



**Justine & another v New Generation Stores Limited (Cause
716 of 2016) [2022] KEELRC 105 (KLR) (9 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 105 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 716 OF 2016**

**AK NZEI, J
JUNE 9, 2022**

BETWEEN

JULIA JUSTINE 1ST CLAIMANT

**ELIAS RAYASI (THE PERSONAL REPRESENTATIVES OF THE ESTATE OF
JUSTINE MWARABU CHENGO) 2ND CLAIMANT**

AND

NEW GENERATION STORES LIMITED RESPONDENT

JUDGMENT

1. The suit herein is brought by the Claimants in their capacity as personal representatives of the estate of the late Justine Mwarabu Chengo (the deceased), having been so appointed vide a Grant of Letters of Administration Intestate shown to have been issued by the High Court of Kenya at Mombasa on 27th June 2016 in succession Cause No. 80 of 2016 (in the matter of the Estate of Justine Mwarabu Chengo – Deceased).
2. The suit was filed on 26th September 2016 vide a Memorandum of Claim dated 23rd September 2016. The Claimants pleaded:-
 - a. that the deceased was working for the Respondent and that while in the course of his employment, on 12th September 2014, the deceased sustained fatal injuries due to an accident involving motor vehicle Registration Number KBK 851X-ZC 9522 make Scania, of which he was the driver and Motor Vehicle Registration Number KBP 810D –ZC 2535, Make M/Benz.
 - b. that the said accident was reported as per Section 21 of the *Work Injury Benefits Act*, 2007 and an Inquiry conducted as per Sections 22 and 23 of the said Act, whereupon compensation was assessed at ksh2,400,000.



- c. that a demand letter and/or notice dated 26th February 2016 was sent to the Respondent by the Taita Taveta County Occupational and Safety Health Services Officer pursuant to Section 30 of the Work Injury Benefits Act (WIBA), demanding payment of the said amount of compensation.
 - d. that despite the aforesaid demand dated 26th February 2015, the Respondent refused and or neglected to pay the said sum, provisions of Section 26(1), (2), (3) and (4) of WIBA notwithstanding.
3. The Claimants prayed that the Court enters judgment against the Respondent for the said sum of Ksh.2,400,000. The Claimants also prayed for costs and interest at Court rates.
4. The Claimants filed a written witness statement of the 2nd Claimant dated 23/9/2016 and a list of documents dated the same date, listing and attaching copies of some nine documents. Also filed was a written authority by the 1st Claimant authorizing the 2nd Claimant to sign all necessary affidavits and Court documents in the suit herein. All these documents were filed together with the statement of claim.
5. Documents listed on the Claimant's list of documents included the Grant of Letters of Administration dated 28th June 2016, Certificate of Death, correspondence between the County Occupational Safety & Health Officer (Taita Taveta County) and the Respondent and a demand for payment for Work Injury issued to the Respondent by the said Officer for Ksh.2,400,000.
6. Although Notice of Summons and suit documents filed herein are shown to have been served on the Respondent on 8th October 2016 and an Affidavit of Service duly filed on 25th January 2017, the Respondent did not enter appearance, and did not file any response to the claim herein. Subsequent service of mention notices on the Respondent did not elicit any action by the Respondent.
7. On 3rd May 2017, the Court directed that hearing proceeds by way of formal proof.
8. When the matter finally came up for formal proof before Ndolo, J on 15th July 2021, the 2nd Claimant adopted her filed witness statement dated 23rd September 2016 as a her testimony and produced the listed and filed documents as exhibits. She prayed for judgment as assessed under WIBA, plus costs.
9. On its own motion, the Court issued Summons to the Director WIBA for purposes of producing the assessment report.
10. When the matter came up for further hearing/formal proof before me on 31st March 2022, Mr. Gerald Muhura, an Assistant Director of Occupational Safety and Health Services (Employment No. 1987017266) currently based at Nairobi, appeared before me virtually. He testified that he authored the DOSH/WIBA4 Form (which he said was dated 26th February 2015). He produced the document as the Claimant's exhibit no. 8. The witness (CW2) further testified that he made demand for the assessed Ksh.2,400,000 but no payment was made. He further testified that he wrote/authored the letters dated 8th September 2014 and 15th January 2015, which he told the Court were valid and were from the Directorate of Occupational Safety and Health Services.
11. The single issue for determination in this case is:-
 - a. Whether this Court can enter judgment in terms of an award and/or assessment made by the Director of Occupational Safety and Health Services under Work Injury Benefits Act (WIBA).



12. The *Work Injury Benefits Act* (WIBA) is silent on the procedure to be followed in enforcing the Director's decision made on assessment of compensation payable to an employee and/or estate of an employee for occupational accident or decease resulting in the disablement or death of an employee.
13. As this Court has previously stated in the case of *Elijah Kisyanza Ndende v Manager Zabkem International Constructions Limited* [2022] eKLR, 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 would be without a civil remedy, and particularly so where the employer never objected to the Director's decision on the assessment of compensation payable.
14. In the case of *Samson Chweya Mwandabole v Protecive Custody Limited* [2021]eKLR the Court addressed the issue of adoption of the Director's award as a Judgment of the Court for purposes of execution. The Court stated 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...”
15. In entering judgment in terms of the Director's assessment of compensation payable to an employee under WIBA, this Court does not in any way contravene Section 16 of the said Act as the issue of liability and the amount of compensation payable to an employee is already determined by the Director under the Act. Under Section 23 of the *Work Injury Benefits Act*, the Director makes such inquiries as are necessary to decide upon any claim or liability in accordance with the Act.
16. When no objection has been lodged against the Director's decision on liability and compensation payable under the Act, and where the employer is shown to have refused and/ or failed to pay the amount of compensation assessed by the Director upon demand, the employee can move the Court to adopt the Director's award as judgment for purposes of enforcing payment through issuance of a decree, which the employee can thereupon execute.
17. In the present case, the Claimant's witness (CW-2) confirmed to this Court the validity of the Director's assessment as well as the fact that the amount of compensation assessed under WIBA, Ksh.2,400,000, was not paid by the Respondent.
18. The Respondent herein, who did not defend the suit despite having been served with Court documents, was not shown to have objected to the Director's decision, either within the time prescribed by the Act or at all.
19. Consequently, Judgment is hereby entered in favour of the Claimants against the Respondent for a sum of Ksh.2,400,000 being the amount assessed by the Director of Occupational Safety and Health Services.
20. The Claimants are also awarded costs of the suit and interest at Court rates.



DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF JUNE 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment 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:

Mrs. Chengo for Claimant

N/A for Respondent

