



Kamande & another (Suing as Administrators and Personal Representatives of the Estate of Josephat Macharia Muigai - Deceased) v ACE Freight Limited (Cause 2204 of 2017) [2022] KEELRC 1275 (KLR) (12 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1275 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2204 OF 2017**

JK GAKERI, J

JULY 12, 2022

BETWEEN

**LUCY MUTHONI KAMANDE & JANE WANGARI MUIGAI CLAIMANT
SUING AS ADMINISTRATORS AND PERSONAL REPRESENTATIVES OF
THE ESTATE OF JOSEPHAT MACHARIA MUIGAI - DECEASED**

AND

ACE FREIGHT LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted this suit by a statement of claim dated October 23, 2017 and filed on November 6, 2017 seeking compensation for injuries sustained by the deceased in a road traffic accident in the course of his employment.
2. The Claimant prays for;
 - a. Compensation to be paid in accordance with the *Work Injury Benefits Act* 2007.
 - b. Costs of this claim.
 - c. Interest on (a) and (b) above from date of filing the claim till payment in full.

Claimant's Case

3. The Claimant avers that the deceased was employed by the Respondent as a driver at a monthly salary of Kshs.23,000/-.
4. That it was the duty of the Respondent to take all necessary precautions to ensure the safety of the deceased while in the course of his employment and not expose him to danger injury or damage.



5. It is further averred that on April 25, 2016 the deceased while in the course of his employment driving the Respondent's lorry Registration No. KBR 765G/ZD8329, an accident occurred.
6. The driver sustained serious injuries as a result of which he died.
7. That at the time of the accident, the deceased was in good health and had four dependants who have suffered loss and damage and are entitled to compensation.
8. It is the Claimant's case that the Respondent failed to report the circumstances to the Director, Occupational Safety and Health Services for completion of the requisite forms for purposes of compensation.

Respondent's Case

9. The Respondent's case is pleaded as follows;
10. The Respondent admits that the deceased was its driver earning a monthly salary of Kshs.23,000/- and it took all the necessary precautions towards the safety of the deceased and did not expose him to risk and damage.
11. It is the Respondent's case that on April 25, 2016, while in the course of his employment the deceased was involved in an accident which resulted in his death.
12. The Respondent's amended response to the statement of claim filed on May 21, 2018 states that the accident occurred at 11.30 pm beyond the stipulated time of operation which was 10.00 pm.
13. That the deceased failed to operate the lorry in a prudent and reasonable manner thus exposing himself to risk or danger.
14. That the Respondent paid Kshs.115,800/- to the deceased's family vide cheque No. 541 CFC Bank, as terminal dues owed to the deceased.

Claimant's Evidence

15. On cross-examination CW1, Lucy Muthoni, the deceased's widow confirmed that the deceased was her husband and was an employee of the Respondent and had worked for 3 years.
16. The witness was not sure whether the accident happened on 25th or 26th April, 2016 but was categorical that she was unaware of the time.
17. It was her testimony that the death certificate indicated that death occurred on April 26, 2016.
18. The witness confirmed that from the Respondent's documents on record, the drivers were not supposed to be on the road after 10.00 pm but the deceased was when the accident occurred at 11.30 pm.
19. The witness admitted having received Kshs.147,300/- as records showed. That the amount was for welfare and funeral expenses.
20. That she neither reported the accident to the employer of the deceased nor the Director, Occupational Safety and Health Services and the case was filed on November 6, 2017 more than one (1) year after the accident.
21. On re-examination, the witness testified that the accident was referred to the insurer of the Respondent's motor vehicle.



22. It was her testimony that she was notified of the accident by another person and was not compensated for the accident. Finally, the witness testified that it was not her duty to report the accident.

Respondent's Evidence

23. On cross-examination RW1, one Landiscus Ericsson stated that he was the Operations Manager of the Respondent from 2016 to 2018 and knew the deceased as an employee of the Respondent.
24. That the deceased drove the Lorry outside working hours on the material day without permission of the Director or Operations Manager though it was his first time to do so.
25. That the accident occurred at 11.30 pm and one of the Respondent's driver called the witness to relay the information.
26. RWI testified that the abstract indicated who was likely to be held culpable but there was no report of who was to blame.
27. The witness confirmed that he was aware that the deceased was entitled to compensation under the [Work Injury Benefits Act, 2007](#).
28. He testified that the accident was reported to the Human Resource but had no evidence of the report.
29. That compensation was effected as per the provisions of the Act.
30. On re-examination, the witness testified that the deceased had not requested for permission to be on the road after 10.00 pm as per the Respondent's Operations Manual and the accident happened outside working hours.

