtime, his doctors indicated that the nerves that relay interpretation of some sounds had been damaged and continued to deteriorate and the medical reports were forwarded to the respondent's Human Resource Department. It is alleged that the headphones the appellant was given were faulty and too noisy and the managers acted slowly. That the hearing aids bought by Safaricom Limited's insurer in 2012 had become non-functional.

3. It was the appellant's testimony that he had suffered financially, emotionally and physiologically as a result of the hearing impairment including loss of job opportunities and the respondent was responsible, since it had not tested the headphones before giving them to him. That for its failure, the appellant has a permanent hearing disability. That it took too long for the Respondent to act. The hearing aid was supplied after the appellant had resigned.

4. The appellant supplied documentary evidence of hospital visitations, audiological request form and a pure tone audiogram report dated April 13, 2016 stating that the appellant had bilateral fairly symmetric moderate sensorineural hearing loss.

5. The suit was filed in the High Court as Civil Case No 145 of 2016 but was transferred to the Employment and Labour Relations Court on May 16, 2020 and finally to the Director, Occupational Safety and Health Services on June 30, 2020.

6. In his resignation letter dated March 18, 2012, the appellant did not indicate the reason for resignation but thanked the respondent for the chance to work for the company and the support accorded. In a subsequent email dated March 20, 2012, the appellant states that he wanted to go and rest. In his exit interview form dated April 18, 2012, the appellant stated that the was leaving on three grounds: -

   (i) Medical frustration due to loss of hearing ability.

   (ii) Lack of promotion, good performance notwithstanding.

   (iii) Perception of not being keen and attentive.

7. On recommendations, the appellant stated that

   > "Although your services are still above board, some issues like my ENT case was not properly handled due to lack of policy thereof…"

8. Evidence on record shows that although the appellant raised the issue of the hearing and in November 2011, the issue had not been resolved by March 16, 2012 due to the medical insurance cover. Also notable is that between 30th February 2012 to February 29, 2020, the respondent provided cash assistance to the claimant of the sum in excess of Kshs 3.7 million.

9. In its response, the respondent asserted that the claimant voluntarily resigned from employment by letter dated March 18, 2012 which the respondent accepted on March 22, 2012. That it provided a safe working environment and usage of the head set was limited to the duration of receiving calls. The respondent sated that it provided medical care to the extent permitted by the medical cover at the time.

10. That the respondent provided hearing aid sometime in 2012 and the appellant was diagnosed with bilateral sensorineural hearing loss after he had left employment and the respondent had no obligation to provide financial support.

11. Upon hearing the parties, the Director, Occupational Safety and Health Services entered judgment of the appellant in the sum of Kshs 3,551,804.54.

12. In making the award, the DOSHS held that:

   (i) The claimant's condition deteriorated with time.

   (ii) The permanent manifestation of the claimant's occupation disease was established with effect from December 2011 and the earnings for December 2012 would be applied in the computation of benefits pursuant to section 30(1) of the WIBA, 2007.

13. The Director further held that the basic pay in December 2011 was Kshs 76,2576.06 and allowances of Kshs 4,419.10 and the gross pay was Kshs 80,776.16.

14. Aggrieved by the award, the appellant lodged the instant appeal citing the following grounds in memorandum of appeal:

(i) That by failing to give reasons for his decision and directive the Director, Occupational Safety and Health Services acted in overt breach of the statutory provisions of the law and therefore the decision and or the directive was made per in curium, spurious and hence bad in law

(ii) That in rendering this decision and or directive outside the statutory time limits without any justifiable reasons the DOSH acted *ultra vires* and hence his decision is bad in law

(iii) That by declining in limine to review his decision following the claimant's objections lodged before him the DOSH made fundamental errors of law and fact.

(iv) That in making his findings that reference of the main claim to him by the court did not detail the issue of costs, the Director manifestly failed to apprehend and appreciate the import and purport of the ruling of the court that transferred this claim to him thus falling into error of law and fact

(v) That in making his findings that the costs of the claim is not applicable that the Director manifestly failed to consider and appreciate the claimants claim and submissions that the issue of costs be stated for the opinion of the superior court of record and thus fell into an error of law and fact to that extent.

(vi) That the Director erred in law and in fact when he arrived at the decision that the claimant is not entitled to any allowance payable to another person for constant assistance as provided under section 15(1) of the *Work Injury Benefits Act*.

