REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL NO. 52 OF 2018

SENIOR SERGEANT- AHMED ABDULLAHI MUSA.....APPELLANT

-VERSUS-

DIRECTOR OF OCCUPATIONAL SAFETY

AND HEALTH SERVICES.....1ST RESPONDENT

NATIONAL POLICE SERVICE COMMISSION.....2ND RESPONDENT

(Being an appeal from the Ruling of the Director under Section 52(1) of the Work Injury Benefits Act)

JUDGMENT

1. The background of this appeal is that on 5.12.2012, the Appellant while on duty as an Administration Police Officer was involved in a road traffic accident along the Khorof-Harar Road. A Discharge Summary from Wajir District Hospital dated 16.12.2012, indicates that as a result of the accident, the Appellant sustained injuries to the chest, right upper arm and neck and was admitted in the hospital from 6.12.2012 to 16.12.2012. Thereafter the appellant filled a DOSH WIBA Form 1 and on 19.8.2015, a doctor assessed his permanent incapacity at 50% indicating the injuries sustained as the dislocation of C3- C4 (tender neck), chest, neck (spine) and left lower limb injuries. However, the 1st Respondent assessed his disability at 15% after inviting the appellant to a Work Injury Evaluation Clinic (WIEC).

2. On 19.10.2015, the Appellant applied for review of the 15 % Incapacity assessment on ground that it was not commensurate to the actual injury he suffered which in his view constituted an injury to the spine. He attached MRI and X-RAY reports as evidence of the spine injury. Subsequently, a second WIEC was held on 2.11.2015 by the same Doctors and prepared a report on 3.11.2015 in which they upheld the award of 15% permanent disability contending that the primary medical records for the appelant after the accident did not include any treatment of the appellant's lower back problems, which formed the basis of the appeal. They further observed that the lower back pathology demonstrated in the MRI was unlikely to have been related to the accident.

3. By a letter dated 4.11.2015, the appellant wrote to the 1st respondent protesting the upholding of the earlier assessment of 15% permanent incapacity and accusing the doctors of undeserving treatment during the two WIEC held on 28.9.2015 and 2.11.2015. However, by the letter dated 16.11.2015, the 1st Respondent declined jurisdiction over the matter and advised the Appellant to make an application to this Court for another assessment and consequent additional compensation because section 52 of the Work Injury Benefits Act (WIBA) which provided for appeal before the Director had been declared unconstitutional by the High Court.

4. The appellant never heeded to the said advice and instead in 2016, he pursued medication for his lower back problem in India on advice from Dr. Gikenye vide a Report dated 2.3.2016 which alleged that the back problem was caused by the Road Accident. Thereafter he was examined by Dr. Wangata in Nairobi on 5.6.2018 and assessed the permanent incapacity at 60% upon considering the lower back problem.

5. On 6.8.2018, the Appellant's lawyer wrote to the 1st respondent notifing him that the Court of Appeal had set aside the judgment of the High Court and reinstated section 52 of the WIBA and requested him to revisit the appeal which he had rejected vide the letter dated 16.11.2015. However, the 1st Respondent, by the letter dated 1.10.2018, informed the appellant's Counsel that the Appellant had been reviewed for a second time on 2.11.2015 pursuant to his appeal dated 19.10.2015 and payment made and as such he considered the matter as fully settled.

6. The Appellant being dissatisfied with the 1st respondent's decision in the letter dated 1.10.2018, filed a Memorandum of Appeal on 31.10.2018 raising the following grounds of Appeal:

> *a. The Director despite acknowledging and terming the Appellant's complaint dated 4.11.2015 as an appeal under section 52 of the Work Injuries Benefits Act, erred in law in abdicating his responsibilities to consider and make a finding on the issues raised in the said appeal.*

b. The Director further erred in failing to consider the findings in the Court of Appeal decision in ***Nairobi Civil Appeal No. 133 of 2011 Attorney General v Law Society of Kenya & another*** *that found that the Director had powers to determine matters and appeals on work injury.*

c. The Director erred in law and in fact in failing to give any consideration to the Medical Report by Dr. Theophilus Wangata dated 24.7.2018 which assessed the Appellant's permanent incapacity at 60%

d. The Director erred in law and in fact in finding that the lumbar spine injuries on the Appellant were not as a result of the accident on 5.12.2012.

e. The Director misdirected himself when he assumed that any injuries not noted in the first medical examination was not part of the injuries sustained by the Appellant in the subject accident and filed to consider the Appellant's evidential material on assessment of injuries.

