



Maridadi Flowers Limited v Director of Occupational Safety and Health Service; Khisa (Interested Party) (Appeal 29 of 2018) [2021] KEELRC 2 (KLR) (5 October 2021) (Judgment)

Maridadi Flowers Limited v Director of Occupational Safety and Health Service; Ezekiel Walwanda Khisa (Interested Party) [2021] eKLR

Neutral citation: [2021] KEELRC 2 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 29 OF 2018
HS WASILWA, J
OCTOBER 5, 2021

BETWEEN

MARIDADI FLOWERS LIMITED APPELLANT

AND

DIRECTOR OF OCCUPATIONAL SAFETY AND HEALTH SERVICE RESPONDENT

AND

EZEKIEL WALWANDA KHISA INTERESTED PARTY

Procedure to be followed by the Director of Occupation Safety and Health Service in handling a claim of an accident or injury at work

Reported by Kakai Toili

Labour Law - employment - injury at work - claims under the Work Injuries Benefits Act - applicable procedure - where a flower farm worker suffered injuries to his eyes while at work - what was the procedure to be followed by the Director of Occupation Safety and Health Service in handling a claim of an accident or injury at work.

Brief facts

While on duty as a grader/bunchier at the appellant's flower farm, the interested party was involved in an industrial accident, being that a drop of solution known as white fly poured into his eyes while he was handling flowers grading. Later on, the interested party went to hospital and was diagnosed with chemical conjunctivitis and was treated and he resumed work. The eye infection became worse till the interested party lost his vision on the right eye and partial loss of vision on the left eye.

Later on, the appellant filled a ML/DOSH/WIBA Form 1 and a doctor assessed his permanent incapacity at 30%, indicating the injuries sustained as loss of vision in the right eye and partial loss of vision in the left eye.



The doctor further indicated that a final examination should be carried out three months later, However, the respondent proceeded and assessed damages payable to the interested party of Kshs. 512,284.00.

The appellant was dissatisfied with the findings and decided to object. The respondent, Director of Occupational Safety and Health Service (Director) directed that the interested party undergo another assessment by another doctor to be mutually agreed between the appellants and the Director. The Director also indicated that the final award of compensation was to be computed after the final assessment. The appellant was requested to meet the cost of the final assessment. The appellant declined to accede to that option and decided to file the instant appeal.

The appellant protested the assessment of costs and the fact that the interested party was to be subjected to another doctor besides the earlier doctor. The appellant prayed for orders that; the decision by the Director be set aside and that the court quashes the assessment and computed compensation and order the director to carry out an inquiry on the authenticity of the interested party's claim.

Issues

What was the procedure to be followed by handling an accident or injury at work by the Director of Occupation Safety and Health Service?

Held

1. Being an appeal in the first instance, the court had a duty to re-evaluate the evidence of the parties before reaching any determination. The Work Injury Benefits Act, 2007 made provision of how an accident or injury at work should be handled. Once an accident or injury was reported, the Director was expected to make an inquiry into the injury or accident. In addition, the Director could also conduct investigation into the accident or injury. It was envisaged that proper particulars including documents should be provided concerning the injury or accident.
2. The employer was expected to submit a claim to the director within 7 days upon receiving the claim, medical report or other documents or information concerning the claim. Since the director had to investigate the claim, it was also provided that the employee would be required to submit himself or herself for medical examination by the medical practitioner designated by the Director or the employee with the approval of the Director. The employee was also entitled at his own expense to have a medical practitioner of his choice present at an examination by a designated medical practitioner.
3. The law was clear as to how inquiries/investigations were to be done. The Director received the documents from employer and employee and then proceeded to investigate the matter. The employee was sent for medical examination or assessment and then a decision was made as guided by the law.
4. There was no indication as to how such investigations were to be done. The doctor had directed a final decision be made after 3 months. Indeed, a decision was made by the Director before the 3 months elapsed. That notwithstanding, the Director offered a solution of a further assessment by another doctor chosen by him and the appellants. The appellants refused to take the option which would have enabled them assess the finding through a doctor of their choice. The appellants could not therefore complain about that as they refused to take the option of another assessment of the interested party through a doctor of their choice.
5. The law was that the appellants would bear costs of the new doctor because it was for their benefit. Indeed, the law envisaged that if an employee wanted to be assessed by a doctor of their choice, they had to bear the cost. The appellants had not demonstrated how the Director erred in the assessment of the interested party. The Director followed the law and process stated under WIBA. The appellants refused to participate in a further assessment and rushed to court on appeal.
6. The appellants had not established that the Director committed an error in the way the interested party was assessed and even if there was an error, there was a mechanism for correction which the appellants refused to pursue.