(vii) That in arriving at his findings that he is unable to award any interest accrued on the amount compensable to the claimant, the Director demonstratively failed to consider and appreciate the appellants claim in totality and the submissions that the issue of interest be stated in the opinion of the superior court of record thereby falling into error of law and fact to that extent.

(viii) That the Director misapprehended evidence on record when he arrived at the decision that the permanent manifestation of the claimant's occupational disease was established with effect from December 2011 thereby falling into error of law and fact.

(ix) That the director erred in law and in fact when he failed to consider analyse and or evaluate the appellants entire body of material evidence presented before him thereby arriving at an erroneous conclusion.

(x) That in failing to appreciate and consider that the respondent is guilty of the material non-disclosure the director demonstratively acted on wrong principles of law and evidence this arriving at erroneous decision

15. The appellant seeks the following orders: -

a) The appeal herein be allowed.

b) The entire decision and or directive of the Director issued on the October 18, 2021 be quashed, vacated, reviewed and or set aside with costs to the appellant herein.

c) The judgment of the Director, Occupational Safety and Health Services dated and delivered on September 24, 2021 be reviewed and or set aside and substituted with an order allowing the appellants claim in the following terms;

    i. The appellant was first diagnosed with permanent manifestation of the occupational disease in April 2016.

    ii. The cost of this appeal and the claim before the Director, Occupational Safety and Health Services be awarded to the appellant.

    iii. Interest at court rates be awarded to the appellant.

d) Any other orders the honourable court may deem just to grant.

16. This court notes that the respondent did not file a response to the memorandum of appeal but instead responded through submissions dated April 12, 2022.

17. The appeal was canvased by way of written submissions.

Appellant's Submissions

18. The appellant submits that the Director's decision dated October 18, 2021 is devoid of *ratio decidendi* and that it was delivered outside the statutory time limit without any justifiable reason and therefore the director acted *ultra vires*.

19. The appellant submits that the expenses incurred by the appellant during the inquiry at the directorate were benefits that he was entitled to as compensation by dint of section 2 of the *WIBA Act*.

20. The appellant further submits that the overwhelming medical evidence that he suffered three distinct diseases being hearing loss, moderate to severe sensorineural hearing loss and Bilateral sensorineural hearing loss was uncontroverted and that compensation should be calculated based on the date it was diagnosed and the salary at the time.

21. The appellant further urges the court to reject the respondent's misconceived assertions made by the respondent to disregard the documentary evidence produced in court in the form of payslips whose custodian and maker is the respondent.

Respondent's Submissions

22. The respondent filed submissions in opposition to the appeal lodged by the appellant. The respondent's response to the appellant's contention that the director did not provide reasons for his decision dated September 24, 2021, it states that the Director gave his reasons under various heads of the claim and it was not necessary to repeat the same in the decision.

23. The respondent further states that it has also lodged an appeal against the decision arising from the judgment of the Director being ELRC Appeal Number E016 of 2022 which appeal challenges the salary of the month of December 2011 applied in computing the compensation award of Kshs 450,000/-.

24. The Respondent further submits that the office of the Director, Occupational Safety and Health Services is established by *Work Injury Benefits Act, 2007* and section 10 provides for employees right to compensation, while section 2 provides that an employer is liable to pay compensation in accordance with the provisions of the Act.

25. It is the respondent's submission that the appellant's claim for payment of a caretaker amounting to Kshs 2,520,000/- under section 15(1) of the *Act* was not properly grounded because there was no medical report indicating that the appellant was unable to perform essential functions of life without assistance. That the only recommendation given was the appellant to be fitted with a hearing aid as he had moderate hearing loss.

26. The respondent submits that the claim, subject of this appeal was pursuant to an order issued by this court on June 26, 2020 in Employment and Labour Relations Court Cause No 202 of 2019 where the court referred the claim to the director to hear and determine it under the relevant provisions.

27. That on costs the court had directed each party to bear its own cost.

28. The respondent submits that the court did not direct that costs would abide the outcome of the decision of the director. The respondent further submits that since the *Act* does not expressly provide if a director can award costs and since the court in its discretion ordered each party to bear its own costs, the appellant's claim for costs is unfounded.

29. The respondent further submits that interest on general damages run from the date of judgment as was held by the Court of Appeal in *Shariff Salim & another v Malundu Kikava* [1989] eKLR

> "According to the authorities, interest on general damages should be paid from the date of assessment which of cause is the date of judgment. That is the earliest date when the defendant's liability to pay does arise"

30. The respondent submits that the appellant admitted that he was diagnosed with occupational disease on April 25, 2008 which date guided the Director on the applicable earning for purposes of compensation.

