Galaxy Paints Ltd v Director of Occupational Safety and Health Services; Karanja (Interested Party) (Employment and Labour Relations Appeal E70 of 2025) [2025] KEELRC 2772 (KLR) (13 October 2025) (Judgment)

Neutral citation: [2025] KEELRC 2772 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E70 OF 2025

NJ ABUODHA, J

OCTOBER 13, 2025

BETWEEN

GALAXY PAINTS LTD ..... APPELLANT

AND

DIRECTOR OF OCCUPATIONAL SAFETY AND HEALTH SERVICES ..... RESPONDENT

AND

GRACE KARANJA ..... INTERESTED PARTY

(Being an appeal arising from the decision of the Director, Occupational Safety and Health Services (DOSHS) Under Section 52(1) of the Work Injury Benefits Act)

JUDGMENT

1. Through the Amended Memorandum of Appeal dated 8th March 2025, the Appellant appeals against the whole ruling of the Director of Occupational Safety and Health Services.

2. The Appeal was based on the grounds that:

    i. The Director erred in law in failing to give any consideration to the Medical Report by Dr. Adegu dated 27th December 2024 which assessed the Appellant's permanent incapacity at 0% despite the parties having expressly consented to the second medical examination.

    ii. The Director erred in law when he based his decision to reject the second medical report on section 25 of the WIBA Act which was in total contravention of the rights of the parties under Articles 10, 41(1), 47, 48, 50(1) and 159 of *the Constitution* of Kenya.

iii. The Director erred in law when he based his decision on the medical report done by DOSH which awarded the Claimant 17% degree of incapacitation which was not supported by any documentation or report.

iv. The Director erred in law by basing his decision on the 17% incapacitation which was in contravention of the first schedule of the Act.

v. The Director erred in law by awarding the Claimant compensation which was manifestly high and unsubstantiated in the circumstances and contrary to the principles of compensation.

3. The Appellant prayed that the Appeal be allowed with costs, the assessment by the Director County Occupational Safety and Health Office done on 23rd January 2025 be reviewed in light of the huge disparity and a declaration that the application of section 25 of the WIBA Act by the Director was in contravention to both the Claimant and the Respondent's rights to fair administrative action, access to justice and fair hearing as espoused under Article 47 and Article 159 of *the Constitution*.

4. The Respondent filed Replying Affidavit to this Appeal sworn on 31st July,2025 by David Ondieki the Assistant Director DOSH who averred as follows: -

i. On 20/11/2024, the 1st Respondent received a notification of an occupational accident from the Appellant vide the prescribed form, accident notification form, ML/DOSH FORM 1 with regards to an occupational accident that had occurred on 23/05/2024 involving the Interested Party who was employed as an Administrative Manager by the Appellant.

ii. On 22/11/2024, the Director of Work Injury Benefits issued a demand for payment amounting to Kenya Shillings 1,240,435.00 compensation based on the medical report completed on Part II of the ML/DOSH FORM 1 where the Interested Party had been awarded 5% total disablement by Dr. W. Mwaura on 10/07/2024.

iii. On 13/01/2025, the 1st Respondent received an objection to the award of Kenya Shillings 1,240,435.00. The objection was lodged in the prescribed form DOSH/WIBA/12 by Mr. Dennis Githinji.

iv. The Objection by Mr. Dennis Githinji, on behalf of Intra Africa Assurance Limited was successful and the Interested Party was scheduled to appear before the Work Injury Evaluation Clinic constituted of doctors empaneled by the 1st Respondent. A letter conveying the invitation dated 16/01/2025, Ref: 8 ML/DOSHS/WIBA/NRB/03029/2024 was sent to Mr. Dennis Githinji, and copied to the Appellant and the Interested Party.

v. On 23/01/2025, after assessing the Interested Party, the work injury evaluation panel at the Directorate requested further medical investigation. The Work Injury Evaluation Clinic panel put a request, Ref: ML/DOSH/MED/VOL.1 for lumbosacral and right shoulder MRI scans of the Interested Party.

vi. On 28/01/2025, the Interested Party again appeared before the Work Injury Evaluation Clinic panel and presented reports of the medical investigations (MRI scans of the right shoulder and lumbar spine) from German Medical Center, located at KMA Centre, Upper Hill in Nairobi.