7. The appeal is opposed by the 1st Respondent vide the Replying Affidavit sworn on 20.12.2020 by Dr. Musa Nyandusi, the Acting Director Department of Occupational Safety & Health who deposed that during the Appellant's first assessment at the WIEC on 28.9.2015, he was freely mobile and his only complaint was neck problems but he never mentioned any back problem.

8. He contended that the primary attending doctor at Wajir District Hospital treated the appellant for neck problems and never sent him for x-ray of the low back (lumbo-sacral spine) which is the basis of his appeal. Further, he contended that the investigations done then included a chest x-ray and neck x-ray which reported a prolapsed inter-vertebral disk between C3 and C4 as well as C6 and C7. However he observed that a neck x-ray cannot show a pro-lapsed intervertebral disc and contended that only MRI or CT Scan can show prolapsed disc but that was not done.

9. He averred that there was no general or specialised radiological investigations on the appellant's lower back until after the WIEC held on 28.9.2015. He observed that the Appellant's in-patient and out-patient records were inconsistent as the initial treatment notes had no indication of a low back injury, just like the P3 Form filled on 7.12.2012 which indicated that the Appellant had a stiff neck with moderate swelling, chest tenderness on the right side and upper arm swelling and laceration.

10. He contended that the doctor who filled Part II of the DOSH WIBA Form 1 in 2015 and awarded him 60% disability indicated that he had cervical neck C3 and C4 and C6-C7 pathologies, but he never mentioned lumbo sacral pathologies L4/L5 and L5/S1. He contended that upon the second review at WIEC on 2.11.2015, the MRI of the back showed a normal cervical spine (neck) was consistent with the initial treatment notes that found him to have soft tissue injuries. According to him, the Appellant developed a low back problem probably after he was assessed at the WIEC on 28.9.2015.

11. He denied that the Appellant's appeal was dismissed and averred that the appellant was subjected to the second evaluation on 2.11.2015 in which the 15% permanent disablement was upheld. He stated that Dr. Theophilus Wangata examined the Appellant on 5.6.2018 which was 3 years after he was evaluated at the WIEC on 28.9.2015. He contended that Dr. Wangata was not the primary attending doctor and cannot make claims of injuries sustained in 2012 without making reference to the primary doctor in Wajir.

12. On the other hand, the 2nd Respondent filed a Preliminary Objection to the Appeal dated 22.9.2020 contending that this Court lacked jurisdiction to determine the matter and that the appeal falls within the jurisdiction of the 1st Respondent as affirmed by the Supreme Court decision in **Law Society of Kenya v Attorney General & another [2019] eKLR**.

13. In response to the 1st Respondent's Replying Affidavit, the Appellant filed an Affidavit on 24.6.2020 in which he admitted that he was initially treated as an outpatient but his pain grew intensely and was rushed to hospital on the same day where he was admitted. He further explained that on 7.12.2012, his Base Commander who was his Superior facilitated the filling of the P3 Form while still admitted.

14. He admitted that the P3 Form and the Discharge Summary from Wajir District Hospital indicated that he had suffered neck, chest and upper arm injuries. However, he stated that as at that time he had severe pains on his lower back and a resultant limp on his left leg, and after a further examination through MRI, Lumbar Disc injuries were revealed for which he is still undergoing treatment in India. He denied any involvement in any other accident or suffered disease and reiterated that he sustained the injuries in the same accident he had in 2012.

15. He avers that the fact that the injuries were not noted at the first instance does not mean that he did not sustain them. He contended that the 1st Respondent carried out his assessment and appeal as his opponent rather than an independent actor. He maintained that the 1st Respondent abdicated his responsibility and failed to consider his grounds of Appeal hence giving rise to the present Appeal.

Appellant's submissions

16. The Appellant submitted that he had been awarded 50% permanent incapacity by the attending physician, because of the presence of prolapsed cervical vertebrae. He argued that the MRI report by Dr. Gikenye indicated that MRI revealed disc bulges at L_45 and L_5S_1 ; that the lower back problem was attributable to the 2012 accident; and for that reason the Ministry of Health in a letter dated 15.3.2016 allowed him to seek treatment at Artemis Hospital, India.

17. He submitted that the estimation of incapacity by Dr. Wangata is close to the 50% estimation issued by the primary doctor. He argued that the Replying Affidavit by Dr. Musa indicated that the 15% permanent disability was for neck injury only and did not consider the chest pains that resulted to chest x-ray at the initial stage. He further submitted that a consideration of the likelihood of further complications of the injuries was not entertained. He also submitted that, Dr. Wangata warned of a likelihood of further complication of the injuries.

