



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELRC APPEAL NO. 48 OF 2020

DOUGLAS SHIKOLI NASIALI.....APPELLANT

VERSUS

CITAM SCHOOLS WOODLEY.....RESPONDENT

RULING

1. The Appellant Douglas, ShikoLi Nasiali has brought this appeal pursuant to Section 52(2) of the Work Injury Benefits Act and Rule 2 and 8 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

2. The Appellant is dissatisfied with the decision of the Director of Occupational Safety and Health Services – Nairobi County of declining, refusing and or neglecting to compute damages due to the appellant as provided for under the Work Injury Benefits Act arising from an accident that occurred on 9/2/2019 on the following grounds:-

- (i) The Director erred in law in failing to assess the damages due to the Appellant.
- (ii) The Director erred in law in failing to give reasons for the refusal to assess damages due to the Appellant.
- (iii) The Director erred in law in failing to consider the Appellant’s application for review vide letter dated 13/02/2020.
- (iv) The Director’s decision of failing to assess the damages due to the Appellant violated the Appellants right to property as set out in Article 40 of the Constitution.
- (v) That the Director’s action violated the Appellant’s right of access to justice as set out in Article 48 of the Constitution.
- (vi) That the Director’s action of failing to assess the damages due to the Appellant violated the Appellants right to property as set out in Article 40 of the Constitution.

Background of Appeal

3. The Appellant was employed by the Respondent as a Carpenter on casual basis and was lawfully acting as such in the course and within the scope of the said employment.

4. On or about 9/2/2019 the appellant was lawfully working in the course of his employment with the defendant when the defendant by its director or supervisor negligently and in breach of its statutory duty, assigned the plaintiff the duty of smoothening wood in the Country Work Station using plane machine when the said machine cut the appellant and as a consequence the appellant sustained severe injuries loss and damages.

5. The Appellant has set out particulars of negligence; breach of statutory duty in the injuries and special damages.

6. The Appellant states that the Respondent failed to report the accident to the Director within the timelines set out under the Act reasons wherefore the Appellant was left with no option but to seek legal redress.

7. The Advocate for the Appellant wrote a demand letter to the respondent to admit liability but the Respondent declined.

8. The Appellant thereafter wrote to DOSH Director for redress but the said director neglected and/or refused to assess the damages due to the Appellant and did not give reasons for the refusal.

9. The appellant has filed this appeal seeking the following reliefs:-

- (i) That a declaration be and is hereby issued that the DOSH Director erred in law in failing to assess the damages due to the Appellant.
- (ii) The Appellant prays for judgment against the Respondent for
 - (a) *General damages.*
 - (b) *Special damages of Kshs.11,280.*
 - (c) *Costs of the Appeal and at Court rates.*
 - (d) *Any other remedy the Court deems fit.*

Preliminary Objection

10. The respondent filed a Preliminary Objection to the Appeal dated 20/9/2020 to have the appeal struck out on grounds:-

- (a) That the appeal as filed offends clear provisions of Sections 51 and 52 of the Work Injury Benefits Act, 2007.
- (b) That the Appeal offends the clear provisions of Section 12(5) of the Employment and Labour Relations Court Act No. 20 of 2011.
- (c) That the pleadings offend clear provisions of Rule 8 and first schedule (**Form 1**) of the Employment and Labour Relations Court Rules, 2016 as well as Order 42, rule (1) and (2) of the Civil Procedure Rules, 2010.
- (d) That the sum total of the Respondent's Preliminary Objection is that the Appeal as filed is fundamentally defective, incompetent, lacking in legal legs and is an abuse of the Court process.
- (e) That the appeal be struck out with costs.

Determination

11. The respondent and the Appellant filed written submissions dated 19/11/2020 and 9/12/2020 respectively and the issues for determination are:-

- (i) Whether the appeal is incompetent and it be struck out.
- (ii) What other relief if at all, is available to the appellant.

12. Section 51 of the Work Injury Benefits Act, 2007 reads:-

“[51] Objections and Appeals against decisions of the Director.

(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.

13. Section 52 on the other hand reads:-

(1) The Director shall within fourteen days, after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.

(2) An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such decision.”

14. It is crystal clear that this Court has jurisdiction to hear and determine an appeal arising from a decision of the Director of DOSH under Section 52(2) of Work Injury Benefits Act, 2007.

