



REPUBLIC OF KENYA  
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 65 OF 2017

BETWEEN

SAIDI MOHAMED ALIAS SAID

MOHAMMED ALIAS NDARO.....CLAIMANT

VERSUS

DIAMOND INDUSTRIES LTD.....RESPONDENT

*Rika J*

*Court Assistant: Benjamin Kombe*

*P. A Osino & Company Advocates for the Claimant*

*Azminah H. Amarshi Advocates for the Respondent*

---

**RULING**

1. The Claimant filed his Statement of Claim on 17<sup>th</sup> March 2017. He avers he was injured in the course of duty. He states the Respondent failed to provide a safe system of work, resulting in chemical particles entering his right eye, occasioning the Claimant serious injury. He prays for general and special damages, together with costs and interest, against the Respondent.

2. The Respondent filed its Statement of Response on 8<sup>th</sup> May 2017. It denies liability for the injury occasioned to the Claimant. Its position is that the Court does not have jurisdiction to hear and determine a work injury dispute. The Respondent also filed a Notice of Preliminary Objection on jurisdiction.

3. Parties agreed to have the Objection considered and determined through written Submissions. They confirmed filing of Submissions on 8<sup>th</sup> November 2017.

***The Court Finds:-***

4. The Objection to the effect that the Employment & Labour Relations Court [E&LRC] does not have jurisdiction in work injury claims is misconceived.

5. Work injury claims are properly employment and labour relations disputes, over which the Court retains jurisdiction.

6. The specific legislation – Work Injury Benefits Act No. 13 of 2007, does not confer jurisdiction on Magistrate’s Courts, or the High Court. This Act is part of the Labour Laws passed in the years 2007/2008, with the input of the International Labour Organization, and the Social Partners. The Labour Laws were intended to be administered by the Industrial Court, and other Labour Institutions.

7. It was intended that work injury claims are determined through a Director of Work Injury Benefits, responsible for management of the Act (Section 53 of the Work Injury Benefits Act). Section 2 refers to ‘Director of Occupational Safety and Health Services.’ It is not clear if this

is intended to be one Director.

8. Section 52(2) intended that a person aggrieved by the decision of the Director, would appeal to the Industrial Court [E&LRC] against such decision.
9. Section 16 of the Act, which expressly barred actions for recovery of damages for occupational accident or disease, except as provided for under the Act, was invalidated by the High Court at *Nairobi in H.C Petition Number 185 of 2008 between Law Society of Kenya v. Attorney General & Another (2009)e-KLR*.
10. Other Sections invalidated by the High Court included Sections 4, 7, 10(4), 23(1), 25(1)(3), 52(1)(2) and 58(2). Work injury dispute resolution, has been in a state of flux after this decision.
11. In a Judgment of the *Court of Appeal, Attorney-General v. Law Society of Kenya & Another [2017]e-KLR*, which was delivered on 17<sup>th</sup> November 2017, a week after Parties to the Claim herein confirmed the filing of their Submissions, the Court of Appeal overturned most of the orders made in *H.C Petition number 185 of 2008*. The only provisions confirmed by the Superior Court as being inconsistent with the current and former Constitution, are Sections 7 and 10(4). The rest of the Work Injury Benefits Act was found to be consistent with the Constitution, or remediable through legislation.
12. Of relevance to the Claim filed herein, and the Preliminary Objection in particular, is the decision of the Court of Appeal, on the role of the Director of Work Injury Benefits, and the E&LRC.
13. The provisions relating to jurisdiction, dealt with by the Court of Appeal, are Sections 16, 23(1), 52(1)(2), and 58(2).
14. In general, the Court of Appeal ruled there is nothing unconstitutional about the above provisions. There is nothing discriminatory in the provisions. Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution, or an Act of Parliament, that procedure should strictly be followed. Jurisdiction donated to the Director of Work Injury Benefits is not unique. The exercise of this jurisdiction is donated by statute and is legitimate. The decision of the Director of Work Injury Benefits can be appealed against at the E&LRC.
15. After Judgment in *H.C Petition Number 185 of 2008*, Parties have been filing work injury claims at the Magistrate's Court, while Appeals from the Magistrate's Court have been filed at the E&LRC, or at times at the E&LRC via the High Court. What should have been Appeals from the Director of Work Injury Benefits to the E&LRC, have been Appeals from the Magistrate's Court to the E&LRC.
16. The E&LRC therefore has jurisdiction under the Work Injury Benefits Act, to deal with disputes relating to work injury as confirmed by the Court of Appeal.
17. This jurisdiction however, is not a primary jurisdiction, but an appellate jurisdiction.
18. Employees who seek recovery of damages in respect of any occupational accident or disease resulting in disablement or death of such Employee, shall pursue recovery of damages against their Employers, under the provisions of the Work Injury Benefits Act.
19. The Claimant pleads he suffered chemical injury to the eye. This type of injury is covered under First Schedule to the Work Injury Benefits Act, relating to degree of Disablement.
20. He should present his grievance to the Director of Work Injury Benefits, and only come to the E&LRC on appeal, as provided for under the Work Injury Benefits Act, and as decreed by the Court of Appeal in the decision of 17<sup>th</sup> November 2017.
21. The Court does not agree with the Respondent that it is divested of jurisdiction under the Work Injury Benefits Act. What it does not have is primary jurisdiction, which vests in the Director of Work Injury Benefits. The Court's jurisdiction is secondary.
22. On Claimant's submission that E&LRC has exclusive jurisdiction on employment and labour relations disputes under Article 162(2) of the Constitution, Section 87 of the Employment Act, and Section 12 of the E&LRC Act, the answer must be that this exclusive jurisdiction is exercised in accordance with the Law.
23. There is exclusive jurisdiction, but only of an appellate nature in work injury disputes, relating to disablement or death of an Employee in the course of work.
24. The Court of Appeal in its decision of 17<sup>th</sup> November 2017, emphasized access to Court, though a right, may be limited by law; Courts may be divested of certain powers through statutes; and jurisdiction can only be exercised as given by the Constitution, Statute, or both.
25. The Court shall therefore decline jurisdiction in this dispute, but not for the reasons stated by the Respondent in the Preliminary Objection. It declines jurisdiction on the ground that the Claimant has not come to Court, under the procedure laid down in the Work Injury Benefits Act. As the Court of Appeal noted, the Act became operational on 2<sup>nd</sup> June 2008 through Gazette Notice No. 60 of 2008. It is the duty of the Court to implement it.

IT IS ORDERED:-

a. The Claim herein is struck out with no order on the costs.

b. *The Claimant to seek remedy under the procedure laid down in the Work Injury Benefits Act.*

Dated and delivered at Mombasa this 9<sup>th</sup> day of February, 2018

James Rika

Judge