



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

APPEAL NO. E017 OF 2021

(Being an appeal from the ruling and orders delivered on 18.03.2021 by

Hon. M.L Nabibya, Principal Magistrate in CMELMA No. E056 OF 2020)

EDWIN SONGOROH1ST APPELLANT

EDISON CONVEYORS LIMITED.....2ND APPELLANT

- VERSUS -

AMONY KOECH YATICH..... 1ST RESPONDENT

MORAN AUCTIONEERS.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th November, 2021)

JUDGMENT

The appellant filed the memorandum of appeal on 24.03.2021 being dissatisfied with the whole of the ruling delivered on 18.03.2021 by Hon. M.L Nabibya, Principal Magistrate, at Mombasa. Miller George Gekonde acted for the appellants. The grounds of appeal were as follows:

- 1) The learned Magistrate erred in law and fact by holding that the appellants should settle the amount of Kshs. 1, 080, 200.00 when in fact his claim had already been settled by the 2nd appellant's insurance company and the 1st respondent acknowledge receipt and discharged the appellants from further liability.
- 2) The learned Magistrate erred in law and in fact by failing to review its orders and decision of 12.01.2012 when there was sufficient evidence to warrant review.
- 3) The learned Magistrate erred in law and in fact by failing to review its orders and decision of 12.01.2021 when there was sufficient evidence to warrant review.
- 4) The learned Magistrate erred in law and in fact by prematurely assuming jurisdiction over a matter that was still very live before the Directorate of safety and Health and refusing to down its tools when that fact was pointed out and demonstrated to it.
- 5) The learned Magistrate erred in law and fact by misinterpreting the provisions of Order 45 of the Civil Procedure Rules, 2010 on the ground demonstrated to it that there was discovery of new and important evidence to warrant exercise of its jurisdiction for review and held that the application for review could only be made before the Director of Safety and Health after presenting the new evidence to him.
- 6) The learned Magistrate erred in law and in fact by admitting the existence of new and important evidence but declining to look into the evidence.
- 7) The learned Magistrate erred in law and in fact by holding that the appellants were liable to the respondent when there was no award from the Directorate capable of being enforced by the Court.
- 8) The learned Magistrate erred in law and fact in failing to consider the respondent's notice of preliminary objection dated 24.02.2021 that the issues raised in the appellant's notice of motion application for review dated 23.02.2021 was *res judicata*.

9) The learned Magistrate erred in law and in fact by misapprehending the appellants' application dated 23.02.2021 to be an application for stay pending appeal under Order 42 of the Civil Procedure Rules, 2010.

The appellants prayed for orders:

- 1) The ruling delivered and orders given in Mombasa CMELR cause No. E056 of 2020 on 18.03.2021 be set aside in their entirety and the matter be transferred back to the Directorate Occupational Safety and Health Services.
- 2) The attachment commenced vide proclamation of attachment of moveable property dated 27.01.2021 in in Mombasa CMELR cause No. E056 of 2020 against the assets of the appellant be unconditionally lifted.
- 3) The costs of the appeal be paid by the respondents in any event.

The parties filed their respective submissions on the appeal and counsel also submitted orally. The Court has considered all the material on record.