vii. That after the review of the medical investigation reports, the Work Injury Evaluation Clinic panel awarded 17% permanent disablement as indicated in a medical report dated 3/02/2025.

viii. On 12/02/2025 on the basis of the medical report by the Work Injury Evaluation Clinic panel, the "1st Respondent awarded the Interested Party compensation of Kenya Shillings

4,577,352.00 vide a "demand letter ML/DOSH/WIBA/FORM 4, Claim Reference No. WIBA/NRB/03029/2024 which was addressed to the Appellant.

ix. The appellant submitted to the Directorate of Occupational Safety and Health Services a medical report dated 27/12/2024 signed Dr. William Adegu without having sought approval from the Director for Interested Party to undergo such examination, as required by Section 25 (1) of the Work Injury Benefit Act, 2007.

x. The Appellant has no right to file this matter in court on the basis of the medical report obtained against the provisions of the law and even proceed to claim that his rights have been infringed having contravened the law in the first place.

xi. The1st Respondent denies having acted in contravention of Section 25 of the *Work Injury Benefits Act*, 2007 and Articles 10, 41(1), 47, 48, 50(1) and 159 of *the Constitution* of Kenya for not considering the Medical Report by Dr. William Adegu.

5. The Appeal was disposed of by written submissions.

Appellant's Submissions

6. The Appellant's Advocates Danlex Partners LLP filed written submissions dated 4th July 2025.

7. On the issue whether the Director erred in law by disregarding the second medical report by Dr. Adegu dated 27th December 2024, counsel submitted that the Appellant was dissatisfied with the initial medical assessment which placed the Interested Party's permanent disability at 5% hence invoked section 25(1) of the WIBA and directed the Interested Party to undergo a second medical examination.

8. Counsel submitted that the examination was conducted by Dr. Adegu on 27th December 2024, who assessed permanent disability at 0% and that the Interested Party has never denied having undergone the re-examination.

9. Counsel relied on Section 25(1) of WIBA to submit that it was a settled principle of law that parties are bound by their own consent which in this case, the Interested Party willingly availed herself for the second examination and the process was carried out with the knowledge and agreement of both parties.

10. Counsel submitted that the re-examination was not only consistent with section 25(1) of the Act but consensual effort to reassess the award made by the Respondent.

11. Counsel further submitted that by consenting to the second examination constituted to a post-award consent to resolve the dispute through an alternative legal mechanism, akin to post-judgment compromise. Counsel relied on article 50 and 159(2) of *the Constitution* on the right to fair hearing and promotion of ADR mechanisms without undue regard to procedural technicalities.

12. Counsel submitted that once the parties adopted a consensual method to resolve their disagreement, the Respondent's role was limited to adopting the outcome, especially where there was no contestation of the process or result.

13. Counsel relied on the case of Republic v Nyandarua District Land Disputes Tribunal &2 others (2005) KEHC 1221(KLR) and IKenga K.E Oraegbunam's paper 'THE JURISPRUDENCE OF ADVERSARIAL JUSTICE' to submit that in an adversarial system, the judge is a neutral and passive and must remain uninvolved in the presentation of arguments to avoid reaching a premature decision and the two adversarial parties have full control over proceedings.

14. Counsel submitted that having voluntarily undergone the re-examination, it followed that the parties intended the results to be acted upon either by confirming or varying the initial award.

15. Counsel relied on the case of Hirani V Kassam (1952) 19 E.A.CA. 131 to submit that prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them.

16. Counsel submitted that the second medical examination was not only lawful and procedurally sound but was also a consensual post-award process intended to guide the fair resolution of the dispute and that the Respondent's disregard of this mutually agreed outcome was, therefore, erroneous in law and in fact.

17. On the issue whether the Director's reliance on section 25 of the WIBA violated the Appellant's constitutional rights under Article 47, 48 and 50 (1), counsel relied on Article on right to fair administrative action, Article 50 on fair hearing and Article 48 on right to justice to all persons.

18. Counsel submitted that despite these provisions the Respondent decided to insert itself into the dispute and take a position as a disputant, impose itself on the parties and disregard their agreed mode of settlement while ignoring cogent evidence. That those actions were inefficient, unreasonable procedurally unfair, curtailed the right to fair determination and impeded access to justice.

19. Counsel submitted that the law was very clear with regard to the procedure to be followed in work injury claims and relied on Section 22 of WIBA.

