



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1124 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 18th July, 2018)

KATHERINE WAIRIMU NDUNGU

(Suing as Administrator of the estate of

FRANCIS NDUNGU GITHINJI).....CLAIMANT

VERSUS

KIRINYGA CONSTRUCTION

COMPANY LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant herein Katherine Wairimu Ndungu filed her Memorandum of Claim on 18/7/2013 in person. The claim by the Claimant is for compensation in accordance with the Work Injury Benefits Act 2007.
2. The Claimant's case is that she is the widow of the late Francis Ndungu Githinji and has obtained letters of administration and has therefore capacity to bring this suit on behalf of the estate.
3. She avers that the late Francis Ndungu was an employee of the Respondent until the 9th July 2007 when he was involved in a road traffic accident. Appendix 2 is a copy of the police abstract.
4. She contends that on 9/7/2007 the Claimant was instructed by Timothy Gatimu a mechanic to go tow a lorry that had broken down. That it was during this time when both were on duty trying to prepare the said lorry registration number KAL 583 K that ran over them killing them instantly.
5. The accident was reported as required by law to District Labour officer who invited the parties for negotiation. The District Labour Officer upon hearing the matter ordered the Respondents to pay as a compensation to the Claimant the amount of Kshs.1,116,000/= (Appendix 3). The Respondent refused and neglected to pay the said amount hence this suit.
6. The Claimant seeks general damages plus damages under the Fatal Accidents and Law Reform Act and costs and interest. The Claimant averred that the deceased was 51 years at the time of his accident and earning a salary of 14,000/= per month and enjoying a productive life. He way survived by a widow, 2 daughters and 2 sons.
7. The Respondent filed a Replying Affidavit to Claim on 10/9/2013 through the firm of M/S Kihara & Company Advocates. The Respondent deponed the facts alleged in the Memorandum of Claim were not true. They alternatively aver that on a no prejudice basis that if an accident occurred (which is denied) then the same was wholly caused and/or substantially contributed by the deceased's own negligence
8. They stated that the negligence was due to the deceased being drunk while driving and failing to control the vehicle and observe road safety rules and also being reckless while on the road. They ask this Court to dismiss this claim with costs.
9. The Respondent called 2 witnesses who gave their oral evidence in Court. RW1 indicated that he is an Insurance Investigator and investigated this accident, which occurred on 9.7.2007. He conducted his investigations and gave a report filed in Court on 3/3/2015. He avers that the investigations confirmed that the accident occurred as a result of the driver being drunk and being involved in a brawl. He

referred to motor vehicle KAL 583K driven by the deceased Francis Ndungu.

10. In cross-examination, he indicated that the vehicle that broke down was not subject to this accident. He avers that he did not investigate the other vehicle. He also indicated that he saw the post mortem report of the deceased and it did not state anything about alcohol in his system.

11. RW2 indicated that he was working for Respondent as spanner boy. He stated that he was with 4 others when they left to go to repair a vehicle that was spoilt in Karatina. He avers that at Karatina. He avers that at Mitini, they stopped to eat something but the driver and mechanic went together and later came back. They started the vehicle but the vehicle landed in ditch.

12. RW2 jumped out with others. He stated that the driver and mechanic started to quarrel with the mechanic arguing that the driver could not drive because he was drunk. They were arguing while holding onto the vehicle steering wheel. The vehicle gave way and ran over both of them.

13. In cross-examination, he said he wrote a statement with Invesco Insurance on 12.9.2008 and never indicated that the driver and mechanic were drunk. He also indicated that he never saw the two enter a bar.

14. The parties field their respective submissions. I have examined all the evidence and submissions of the parties. The issues for determination are as follows:-

1. Whether this claim is properly before this Court and if this Court has jurisdiction to entertain it.

2. Whether the Claimant has established this case as against the Respondent.

3. What remedies if any are available to the parties.

15. On the first issue, the Respondent submitted that his claim was wrongly filed under the Workman Compensation Act Cap 236 and Fatal Accidents and Law Reform Act.

16. The Respondent submitted that this Court lacks jurisdiction to hear and determine claims under the Fatal Accidents Act and the Law Reform Act. I note that this accident occurred on 9.7.2007 when the Workman Compensation Act (now repealed) was in force. Under the said Act, Section 17(2) states:-

“All claims for compensation under this Act unless determined by agreement and any manner (except disputes as to the assessment of disability which fail to be determined under Section 15A arising out of proceedings thereunder shall be determined by the Court whatever may be the amount involved, and the Court may, for that purpose, call upon any Government Officer, or any Independent Medical Practitioner to give evidence, if the Court is of the opinion that such officer or practitioner is by virtue of his expert, knowledge, able to assist the Court”.

17. The Court in this case is a Subordinate Court of 1st or 2nd class.

18. This matter having arisen in July 2007, the correct Court to hear this case would have been the Magistrate's Court. When the WIBA was passed however, the Industrial Court acquired appellate jurisdiction in such work injury cases as provided for under Section 51 of Work Injury Benefits Act (WIBA) which provides that:-

1) Any person aggrieved by a decision of the Director on any matter under this Act, may within sixty days of such decision, lodge an objection with the Director an objection against such decision.

2) The objection shall be in writing in the prescribed form accompanied by particulars containing a concise statement of the circumstances in which the objection is made and the relief or order which the objector claims, or the question which he desires to have determined”.

19. Section 52 of Work Injury Benefits Act (WIBA) on the other hand states as follows:-

1) “The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.

2) An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such decision.”

20. After the death of the Claimant, herein the matter was reported to the Director as envisaged. The Director (the Labour Officer then) who had received the report under the Workman Compensation Act did an assessment under the Act and directed payment of Kshs.1,116,000/= to the deceased's family. The Respondent failed to pay.

21. This matter rightfully was lodged before this Court but as a claim instead of an objection. The form by which the objection was lodged notwithstanding, it is my position that the claim is properly before me save that the same should have been lodged as an objection as envisaged under Section 52 of WIBA (supra).

22. On the 2nd issue, the Respondent had denied an employment relationship with the Claimant. It is however evident that the deceased Claimant was an employee of the Respondent as evidenced from the evidence of RW2. The manner in which the accident occurred is however not very clear. The only eyewitness is RW2 but in his initial statement to the insurance investigator, he never mentioned that the driver was drunk or even went to the bar with the mechanic to drink. The statement is included at page 18 of the report by the insurance investigator.

23. There is no other eye witness who gave evidence in Court. There is no report from the police on the mechanical condition of the accident vehicle. With many questions unanswered, it is my finding that the Claimant deceased died as a result of the accident whilst on duty and therefore the Respondent should compensate him as required by the law.

24. On the issue of the quantum, the matter was already reported to the Labour Officer who after investigation of the matter found the amount payable to be 1,116,000/= and ordered payment in 2007. To date the Respondent have never paid. They never appealed the Labour Officer's finding.

25. I will therefore confirm the amount of damages payable as 1,116,000/= as directed by the Labour Officer with interest at Court rates with effect from 2007 when the finding was made till payment in full. The Respondent will also meet costs of this suit.

Dated and delivered in open Court this 18th day of July, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mungai holding brief Ngigi for Claimant – Present

Njunjuna holding brief for Kihara for Respondent – Present