



**Wambua v Uber Kenya Limited & 2 others (Miscellaneous Application E004 of 2022) [2022] KEELRC 4866 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4866 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E004 OF 2022  
MN NDUMA, J  
SEPTEMBER 29, 2022**

**BETWEEN**

**FESTUS MUSYOKA WAMBUA ..... CLAIMANT**

**AND**

**UBER KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**UBER INTERNATIONAL HOLDINGS B.V ..... 2<sup>ND</sup> RESPONDENT**

**UAP INSURANCE LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. By a notice of motion dated January 6, 2022, the applicant seeks the following reliefs: -
  1. That the honourable court be pleased to make a declaration that the applicant is an employee of the 1<sup>st</sup> respondent.
  2. That the honourable court be pleased to issue an order directing the Director Of Occupational Safety and Health Services to assess the work injury benefits due to the applicant.
  3. That a declaration to issue that the respondents have committed a criminal offence contrary to section 22(4) of the *Work Injury Benefits Act* for failing to issue notice of an accident to an employee.
  4. That the honourable court commits the directors of the respondent to one year in jail or fine them Kshs 200,000 or both.
2. The application is supported by grounds set out on the face of the application and affidavit of the applicant who deposes that he is an employee of the 1<sup>st</sup> respondent who holds a work injury insurance policy cover with UAP Insurance Company Limited, the 3<sup>rd</sup> respondent.



3. That on or about January 8, 2019, the applicant an uber taxi driver, sustained an injury while working for the 1<sup>st</sup> respondent.
4. That the 1<sup>st</sup> respondent has failed and or neglected to fill a notice by employer of an occupational accident of an employee (dosh form 1) to report the accident to the Director of Occupation Health and Safety.
5. That the applicant sought medical treatment at Mama Lucy Hospital and was discharged on the same day with an assessment of 5% permanent disability. That the 1<sup>st</sup> respondent sent the applicant to the 3<sup>rd</sup> respondent who later referred the applicant to one Dr Shchukin who reviewed the disability to 3% upon examining him.
6. That the 3<sup>rd</sup> respondent offered the claimant payment of Kshs 5,000 which was so little the applicant declined.
7. That the application be granted as prayed in view of section 22(1) of the [Work Injury Benefit Act, 2007](#).
8. The 1<sup>st</sup> respondent filed a notice of preliminary objection dated February 21, 2022 to the effect that there is no employee/employer relationship between the applicant and the 1<sup>st</sup> respondent and so this application be struck off for want of jurisdiction to deal with the same.
9. The respondent relies on the definition of an employee under section 2 of the [Employment Act, 2007](#) and as interpreted by the court in E & LRC Cause No 2499 of 2012 [Vitalis Oliewo K'omudho vs AAR Health services Limited](#) [2016] eKLR.
10. The respondent further invokes the provisions of section 16 of the [Work Injury Benefits Act, 2007](#) which prevents an employee from instituting a Court action for recovery of damages in respect of injuries arising from an accident and that the jurisdiction to determine such action lie with the Director of Occupational and Safety Services at the Ministry of Labour. That the applicant has not exhausted the procedural mechanisms for resolution of the said dispute.
11. The parties filed written submissions and the issue for determination is whether this court has jurisdiction to entertain this application.
12. In terms of section 21 of [Work Injury Benefits Act](#),
 

“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 a notice of the verbal notice, shall be sent to the Director within twenty-four hours of this occurrence in the case of a fatal accident.”
13. Under section 22(1) an employer shall report an accident to the Director in the prescribed manner within seven days after having received notice of an accident or having learnt that an employee has been injured in an accident.
14. From the facts deposed in the notice of motion and the supporting affidavit, which have not been responded to by the respondents, it is apparent that the 1<sup>st</sup> respondent as set out under paragraphs 4, 5, 6, 7, 8, 11, 12 and 14 of the supporting affidavit took responsibility to cover injuries arising from accidents in the course of duty and went ahead to refer the applicant for medical examination and compensation by its insurance UAP.
15. This is a responsibility ordinarily taken by an employer. There being no rebuttal from the respondent, the court finds that there is an employer and employee relationship between the 1<sup>st</sup> respondent and the



applicant and the 1<sup>st</sup> respondent has taken out a cover in favour of its drivers including the applicant in respect of injuries sustained in the course of employment.

16. However, this application is misconceived for the reasons that: -
- (i) the applicant has not provided a written notice of the injury sustained in the course of duty to the 1<sup>st</sup> respondent copied to the Director of Occupational Safety, with a view to have the employer fill up the dosh form and submit to the Director.

17. Furthermore, in terms of section 22(5):-

“The provision of this section does not prevent an employee from reporting an occupational accident or disease to the Director at any stage.”

18. The applicant has an obligation where the employer fails to report the accident and submit the dosh form to report the accident directly to the Director and fill the doshform for assessment.

- (ii) Secondly, the route to be taken by an employee, aggrieved by a failure by his employer to report an occupational accident to the director timeously, is to report the matter to the relevant labour office for the grievance to be resolved through conciliation and or the labour office assists the employee to report the matter to the director and fill the relevant forms.

22. The Ministry of Labour, has prosecutorial authority delegated to it by the Director of Public Prosecutions to prosecute any employer who violates the penal provisions of the Labour Legislation including [Work Injury Benefits Act](#) in this case as provided under section 22(4) of [Work Injury Benefits Act](#).

23. The Employment and Labour Relations Court has jurisdiction only to entertain appeals from the decisions of the Director in terms of section 51(2) of [Work Injury Benefits Act](#).

24. The court has also assumed incidental jurisdiction of enforcing the decisions (assessment) by the director since [Work Injury Benefits Act](#) is silent on the matter.

25. Accordingly, though the applicant has an employee and employer relationship with the 1<sup>st</sup> respondent and is duly covered by the 3<sup>rd</sup> respondent for injuries sustained in the course of his employment, as an uber driver, this court lacks jurisdiction to deal with claims by employees before they have been considered by the Director.

26. The Director is however notified *vide* this ruling to assume its responsibility of sensitizing employees such as the applicant who fail to assert their rights timeously due to lack of knowledge on the procedure to be followed in the event an employer fails to report an occupational accident or disease to the labour office and/or the directorate for appropriate action to be taken.

27. Accordingly, the objection is upheld and the application is dismissed with no order as to costs.

**DATED AND DELIVERED ONLINE AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 2022.**

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

**Coulson Harney Advocates for the Objector**

**Mr. Maina for Applicant**