20. Counsel relied the case of Maridadi Flowers Limited v Director of Occupational Safety and Health Service:Khisa(interested party) (Appeal 29 of 2018)(2021) on Section 2 of the *Employment Act* to submit that the employer is also required to produce particulars, medical reports and other documents concerning the accidents.

21. Counsel submitted that the Director relied on section 25 of WIBA to commission a third medical examination, which was then adopted as the basis for assessing the interested party's permanent incapacity at 17% and in doing so the Director failed to give any consideration to the second medical report which had been obtained through mutual consent between the parties and assessed permanent incapacity at 0%.

22. Counsel submitted that while the provision empowers the Director to require an employee to undergo a medical examination, it does not oust the right of parties to mutually agree to a second medical opinion, especially where there is an express consent and the purposes is to ensure fairness and accuracy in assessment.

23. Counsel submitted that the Director's interpretation and application of the provision in a rigid and exclusionary manner undermined the broader constitutional principles of fair administrative action and participatory decision-making.

24. Counsel submitted that, by ignoring a medical report that had been procured by mutual agreement, and without providing adequate reasons for its rejection, the Director not only denied the Appellant a fair opportunity to be heard but also frustrated access to an impartial process of dispute resolution.

25. Counsel further submitted that the Director's action fell short of the principles under Article 10 and Article 159 of *the Constitution* which required adherence to the rule of law, equity and justice and call for the resolution of disputes without undue regard to procedural technicalities.

26. Counsel submitted that the Director's reliance on section 25(1) in the manner he did was unconstitutional, irrational and inconsistent with the objectives of the WIBA framework when read in harmony with *the Constitution*.

27. On the issue on whether the award of 17% permanent incapacity was unsubstantiated and contrary to the first schedule of the WIBA, counsel submitted that the Interested Party was reported to have sustained blunt injuries to the knee and lower back. The injuries were later assessed by Dr. Adegu, a qualified medical practitioner jointly agreed upon by the parties, who confirmed in his medical report that the injuries were soft tissue in nature and that the Interested Party had fully recovered. He expressly concluded that the injuries did not result in any harm of permanent incapacitation.

28. Counsel submitted that the First schedule to the WIBA provided a comprehensive guide for assessing permanent incapacity based on the specific type and severity of injury, however, it does not make provision for compensation in cases of soft tissue injuries unless they result in long-term disability, which must be clinically demonstrated. That in this case, the Interested Party's injuries were soft tissue in nature and no structural or functional impairment was evidenced.

29. Counsel further submitted that blunt trauma to the knee and lower back, absent any fractures, ligament tears, or dislocations did not meet the threshold of permanent incapacity as envisaged under the first schedule and that the Director's attempt to quantify the injury at 17% permanent incapacity was therefore baseless, arbitrary and contrary to the statutory framework.

30. Counsel relied on section 30(3) of the Act to submit that where the degree of permanent disablement is not provided in the schedules, it should be assessed by a medical practitioner, as was done herein and Doctors Mwaura, Kowino, Rono, Kimani and Adegu, in their different reports all confirmed that the Interested Party had satisfactorily healed.

31. Counsel relied on section 2 of the Act to define and submit that permanent disability is a permanent injury or disfigurement. Counsel further relied on the case of Momanyi v Pressmaster Africa ltd (Appeal E091 of 2021) [2022] KEELRC13423 (KLR) to submit that the degree of permanent incapacity is to be determined by reference to the 1st schedule to the Act.

32. Counsel submitted that the Director's reliance on the third medical report which gave a figure of 17% permanent incapacity for injuries that were conclusively soft tissue and fully healed, was legally unfounded and that the report ignored the nature of the injuries, contravened the first schedule of WIBA and resulted in an inflated and unmerited award.

33. Counsel submitted that the Appeal was merited and the appellant had proved the same to the required standards and therefore implores the Honourable Court to find in the Appellants favour and allow the appeal with costs to the Appellant.

Interested Party's Submisssions

34. The Interested Party's Advocates Makau Mutua Advocates filed her submissions dated 24th July, 2025.

35. On the issue of whether 2nd Medical opinion by Dr. Adegu William Jacob dated 27th December,2024 was legal and or valid counsel submitted that the report was illegal, unlawful and invalid. That the Appellant used deceit and coercion to convince the Interested Party into going for a second medical examination that was unlawful.