The background to the appeal is as follows. The 1st respondent herein filed a miscellaneous application No. E056 of 2020 in the Magistrates' Court at Mombasa and through Bryan Khaemba, Kamau Kamau Advocates. The application was under section 3(1) (2) and (3) of the Employment and Labour Relations Court Act No. 20 of 2011 and rule 17 (1 -6) and (8) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and all other enabling provisions of the law. His case was that on 09.08.2019 while working as a driver of the respondents he was involved in a serious accident resulting in the amputation of his right leg below the knee. Further the Occupational Health and Safety, Eldoret Office computed and awarded him Kshs.1, 747, 200.00 payable within 90 days per statutory provisions. The respondents through their insurer, Geminia Insurance Company Limited paid the applicant Kshs. 667, 000.00 out of Kshs. 1, 747, 200.00 and the remaining unpaid balance was Kshs. 1, 080, 200.00. The 1st respondent prayed for the Magistrate's Court to issue an order compelling the appellants herein to pay the remaining award of Kshs.1, 080, 200.00 plus interest at 14% p.a from 05.11.2019; any other just order; and for costs of the application. The appellants opposed the application by filing on 03.11.2020 the 2nd respondent's replying affidavit. The appellants case was that the 1st respondent herein worked for them as a driver effective 05.08.2019 and four days thereafter, while he had embarked on his probationary service, he got injured in the said accident. The appellants were never heard by the Directorate of Occupational Safety and Health Services but they received the Directorate's documents forwarded by the Directorate's letter dated 05.11.2019. The letter conveyed that the 1st respondent's case of occupational accident had been processed by the office for compensation purpose and the appellants were being reminded that the case should be compensated within 90 days from the date indicated therein and through the office. Further, the letter stated that all copies of the DOSHWIBA 5 attached should be returned to the office for countersigning. The documents annexed on the letter included DOSH/WIBA 3 being notice of accident or disease by or on behalf of an employee in the instant the 1st respondent herein; DOSH/WIBA 4 being demand for payment of work injury benefit assessed in favour of the 1st respondent at Kshs. 1, 747, 200.00; DOSH/WIBA 5/A being form of the agreement as to work injury benefit to be paid by the employer to the injured employee to be completed in triplicate. In part the form states thus, "**Subject to the right of either the employee or the employer to make appeal to the Industrial Court under section 52 subsection (2) of the Work Injury Benefits Act before the execution of this agreement –**

a) as compensation for such injury as aforesaid, the employer will pay to the employee the sum of Kshs.1, 747, 200.00 in discharge of the liability (if any) of the employer under the said Act;

b) the employee will accept the aforesaid lump sum in discharge of the liability of the employer to pay the compensation under the said Act in respect of the aforesaid injury to the employee"

In opposing the 1st respondent's application before the learned Magistrate, the appellants herein urged that there was no award by the Directorate and in an unclear fashion stated that after receiving the letter of 04.11.2019 demanding payment to the 1st respondent herein, the 1st respondent was unable to produce a document justifying the calculation using the Kshs.52, 000.00 as his salary. Further based on the probation letter as evidence for employment and salary, the insurance company calculated the payable amount at Kshs. 667, 000.00. Parties filed their respective submissions and on 10.12.2020 the learned magistrate delivered her ruling allowing the application. She found that if the appellants were dissatisfied with the findings of the Directorate, they ought to have lodged an objection within 60 days (per section 51 (1) of the WIBA). The order was that the respondents (the appellants herein) to pay the remaining Kshs. 1, 080, 200.00 plus interest at 14% p.a from 03.11.2019 (the date of the Directorate's letter to the appellants); and, that costs of the application be awarded to the applicant.

The appellants filed an urgent application on 11.02.2021 seeking numerous orders inter alia, that they be given leave to change advocates to Sidinyu Njau & Company Advocates for stay of execution with respect to a motor vehicle KCM 700W/ZF Mercedes Axor and that the execution warrants issued on 26.01.2021 be found illegal. The appellants also filed another application dated 16.02.2021 for stay of execution and to be allowed to settle the judgment debt by three equal instalments. They filed yet another application on 23.02.2021 to change advocates to Miller George & Gekonde Advocates; for stay of execution and for 2nd respondent herein to release the motor vehicle; and, for the stay of execution of orders granted on 12.01.2021 to be granted pending determination of the objection to the Directorate with respect to the award to the 1st respondent herein. The 1st respondent herein filed his replying affidavits to oppose the applications and further filed a preliminary objection that the application of 23.02.2021 was *res judicata* in view of the ruling of 10.12.2020. The appellants in the application of 23.02.2021 urged that the ruling and order of 12.01.2021 compelled the appellants to pay the 1st respondent Kshs. 1, 080, 200.00 plus interest at 14% being part settlement of the award that had been settled by the insurance to the tune of Kshs. 667, 000.00. However, there had been discovery of that the computed amount was based on incorrect figure which the directorate has admitted led to an erroneous final figure as an award for damages for which the appellants had filed an objection with the Directorate pursuant to section 52 of Work Injury Benefits Act (WIBA). That based on the correct figure of Kshs. 20, 000.00 (as opposed to Kshs.52, 000.00 that was presented to the Directorate) as the basic salary, the 1st appellant's award would be Kshs. 667, 000.00 to compensate for the injury and already paid and already signed an agreement discharging the employer from any further liability arising from the claim. Further upon receiving the objection (the one exhibited appearing not to be dated) the Directorate had replied by the letter dated 17.02.2021 stating it was a reply to the appellants'

