



**Omar v Mackenzie Maritime [E.A] Limited (Cause E030 of 2021)
[2022] KEELRC 4109 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4109 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E030 OF 2021
AK NZEI, J
SEPTEMBER 29, 2022**

BETWEEN

AMIR SWALEH OMAR CLAIMANT

AND

MACKENZIE MARITIME [E.A] LIMITED RESPONDENT

JUDGMENT

1. Vide a statement of claim dated March 11, 2021 and filed in this court on March 12, 2021, the claimant sued the respondent and pleaded, inter-alia:-
 - a. that at all times material to the claim, the claimant was an employee of the respondent, having been employed since January 2018 as a banksman earning a salary of ksh 34,832.84 per month.
 - b. that on February 16, 2018, while at his work station at Africa Oil and Gas Limited, the claimant was injured whereby he broke his right hip.
 - c. that on January 14, 2019, the county occupational safety and health officer assessed the claimant's injury at 40% incapacity and awarded him ksh 1,476,912.
 - d. that being dissatisfied with the assessment and award, the respondent wrote to the director of occupational safety and health services and requested that a medical board be constituted to assess the claimant.
 - e. that on the advice of the director, the claimant was send for review by a panel of two doctors at Nairobi, who on July 8, 2019 reviewed the claimant and assessed his permanent disablement at 60% and the claimant was awarded ksh 2,167,138.53, and that both the director and the respondent were duly notified vide letters dated July 12, 2019 and DOSH Form 4 dated August 13, 2019 respectively.



- f. that under section 29(2) of the WIBA Act, an employee may be awarded additional compensation for temporary, total or partial disablement if: the disablement of the employee recurs or the employee's health deteriorates and if the employee requires further medical aid necessitating further absence from employment.
 - g. that under section 29(2) and 30(5) of the WIBA Act, the claimant is entitled to damages for diminished earning capacity as a result of the injury.
2. The claimant proceeded to pray for judgment against the respondent for:-
 - a. an order compelling the respondent to settle the claim
 - b. compensation for diminished earning capacity due to the injury.
 - c. an order for conviction of the respondent's directors for failure to pay the compensation claimed in line with section 26(6) of the WIBA Act.
 - d. costs of the suit.
 - e. interest as at the date of assessment by the director
 - f. any other relief this honourable court may deem fit and just to grant.
 3. The respondent defended the claim vide its statement of response dated July 12, 2021 and filed in this court on July 13, 2021 whereby it pleaded, inter-alia:-
 - a. that the respondent's insurer wrote to COSHO Nairobi on September 23, 2019 requesting for a review of the award on grounds that:-
 - i. the assessment of 60% permanent total incapacity differed with the first two assessments of 40% and 10%; and
 - ii. the assessment was higher than what the WIBA stipulates as maximum for amputation of a foot below the knee in that the WIBA stipulates that an ankle (sic) anklyloses at maximum position attracts an award of not more than 15%. The respondent therefore queried how a loss of flexion of the ankle would be awarded more than an amputated foot.

Cosho Nairobi is yet to respond to that letter todote.
 - b. that the respondent denies that the claimant is entitled to compensation for diminished earning capacity under WIBA. The claimant never submitted that part of the claim for assessment under WIBA, neither did he lodge an objection to any assessment where the director failed to provide for it. That part of the claim is an afterthought and this court does not have original jurisdiction on any aspect under WIBA. Therefore, the court cannot determine that part of the claim.
 4. When trial opened on March 28, 2022, the claimant adopted his recorded and filed witness statement dated March 11, 2021 and a further witness statement dated January 27, 2022 as his testimony. He also produced in evidence documents listed on his list of documents dated March 13, 2021 and a further list of documents dated November 25, 2021. The claimant further produced in evidence what he referred to as a further bundle of documents.
 5. The claimant told the court, both in his evidence in chief, under cross examination and re-examination, inter-alia:-



- a. that his incapacity was initially assessed at 40% on January 14, 2019 and an award of ksh 1,476,912.50 was made based on this assessment.
 - b. that the claimant was, at the respondent's instance, sent to the respondent's insurer's doctor, a Dr Sheth, who assessed the claimant's incapacity at 10%, and that, that assessment was not used to award any compensation.
 - c. that the claimant was then sent for assessment by a panel of two doctors in Nairobi, and that the panel assessed the claimant's permanent incapacity at 60%, on the basis of which the director of occupational safety and health services made his second assessment (award dated August 13, 2019).
6. Among the documents produced in evidence by the claimant is Form ML/Dosh/WIBA Form 4 dated August 13th, 2019, whereon the claimant's permanent incapacity is shown to be 60% and total compensation payable to the claimant is shown to have been assessed by the director of occupational safety and health services, Nairobi, at ksh 2,167,138.53. The said document is addressed to the respondent and by dint of it the respondent was required by the director to remit the aforesaid sum to the claimant through the director's office. The respondent did not deny having received the said assessment and demand to pay.
 7. It was the claimant's further evidence that the respondent did not object to the assessment dated August 13, 2019, and that there was no other assessment by the director after August 13, 2019.
 8. On its part, the respondent called one witness (RW1), who adopted his recorded witness statement dated November 12, 2021 as his testimony and produced in evidence documents listed on the respondent's list of documents dated July 12, 2021.
 9. Under cross-examination, the witness (RW1) testified that there were two assessments by the director. That the first assessment was dated January 14, 2019 wherein permanent incapacity was assessed at 40% and the second one was dated August 13, 2019 whereby incapacity was assessed at 60%. That all the references of the claimant to different doctors was being sanctioned by the respondent. The respondent (RW-1) further testified that the respondent did not object and had no objection, to the second assessment.
 10. It was further evidence of the respondent's witness (RW-1) that it was the respondent's Insurer who objected to the second assessment (dated August 13, 2019) vide a letter dated September 23, 2019 and that there was no indication that the said letter was ever served on the director or on the claimant.
 11. Section 51 of the *Work Injury Benefits Act* provides as follows:-
 - “(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.”
 12. As already stated hereinabove, the respondent did object to the director's decision dated August 13, 2019, either in the manner and within the time prescribed by the foregoing statute or at all. The respondent's witness testified that a letter written by the respondent's insurer on 23rd September 2019 was not shown to have been lodged with the director. The respondent, who admitted to not having