36. Counsel submitted that the law was very clear on how to object to awards by DOSH. That the right and or lawful procedure was to lodge an objection within 60 days of receiving the DOSH R4 via a DOSH 12 which gives the reason for the objection and then seek DOSH'S permission to conduct a second medical opinion. That at this point the DOSH may give approval to conduct the 2nd Medical examination or opt to refer one to their WIEC.

37. Counsel submitted that the crafters of the WIBA were deliberate in putting DOSH at the centre of work injuries because if left unchecked employers would underpay or not pay through questionable 2nd Medical opinions ordered by their insurers. That it would be unfair and unjust for an employee to be injured in the course of employment and the employer or its insurer be the one to determine what award the employee gets.

38. Counsel submitted that there was no consensus and consent to conduct the 2nd Medical report and all arguments about settling a work injury through ADR mechanisms were moot and absurd. That one cannot conduct an activity that is illegal under law and then start invoking ADR and Article 159(2). That the Appellant forgot about the last bit of section 25(1) of the WIBA Act that a second medical examination can only be done by employer with approval of the Director. This was not done hence illegal.

39. On the issue of whether WIEC was properly constituted in order to ascertain the nature and extent of injuries counsel submitted that the Director did not misdirect himself on the nature of the injuries. That the WIEC report shows that a medical board of three medical doctors were constituted to examine the Interested Party. That such professionals with experience on work injuries and could not be said to have misdirected themselves on the nature and extent of injuries.

40. On the issue of whether the WIEC gave reasons of enhancement of the percentage of permanent incapacity from 5% to 17% and whether the Director properly applied the provisions of the first schedule of WIBA, counsel submitted that WIEC gave reasons for enhancing the percentage of permanent incapacity to 17%.

41. Counsel further submitted that the Director applied provisions of the first schedule of WIBA properly as the ankylosis in optimum position of the shoulder is awarded at 35% yet in this case the interested party had reduction of shoulder movements by 50% which is half the optimum percentage hence the Director rightfully applied the schedule.

42. On the issue of whether the Interested Party should be paid Director's award of Kshs 4,577,352/ = counsel submitted that the Interested Party should be paid the same award as granted by the Director which stemmed from WIEC that was duly and competently constituted. That the results were communicated to the Appellant hence this appeal.

43. Counsel relied on article 48 of *the Constitution* on the right to justice. Counsel also relied on section 107 of the *Evidence Act* on burden of proof that the Appellant had the burden to prove that the Director erred on nature of injuries or did not consider provisions of first schedule of the WIBA.

44. Counsel also relied on WIBA Act section 10 on entitlement to compensation, section 25 on medical examination of the injured employee, section 51 on objections and appeals against decisions of the Director and section 52 on the Director's reply and appeal to this court. That proper procedure was followed in this case as the Appellant objected to the Director's decision, the Director considered the objection and ordered for a WIEC, the decision of the WIEC was communicated to the Appellant who instead of considering the decision chose to appeal the decision.

45. Counsel relied on the case of Mombasa Miscellaneous ELRC Cause No. E045 of 2021 Stephen Wangusi Nyongesa v Dot Com Bakery Limited on the issue of illegality and unlawfulness of a 2nd medical examination which was made to disenfranchise the Interested Party.

46. Counsel relied on the case of Nairobi ELRC Appeal No E012 of 2020 Signon Group v Linus Onyonka on the medical assessment by the WIEC.

Determination

47. The court has considered the Appeal, the record of Appeal and the submissions by the parties and this being an Appeal from the DOSH which is more of an administrative action the court will proceed to scrutinize the decision of the DOSH to find if the Director's action were within the law or not. The main issue herein is whether this Appeal is merited.

48. In this case, the DOSH awarded Interested Party Kshs 4,577,352.00/= relying on WIEC report of 17% permanent disablement dated 3rd February,2025. A demand of this amount was made to the Appellant on 12th February,2025.

49. The court notes that initially the Interested Party was awarded Kshs 1,420,435/= demanded on 22nd November,2024 based on 5% permanent disability via Dr. WMwaura medical examination report dated 10th July,2024 which the Appellant objected to on 2nd January,2025 legally within 60 days via section 51 of the Act and the Director responded on 16th February,2025 via section 52 directed that the Interested Party be examined by Work Injury Evaluation Committee(herein referred as WIEC) who constituted three medical doctors. The WIEC on 12th February,2025 enhanced the degree of permanent disability from 5% to 17% because of the reduced right shoulder movements by 50% as a result of rotator cuff tendon tears due to the accident.