Claimant's Submissions

31. The Claimant isolates two issues for determination namely, reliefs entitlement and costs of the suit.
32. On entitlement to reliefs, reliance is made on Section 10(1) of the [WIBA, 2007](#) to urge that the employer is liable to pay compensation.
33. In addition, section 10(4) of the Act is relied upon to urge that the compensation is payable whether or not the employee was acting in contravention of any law or instructions of the employer.
34. It is urged that in the circumstances the deceased is entitled to compensation. Similarly, section 22 of the Act is relied upon to underline the duty of the employer to report the accident to the Director, Occupational Safety and Health Services (DOSHS) within 7 days of receipt of notice of an accident or having learnt that an employee had been injured in an accident.
35. That the Respondent failed to report the accident to the DOSH as provided by the law.
36. It is further submitted that requests by the Claimant to the respondent to report the accident to the DOSHS or forward notice of the same were unresponded to. Reliance is also made on section 35 of the Act on the level of compensation payable to the dependants of the deceased.
37. It is urged that the Claimant is entitled to demand compensation payable in accordance with the provisions of WIBA, 2007.
38. The Claimant submits that the failure by the Respondent to follow the law necessitated this suit.



Respondents Submissions

39. The Respondent lists four issues for determination namely, jurisdiction of the Court to determine the dispute, Respondents duty to ensure safety of the deceased, deceased's conduct on the date of the accident and entitlement to the reliefs sought.
40. On the first issue, counsel relies on the decision in *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR to urge that jurisdiction is primordial in every suit. That a suit filed in a Court without jurisdiction to entertain it is of no consequence.
41. The decision in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR is relied upon for the proposition that "A Court's jurisdiction flows from either *the constitution* or legislation or both."
42. It is urged that the Court has no original jurisdiction to hear and determine the suit herein.
43. Reliance is made on section 21, 22 and 23 of *WIBA* to urge that the procedure to seek compensation is prescribed by the Act not by way of Court action.
44. That Article 159 of *the Constitution* of Kenya, 2010 allows ADR mechanisms and this includes the DOSHS as affirmed by the Court of Appeal in *Attorney General v Law Society of Kenya & another* [2017] eKLR. The decision in *Yvonne Damaris Kimantbi & another (suing as the Administrators of the Estate of Newton Mugendi Njeru (Deceased) v Pathologists Lancet Kenya Limited* [2019] eKLR is also looped in to urge that this Court no longer has jurisdiction to determine claims under WIBA.
45. It is submitted that the Claimant neither reported the accident to the Respondent nor requested for the notice as no evidence has been adduced to that effect.
46. That the claim herein is statute barred by virtue of section 26 of *WIBA* which has a time limitation.
47. It is further submitted that the claim was lodged in October 2017 more than 12 months after the accident which was never reported to the Respondent in the first place.
48. As regards the steps taken by the Respondent to ensure the deceased's safety, the decision in *Muritu Kinyanjui v Jane Muthoni Njiru & 2 others* [2020] eKLR is relied upon to urge that the burden of proof in civil cases is on a balance of probability.
49. It is urged that the Respondent took the necessary steps to ensure the safety of the deceased as required by law. The Respondent had inter alia prescribed working hours at night up to 10.00 pm.
50. As regards the conduct of the deceased on the date of the accident, it is submitted that the deceased failed to operate the lorry in a reasonable manner which exposed him to danger. The decision in *Leah Wambui Ngugi v George Mbugua Karanja & 2 others* [2016] eKLR is relied upon to urge that the deceased may have been negligent. That the deceased was driving outside working hours.
51. As regards the reliefs sought, the Respondent submits that the claim was never reported to the DOSHS as prescribed by Section 21 of *WIBA* and was lodged 12 months later and no relief is due.
52. The decision in *Alba Petroleum Limited v Total Marketing Kenya Limited* [2019] eKLR and *Iga v Makerere University* [1972] EA 65 are used to buttress the submission on limitation of time. The Respondent also urges that parties are bound by their pleadings.
53. It is also submitted that the Claimant's evidence was contradictory regarding the date of the accident and was therefore not credible.



54. The decision in *Shadrack Mathias & another v Agnes Muluki Wambua* [2021] eKLR is relied upon as is the holding in *Attorney General v Law Society of Kenya & another* (*supra*) to urge that the deceased was guilty of misconduct.