18. He submitted that it is only fair that the 15% permanent disability by the 1st Respondent be set aside and reviewed upwards to 90% in include chest injuries that were initially reported and the lumbar disc injuries complications arising thereafter.

1st Respondent's submissions

19. The 1st Respondent reiterated the averments in his Replying Affidavit and submitted that he was right in agreeing with the first evaluation at the WIEC on the 15% permanent disability. He maintained that a definitive diagnosis such as a prolapsed intervertebral disc requires substantive treatment and is unlikely to be treated with painkillers.

20. He submitted that the assessing Physicians could not assess injuries that are not diagnosed or treated by the primary attending physician. He further submitted that when the Appellant first presented himself at the WIEC on 28.9.2015, he was evaluated by 3 doctors. He also submitted that the doctors at the evaluation clinic wrote to Dr. Wangata on 10.9.2018, through the Appellant's advocate, requiring him to explain his medical report but he declined to avail himself. Based on the doctor's failure to explain his medical report, and the fact that he was not the primary doctor, the 1st respondent opined that there is no way the Director could have relied on Dr. Wangata's Report.

21. He submitted that it is well mandated to determine the matter under section 23 (1) of the Work Injury Benefits Act which confers upon him the power to make decisions on any claim. He denied the alleged neglect of his mandate and maintained that the Appellant was allowed to present himself for the 2nd time at the WIEC. Finally, he urged the Court to disallow the appeal and hold that the Director rightly carried out his mandate in upholding the 15% disablement.

2nd Respondent's submissions

22. The 2nd Respondent submitted that the appeal before the 1st Respondent was never heard and determined as confirmed by the 1st Respondent in the letter dated 16.11.2015. He observed that the Supreme Court upheld the decision of the Court of Appeal in **Attorney General v Law Society of Kenya & another [2017] eKLR** where it set aside the trial Court's order which had declared that sections 4, 16, 21 (1) , 23 (1) , 25 (1) & (3), 52 (1) & (2) and 58 (2) of Work Injury Benefits Act were inconsistent with the former Constitution.

23. It submitted that the Supreme Court having affirmed the 1st Respondent's powers under section 52 of WIBA to hear and determine appeals, this appeal is not properly before this Court.

24. It argued that the Supreme Court in **Civil Application No.2 of 2011 Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 Others** held that where procedure for redress of a grievance is prescribed by the Constitution or statute it must be strictly followed. Consequently, the 2nd respondent urged this Court to down its tools as it does not have jurisdiction to hear and determine the matter.

25. The 2nd respondent further submitted that the inconsistencies in the appellant's medical records noted by the 1st Respondent leads to the conclusion that the appellant is fishing for a high percentage of award from the 1st Respondent. Therefore the 2nd respondent argued that the discrepancy in the evidence diminishes the evidentiary value of the documents as was held in **GAS Kenya Limited v Amber Enterprises Limited [2020] eKLR**.

26. Finally, the 2nd respondent argued that the Appellant has failed to put a sufficient and compelling reason why this Court should admit the appeal and overturn the decision of the 1st Respondent that the permanent incapacity suffered was 15%. Therefore the 2nd respondent prayed that this court does find that the appal lacks merit and dismiss it with costs.

Issues for determination

27. The main issues for determination are:

a. Whether this Court has jurisdiction to determine the appeal

b. Whether the Director erred in upholding the assessment of 15% permanent incapacity.

28. This being a first appeal, my duty is well cut out, namely, to review and re-evaluate the evidence and draw my own conclusions to test whether the decision reached by the Director should stand. The said mandate has been restated by the Court of Appeal in numerous decisions including ***Kenya Ports Authority vs Kuston (Kenya) Limited (2009) 2 EA 212*** where it held inter alia that:

> ***"On a first appeal from the High Court, the court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

Whether this Court has jurisdiction to determine the appeal

29. The 2nd respondent submitted that this Court has no jurisdiction to determine the appeal by dint of section 51 of WIBA because the 1st respondent rejected the appellant's appeal by the letter dated 16.11.2015, citing the High Court decision that declared section 52 of WIBA unconstitutional on 4.3.2009. He further argued that since the section was reinstated by the Court of Appeal, the 1st respondent is the correct

person to entertain the instant appeal. The appellant and the 1st respondent did not respond to the foregoing submissions.

30. I have carefully considered the 2nd respondent's submissions. It is common ground that the Court appeal in **Civil Appeal No. 133 of 2011 Attorney General v Law Society of Kenya & ano** overturned the earlier decision of the High Court in the same matter and reinstated section 52 of the WIBA in 2017. It is also common ground that the Court of Appeal decision was affirmed by the Supreme Court in **Law Society of Kenya v Attorney General & ano [2019] eKLR**.