31. It further submits that section 2 of the *Act* defines earnings as "remuneration of the employee at the time of the accident" and the appellant confirmed that on April 25, 2008 he was earning a monthly salary of Kshs 47,000/- inclusive of scratch card allowance.

32. The respondent submits that the Director erred in using the appellant's salary of December 2011 in determining compensation instead of the April 2008 salary when the appellant was diagnosed with occupational decease.

33. The respondent further submits that the appellant voluntarily resigned from employment with the respondent in March 2012 and as such stopped earning. that it is inconceivable for the appellant to pray for the alleged salary 4 years after leaving employment.

34. The respondent also states that the Director confirmed that the appellant's permanent incapacity was 40% and no objection to review was raised to have it increased to 50% and cannot be raised by way of submissions.

35. In conclusion, the respondent urges the court to dismiss the appeal with costs to the respondent.

Analysis And Determination

36. In a first appeal like this one, the duty of the court is to evaluate the evidence in the lower court both on points of law and fact and come up with its findings and conclusions.

37. This principle is set out in *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123-126 as follows:

> " ... this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial. judge's findings of fact appear earlier that he has clearly failed on some part to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

(See also *Mohamed Mahmoud Jabane v Highstone Butty Tongoi Olenja* [1986] eKLR and *Mwanasokoni v Kenya Bus Service Ltd* (1982-88) 1 KAR 278)

38. I have considered the record of appeal and the submissions of parties in this matter and find that the following issues arise for determination;

 i. Whether submissions can be used to respond to pleadings;

 ii. Whether the appeal is merited.

Whether Submissions Can Be Used To Respond To Pleadings

39. I have noted that the respondent responded to the appeal through its submissions dated April 12, 2022. In the submissions, the respondent opposes the appeal. It is trite that submissions are not part of the pleadings nor are they evidence. The status or role of submissions was articulated in *Daniel Toroitich Arap Moi v Mwangi Stephen Murithi & another* [2014] eKLR where the court held that:

> " Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all".

40. From the foregoing, it is clear that the respondent did not file a response to the appellant's memorandum of appeal. It therefore follows that the memorandum of claim is uncontested.

Whether The Appeal Is Merited

41. As to whether the appeal is merited, the appellant raises several issues for determination. These are whether:

 (i) The DOSHS acted *ultra vires*;

 (ii) The appellant is entitled to costs before the DOSHS;

 (iii) The appellant is entitled to the Kshs 2,500,000/- allowance for the assistance rendered;

 (iv) The appellant is entitled to interest on the amount awarded;

 (v) The compensation should be based on the earnings in December 2011 or 2016;

(vi) The DOSHS took into account all the material evidence on record.

42. As to whether the DOSHS acted *ultra vires*, the appellant submits that he did in that he did not provide a *ratio decidendi*, that the decision was without justification. The respondent on the other hand submits that the Director gave reasons under various heads of the claim and it was unnecessary for him to repeat the same at the end of the judgment.

43. In his decision dated September 24, 2021, the Director, Occupation Safety and Health Services (DOSHS) captured the substance of a decision including a statement of the claim, proceedings, submission by the parties and more significantly, the issues for determination. The Director identified ten issues for determination and dealt with each of them in a systematic manner making a determination or finding on each and every issue on basis of the evidence and the provisions of the *Work Injury Benefits Act, 2007* (WIBA).

44. To exemplify the argument, I will rely on two issues as formulated and determined by the Director.

Whether Costs Of This Claim Are Applicable And In Whose Burden The Costs Will Be Borne

45. It was the Director's position that WIBA provided for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes as the preambular provision of the Act states.

46. In rejecting the claim for costs, the Director reasoned that WIBA 2007 provides the basics and mechanics of pursuit, processing and settlement of compensation. The Director relied on section 53 of the Act which establishes the position of the DOSHS and whose responsibility is the management of the Act.

47. Further, the Director reasoned that the claim before him was referred by the Employment and Labour Relations Court and the reference did not detail the issue of costs.

48. That the reference was made on the basis that the Director was mandated to hear and determine the claim under the provisions of WIBA, 2007.

49. As to whether the respondent committed an offence and was therefore guilty for non-disclosure and failure to produce documents sought by the Director, the Director relied on section 23 of WIBA, 2007 which provides for iniquiry by the Director after having received notice of an accident or learnt that an employee had been involved in an accident.