Analysis and Determination

55. The issues of determination are;
- i. Whether the Court has jurisdiction to hear and determine the suit;
 - ii. Whether the Respondent had taken steps to ensure safety of the deceased and whether the deceased was negligent;
 - iii. Whether the Claimant is entitled to the reliefs sought.
56. As to whether the Court has jurisdiction, Counsel referred to the decision of the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR where the Court was emphatic that a Court's jurisdiction flowed from either *the constitution* or legislation or both and the Court cannot assume jurisdiction in excess of that which is conferred upon it by law.
57. It requires no gainsaying that jurisdiction is everything in the administration of justice and a threshold issue for determination.
58. The Respondent submits that the Court has no jurisdiction to hear the case on the promise that the deceased did not give notice of the accident to the employer within 24 hours as prescribed by section 21 of *WIBA* and it was not reported to the DOSHS within 12 months as prescribed by section 22 of the Act.
59. Without belabouring the point, this suit was commenced on November 6, 2017 before the Court of Appeal pronounced itself in *Attorney General v Law Society of Kenya & another* (*supra*) on November 17, 2017. Before this decision, sections 4, 7, 10 (4), 16, 21(i), 23(1), 25(1), (3) 51(1), (2) and 58(2) had been declared unconstitutional by Ojwang J. in High Court Petition 185 of 208.
60. In a nutshell, the Claimant had no other forum to litigate the claim and as was held by Radido J. in *West Kenya Sugar Co. Ltd v Tito Lucheli Tangale* [2021] eKLR, the Court has jurisdiction to hear and determine the suit herein.
61. The Learned Judge was categorical that
- “In the view of this Court, these litigants who filed their disputed with the Courts from May 22, 2008 to December 3, 2019 on the firm belief that the judge declared the valid law in place then, are entitled to successfully assert legitimate expectation in having the claim heard to a conclusion before the Courts were they have been lodged.”
62. The Court is guided by these sentiments and is in agreement with them.
63. Instructively, the Court of Appeal overturned the decision of the High Court on the unconstitutionality with the various sections of *WIBA* other than section 7 (in so far as it provides for the Minister's approval or exemption) and Section 10(4).
64. Before this decision, the law was as declared by Ojwang J. and reference of claims to the Director, Occupational Safety and Health Services (DOSHS) could not arise.



65. For the foregoing reasons, it is the finding of the Court that it has jurisdiction to hear and determine the suit herein.
66. As regards the steps taken by the Respondent to ensure safety of the deceased, the Court in agreement with the Respondent's counsel submission that the Respondent had by the contract of employment of the deceased and its policy of working hours attempted to incorporate safety concerns in its mode of operation.
67. The contract is explicit on safety and adherence to traffic law, vehicle safety, cleanliness, tyres and vehicle management and repairs.
68. In addition, the policy on working hours provided for allowable time frame, not later than 10.00 pm unless expressly authorised by the Managing Director or Operations Manager, reporting of breakdowns for quick dispatch of help, ensuring secure and safe parking of lorries and avoidance of unnecessary stop overs.
69. In a nutshell, the Respondent had by the terms of the contract and the policy provided a basic framework whose compliance with by drivers would enhance safety of drives including the deceased.
70. The Respondent's witness testified that the deceased was driving outside the working hours and had no permission to do so. He also confirmed that there was no report on who was to blame for the accident.
71. That the deceased was operating in contravention of the Operations Manual.
72. In its submissions on this point, the Respondent submits that the deceased did not operate the lorry in a reasonable manner, that the deceased was negligent by the fact an accident occurred involving the vehicle he was driving KBR 765G/ZD 8329.
73. That but for his negligence, the accident would not have occurred.
74. That according to the abstract the police intended to prefer charges against the deceased. That all this was evidence of his negligence driving.
75. The police abstract dated April 27, 2016 states that the accident involved two lorries, KBR 765G/ZD 8329 and KBS 486N/ZD 7905 and although the abstract identifies Mr. Yussuf Sharif, Omar Mustafa and PC Ongulu and CPL Wambulwa as witnesses, no witness statements or report on the accident are attached.
76. The Claimants submission is analogous to pleading *res ipsa loquitur* which in the Courts view is inapplicable to this case.
77. It is trite law that whether a party acted negligently or not is a question of law and fact and neither the facts nor the applicable law has been provided.
78. The deceased may have contributed to the accident as the words of *Holman v Johnson* (1775) 1 Cowp 341 cited with approval by the Court of Appeal in *Attorney General v Law Society and another* (Supra) suggest, but no material has been placed before the Court to prove his contribution.
79. The Court declared section 10(4) of *WIBA*, 2007 unconstitutional.
80. The police Abstract is not a solid basis on which to decipher negligence on the part of a driver.
81. The deceased may have been negligent, but the same has not been established evidentiary.
82. For these reasons, it is the finding of the Court that the Respondent has not in a balance of probabilities established that the deceased drove motor vehicle KBR 765G/ZD 8329 negligently.