Appeal dismissed.



Orders

Costs to the respondents and interested party.

Citations

Cases

1. Law Society of Kenya v Attorney General & another — Explained
2. Samuel Kamau Macharia and another -v- Kenya Commercial bank Limited 72 others — Explained

Statutes

1. Constitution of Kenya, 2010 — article 165 — Interpreted
2. Occupational Safety and Health Act — section 112 — Interpreted
3. Work Injury and Benefits Act — section 53, 30 (3), 23, 53 (2) (d), 22, 21 — Interpreted

Advocates

Oduor holding brief Wekhomba for the Appellant

Wanjari holding brief for Weche for the Respondent

Olaly Cheche for the Interested Party

JUDGMENT

1. The background of this appeal is that on September 14, 2017, the interested party while on duty as a grader/bunchier at the appellant's flower farm, was involved in an industrial accident, being that a drop of solution known as white fly poured into his eyes while he was handling flowers grading.
2. On September 17, 2017 the Interested party requested for permission to go for an eye checkup as the eye became more irritated which permission was granted and he attended at Naivasha Optics for an eye checkup which the doctor diagnosed him with chemical conjunctivitis and was treated and he resumed work. It is stated that the eye did not heal as expected and the interested party was referred to Kikuyu Hospital for a specialized eye checkup. He was attended to on the October 9, 2017 and several visits and checkups ensued therefrom and the eye infection became worse till the interested party lost his vision on the right eye and partial loss of vision on the left eye.
3. Thereafter the appellant filed a ML/DOSH/WIBA Form 1 on the March 20, 2018 and on May 12, 2018 a doctor assessed his permanent incapacity at 30% indicating the injuries sustained as loss of vision in the right eye and partial loss of vision in the left eye. The doctor further indicated that a final examination shall be carried out Three (3) Months later, However, the respondent proceeded and assessed damages payable to the interested party on the May 25, 2018 of Kshs. 512,284.00 and immediately issued DOSH/WIBA 3 form notifying the appellant herein to pay the said money.
4. The appellant objected to the award on July 2, 2018 which did not elicit any response prompting them to file another objection reminder on October 18, 2018 protesting the award. The respondent by the letter dated November 6, 2018 directed that the interested party to be subjected to a 2nd medical examination by a doctor to be decided by the director DOSHS before final award is confirmed. The appellant herein protested the assessment of costs and the fact that the interested party was to be subjected to another doctor besides the earlier doctor and therefore filed this Appeal.



5. The appellant being dissatisfied with the respondent's decision in the letter dated November 6, 2018, filed a Memorandum of Appeal on December 6, 2018 raising the following grounds of Appeal:
- a) That the director erred and misdirected himself in disregarding the appellants objection and taking the assumption that the Appellant's duty to report any alleged industrial accident is a confirmation of the occurrence of an accident.
 - b) That the director erred in law and in fact by failing to order an inquiry into whether the accident happened despite the glaring disparities in the documents presented to him.
 - c) That the director erred in law and in fact by directing a final assessment in Nairobi yet Dr. Munga Steven who asked for a further assessment in Naivasha is still available.
 - d) That the director erred in fact and in law by failing to give reasons for the decision as statutorily required.
 - e) That the director erred in law and in fact by directing the appellant to bear costs of assessment which powers he does not have statutorily.

