



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 296 OF 2018

JARED INGLING OBUYA.....CLAIMANT

VERSUS

HANDICAP INTERNATIONAL....RESPONDENT

JUDGMENT

1. The Claimant filed a Memorandum of Claim dated 19/9/2018 seeking an order in the following terms:-

(a) A declaration that the Respondent pay the claimant the award amount of Kshs.5,538,272, being the compensation award by the Director of Occupational Safety and Health Services to the Claimant.

(b) An Order that the compensation of Kshs. 5,538,272 by the Director of Occupational Safety and Health Services to the Claimant be adopted as the judgment of this Court.

(c) Costs of the suit.

(d) Interest.

2. The cause of action as set out in paragraph 6-10 of the Memorandum of Claim and the testimony by C.W.1 is that the claimant contracted Hepatitis B disease in the course of his employment with the respondent based at Kakuma Refugee Camp to which the claimant notified the Director of Occupational Safety and Health Services on 25/10/2016.

3. The Director awarded the compensation at the sum of Kshs. 5,538, 272and issued a demand for payment of the Work Injury Benefit to the respondent.

4. The respondent did not appeal nor object to the decision of the Director within the Statutory period allowed under Section 51 of Work Injury Benefits Act, 2007. The compensation remains unpaid to date despite several demand letters sent to the respondent.

5. C.W.1 produced exhibits 1 to 8 annexed to the Statement of Claim in support of his case which include, contract of employment. Medical Report from Aga Khan Hospital, resignation and acceptance of resignation notices; DOSH 1 Form which is notification of injury by the claimant to the Director. DOSH 4 Form which is a demand for payment sent by the Director to the Respondent and several Demand Letters and reminder for payment sent by the Director to the Respondent.

5. The Claimant prays that he be awarded as prayed.

6. The Respondent filed a Memorandum of Response to the Claim on 4/10/2018 and called R.W.1 Caroline Aseto to testify in support of the respondent's case. R.W.1, testified that she was the Human Resource Manager of the Respondent and was aware of the dispute. R.W.1 adopted a witness statement filed on 4/10/2018 as her evidence in chief.

7. R.W.1 testified that the Claimant joined the Respondent on 1/7/2014 as a rehabilitation Trainer – Outreach Services based Kakuma Station. That the claimant was a trained Occupational Therapist and performed duties set out in the job description produced before Court.

8. That the claimant left the organization following his resignation on 30/9/2016. That the Claimant earned a gross salary of Kshs. 117,123 per month at the time he left employment. That the Claimant was paid terminal benefits when he left the respondent on 19/1/2007.

9. That on 3/8/2016, the Claimant wrote an email to the Field Administrator Kakuma copied to R.W.1 stating that he had been diagnosed with Hepatitis B and he wanted some time off for Counselling sessions. The claimant also requested the respondent to vaccinate its staff against Hepatitis B but nothing had been done so far.
10. R.W.1 stated that the claimant went for testing after one of his Chefs and an incentive staff member whom he was with closely tested positive for Hepatitis B. That he had already exhibited similar symptoms as those explained by those officers.
11. R.W.1 stated that the Claimant took off days on 4/8/2016 to 18/8/2016 and from 29/8/2016 to 8/9/2016 and on 2/10/2016 he sent his resignation letter. R.W.1 asked the claimant to address the letter to the head of the respondent. In the letter the Claimant indicated his wish to seek compensation for the illness that he had contracted during his course of duty.
12. R.W.1 stated that on 7/10/2016, the DOSH form was filled by his attending Doctor at Aga Khan hospital Kisumu.
13. That on 12/10/2016, the Claimant travelled to Lodwar DOSH office who referred him to Eldoret on 14/10/2016 and he was later referred to Regional DOSH officer in Kitale.
14. That on 16/12/2016 the documents were forwarded to the Insurance Company awaiting their feedback.
15. That on 18/1/2017 the Claimant was re-examined by the Insurance's doctor and on 22/2/2017 the Insurer sent a letter stating that the claim is not work related hence the claimant could not be covered by the Insurance.
16. That on 23/3/2017 R.W.1 received a demand letter from the claimant seeking payment of compensation.
17. That on 10/7/2017 the respondent wrote to the Claimant and to DOSH Office Nairobi, regarding the rejection of the claimant's compensation by the Insurance. That a second letter dated 15/1/2018 was sent to the Claimant and copied to DOSH office Nairobi regarding the rejection of the Claimant's compensation by the Insurance company.
18. On 5/7/2017 the respondent received a demand letter from Daniel Ondabu & Company Advocates for failure to pay compensation to the claimant.

Determination

The issue for determination is: -

- a. Whether the Court has authority to enforce a Decision of Director DOSH, which has not been objected to nor appealed against for payment of compensation for work Injury/occupational disease contracted in the course of duty.
- b. Whether the claimant is entitled to the reliefs sought.

19. The testimony by C.W.1 and R.W.1 on all material aspects of this suit is common cause. It is not in dispute that the claimant worked as an Occupational Therapist for the respondent based at Kakuma Station. It is not in dispute that the claimant contracted Hepatitis B in the Course of Employment in terms of Section 22(5) of the Work Injury Benefits Act, No. 13 of 2007.

20. Both C.W.1 and R.W.1 testified that the Director proceeded to assess compensation in terms of Section 38(1) (a) as read with (2) and 40(1) (a) (b) and (2) of the Work Injury Benefits Act for the occupational disease suffered by the claimant in the course of duty in the sum of KShs. 5,538,272, and a claim for payment was forwarded by the Director DOSH to the respondent.

21. That the respondent having insured against that risk forwarded the claim to its insurer.

22. That the respondent did not object to the assessment by the Director in terms of Section 1(1) and (2) nor Appeal in terms of Section 52(2) of Work Injury Benefits Act.

23. The Employment and Labour Relations Court being the Court with original and Appellate jurisdiction to hear and determine disputes arising from Employer and Employee relationship and to administer statutory enactments dealing with Employment and Labour Relations matters has in this Court's considered finding jurisdiction to enforce awards by the Director pursuant to Work Injury Benefits Act 2007 where an employer willfully disregards and fails to enforce a decision and award of the Director pursuant to a statutory assessment of compensation arising from an occupational disease in terms of Article 162(2) of the Constitution read with Section 12(1) of the Employment and Labour Relations Court Act No. 20 of 2014, which provides:-

“(12) (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and Labour Relations as read with Section 13 therefore which provides: -

“A judgment award, order or decree of the Court shall be enforceable in accordance with the rules made under the Civil Procedure Act.”

24. The Work Injury Benefits Act is silent on the manner of enforcement of the decisions by Director DOSH. It is however this Court's

finding that it could not have been the intention of the Legislator that beneficiaries of compensation by Director DOSH remain without a remedy in the event an employer does not implement the decision of the Director awarding an employee compensation. The court must bridge the lacuna bring to effect the objects and purpose of the Act as captured in the preamble as follows:

“An Act of parliament to provide for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes”

25. Having said that, it is however desirous that the Legislature enacts an express provision as to the manner of enforcement of compensation awards made by Director DOSH.

26. In the meantime applying purposive interpretation of Work Injury Benefits Act; Article 162(2) of the Constitution as read with Section 12(1) of Employment & Labour Relations Court Act, this Court finds that Employment & Labour Relations Court has jurisdiction to enforce awards of compensation by Director DOSH.

27. Accordingly, the Court makes the following final orders:-

(a) The respondent to pay the Claimant the sum of Kshs. 5,538,272 being compensation by the Director of Occupational Safety and Health Services to the claimant upon the said award being adopted herein as an order of this Court.

(b) The award be paid with interest at Court rates from date of the award Judgment till payment in full.

(c) Costs to follow the event.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 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 Judgment 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. Omondi for Claimant

Mr. Museve for Respondent

Chrispo: Court clerk