50. The decision is explicit that the Director requested to be furnished with documents relating to the health of the claimant during his employment for purposes of processing the matter but none was availed by the respondent which made the Director's task more arduous than it was.

51. Section 9(1) of the *Act* is relied upon to demonstrate the obligations of an employer to keep and produce employee records of earnings and other prescribed particulars.

52. Section 9(1)(c) of the *Act* is explicit that the records should be kept for at least six years after the date of the last entry in that register or record.

53. The Director reasoned that since the claimant left employment in 2012, it was possible to surmise that certain entries in the register or records of the appellant were made in 2012, nine years ago and the documents may have been disposed of as from 2018 at the earliest.

54. The Director found that the respondent could not be held liable for nonproduction of documents relating to the claimant if they had been disposed of after the six years since the departure of the claimant.

55. However, the Director noted that it was incumbent upon the respondent to maintain records on the claimant since it was privy to the fact that there was a possibility of a claim or action.

56. However, the Director did not find that the respondent was culpable.

57. The upshot of the foregoing is that the court is in agreement with the respondent's submission that the Director addressed the various issues separately and made findings and justifications for each of them.

58. Relatedly, the appellant citied no instances in which the Director acted in excess of the statutory powers conferred by the provisions of *WIBA, 2007*.

59. This ground of appeal has not been substantiated and inevitably falls.

59. As to whether the appellant was entitled to an allowance to the person offering constant assistance, the home port is section 15 of *WIBA, 2007* which provides:

"(1) If an injury in respect of which compensation is payable causes disablement of such a nature that the employee is unable to perform the essential functions of life without the constant assistance of another person, the Director shall grant an allowance in addition to any other benefit provided for under this Act, towards the cost of such help as may be required for a specified period, which allowance shall be reviewed from time to time.

(2) The Director may, upon the application of the employee and on good cause shown by the applicant, revise any order made in accordance with subsection (1)."

60. Although the Director makes reference to testimony and plea that the claimant had engaged the services of a helper whom he has been paying a daily allowance for seven years neither the statement of claim nor the statement on record make reference to the services of a helper or the amount paid per day. In sum the allowance was neither pleaded nor proved by the claimant. The Director was categorical that the claim for the allowance was disputed by the respondent.

61. The Director expressed himself as follows on this issue:

> " It is therefore the Director's finding that determination of whether this claim would be paid had not been determined. It could not auger well for the claimant to proceed in engaging the services of a helper when the dispute of whether the claim was payable was still apparent. From the testimonies of medical practitioners namely CW1, CW2 and CW5, the claimant had partial permanent disability meaning audio perception of the claimant was still possible to some degree. Other faculties of the claimant's body were fully functional. The claimant does not require constant assistance.
>
> For a director to arrive at the decision to award allowance to a helper of an injured person, it is prudent for the Director to appreciate the essential functions, the injured person is unable to perform. The Director has to be made aware of the condition of the injured beforehand. The Director was not made aware of the inability of the claimant to perform essential functions. The Director would not fail in awarding allowance to a helper after adequate fact finding. The section 15(1) also gives the Director discretion of the amount payable to the helper required.

Considering the foregoing, the claimant is not entitled to any allowance payable to another person for constant assistance."

62. The court is in agreement with the Director's reasoning. section 15(1) of the *Act* is unequivocal that the Director shall only grant an allowance if it is demonstrated that the injury sustained renders the employee unable to perform the essential functions of life without constant assistance of another person.

63. The upshot of the foregoing, is that the claim for allowance to the person offering constant assistance was not established and the court upholds the finding and holding of the DOSHS.

64. The Director is also faulted for having held that permanent manifestation of the claimant's occupational disease was established effective 2011 as opposed to 2016.

65 On the issue of whether the appellant's injuries of 40% sufficed as permanent incapacity, the Director, guided by the evidence of the tests done by CW1 and CW2, that the appellant's loss of hearing was not total, held that the 40% permanent incapacity was a correct assessment as it fell within the extremes of 50% and 7% as provided by paragraph F of the first schedule to the Act.

66. Section 30 of *WIBA, 2007* provides:

(1) Compensation for permanent disablement shall be calculated on the basis of ninety-six months earnings subject to the minimum and maximum amounts determined by the Minister, after consultation with the Board, and set out in the Third Schedule.

(2) If an employee has sustained an injury specified in the first column of the first schedule, the employee shall for the purposes of this Act, be deemed to be permanently disabled to the degree set out in the second column of the First Schedule.