The appellant prays for Orders that;-

- a) The decision by the director of Occupational Safety and Health services dated November 6, 2018 be set aside.
 - b) That this Honourable Court quashes the assessment and computed compensation and Order the director to carry out an inquiry on the authenticity of the interested party's claim.
6. The appeal is opposed by the respondent who filed a response to the Appeal on the February 14, 2019 on the basis that the appellant herein notified it of an occurrence of an industrial accident involving the interested party therefore affirming that indeed an accident occurred.
7. It is stated that the appellant through its Human Resource personnel, one Susan Kihara filled form ML/DOSH/FORM 1 dated March 20, 2018 and further send the said form by their letter of October 30, 2017 to be filled by a medical doctor of their choice, One Doctor Amunga. It is contended that the two documents is an admission on the part of the appellant that an accident indeed occurred.
8. The respondent stated that when it received a protest of the assessed damages payable to the interested party, It provided a way forward by directing that the interested party be subjected to a further examination by a panel of doctors to be chosen by it, which in response the appellant disagreed on the basis that the costs of the doctor who were to examine the interested party was to be borne by the appellant when the law mandates it to constitute such panel of doctors for re-examination.
9. The respondent states that it did not contravene any section of the law by not ordering any inquiry into the alleged accident owing to the demand by the appellant.
10. The respondent finally stated that if indeed no accident occurred as per the appellant appeal then the appellant ought to be convicted under section 112 of the *Occupational Safety and Health Act* for falsely notifying the respondent of an accident.
11. This Appeal was disposed of by way of written submission with the appellant filing on the June 24, 2021 while the respondent and the interested party did not file any submissions.



Appellant's Submissions.

12. It was submitted for the appellant that the director of Occupational safety and health services does not have any powers to direct which party is to bear costs of assessment. He argued that section 53 of the Work Injury and Benefits Act gives the powers of the director and to order payment of costs payable is not one contemplated in the said section.
13. It was submitted that under section 30 (3) of *Work Injury and Benefits Act*, the assessment of compensation was to be made by a director following an assessment of a medical doctor. He therefore contends that the doctor who had examined the interested party on May 12, 2018 directed that the final assessment be made 3 months later to affirm the progress before final award can be made. He argued therefore that the assessment by the director on the May 25, 2018 was done prematurely.
14. On whether the director is mandated under the law to carry out investigations of the alleged accident, it was submitted that under section 22 of Work Injury and Benefits Act, the employer is mandated to report any alleged accident while the Director is tasked under section 23 of the Act to carry out inquiries of the alleged accident to ascertain liability of each party, in addition that section 53 (2)(d) mandated the director to carry out investigation of any alleged accident once it received a report of an accident. It was therefore argued that the respondent misdirected itself in failing to carry out any inquiries and merely relying on the report of the accident made by the appellant. The appellant reinforced its argument by citing the Supreme Court decision of *Samuel Kamau Macharia and another –v- Kenya Commercial bank Limited 72 others* [2013] eklr where the Court held that where there is a clear procedure prescribed under the law, that procedure should be strictly followed.
15. The appellant also cited the supreme Court decision in *Law Society of Kenya v Attorney General & another* [2019] eklr where the Court held that;

“Having so held, it is evident that by granting the Director authority to make inquiries that are necessary to decide upon any claim or liability in accordance with WIBA, the jurisdiction of the High Court to deal with constitutional questions and violations that may arise from such claims under article 165 of the Constitution 2010 is not ousted at all. Similarly, the appellate mechanism to the Industrial Court, in the circumstances, cannot be legitimately questioned. [64] The Director’s inquiries are also essentially preliminary investigations. Such mechanisms, set out by statute must be left to run their full course before a court intervenes. Not only does this simplify procedures to ensure that courts focus on substantive rather than procedural justice, but also potentially addresses the problem of backlog of cases, enhances access to justice, encourages expeditious disposal of disputes, and lowers the costs of accessing justice. [65] There is also the added benefit that inquiries by the Director inevitably means that work injuries and accidents are well captured and understood by his office. He can for example take measures or instruct his officers to hasten remedial administrative measures to avoid further occurrence of similar incidents.”
16. On whether the respondent erred in failing to give reason for the objection, the appellant submitted that section 51 of Work Injury and Benefits Act provides for an avenue to object to the decision of the director while section 52 of the said Act mandated the director to respond within 14 days of receipt of the objection and further give reasons for varying or upholding the objected decision.
17. Accordingly, it was submitted that the director failed to follow the set out timelines of responding within 14 days and instead responded after 4 months and upheld its decision but still failed to give reasons for its decision.



