



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. E-030 OF 2021

AMIR SWALEH OMAR.....CLAIMANTS

VERSUS

MACKENZIE MARITIME [E.A] LIMITED.....RESPONDENTS

R U L I N G

1. Vide a Statement of Claim dated 11th March 2021 and filed in this Court on 12th March 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 16th February 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 14/01/2019, 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 sent for review by a panel of two doctors at Nairobi, who on 8th July 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 12th July 2019 and DOSH Form 4 dated 13th August 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 12th July 2021 and filed in this Court on 13th July 2021 whereby it pleaded, *inter-alia*:-

a) that the Respondent's insurer wrote to COSHO Nairobi on 23rd September 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 to date.

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. On 6th August 2021, the Claimant filed the Notice of Motion dated 4th August 2021, seeking orders:-

(a) That judgment be entered against the Defendant/ Respondent for the sum of kshs.2,167,138.53 together with interest thereon at Court rates until payment in full.

(b) That the costs of this application and generally for (sic) this suit be awarded to the plaintiff/Applicant.

5. This is the application before me for determination; and it is expressed to be brought under Order 36 Rules 1(1) (a), 2 & 8 and Order 51 Rules 1 and 3 of the Civil Procedure Rules and Sections 1A and 3A of the Civil Procedure Act.

6. The application is opposed by the Respondent, which on 4th October 2021 filed a Replying Affidavit sworn by one Joseph Mwella, the Respondent's Head of Legal Litigation.

7. Order 36(1) (a) of the Civil Procedure Rules provides:-

1 (1) "in all suits where a plaintiff seeks judgment for:-

(a) a liquidated demand with or without interest; or

(b)where the defendant has appeared but not filed a defence, the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mense profits."

8. As already stated in paragraph 3 of this Ruling, the Respondent on 13th July 2021 filed a Statement of Response which, in my view, raises triable issues. In the case of Job kilach –vs- Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono [2015] Eklr, the Court of Appeal had this to say:-

"Before the grant of summary Judgment, the Court must satisfy itself that there are no triable issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner...A bonafide triable issue is any matter raised by the defendant that would require further interrogation by the Court during trial. The Blacks Law Dictionary defines the term "triable" as "subject or liable to judicial examination and trial". It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court."

9. On his part, the Claimant instituted an ordinary Claim in this Court and pleaded matters that went beyond enforcement of the Director's assessment and award. He raised triable issues by pleading diminished earning capacity under Section 29(2) and 30(5) of the WIBA (Work Injury and Benefit Act) and praying for compensation in that regard.

10. In the Job kilach case (supra), the Court of Appeal said:-

"summary judgment has far reaching consequences. It must therefore be granted only in the clearest of cases, as was stated by this Court in Lalji t/a Yakkep Building Contractors –vs- Casousel Ltd [1989] KLR 386, in which the predecessors of this Court held that: Summary judgment is a draconian measure and should be given in only the clearest of cases. A trial must be ordered if a triable issue is found or one which is fairly arguable is found to exist."

11. Having considered the application and rival submissions by counsel, it is my finding that there are triable and fairly arguable issues raised in the pleadings as currently filed. The suit should go for trial; and I direct that the same be fixed for hearing on priority basis.

12. The Claimant's Notice of Motion dated 4th August 2021 is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF OCTOBER 2021

AGNES M.K. NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES M.K. NZEI

JUDGE

APPEARANCE:

MISS ONYANGO FOR THE CLAIMANT/APPLICANT

MR. MUGAMBI FOR THE RESPONDENT