67. In addition, paragraph F of the first schedule to the Act which provides for injury by loss of hearing provides as follows:

	Minimum degree of disablement (%)
1. Total loss of hearing – both ears	50
2. Total loss of hearing – one ear	7

68. The DOSHS held that since the claimant had a disablement assessed at 40%, it was permanent disablement and the provisions of Section 30 of WIBA, 2007 thus applied.

69. The appellant contends that the DOSHS should have found that the claimant's permanent disablement was established in 2016 and not 2011 as he led and should have relied on the claimant's salary as in 2016.

70. Section 37(1) of the *WIBA, 2007* provides:

1. In order to determine compensation, the earnings of an employee are deemed to be the monthly rate at which the employee was being remunerated by the employer at the time of the accident, including—

(a) the value of any rations, living quarters or both supplied by the employer to the employee to the date of the accident or report of disease;

(b) allowances paid regularly; and

(c) any overtime payment or other special remuneration of a regular nature or for work ordinarily performed, but excluding—

(i) payment for intermittent overtime;

(ii) payment for non-recurrent occasional services;

(iii) amounts paid by an employer to an employee to cover any special expenses; and

(iv) ex gratia payments whether by the employer or any other person.

[Emphasis added]

71. The appellant relies on section 40(1)(b) and (2) of *WIBA, 2007 t*o urge that one disease was diagnosed in 2011 and the other one in 2016, that the claimant's compensation should be calculated on the basis of the disease diagnosed in 2016 as the same is favourable to the appellant.

71. Section 40(1)(b) and (2) provides:

(1) Compensation for an occupational disease shall be calculated on the basis of the earnings of the employee calculated in accordance with the provisions of section 35—

(a) at the time of the commencement of the disease; or

(b) such earlier date as a medical practitioner may determine, if the employee was suffering from the disease at an earlier date, whichever earnings are more favourable to the employee.

(2) If an employee is no longer in employment at the time of the commencement of the disease, the earnings shall be calculated on the basis of the earnings that the employee would have been earning had the employee still been working.

[Emphasis added]

72. After a detailed review of the medical evidence on record, the DOSHS held that:

"(i) The claimant's condition deteriorated with time.

(ii) The permanent manifestation of the claimant's occupational disease was established with effect from December 2011. The earnings of December 2012 will be applied in the computation of benefits pursuant to section 30(1) of WIBA, 2007.

The basis pay in December 2011 was Kshs 76,257,06 and allowances of Kshs 4,519.10 and so that gross pay was Kshs 80,776.16."

73. From the evidence on record, it is clear that the appellant was diagnosed with moderate to severe sensorineural hearing loss in 2011 and bilateral sensorineural hearing loss in 2016.

74. As held by the DOSHS the appellant's condition deteriorated over time. Contrary to the appellant's submission that the appellant had two diseases diagnosed in 2011 and 2016 respectively, the court is satisfied that the appellant's hearing loss deteriorated overtime and the diagnosis of 2016 was not extra ordinary or totally unexpected. It was a manifestation of a worsening condition.

75. The court is in agreement with and upholds the decision of the DOSHS on this issue.

76. As regards costs, section 27(1) of the *Civil Procedure Act* provides that:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

77. This rule has been replicated in legions of decisions in all courts. In *Republic v Rosemary Wairimu Munene (Ex parte Applicant) v Ihururu Dairy Farmers Co-operative Society Ltd* [2014] eKLR the court held as follows;

> "The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event....... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case."

78. Further, in *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] eKLR the court stated that:

> "Thus, it is imperative to bear in mind the various steps taken by the parties in the case so as to appreciate the trouble taken by both parties since the suit was filed..."

78. Finally, in *Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others* [2013] eKLR the court stated as follows: -

> "It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial Judge is given discretion. ......But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."

79. The court is guided by these sentiments.

80.. In the instant case, the Director held that the *WIBA, 2007* had no provision for costs and the Employment and Labour Relations court's reference did not detail the issue of costs. According to the Director the issue of costs did not arise.

81. Be that as it may, the sentiments quoted above are unequivocal that the essence of costs is to compensate the successful party for the trouble taken.

82. In *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* (*supra*) Mativo, J listed some of the factors to be taken into consideration in determining the issue of costs as follows:

> "To my mind, in determining the issue of costs, the court is entitled to look at *inter alia*
>
> (i) The conduct of the parties,

(ii) The subject of litigation,

(iii) The circumstances which led to the institution of the proceedings,

(iv) The events which eventually led to their termination,

(v) The stage at which the proceedings were terminated,

(vi) The manner in which they were terminated,

(vii) The relationship between the parties and

(viii) The need to promote reconciliation amongst the disputing parties pursuant to article 159 (2) (c) of *the constitution*."