18. The appellant in conclusion submitted that their Appeal is merited and urged this Court to allow the same as prayed.
19. I have examined the averments and submissions of the parties herein. This being an appeal in the 1st instance, this court has a duty to re-evaluate the evidence of the parties before reaching any determination.
20. From the record herein, on 30/10/2017, the respondent appellant herein wrote to a Dr. Amunga and asked him to attend to Ezekiel Walwanda who had been splashed with a chemical on his eye on 20/3/2018, the appellants filed MN/DOSH/FORM 1, notifying the respondent herein of an accident involving the interested party.
21. This form was also filed by a medical officer Dr. Munga on 12/5/2018 indicating that the interested party had conjunctivitis on his right eye and lost sight therein and also had partial loss of eyesight in the left eye at 6/24.
22. The report of the doctor further recommended a further assessment after 3 months.
23. This matter was entered in the Accident Register No. WIBA/NSA/7360 on 28/3/2018.
24. On 25/5/2018, the respondent herein assessed compensation payable to the Interested party at 512,284/=.
25. The amount was arrived at by calculating 30% durability against his 96 months total earning = 13,720 x 96 x 30/100 which came to 395,136/=
26. This amount was added to the temporary incapacity of 117,148/= calculated at 13,720 x 222 days = 117,148/=
27. The total came to 512,284/=. This is contained in DOSH/WIBA 4 produced by the appellant in the record of appeal herein.
28. This assessment was notified to the appellant by the respondent vide its DOSH/WIBA 3 & DOSH/WIBA 4.
29. The appellants wrote an objection to this award vide their letter of 18/10/2018. They indicated that they had filed an objection regarding the award with the respondent and he had not responded within 14 days as expected and so required a meeting with the respondent in order to make an inquiry and investigate the alleged accident.
30. They also complained that the award was premature noting that in the medical report, the doctor had indicated that the interested party was to be examined further after 3 months from May 2018 to assess the level of permanent disability.
31. Though the appellant avers that they had filed an objection the objection referred to is not annexed to the documents filed in court.
32. On 6/11/2018, the direction of WIBA wrote to the appellants advocates indicating as follows;

“Refer to your letter of 2/7/2018 on the above subject. I would like to direct as hereunder;-

1. Ezekiel Walwada Khisa to undergo a final assessment of permanent incapacity by a panel constituted by the Director, DOSHS, on a date to be mutually agreed between Maridadi Flowers Ltd and Direction DOSH.



2. That the venue and place for the final assessment be at Safety House, Commercial Street, Industrial Area, Nairobi.
 3. That the notice by employer of an occupational accident/disease of an employee dated March 20, 2018 be confirmed as such with respect to Ezekiel Wamalwa Khisa.
 4. That the final award of compensation be computed after the final assessment as indicated in (1) above.
 5. That the cost of the final assessment be met by Maridadi Flowers Ltd...”
33. Vide a letter dated 7/11/2018 the counsels to the appellants replied to the letter of 6/11/2018 and decided to disagree with the decision made by the respondent and sought for reason for the decision in order to pursue the matter in court.
34. I have analysed the above chronology of events in order to determine what the correct procedure is that should be followed by the respondent in computing compensation payable following a workplace injury and whether the respondent adhered to the said process.
35. The Work Injury Benefits Act 2007 makes provision of how an accident or injury at work should be handled. Section 21 of WIBA provides as follows;-
- “ 21. 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 its occurrence in the case of a fatal accident. Notice of injury or accident by employer to Director”.
36. Section 22 of WIBA on the other hand stipulates as follows;-
- “ 22. (1) Subject to the provisions of this section, 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 learned that an employee has been injured in an accident. (2) For the purposes of this section, an accident includes any injury reported by an employee, to his employer, if the employee when reporting the injury, alleges that it arose out of and in the course of his employment and irrespective of the fact that the employer is of the opinion that the alleged accident did not so arise out of and in the course of employment. (3) An employer shall, at the request of an employee or the dependant of an employee, furnish the employee, or dependants with a copy of the notice of the accident furnished by the employer to the Director in respect of a claim for compensation by such employee or dependant. (4) An employer who fails to comply with subsection (1) commits an offence. (5) The provisions of this section do not prevent an employee from reporting an occupational accident or disease to the Director at any stage”.
37. Once an accident or injury is reported for the direction, the Director is expected to make an inquiry into the injury or accident. In addition, the Director may also conduct investigation into the accident or injury.