letter of 16.02.2021 and 08.02.2021 and further that the 1st respondent had been consulted on telephone and had denied that he was given a letter of probationary service or given pay slips with a salary of Kshs.20, 000.00 pm but that his agreed monthly pay was Kshs. 50, 000.00 and not Kshs. 52, 000.00 the appellants had stated in DOSH Form 1 and dated 05.08.2019. The Directorate concluded the letter thus “ **In conclusion, I confirm that there is a discrepancy on what monthly salary the employee said he earned, what you as the employer indicated as his last salary that was used to compute the award. The said employee will therefore be required to submit the probation letter or any documentary evidence that his actual salary was Kshs.50, 000.00 as he stated on phone to help shed more light on the actual monthly earnings of the employee.**”

The 1st respondent herein opposed the application by filing his replying affidavit sworn on 20.02.2020. He stated and urged as follows:

- a) The ruling delivered on 10.12.2020 awarded him Kshs. 1,080, 200.00 plus 14% pa interest from 05.11.2020.
- b) The appellants were at all material times aware of the proceedings.
- c) Order extracted from the ruling was served on 12.01.2021 by way of email exhibited. The respondent’s advocates acknowledged the service on 19.02.2021 and promised to inform the appellants.
- d) The 1st respondent gave instructions on execution which the 2nd respondent was assigned to carry out. On 09.02.2021 the proclamation notice took effect and the 1st appellant stormed at the 1st respondent’s home and assaulted him. The 1st respondent was arrested on account of alleged forging Court papers and locked up briefly. He made a police report about the assault and arrest.
- e) He had complied with the law and suffered and he urged the application be dismissed.

The learned trial Magistrate rendered he ruling on the three applications on 18.03.2021 and found and held as follows:

- a) The prayer to release the motor vehicle were in two applications and would be determined as one.
- b) There would be no order of stay of execution under order 42 rule (6) of the Civil Procedure Rules as no substantial loss would result to the appellants as there was no appeal and all there existed was an objection to the Directorate to review its award on account of an error.
- c) Even if there may be discovery of new evidence, the Court could not review the decisions of the Director.
- d) The application dated 16.02.2021 acknowledges the indebtedness of the applicant to the respondent and it is confirmed part of the money had been paid and the prayers to pay by instalment were allowed as not opposed and the 1st of the three instalments ordered to be within 14 days from the date of the ruling.
- e) Upon pay of the 1st instalment, the lorry shall be released on a running attachment basis until payment of the 1st instalment which shall be within 45 days from the 1st payment date, thereafter the appellants to be discharged fully.
- f) Failure to comply with any of the conditions shall leave the claimant with an option of executing the judgment.
- g) Costs of the application to the respondent (claimant, 1st appellant herein)
- h) Right of appeal 30 days.

The appellants have appealed against that ruling. The court finds as follows.

First, the Court finds that the Directorate’s letter dated 05.11.2019 communicated the Director’s award. Section 26(4) of WIBA provides that an employer or insurer against whom a claim for compensation is lodged by the Director under the section shall settle the claim within ninety days of lodging of the claim. The letter of 05.11.2019 essentially advised the respondents accordingly. Further as found by the learned Magistrate and urged for the respondents, part payment had been made thereby acknowledging existence of the award. The Court finds the Director made an award and communicated the award per the letter dated 05.11.2019. Grounds 1, 4 and 7 will fail.

