



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 14 OF 2018**

**SILVANUS NYAMBUTA OSEWE ..... PETITIONER**

**VERSUS**

**NAIROBI CITY WATER & SEWERAGE**

**COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

**Summary of facts**

1. This petition was filed on 26.2.2018. It is brought under Articles 2(5), 10, 19, 20, 21, 22, 23, 26, 28, 29, 43 and 258 of the constitution of Kenya, Articles 4, 5, 14, 15, 16, 17, 18, 19, 22 and 24 of the African Charter and Articles 6, 7 and 11 of the International convention on Economic, Social and Cultural Rights (1966). The petition is supported by the petitioners affidavit dated 26.2.2018.

2. The gist of the petition is that the petitioner was employed as casual labourer by the respondent on 19.2.2015 when his left leg was trapped between wooden bars which were negligently and dangerously erected at her factory situated at Sasumua Dam and treatment plant, Kinangop, resulting to amputation of his left leg above the knee. The petitioner blames the employer for the accident for breaching constitutional, contractual and statutory obligations to provide the petitioner with safe working environment and protective clothing and appliances and to direct a proper system of work contrary to the factories Act, Article 22 and 24 of the African Charter, and contrary to Article 7 of the ICESCR (1966) and contrary to Article 10,26, 28, 29 and 43 of the constitution of Kenya.

3. It is further petitioner's contention that as a result of the said injury, his capacity to work and earn a livelihood for himself and family has been diminished or completely lost and thereby curtailed the petitioner's Social Economic rights which has curtailed or is threatening to curtail the petitioner's right to life and provide for his family contrary to Article 26, 28, 29 and 43 of the constitution of Kenya and the aforesaid treaties and conventions which were ratified by Kenya.

4. Consequently, the petitioner prays for:

- (a) General damages
- (b) Prosthesis to replace the amputated left leg.
- (c) Costs of the petition
- (d) Interests on (a) and (c)
- (e) Any other or further reliefs that the court deems fit to grant.

5. The respondent was served with the petition on 27.2.2018 but she filed nothing in opposition to the same. Thereafter the petitioner request for directions to dispose of the petition by written submission which he filed through his counsel on 11.6.2018.

6. After careful consideration the petition, supporting Affidavit and the written submissions filed by counsel the following issues arose for determination

(a) Whether the petition raises any constitutional question

(b) Whether the petition meets the competence threshold.

(c) Whether the reliefs sought should be granted.

### **Constitutional question**

7. At the onset, I appreciate the provisions of Article 159(1) (d) of the constitution of Kenya which requires that justice shall be administered without undue regard to procedural technicalities. In this case, paragraph 1 and 2 of the petition it is clear that the petition is grounded on a cause of action that arose in a workplace in the context of employment relationship between the parties herein. The petitioner is alleging that the employer acted negligently by exposing him to risky, unsafe and unhealthy working environment and denied him protective gear resulting into a near fatal accident which left him with an amputated left leg above the knee. He then seeks General damages and prosthesis to replace the amputated left leg. The main dispute therefore appears to be whether the employer breached contractual and statutory obligations to provide safe working condition to petitioner.

8. Surely, and with due respect to the petitioner, the facts of the dispute before the court is work injury whose first port of call is the relevant statutes and not the Bill of Rights under the constitution. The relevant statues in that respect would be the work Injury Benefit Act (WIBA) and the Occupational Safety and Health Act (OSHA) which creates obligations on the part of the employer to provide safe and healthy working conditions to the employees, the breach of which attracts legal consequences including compensating employees for injuries, diseases or death resulting from accidents at the work place or unsafe or unhealthy working environment. Such statues have not even been cited in the petition.

9. Having made the foregoing observation, the question that pops up is whether the court should allow such a clear statutory dispute to be elevated to a constitutional dispute. The answer is no. I am bound by the Court of Appeal decision in *Francis Gathungu Vs Kenyatta University [2018]eKLR* where it was held that:

***“In the view of the learned judge the dispute was whether the appellant was entitled to payment of his salary and other benefits during the period of his suspension. It is clear to us, as it was to him, that the dispute is really an industrial one which ought to have been made as a civil claim and not a constitutional matter.”***

The court, then went on to affirm its earlier decision in *Speaker of the National Assembly Vs Karume [1990-1994]EA* that:

***“where there is a clear procedure for redress of any particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed.”***

The Court further appreciates the principle of avoidance established by the Supreme Court in the *Communication Commission of Kenya & Others Vs Royal Media Services and Other [2014] (consolidated)eKLR* that a court should not determine a constitutional issues when the matter before it may properly be decided on another basis. As already observed herein above, the matter before me now can properly be adjudicated under WIBA as a civil claim for compensation of damages. I therefore decline to determine it under this petition.

### **Competence threshold.**

10. In view of the finding that the dispute ought to be dealt with as a civil claim and not as a constitutional question, it is no longer necessary for me to deal with the question whether the petition meets the competence threshold.

### **Reliefs**

11. For the same reason stated above, I am not entertaining the reliefs sought by the petitioner. Such reliefs should be sought through a civil claim under the provisions of WIBA and/or common law. The question that will henceforth trouble the petitioner is whether his claim is caught up by the time bar under any law. I say so because the cause of action arose on 19.2.2015, more than 3 years before filing this petition. I can therefore only wish him all the best for now as he embarks on the next process under the said statute.

### **Disposition**

12. For the reasons that the petition does not raise a pure constitutional question, and that the dispute can properly be determined through other procedures provided by the statute law, the petition dated 26.2.2018 is declined and instead I refer this dispute to the Director appointed under WIBA to resolve.

**Dated, Signed and Delivered in Open Court at Nairobi this 28th day of September, 2018**

**ONESMUS N. MAKAU**