38. Since the Director is expected to conduct an inquiry and/or investigation, it is envisaged that proper particulars including documents shall be provided concerning the injury or accident.
39. The employer is expected to submit a claim to the director within 7 days upon receiving the claim, medical report on other documents on information concerning the claim.
40. Since the director has to investigate the claim, it is also provided that the employee would be required to submit himself or herself for medical examination by the medical practitioner designated by the Director or the employee with the approval of the director. The employee is also entitled at his own expense to have a medical practitioner of his choice present at an examination by a designated medical practitioner.
41. From the evidence submitted before me, the employee the interested party herein, reported the injury and the employer picked it up and made a claim to the Director as per the law.
42. It is clear also clear that the Director proceeded to make his inquiry/investigation on the injury sustained by the interested party.
43. The interested party was examined by a doctor prescribed by the Director who made their recommendation. The appellant was however dissatisfied with the findings and decided to object.
44. The objection is not annexed to these proceedings though.
45. It is also apparent that there was some complain about the findings and the Director directed that the Interested Party undergoes another assessment by another doctor to be mutually agreed between the appellants and the Director. The Director also indicated that the final award of compensation was to be computed after the final assessment. The appellant was requested to meet the cost of the final assessment.
46. The appellants declined to accede to this option and decided to file the appeal.
47. My view is that the appellants had an option to have a further assessment of the interested party by another doctor of their choice. They had already reported this accident and thus agreed in principal that the interested party worked for them.
48. It was illogical for the appellant to ask for further inquiries and at the same time demand for reason for the decision of the Director which decision emanated from the findings of assessment of the doctor.
49. A new doctor of the appellant's choice would have helped to alley their fears which the appellant decided not to follow.
50. The appellants have appealed to this court concerning the award of the Director on the ground that the director didn't conduct any inquiry on the injury and also the fact that a final assessment was made before 3 months as directed by Dr. Muiga. The appellants also felt aggrieved being asked to bear costs of the final assessment.
51. First, the law is clear as to how inquiries/investigations are to be done. The Director receives the documents from employer and employee and then proceeds to investigate the matter. The employee is sent for medical examination or assessment and then a decision is made as guided by the law.
52. There is no indication how such investigations were ever done. It is also true that Dr. Munga had directed a final decision be made after 3 months.
53. Indeed a decision was made by the Director before 3 months elapsed.



54. That notwithstanding, the Director offered a solution of a further assessment by another doctor chosen by him and the appellants. The appellants refused to take the option which would have enabled them assess the finding through a doctor of their choice.
55. The appellants cannot therefore complain about this having refused to take the option of another assessment of the interested party through a doctor of their choice.
56. As to complaint that they were asked to bear costs of the new doctor, I believe that is the law because it was for their benefit. Indeed even the law envisages that if an employee wants to be assessed by a doctor of their choice, they bear the costs.
57. In my view the appellants have not demonstrated how the Director erred in the assessment of the interested party. The Director followed the law and process stated under WIBA. The appellants refused to participate in a further assessment and rushed to court on appeal.
58. The appellants have not established that the director committed an error in the way the Interested party was assessed and even if there was an error, there was a mechanism for correction which the appellants refused to pursue.
59. I therefore find that the appeal has no merit. I find no proper reason to disturb the findings and decision of the Director.
60. I therefore confirm the decision of the Director and dismiss this appeal accordingly with costs to the respondents and interested party.

DATED AND DELIVERED VIRTUALLY THIS 5TH DAY OF OCTOBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Olaly Cheche for Interested Party – present

Wanjeri holding brief Weche for Respondent – present

Oduor holding brief Wekhomba for Appellant – present

Court Assistant - Fred

