



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

MISCELLANEOUS NO. E177 OF 2021

JOHN BOSCO MUNYAO NZUMAI.....APPLICANT

VERSUS

ZHENG HONG (K) LIMITED.....RESPONDENT

RULING

1. The motion for determination is the Notice of Motion application dated 1st October 2021 expressed to be brought under Rule 28 & 31 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and Section 26 of the Work Injury Benefits Act and all other enabling provisions of the law. The Applicant seeks orders:-

1. THAT the Court adopts the assessment of the Director of Occupation Health and Safety as an order of this Honourable Court.
2. THAT a decree to issue in accordance with assessment of the Director of Occupation Health and Safety.
3. THAT the costs of this application be provided for.

2. The Application is predicated on the grounds: -

- a) THAT the Applicant is an employee of ZHENG HONG (K) LIMITED the Respondent herein.
- b) THAT on the 9th day of June 2019, the Applicant was in the lawful course of his employment with the Respondent when he was ordered him to carry some heavy 250 litre tanks of ethanol which were being offloaded from a truck when his back suddenly buckled under the strain and weight of the heavy tank occasioning him grievous injuries to his spinal cord.
- c) THAT the matter was subsequently reported to the Director of Occupation Safety and Health Services who assessed the compensation due to the Applicant to Kenya Shillings One hundred and seventy-two thousand eight hundred.
- d) THAT the Applicant has served the Respondent with the assessment of the Director of Occupational Safety and Health Services but no payment has been forthcoming to date.
- e) THAT the Respondent has refused and or neglected to pay the compensation.
- f) THAT furthermore efforts of the Applicant to negotiate with the Respondent through his Counsel have proven unfruitful.
- g) THAT the Work Injury Benefits Act does not provide for a civil remedy for the enforcement of the decision of the Director of Safety and Health services in the event that the Employer declines to pay the compensation.
- h) THAT the failure of the Respondent to pay up the Claim as assessed has necessitated the instant application.
- i) THAT it is an equitable legal maxim that no person will suffer a wrong without a remedy.
- j) THAT no wrong should be allowed to go without any compensation if it can be redressed by a court of law.
- k) THAT Article 159 (2) of the Constitution of Kenya provides that justice shall be done to all, irrespective of status.

l) THAT Article 159 (2) of the Constitution of Kenya provides that justice shall not be delayed.

m) THAT furthermore, the Constitution of Kenya 2010, reiterates that justice shall be administered without undue regard to procedural technicalities.

n) THAT furthermore Article 162(2) of the Constitution of Kenya 2010, establishes this Honourable Court giving it the mandate to hear and determine disputes relating to Employment and Labour Relations.

o) THAT it is in the interest of justice that this matter be heard expeditiously and the application herein be allowed as prayed.

3. The Application is further supported by the affidavit of Brian Murangasia Advocate. The matter was argued on 15th November 2021 and Counsel for the Applicant urged the adoption of the WIBA assessment.

4. The issue for consideration is mainly whether the Court has authority to enforce a decision of the Director for payment of compensation for work Injury/occupational disease contracted in the course of duty and which has not been objected to nor appealed against. For this matter, I am suitably guided ruling of my sister Mbaru J. in **Richard Akama Nyambane v ICG Maltauro SPA [2020] eKLR** where the Learned Judge stated:

*“The Work Injury Benefits Act, 2007 (WIBA) does not provide for an enforcement mechanism in respect of awards of the Director and recourse was section 87 of the Employment Act, 2007 (the Act) as held in the case of **Ruth Wambui Mwangi & Another versus Alfarah Wholesalers Limited [2017] eKLR**. Section 87(1) Subject to the provisions of this Act whenever— (a) an employer or employee neglects or refuses to fulfil a contract of service; or (b) any question, difference or dispute arises as to the rights or liabilities of either party; or (c) touching any misconduct, neglect or ill-treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court. (2) No court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1). The award under WIBA may only be enforced by filing suit with the court under the provisions of section 87 of the Act.”*

5. The Court is further guided by the case of **Jared Ingling Obuya v Handicap International [2021] eKLR** where my brother Nduma J. held that:

“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.”

6. These decisions demonstrate this Court has authority to enforce a decision of the Director which has not been objected to nor appealed against and therefore the Applicant herein is entitled to the reliefs sought in the motion. If I were to find otherwise the import would drive the Applicant from the seat of justice and leave said Applicant with nowhere to turn given that the Latin maxim holds *Ubi jus ibi remedium* which means '**where there is a right, there is a remedy**'. This is a legal concept that postulates where the law establishes a right there should be a corresponding remedy for its breach.

7. The Applicant has been shown to have complied with the law in relation to work injury claims and has received an assessment from the Director of Occupational Safety and Health. The refusal to pay the sum assessed attracts a fine of Kshs. 500,000/- and imprisonment for up to one year a fact that many employers and their insurers seem to ignore. I foresee in the not too distant future an enforcement where a party in addition to the sums ordered by the Director will seek the fine to be imposed. There would obligation if appropriately moved to enforce Section 26(6) of the Work Injury Benefits Act which provides that 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. As the notice of motion application herein has merit, it is granted in terms of prayers 1 and 2 of the motion. Since the action was necessitated by the mishandling of the assessment by the Respondent the Respondent shall meet the costs of this suit and application.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER 2021.

Nzioki wa Makau

JUDGE