- objected to the director's award of compensation to the claimant dated August 13, 2019, did not demonstrate that any objection was lodged with the director against the said decision on compensation dated August 13, 2019.
13. In view of the respondent's pleading that the claimant never submitted his claim for compensation for diminished earning capacity to the director WIBA for assessment and that this court does not have original jurisdiction on any aspect under WIBA, and having considered the evidence adduced by both parties, the following two issues, in my view, emerge for determination. These are:-
- a. whether this court has jurisdiction over the claim herein.
 - b. whether the claimant is entitled to the reliefs sought.
14. On the first issue, section 16 of the [Work Injury Benefits Act](#) provides as follows:-
- “no action shall lie by any employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.”
15. Section 23 of the [Work Injury Benefits Act](#) on the other side provides as follows:-
- “(1) after having received notice of an accident or having learned that an employee has been injured in an accident, the director shall make such enquiries as are necessary to decide upon any claim or liability in accordance with this Act.
- (2) an inquiry made under subsection (1) may be conducted concurrently with any other investigation.
 - (3) an employer or employee shall, at the request of the director, furnish such further particulars regarding the accident as the director may require.
 - (4) a person who fails to comply with the provisions of Subsection (3) commits an offence.”
16. It is quite clear from the foregoing sections of WIBA that determination of liability and assessment of compensation payable thereon in work injury claims is the preserve of the director of occupational safety and health services, and that this court does not have primary and/or original jurisdiction over such matters.
17. The Act (WIBA) is silent on how the awards of compensation made by the director in favour of employees involved in occupational accidents or who suffer occupational diseases are to be enforced. At the same time, the Act does not expressly divest this court of jurisdiction to enforce such awards; and especially where the award of compensation by the director has not been objected to and the employer has refused to pay the assessed compensation. Did parliament intent that an employee caught up in such a situation would be left at the mercy of an employer who may choose either to pay or not to pay the assessed sum?. I do not think so.
18. What would be the purpose of the director making or undertaking inquiries in order to determine the issue of liability and proceeding to assess the compensation payable if the compensation assessed by the director was not meant to be paid to the injured employee? In my view, once the director assesses the compensation payable and the same is not objected to pursuant to section 51 of the [WIBA](#), the assessed



sum becomes the injured employee's right and entitlement regarding which the employee can move to court and seek enforcement of that right by seeking entry of judgment in terms of the director's assessment, and issuance of a decree which can then be executed to realize that right.

19. Indeed, failure by an employer to pay a demanded compensation that has been assessed by the director and to which no objection has been lodged creates a dispute over a liquidated claim, which this court can entertain and determine. Article 50(1) of the *Constitution* of Kenya 2010 provides:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body.”

20. On the second issue, and in view of the foregoing paragraphs, it is my finding that the claimant is entitled to the sum of ksh 2,167,138.5 assessed by the director WIBA on August 13, 2019.
21. The court cannot, however, be called upon to award any compensation that was not assessed by the director WIBA in accordance with the provisions of the Act, and cannot determine any issue of liability as between the employer and employee, as this is the province of the director. Sections 16 and 23 of the *WIBA* are called in aid. The claimant's prayer for compensation for diminished earning capacity due to the injury cannot be entertained by this court as it has no jurisdiction to do so. The same is hereby dismissed.
22. The prayer for conviction of the respondent's directors for failure to pay the compensation claimed in line with section 26(6) of *WIBA* cannot be allowed by this court. Section 26(6) creates an offence which, in my view, should have been dealt with under the criminal law regime. The prayer is hereby dismissed.
23. Ultimately, and having considered submissions by counsel for both parties, judgment is hereby entered for the claimant against the respondent for ksh 2,167,138.53 being the amount of compensation assessed by the director WIBA on August 13, 2019.
24. The claimant is awarded costs of the suit and interest at court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29th DAY OF SEPTEMBER 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:

Ms. Kanazi for claimant

Ms. Lelu for respondent