31. Section 52 of the WIBA provides for appeals from the Director's decisions on objections made under section 51 of WIBA. Section 51 (1) of WIBA provides:

> ***"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."***

32. Section 52 then provides as following:

> ***"(1) The Director shall within fourteen days after receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding the 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."***

33. The foregoing provisions are not ambiguous. Section 51 makes it clear that a party aggrieved by the decision of the Director is entitled to lodge an objection with the Director within 60 days of the impugned decision. Section 52 provides that the Director is required to give a response to the objection in writing within 14 days either varying or upholding the impugned decision. The response must set out the reason for the decision and it must be served on all the persons affected by the decision. Finally, any person aggrieved by the response to the objection is at liberty to appeal to this Court.

34. The foregoing is what the Court of Appeal observed in **Attorney General v Law Society of Kenya & another [2017] eKLR** when it set aside the judgment of the High Court:

> ***"Section 51 and 52 provides for an appellate system. By the former, any aggrieved person by a decision of the Director may lodge an objection with the Director against the decision. . . It is subsection (2) which allows the objector to appeal the decision of the Director to the Industrial Court."***

35. Subsequently, the Supreme Court in **Law Society of Kenya v Attorney General & another [2019] eKLR** upheld the decision of the Court of Appeal and stated that:

> ***"…But what if one is still aggrieved by the decision of the Director? The answer to that question lies in Section 52 of the Act which allows aggrieved parties to seek redress in a court process."***

36. The 1st Respondent averred that the Appellant appealed against his decision on 19.10.2015 and presented himself for second evaluation at the WIEC on 2.11.2015 after which the doctors upheld the award of 15% permanent disability. According to him, the Appellant's appeal was determined there and any further appeal lies before this Court as explained vide his letter to the appellant dated 16.11.2015.

37. I have carefully considered the material presented by the parties together with submissions by their counsel. It is clear that on 28.9.2015, the 1st respondent reduced the 50% assessment of permanent incapacity by the appellant's doctor to 15%. It is also common ground that by the letter dated 19.10.2015, the Appellant sought review of the award of 15% permanent disability contending that it was low and complaining that his lower back injury was not considered. As a result, second evaluation was done on 2.11.2015 by the same team of three doctors but no written communication was done by the 1st respondent to the appellant as contemplated in section 52 (1) of the WIBA. However, both the appellant and the 1st respondent acknowledge that the earlier assessment of 15% permanent incapacity was upheld.

38. The appellant was dissatisfied and by the letter dated 4.11.2015, complaint to the 1st respondent about his undeserving treatment by the doctors who assessed him in the two occasions. In response, the 1st respondent, by the letter dated 16.11.2015 treated the said complaint letter as an appeal and contended that the machinery provided for dealing with appeals under section 52 of WIBA in his office was no longer available after the section was declared null and void by the High Court. He therefore advised the appellant to apply to this Court for another assessment and consequential compensation.

39. The question that arises is whether the correspondences between the appellant and the 1st respondent from 19.10.2015 to 16.11.2015 constituted objection proceedings under section 51 of the WIBA. In my view, the answer is, yes because the letter dated 19.10.2015 sought for a review of the 15% assessment. However, as rightly submitted by the 2nd respondent, the 1st respondent declined jurisdiction on ground that section 52 of the WIBA, which provided for dealing with such cases, had been nullified by the High Court. Consequently, since the law upon which a valid decision on the appellant's objection could have been rendered had been nullified by the High Court, I find and hold that the 1st respondent rightly declined to exercise the mandate given under section 52 of WIBA vide the letter dated 16.11.2015.

40. I gather support from **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 Others [2013] eKLR ,** where the Supreme Court held 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 the law; and that jurisdiction goes to the very heart of the dispute and that it is equally accepted that; where there is a clear procedure prescribed for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."***

41. By the letter dated 18.8.2018, the appellant notified the 1st respondent that the Court of Appeal had reinstated section 52 of the WIBA and requested him to revisit his request for review and enhancement of the assessment of his permanent incapacity. The 1st respondent by the letter dated 1.10.2018 responded that, following the appellant's appeal dated 19.10.2015 on the 15% assessment, a second evaluation was done on 2.11.2015 and he was paid. He attached a copy of the second evaluation report and the medical reports presented by the appellant during the first evaluation. In his view he believed that the matter is fully settled.