83. Before delving into the reliefs prayed for, the Respondent raised the issue of credibility of the Claimant that she was inconsistent on the date of the accident whether it was on 25th or 26th April, 2016.
84. The Claimant is the widow of the deceased and confirmed on cross-examination that she received a message from a friend of her husband who did not indicate the time of the accident.
85. Initially, the Claimant testified that the accident happened on April 26, 2016 and later changed to April 25, 2016 as per the abstract.
86. Instructively, the accident is alleged to have occurred at 11.30 pm and it is unclear when the deceased friend sent a message to his wife. In the Court's view, nothing turns on this issue.
87. As to whether the Claimant is entitled to the reliefs sought, the Respondent contends that the relief provided by WIBA are unavailable owing to limitation of time on account that;
 - i. The Claimant did not report the accident to the Respondent and
 - ii. The claim was not filed with the DOSHS within the 12 months prescribed by WIBA.
88. Section 21 of *WIBA*, 2007 provides 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 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.
89. Section 22 provides
 1. Subject to the provisions of this section, an employer shall report any 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.
 3. An employer shall, at the request of an employee or the dependant of an employee furnish the employee or dependants with a copy of the notice of the accident furnished by the employer to the Director in respect of a claim for compensation by such employee or dependant.
 4. An employer who fails to comply with sub-section (1) commits an offence.
90. As regards reporting of the accident by the Claimant, or deceased, the Respondent states that no report of the accident was done. However, RW1 Mr. Laudiscus Erickson Mande confirmed on cross-examination that one of the drivers of the Respondent called him around 11.00 pm to inform him about the accident.
91. Needless to emphasize the witness was the Operations Manager and the deceased's Supervisor.
92. The insinuation that the Respondent expected the dependants to make another report yet the Respondent had through its Operations Manager learned of its occurrence on the night it occurred is tantamount to demanding double reporting.
93. Section 22(1) of *WIBA* is emphatic that the notice may be made by the employee or any other person on behalf of the employee or the employer may learn of the accident from any other source.
94. Relatedly, RW1 confirmed that he was aware that an employee was entitled to compensation though he admitted not being familiar with WIBA. He also replied that the accident was reported to the Human Resource but had no evidence to show.



95. The absence of written evidence notwithstanding, the foregoing admission demonstrates beyond peradventure that the Respondent was aware of the accident.
96. The Court is satisfied that the Respondent was aware that the deceased had been involved in an accident by the morning of 2 April 6, 2016.
97. The Respondents contends that the accident was never reported to the Director, Occupational Safety and Health Services as required by Section 22 (1) of WIBA wrongly cited as Section 21.
98. A plain reading of section 22 (1) of the Act reveals that it is equally the duty of the employer to report an accident to the DOSHS and must do so in the prescribed manner within 7 days of having been notified or becoming aware of it.
99. The 7 days started running against the employer as well from April 26, 2016 and no notice of the accident was made to the Director. The fact that the Respondent uses the failure to report the accident as a defence to the Claimant's claim in the court's view signifies unconscionability on the part of the Respondent.
100. In a case like this where the employer lost an employee in a road accident, it was incumbent upon the employer to report the accident within the required duration as a sign of empathy to the family of a former dedicated employee. Leaving the young family to navigate the legal terrain on its own was hard-hearted.
101. In a similar vein, the Respondent submits that the claim for compensation was not filed before the DOSHS within the 12 months prescribed by law and is thus statute barred.
102. Section 26 of WIBA provides
 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 12 months after the date of the accident or, in the case of death within 12 months after the date of death.
 2. If a claim for compensation is not lodged in accordance with sub-section (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.
103. Sub-section 3 empowers the Director to inter alia levy a penalty on the employer for failure to report an accident. Relatedly, the Respondent committed offence under section 21 and 22 of WIBA for failing to notify the Director within 24 hours and report the accident within 7 days respectively.
104. As regards the request for notices by the Claimant from the Respondent under section 22(3), the Claimant tendered no evidence of the requests and the Court is in agreement with the submissions by the Respondent.
105. While credit goes to the Respondent for having paid the final dues to the family within a relatively short time, it did not go the full length to ensure that the family received all the dues to it on account of the death of the bread winner.
106. In the Court's view, the Respondent failed the family of the deceased. It is injudicious for the respondent to rely on limitation of time to defeat the claim.
107. For the foregoing reasons, it is the finding of the Court that the Claimant was entitled to compensation in accordance with the provisions of WIBA, 2007 but the duration prescribed by the Act has lapsed.



108. However, Section 26(2) appears to confer discretion upon the Director to determine applications made where claims for compensation have not been filed within 12 months.
109. Finally, this Court is minded of the need to ensure and enhance consistency in decision making and in particular those relating to WIBA matters so as to ensure the emergence of solid jurisprudence from the Director and the Court.
110. Accordingly, the claim herein is referred to the Director, Occupational Safety and Health Services for determination. The Director may award costs as necessary.
111. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF JULY 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 15th March 2020 and subsequent directions of 21st April 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