83. Similarly, in *David Kiptum Korir v Kenya Commercial Bank & another* [2021] eKLR Omondi, J stated that:

> "The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exists some other good reasons and or cause for not awarding costs to the successful party."

84. Since the decision to award or not award costs is discretionary, the court can only interfere with the exercise of judicial discretion on costs by applying the test articulated by the court in *Stanley Kaunga Nkarichia v Meru Teachers College & another* [2016] eKLR

> "On my part, the law is that, the appellate court will not interfere with the exercise of discretion by trial court on costs, except
>
> (1) where the discretion was not exercised judicially or was exercised on wrong principles, or
>
> (2) where the trial court gives no reasons for the decision and the appellate court is satisfied that the decision was wrong; or
>
> (3) where reasons are given, the appellant court considers those reasons not to constitute "good reason" within the meaning of section 27 of the *Civil Procedure Act*."

85. The court is guided by these sentiments.

86. On this issue the DOSHS denied the claimant costs on the grounds that the Employment and Labour Relations Court referral made no reference to costs and the WIBA, 2007 has no provision of costs. While these are reasons, question is whether they are good reasons. The court is not persuaded they are good reasons in the context of section 27 of the *Civil Procedure Act* on account that:

(i) Because costs are discretionary, the Employment and Labour Relations Court could not have included the issue, acting otherwise would have fettered the Director's discretion as the arbiter.

(ii) The fact that WIBA, 2007 has no provision for costs does not necessary mean that the Director has no discretion to award costs in appreciation of the fact that the claimant took the trouble to file and prosecute the suit before the Director and costs were incurred.

87. In the circumstances, the court is satisfied that the DOSHS should have exercised discretion to award or deny costs. To this extent the court will interfere with the exercise of discretion by the DOSHS and award costs of the claim to the appellant.

Declaration Of Fundamental Principles And Rights At Work To The Claim

88. As to whether the Director did not consider the entire material evidence, the court reiterates the fact that the DOSHS identified and determined not less than eighteen (18) specific issues based on the pleadings and evidence.

89. In summary, the DOSHS considered issues relating to costs of the claim, offence of non-disclosure by the respondent, applicability of section 30 of *WIBA, 2007*, payment of allowances under the provisions of section 15(1) of *WIBA, 2007*, claim for medical expenses, interest on the compensation, medical expenses and costs of a helper, jurisdiction to award compensation, applicability of articles 10 and 50 of the *Constitution* to the claim, applicability of the common law and the ILO, presence of an occupational diseases, appropriateness of 40% as permanent incapacity, whether the injuries required the use of aids and entitlement to the reliefs sought.

90. The only material evidence which the DOSHS does not appear to have considered and its impact on the compensation payable as ordained by *WIBA, 2007* are the cash vouchers on pages 121 – 143 and pages 145 of the record of appeal.

91. The cash vouchers reveal that from April 30, 2012 to January 30, 2020, the appellant received more than Kshs 2.5 million for personal assistance/guide.

92. The DOSHS rejected the claim on the ground that none of the doctors who testified recommended or prescribed the engagement of an assistance by the appellant.

93. The court is satisfied that nothing turns on this issue.

94. Finally, as regard interest on the amount due to the appellant as compensation, section 26(1) of the *Civil Procedure Act* is the home port.

95. Section 26(1) provides:

    "(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."

96. In *Prem Lata v Peter Musa Mbiyu* [1965] EA 592 the Court of Appeal stated as follows:

> “ In both these cases the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest”

97. The court is guided by these sentiments.

98. The DOSHS denied interest on compensation, medical expenses and costs of the helper and the court finds no compelling reason to interfere with the decision.

99. In the end, therefore, the result is as follows:

(a) The appeal is allowed only to the extent that the appellant is awarded costs of the claim before the DOSHS and on the appeal.

(b) The parts of the appeal contesting interest, jurisdiction of the DOSHS allowance for the assistance, date of manifestation of the claimant's occupational disease, failure to consider and analyse or evaluate the entire body of material evidence and failure to consider that the respondent was guilty of material nondisclosure are without merit and are accordingly dismissed.

100. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF JUNE 2022

DR JACOB GAKERI

JUDGE

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 March 15, 2020 and subsequent directions of April 21, 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 *Civil 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.

DR JACOB GAKERI

JUDGE