Second, if the appellants were dissatisfied with the award by the Director, they were to lodge an objection within 60 days of the Director’s decision per section 51 (1) of WIBA, 2007. The decision was on 05.11.2019. The letter dated 17.02.2021 by the directorate states that it was a reply to the appellants’ letter of 16.02.2021 and 08.02.2021 by which objections had been raised on account of alleged error on the monthly salary as a base for calculating the award. The Court finds the prescribed 60 days had already lapsed and there was no valid objection before the director so that the learned Magistrate did not err in finding that there was no jurisdiction to review the director’s decision or to stay the execution in issue. In view that there was no demonstrated valid objection before the Director, there was no ground to stay or review the orders of 12.01.2021 purportedly to allow the Director to decide an objection because no such valid objection actually existed. The Court finds that grounds 2, 3, 5, and 6 will collapse. The Court further finds that as against the Magistrate’s ruling and orders of 12.01.2021, the appellants all along knew about the Directorate’s award and since employment of the claimant they knew about his salary and the alleged error in salary would not amount to new evidence because with due diligence, those are material facts the appellants should have provided in their replying affidavit to the applicant’s notice of motion initiating the proceedings. There being no valid objection it cannot be said, as submitted for appellants, that the orders of 12.01.2021 were premature.

Third, the Court returns that the preliminary objection was not mentioned in the ruling appealed against and the appellants have not established that the preliminary objection had been urged and was due for determination in that ruling. Ground 8 of appeal will therefore collapse.

Fourth, while there was no application for stay of execution pending appeal, the appellants had urged a unique application of stay of execution pending Director's decision on the basis of errors the appellants said they had raised before the Director. While the trial Court erred in analysing the applications as though they were under Order 42 rule 6 of the Civil Procedure Rules, the Court returns that there being no valid objection before the Directorate and there being an unopposed application to settle by instalment, the appellants were undeserving of the order of stay of execution as was prayed for before the learned Principal Magistrate.

Fifth, in matters under Work Injury Benefits Act (WIBA, 2007), appeals to this Court may be made by an objector to the Director's reply within thirty days from the date the objector receives the reply and as provided for in section 52(2) of the Act. The Court therefore returns that the Director's decision cannot be questioned on merits by way of the present appeal and the learned Magistrate did not err in finding that she had no jurisdiction to delve in to consideration of the alleged new evidence on account that the proceedings before the Court were for adoption and enforcement of the Director's decision and nothing more beyond that.

Sixth, the parties were not in a dispute that the Magistrates' Court enjoyed the necessary jurisdiction to adopt the Director's decision for subsequent enforcement as a decree of the Court. In view that the monthly pay was Kshs. 52, 000.00 per the Director's decision, the Court returns that the matter properly fell within the Principal Magistrate Court's pecuniary jurisdiction. In any event, the Court considers subsection 26(6) of WIBA, 2007 provides thus, **"An employer or an insurer who fails to pay the compensation claimed under this subsection commits an offence and shall on conviction be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding one year or to both."** The Court holds that the Magistrate Court is vested with the jurisdiction of first instance to hear and determine the criminal case with respect to the offence under section 26(6) and the section therefore essentially vests in the Magistrate Court the necessary jurisdiction (even by implication) to adopt and enforce the Director's decision. The Court therefore considers that the learned Principal Magistrate had the jurisdiction to adopt and enforce the Director's award herein and despite the Court's earlier findings and opinion in Virginia Wangari Muita –Versus- Nyoro Construction Limited [2020]eKLR thus, **"Second, the WIBA does not provide for the procedure for enforcement of the decision by the Director. It is the Court's considered view that such procedure ought to be provided for in the regulations to be made by the Cabinet Secretary under section 56 of the WIBA or the rules of this Court made under Part V of the Employment and Labour Relations Court Act, 2011 (ELRCA). The Court considers that such regulations having not been made, it is proper that this judgment be served upon the Cabinet Secretary responsible for labour, the Attorney General and the Registrar of the Employment and Labour Relations Court (in his capacity as Secretary under section 26 of the ELRCA) for appropriate action. For the time being that the procedure is not expressly provided, the Court considers that the Director's decision would be enforceable by way of a miscellaneous application or memorandum of claim and exhibiting the Director's decision for enforcement by this Court."** Thus, in absence of rules or regulations or statutory procedure on enforcement of the Director's decision, the Court holds that the 1st respondent was entitled to move the Principal Magistrate's Court by way of a miscellaneous application as was done.

In view of the findings all the grounds in the memorandum of appeal will fail.

In conclusion the memorandum of appeal is hereby dismissed with costs of the appeal in favour of the respondents.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 19TH NOVEMBER, 2021.

BYRAM ONGAYA

JUDGE