15. For the appeal to be deemed properly filed before this Court there must be in existence the following:-

- (a) A Decision of the Director arising from a Work Injury Claim reported in terms of Section 22(1) of Work Injury Benefits Act by an employer pursuant to a notice of accident by an employee to the employer in terms of Section 21 thereof or
- (b) A Decision of the Director arising from a Work Injury Claim reported in terms of Section 22(5) by an employee in the event the employer fails to report the accident.
- (c) An Objection in writing in the prescribed form to the Director by any aggrieved person by a decision of the Director within 60 days of the decision in terms of Section 51(1) and (2).
- (d) A reply to the Objection by the Director within 14 days after receipt of the Objection giving reasons for the decision objected to in terms of Section 52(1).
- (e) Within thirty days of receipt of Director's reply by the objector, file an appeal to Employment and Labour Relations Court in terms of Section 52(2).

16. From the submissions by both parties it is apparently clear that there is not in existence any of the aforesaid prequisite before filing an appeal under Work Injury Benefits Act to this Court. It is common cause that the employer did not report the accident to the Director upon the report of the accident by the employee at the work place.

17. It is also apparently clear, the appellant did not exercise his statutory option and right to report the injury to the Director in terms of Section 22(5) of Work Injury Benefits Act (WIBA) upon not being furnished with a copy of the notice of injury of accident by the employer to the Director within 7 days from the date the appellant reported the accident to the employer.

18. It is apt to note that under Section 22(4) thereof, an employer who fails to report an injury or accident reported by an employee or on behalf of the employee to the Director within 7 days of receipt of the report commits an offence and is liable to criminal prosecution.

19. The statute has therefore put in place adequate safeguards to ensure an accident or injury that occurs at the work place involving an employee is reported to the Director for the work injury claim to be processed in terms of the Act.

20. The appellant has not placed any evidence before Court to show that he took any appropriate steps to ensure that the accident and injury which occurred to him at the workplace was reported to the Director by the respondent and/or by himself to allow the compensation claim to be processed by the Director.

21. It follows from the record of appeal that there is no decision of the Director from which an appeal to this Court may be filed.

22. What is now before this Court is an original claim of accident and injury, not yet processed by the Director to make a decision from which an appeal may be lodged to this Court.

23. It is now settled by the Supreme Court in **Law Society of Kenya -vs- Attorney & Another [2019] eKLR** that all original Work Injury Claims are to be reported, heard and determined by the Director Work Injury Benefits Act (WIBA) and the Courts be it Magistrate Courts, the High Court or Employment and Labour Relations Court have no jurisdiction to entertain original work injury claims.

24. This was clearly stated in Employment & Labour Relations Court at Mombasa in **Saidi Mohammed –vs- Diamond Industries Limited 2018, eKLR** where the Court observed that:-

“[15] After judgment in Petition Number 185 of 2008, parties have been filing Work Injury Claims at the Magistrates Court while Appeals from the Magistrates Court have been filed at the Employment & Labour Relations Court or at times at Employment & Labour Relations Court via the High Court. What would have been Appeals from the Director of Work injury Benefits to the Employment & Labour Relations Court have been Appeals from Magistrates Court to the Employment & Labour Relations Court.”

25. It is settled as was stated by the Court of Appeal in **Attorney General – vs- Law Society of Kenya and Another [2017] eKLR** that:-

“It is well settled on the authority of the supreme Court in the decision of **Samuel Kamau Macharia & Another –vs- Kenya Commercial Bank Limited and 2 Others S.C. – Civil Application No. 2 of 2011**, and in a long line of others, that a Court's jurisdiction flows from either the Constitution or Legislation or both; that it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law; and that jurisdiction goes to the very heart of the dispute and that

“Where there is a clear procedure for the redress of any particular guidance prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed.”

26. Accordingly, though the Court sympathises with the predicament, the Appellant has found himself in, the Appellant is partly to blame for the failure by the Director to be properly seized with his matter for assessment of damages.

27. There is no proper appeal therefore before this Court for the Court to exercise the jurisdiction given to it under Section 52(2) of Work Injury Benefits Act.

Accordingly, the Appeal is struck out. The Court deems this an appropriate case for each party to bear their costs of the proceedings.

Dated at Nairobi this 22nd Day of February 2021

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances:

Mr. Chandianya for Respondent

Mr. Makori for Appellant

Ekale – Court clerk.