42. In my view the foregoing letter by the 1st respondent, served as the response under section 52 (1) of the WIBA because it completed the process of objection proceedings which had been frustrated by the nullification of section 52 of the Act by the High Court , and which was reinstated on appeal. It follows that the appellant was entitled to challenge the said response by way of an appeal before this court. Consequently, this Court has jurisdiction to determine the appeal herein by dint of section 52 (2) of the WIBA.

Whether the Director erred by upholding the assessment of 15% permanent incapacity.

43. The Appellant contended that the 1st Respondent Director erred in by finding that the lumbar spine injuries were not as a result of the accident on 5.12.2012 and upheld the assessment of 15% permanent incapacity.

44. I have carefully considered the medical evidence on record and noted that the Appellant's Discharge Summary dated 16.12.2012 and Outpatient Record indicated that the Appellant had pains in his chest, right upper arm and neck. The P3 Form dated 7.12.2012 indicated that he had a stiff neck, chest tenderness, right upper arm swelling with bruises and lacerations. I have also noted that Dr. Mohamed M. Mohamed who filled the DOSH Form on 19.8.2015 indicated that the Appellant had sustained a dislocation of the tender neck, soft tissue injuries of the chest, and multiple lacerations on the right upper arm right arm/left lower arm.

45. The common factor of these assessments is that there was no mention of lumbar spine injuries. The 1st Respondent stated that the Doctor at Wajir Hospital never sent the Appellant for an x-ray of the lower back and that no general or specialized radiological investigations on the lower back was done until after the Appellant was assessed at the WIEC on 28.9.2015.

46. The Appellant relied on the medical report of Dr. Wangata which indicated that he was examined on 5.6.2018. The Doctor stated that as a result of the accident, the Appellant had sustained disc protrusion at L4-L5, annular tear and disc protrusion at L5-S1, degenerative disc disease at the level of L5-Si with foraminal stenosis, neck dislocation with arthropathy disc bulges C2-C4. His Opinion was that the Appellant has suffered spinal injuries C2-C4 and L4-S1 levels in the accident, and he was at the risk of getting complications of the spine in the future and therefore assessed the permanent incapacity at 60%.

47. Prior to this, the Appellant had been attended to by Dr. G. Gikenye who stated that the Appellant complained of back ache and the MRI examination of the lumbar revealed disc bulges at L45 and l5S1. The Ministry of Health on 15.3.2016 relied on this medical report and stated that its office had no objection to the patient travelling for treatment at Artemis Hospital, India.

48. Neither Dr. Wangata nor Dr. Gikenye examined the Appellant when the accident occurred. Their findings were made 6 years and 4 years respectively, after the accident. The WIEC findings conducted by the 3 doctors stated that the MRI done on the Appellant on 2.11.2015 indicated that the Appellant had a normal cervical spine and spinal cord and demonstrated that the pathology on the lumbar region did not form part of the injuries from the accident.

49. Dr. Wangata indicated that he had utilised various documents *inter alia* the police abstract, the P3, the discharge summary and treatment notes from Wajir Hospital and the letter from Dr. Gikenye in his assessment of 60%.

50. In my opinion, since all the primary treatment records and other reports relating to the appellant's accident did not indicate that there were lower back and spinal injuries, the said condition cannot be factored in assessing his permanent incapacity that resulted from the accident on 5.12.2012.

51. I gather support from **Timsales Ltd V Wilson Libuywa [2008] eKLR** , where Maraga J (as he then was) held that:

> ***"In any alleged factory accident which is disputed by the employer it is the duty of the employee, as the Plaintiff, to prove on a balance of probabilities that he indeed suffered the alleged accident. A medical report by a doctor who examines him much later is of little, if any, help at all. Although it may be based on the doctor's examination of the plaintiff on whom he may, like in this case, have observed the scars, unless it is supported by initial treatment card it will not prove that the plaintiff indeed suffered an injury on the day and place he claimed he did. The scars observed on such person would very well relate to injuries suffered in another accident altogether." [Emphasis Added]***

52. Having considered all the material presented to the court, I find and hold that the appellant has not demonstrated any error of fact or law committed by the 1st respondent in upholding his initial assessment of permanent incapacity at 15%. In my view, the 1st respondent considered the appellant's primary treatment and medical reports in assessing the decree of permanent incapacity and correctly excluded the

medical reports which were prepared many years after the accident, and which introduced medical conditions which were never indicted in the primary treatment records or subjected to investigations during the initial treatment.

53. In the end I find that the appeal has no merit and proceed to dismiss it with no costs.

DATED AND DELIVERED IN NAIROBI THIS 6TH DAY OF MAY, 2021.

ONESMUS N. MAKAU

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 April 2020, this judgment has been delivered to the parties online via Google Teams with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE