



**Ochieng v Manco Limited (Cause E028 of 2022)
[2022] KEELRC 1565 (KLR) (2 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1565 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E028 OF 2022**

B ONGAYA, J

JUNE 2, 2022

BETWEEN

JACTONE ABAYO OCHIENG APPLICANT

AND

MANCO LIMITED RESPONDENT

RULING

1. The proceedings were commenced by way of a notice of motion filed on April 12, 2022 through Ogembo & Associates Advocates. The application is under rule 28 and 31 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#) and section 26 of the [Work Injury Benefits Act \(WIBA\)](#). The prayers are for orders:

1. That the court adopts the assessment of the Director of Occupational Health and Safety dated January 3, 2022 as an order of the honourable court and a decree to issue accordingly.
2. Costs of the application be provided for.

The application is based on the annexed applicant's affidavits, exhibits attached and upon the following grounds:

- a. On January 26, 2018 the applicant was in the respondent's lawful employment when a heavy metallic object fell on the applicant's feet and as a result of the accident, the applicant suffered severe injuries on his left leg which had to be amputated below the knee.
- b. The injury was reported to the Director of Occupational Health and Safety at Mombasa who assessed the compensation dues at Kshs. 780,000.00.
- c. The Director's assessment has been served upon the respondent but no payment is forthcoming.



- d. The respondent has delayed to pay and hence the present proceeding.
2. The respondent appointed Aroka & Company Advocate to act in the case per notice filed on May 11, 2022. The respondent opposed the application by filing on May 30, 2022 the replying affidavit of Husna Hussein, respondent's human resource officer. The respondent urges that the application is premature as the matter is currently still under review by the Director. The respondent relies on the Director's letter dated April 11, 2022 referring to the respondent's letter of February 23, 2022 and received on April 1, 2022. The Director's letter confirmed that part II of the Dosh 1 was filled by the doctor who was treating the applicant and not the Director's doctors. Further, the doctor's report had been used to assess the compensation. It further states that in consultation with the respondent's insurer the employee can be subjected to a second medical opinion.
 3. The respondent urges issues of merits as to why the respondent would not be satisfied with the assessment (such as paying medical bills, paying salary for over a year while the claimant was sick of the injury, paying for rehabilitative services, offering a clerical job but which the claimant declined, and he has of his own will left employment) are all matters outside the Court's jurisdiction in the instant case. Further, the applicant had been uncooperative in availing himself for medical assessment by the insurer's doctor. On January 11, 2022 the award of assessment at Kshs.780, 000.00 was served through the applicant's advocates. Further, filled DOSH 1 form was not served or availed and the respondent did not know the doctor who examined the claimant and rendered a report in that regard. On February 23, 2022 the respondent wrote objecting to the Director's assessment and the Director replied by the letter of April 11, 2022. Further the respondent has a cover with Jubilee Insurance who are actively pursuing the claim with the intention of settling the same. It is so stated for the respondent.

Parties' advocates made oral submissions on May 31, 2022.

4. The applicant's counsel submitted that there was a valid assessment and the respondent had failed to satisfy it. Further, per section 51 of *WIBA* the respondent was entitled to lodge an objection within 60 days of the decision and in the prescribed form. It was further submitted there was no valid objection because the purported objection was by a letter dated February 23, 2022 and received by the Director on April 1, 2022 so that it was not in the prescribed DOSH form. The decision was signed on January 3, 2022 and served on January 11, 2022.

For the respondent it was submitted that the matter is still active before the Director and the court has no jurisdiction to consider merits of the objection except if an appeal is filed per section 52 of the Act.

5. The court has considered the parties' respective cases and submissions and returns as follows.

The main issue for determination is whether the applicant is entitled as prayed for.

6. There is no doubt and it is parties' mutual position that the Director issued the assessment on January 3, 2022 and served by the respondent's counsel on January 11, 2022. Allowing 60 statutory days for objection, the days would have not lapsed by the day the respondent wrote to the Director the letter dated February 23, 2022 but, for unexplained reasons, served on April 1, 2022 – outside the prescribed 60 days.
7. Does the respondent's letter amount to an objection under section 51 of the Act? The objection is that it is not in the prescribed DOSH Form 12. Specific submissions have not been made on the material variance in substance from the prescribed form and in the opinion of the court, on its face, the purported objection is clear in substance. Section 72 of the *Interpretation and General Provisions Act*, cap 2 provides that save as otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a



deviation therefrom which does not affect the substance of the instrument or document or which is not calculated to mislead.

8. Now section 51 (2) provides thus, “(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.” The court’s opinion is that whatever is mandatory is that the objection is in writing and spells out the matters prescribed in section 51(2) of the Act. It is not imperative that the form be used in lodging the objection, though, is desirable to use the form as far as possible and as prescribed. The letter of February 23, 2022 was categorical on the respondent not having been supplied with medical report documenting the award of Kshs.780, 000.00 on the basis of 50% permanent total incapacity; from 2018 until 2022 the respondent had required the applicant to attend a medical test for second opinion on conclusive extent of the injury but the applicant had been evasive; he had been paid full salary throughout for one year as he recovered from the injury; and he had been reassigned a desk job but decided not to work anymore. The respondent requested in the letter as follows:
 1. Clarification of basis of award of 50%.
 2. The medical report that is basis for the award.
 3. Opportunity to conduct second independent medical review of the applicant.
 4. Review of the award in view of initial reports, second opinion, doctor’s reports and [WIBA Act, 2012](#).
9. The court has elaborated the contents of the letter to establish that indeed it complied with the substance of section 51 (2) and it cannot be defeated for want of use of the prescribed form. Nevertheless, the objection was submitted on April 1, 2022 long after lapsing of the 60 days from January 3, 2022 when the director made the decision – and even if service was on January 11, 2022, 60 days thereof had lapsed by April 1, 2022 and in any event, the 60 days ran from the date of the decision and not from the date the decision was served. The court has reconsidered the [WIBA, 2007](#) and there appears no room for the Director to accept a belated objection or no authority is granted to extend the 60 days for lodging objection. Section 52 (1) of the Act provides that the Director shall within 14 days after receipt of an objection in the prescribed form, give a written answer to the objection varying or giving reasons for the decision objected to and within the same time send a copy statement to any other person affected by the decision. It appears the Director treated the belated objection of February 23, 2022 and received on April 1, 2022 as valid when on April 11, 2022 the Director conveyed to the respondent the reply that the assessment was per the report by the doctor who treated the applicant; the respondent could get the report from the doctor; and in consultation with the insurer the applicant “can” be subjected to a second medical opinion. While the Director purported to make a decision (reply) within the 14 statutory days, the court has found that the objection had been submitted belated. If the objector was dissatisfied with the Director’s decision, then an appeal would lie to the court within 30 days from the date of receipt of the reply to objection and it is not clear when the letter was received. It is imperative that only an objector (the respondent) could appeal the Director’s reply and not the claimant and per section 52 (2) of the Act.
10. In view of the foregoing findings the court returns as follows:
 1. The respondent’s letter dated February 23, 2022 amounted to an objection but which was time barred when the Director received it on April 1, 2022.
 2. While the Director replied by the letter dated April 11, 2022, the same was with respect to a belated objection and the objector having not appealed per section 52(2) of the [WIBA Act](#),



there is nothing pending before the Director – the Director’s possible decisions in determining an objection being to vary or uphold the initial decision and it is that in the instant case, no variation was imposed by the Director with respect to the earlier decision. The respondent appears not to have appealed. The Court finds the matter thereby rested as concluded.

3. There being no pending proceedings under sections 51 and 52 of the *WIBA Act* by way of an objection or appeal, the applicant has established that he is entitled to the remedy as prayed for.
11. As submitted for the respondent, indeed the court has no jurisdiction to determine the merits of the Director’s decision as the present proceedings are limited to enforcement of the Director’s decision and are not an appeal under section 52(2) of *WIBA Act*, 2007. The court’s considerations in the instant ruling were therefore limited to whether there is any pending objection or appeal proceeding in terms of sections 51 and 52 of the Act and the court has given an answer in the negative.
12. The applicant has succeeded and is awarded costs of the application.

In conclusion the application dated April 12, 2022 and filed the same date is allowed with orders:

1. That the court hereby adopts the assessment of the Director of Occupational Health and Safety herein dated January 3, 2022 as an order of the honourable court and a decree to issue accordingly.
2. The respondent to pay the applicant the decretal amount by August 1, 2022 failing interest to accrue thereon at Court rates from the date of this ruling till full payment.
3. There be stay of execution of the decree until August 1, 2022.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS THURSDAY 2ND JUNE, 2022.

BYRAM ONGAYA

JUDGE