50. The court notes that the first schedule prescribes 35% for 100% reduced movements. This means that this was like half of the percentage which was justified since the movements were reduced by 50%. The Appellant produced its second medical report undertaken by Dr. Adegu dated 27th December,2024 which indicated that the Interested Party injuries were 0% permanent disability. The Appellant alleged that the Interested Party attended to the examination willing and it was a post award arrangement in order to resolve the dispute through ADR mechanisms.

51. The Appellant alleged violation of its right to fair hearing under Article 50, right to justice under Article 48 and right to have the dispute determined without undue regard to procedural technicalities while invoking ADR mechanisms under Article 159 (2) of *the Constitution*.

52. The Appellant alleged that section 25(1) of the WIBA Act should not be applied rigidly to deny consenting parties from settling the issue amicably. Section 25(1) of the WIBA provides as follows: -

> An employee who claims compensation or to whom compensation has been paid or is payable, shall when required by the Director or the employer as the case may be, after reasonable notice, submit himself at the time and place mentioned in the notice to an examination by the medical practitioner designated by the Director or the employer with the approval of the Director.

53. This court on the other hand does not agree with the Appellant's assertion since the drafters of the WIBA must have foreseen a scenario where employers would come up with their medical reports or those of their insurers which would be detrimental to the injured employees.

54. This is the reason the Act under section 25(1) requires such an employer to only undertake such a second medical examination with approval with the Director. In this case no such approval was sought by the Appellant.

55. In the case of Stephen Wangusi Nyongesa v Dot.Com Bakery Limited [2022] KEELRC 224 (KLR) court held as follows: -

> Any process outside of the statute that is shown to have been undertaken, either by the Respondent or its agents and/or insurers to the disadvantage of the Applicant regarding the assessment and award made by the Director of Occupational Safety and Health Services was an outright illegality, which this Court cannot sanction.

56. The court notes that since the Appellant was already served with the demand, the best they could have done would be to appeal and seek approval of the Director to do a second medical examination on the Interested Party. The Appellant did the examination without approval of the Director then appealed the outcome by the Director. This meant it used the said report to strengthen its Appeal.

57. In addition, the Director through WIEC constituted three medical doctors to do a further medical examination. The WIEC consisted of persons who were experienced professionals in work injury claims. The same committee requested for lumbosacral & right shoulder MRI Scans which were obtained from German Medical Center which were used by the three doctors to assess the nature and extent of injuries. There was no way an opinion of one doctor hired by the employer's insurer could outweigh opinion of three independent doctors constituted by WIEC.

58. The Appellant's assertions that the WIEC report was not supported by any documents is not true since the scans formed part of documents and the WIEC explained the reason they gave the Interested Party 17% permanent disability due to the reduced movements of the right shoulder.

59. The Director therefore, based its award on the said medical examination of 17%. In addition, after the Appellant was served with the demand for payment of the reassessed amount dated 12th February,2025 they were free to object the same as provided under section 51 of the WIBA. Section 51 of the *Work Injury Benefits Act* provides: -

> "(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 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."

38. In the above case of Stephen Wangusi the court held that:

> The Respondent did not dispute the Director's assessment and award, either as by law provided or at all. Indeed the Respondent passed on the assessed claim to its insurers for settlement.
>
> 7. In the Respondent's words,
>
> > "The Insurance opted to conduct an independent assessment and directed that the Claimant undergo a Second medical evaluation by a different doctor..."
>
> 8. The Respondent did not tell the Court in which law this kind of procedure is domiciled...

39. As it stands the DOSH demand of 12th February, 2025 has not being objected to by the Appellant as it chose to appeal to this court.

40. The Appellant has not adequately shown why the DOSH award should be set aside by this court since the second medical report was unprocedurally procured.

41. In the upshot the Appeal is found unmerited and is hereby dismissed with costs.

42. It is so ordered.

DATED AT NAIROBI THIS 13TH DAY OF OCTOBER 2025

DELIVERED VIRTUALLY THIS 13TH DAY OF OCTOBER 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION