REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELRC PETITION NO. E090 OF 2024

HARRY STEPHEN ARUNDA……..PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL……1ST RESPONDENT

KENYA NATIONAL HUMAN RIGHTS COMMISSION…2ND RESPONDENT

CENTRAL ORGANISATION OF TRADE UNIONS……3RD RESPONDENT

AND

LAW SOCIETY OF KENYA……. INTERESTED PARTY

JUDGMENT

The Petitioner Harry Stephen Arunda filed this petition against the Respondents seeking the following reliefs: -

1. A declaration that personal injury entails a question of law/constitution thus cannot be decided by the Director of injury
2. A declaration that the Director of Work Injury Benefits under WIBA is an administrative authority with quasi-judicial function.
3. A declaration that section 10(3) of the WIBA entails question /issues of negligence under the law of torts which therefore cannot be heard and determined by a director of Injury Benefits with no

training in law and statutory qualification to practice law thus violating the parties right to fair trial under the Constitution.

4. A declaration that the hearing procedure under WIBA does not conform to the Constitutional principles of natural justice set out in Articles 25(c), 27 (1), 47, 48 and 50(1).
5. A declaration that the original jurisdiction of the Director of Work Injury Benefits under WIBA is unconstitutional for contravention of Article 23 (2) and Article 169(1) of the Constitution
6. A declaration that section 10 (3), 21, 22(1)(5), 23(1), 24 (2), 25(1), of WIBA contravene Article 25(c), 47, 50 (1) and 50 (2)(i) of the Constitution.
7. A declaration that DOSH 1 and DOSH 4 forms under WIBA are unconstitutional.
8. A declaration that section 10 (3) of WIBA contravenes Articles 10 (2), 47 and 50 (1) of the Constitution.
9. Cost of the Petition to be on each party.

The Law Society of Kenya (LSK) joined the suit as an interested party upon application

Legal Foundation

The petition is anchored on Articles 2 (1) (4); 10(1); 20(1)(4); 21(1); 22(1); 23(1)(2)(3); 25(c); 27(1)(2); 27(1)(2); 28; 47(1); 50(1); 159(2)(a)(b)(c) and (3); 162(2)(e) and 165(3)(d)(1) of the constitution of Kenya 2010.

The Petitioner relies on the Supreme Court decision in the case of **Kenya Tea Owners Association and 2 others versus The National Social Security Fund Board of Trustees and 13 others JC Petition E004 of 2023 (as consolidated with No. E002 OF 202**3 in stating that ELRC, has the jurisdiction to interpret the Constitution and determine legality of statutes as the Supreme Court stated: -

“For avoidance of doubt, and so as to stop the pendulum of jurisdictional re-jigging that has characterized this case from the beginning, we hereby restate that the ELRC has jurisdiction to determine the Constitutional validly of a statute in matters of employment and labour” [paragraph 87]

Facts of the petition

The Petitioner invokes Articles 3(1), 22 (1), 258 (1) and 259 (1) to lay the locus standi to bring this suit to have sections 10(3), 21, 22(1)(5), 23(1), 24(2) and 25(1) of the Work Injuries Benefits Act, Cap 236 be declared unconstitutional for contravening Articles 25©, 47, 50(1) and 50(2)(i) of the Constitution

The petitioner relies on the Indian Case of **SP Gupta v President of India & Ors Air (1981) SC 149** per Justice Bhagwati on Public Interest Litigation thus: ‘’We would therefore, hold that any member of the public having sufficient interest can maintain an action for judicial interest for public injury arising from breach of duty or from violation of some provision of the Constitution or the law and seek enforcement for such public duty.’’

Work Injury Benefits Act Cap 236 was assented on 22nd October 2007 and commenced operation on the 20th December 2007 before the promulgation of the Constitution 2010.

The preambular objective of the Work Injury Benefits Act, 2007, hereinafter referred to as WIBA, is to provide compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes.

The WIBA has established the office of the Director of Work Injury Benefits with quasi-judicial authority to award compensation for employees who are injured in the course of employment.

It is a fundamental principle of fairness that all decisions affecting the rights of individuals must conform to the principles of natural justice and the person(s) who is bound to be adversely affected by the decision must be afforded every opportunity to be heard fairly.

Pursuant to section 2 of the Evidence Act Cap 80 Laws of Kenya the rigours of the evidence law are excluded from any quasi-judicial proceedings. Therefore, it is of paramount importance that decisions of any quasi-judicial body or office must be capsulated with the rules of natural justice to boot.

Injury is defined under section 2 of WIBA to mean a personal injury and includes contracting of a disease. The meaning conforms to definition of ‘bodily injury’ to include injury to health under Occupational Safety and Health Act 2007(section2)

Injury of an employee during employment form an integral part of the Bill of Rights of which Article 20(4) of the Constitution thus demands that in interpreting the Bill of Rights, a court, tribunal or other authority shall promote-the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and spirit, purport and object of the Bill of Rights.

The WIBA has established the office of the Director of Occupational Safety and Health under Cap 253(section 2), hereinafter referred to as the director, who is the decision maker whenever or in the event of an employee accident or that an employee has contracted a disease in the workplace or in the course of employment.

Section 7 of WIBA dictates that every employer must obtain and maintain an insurance policy, with an insurer approved by the Minister in respect of any liability that the employer may incur under WIBA to any of its employees, and penalty for such contravention is a fine not exceeding Kes. 100,000 or an imprisonment term not exceeding three months or both.

The Director is also the inspector, whom every employer register to by furnishing him with copies of particulars of their business, and any other particulars as the Director may require (section 53 WIBA).

A right to compensate an injured employee is created under section 10 of WIBA, however such right to compensation is not absolute by the fact that a form/degree of liability is created since it is subjected to section 10(3) of the Act whereby an employee is entitled to compensation if an accident, not resulting in serious disablement or death, is caused by the deliberate and willful misconduct of the employee

Section 10(1) of WIBA creates a right to compensation of an employee who is involved in accident that results in his employee(s) disablement or death. The Director of Injury Benefits must be clothed with quasi-judicial authority with obligation to adopt the judicial approach and to comply with the basic requirement of justice in determining the degree of the injury and amount of compensation of the injured employee.

Section 10(3) of WIBA states that an employee is not entitled to compensation if an accident, not resulting in serious disablement or death is caused by deliberate and willful misconduct of the employee.

Section 10 (3) of the Act creates a quasi-judicial adversarial forum that pits an employee injured in the cause of employment/workplace and the employer against each other in determining the following questions/issues

i. Degree of employee's disablement;
ii. Causation (question of negligence) and scope of liability;
iii. Burden and standard of proof
iv. Whether the employee is injured in the course of employment
v. Whether the employee's injury has resulted in serious disablement
vi. Whether the cause of the employee's accident was deliberate or out of willful misconduct

Decision on the degree of liability between the employer and employee would demand some level of evidence on the balance of probability yet, parties are excluded from relying on the Evidence Act Cap 80 Laws of Kenya. Moreover, the director should invoke the principles of natural justice and observe the same in determining the dispute of injury between the employees and the employer.

When the report or notice is issued, the employer fills the DOSH 1 on behalf of the employee pursuant to section 10(1)(3)(6), 21 and 22(1) of the WIBA which form is sent to the Director of Work Injury Benefits.

The moment a liability manifests, the natural justice principle of right to be heard and doctrine of bias spring under Articles 25 (c), 27 (1), 47 and 50(1) of the Constitution hence the injured employee must appear before a

director who is impartial, independent, reasonable, and must ensure that justice is not only done but seen to be done.

Section 10 (4) of WIBA was declared unconstitutional by the Court of Appeal at Nairobi in **Hon Attorney General versus Law Society of Kenya & Another Civil Appeal No. 133 of 2011** by holding that it contravenes Article 47 since it is arbitrary in terms.

Section 10(6) of WIBA defines an injury of serious disablement as the injury suffered by the employee is a degree of permanent disablement of 40 % or more.

Under section 13 of WIBA, the director may refuse to grant compensation to an employee if the employee at any time represented information to the employer, knowing the information to be false, that he was not suffering from or had not previously suffered from serious injury or occupational disease or any other serious disease, and such an accident or occupational or any other serious disease, and such an accident or occupational disease was caused by or the death resulted from or the disablement resulted from or was aggravated by, such injury or disease; or in the opinion of the Director, the death was caused, or the disablement was caused, prolonged or aggravated by the unreasonable refusal or willful neglect of the employee to submit to medical aid in respect of an injury or disease, whether caused by the accident or existing before the accident.

Section 21 of WIBA states that written or verbal notice of any accident provided for in section 22 which occurs during employment shall be given by or on behalf of the employee concerned to the employer and a copy of the written notice or a notice of the verbal notice shall be sent to the

Director within twenty-four hours of its occurrence in the case of a fatal accident

Section 22 of WIBA states that;

> (1) **an employer shall report an accident to the Director in the prescribed manner within seven days after having received notice of an accident or having learned that an employee has been injured in an accident.**
>
> **(2) For the purposes of this section, an accident includes any injury reported by an employee, to his employer, if the employee when reporting the injury, alleges that it arose out of and in the course of his employment and irrespective of the fact that the employer is of the opinion that the alleged accident did not so arise out of and in the course of employment.**
>
> **(3) An employer shall, at the request of an employee or the dependant of an employee, furnish the employee, or dependant with a copy of the notice of the accident furnished by the employer to the Director in respect of a claim for compensation by such employee or dependant.**
>
> **(4) An employer who fails to comply with subsection (1) commits an offence. (5) The provisions of this section do not prevent an employee from reporting an occupational accident or disease to the Director at any stage**.

Section 23 of WIBA gives the Director power after having received a notice of an accident to make necessary inquiries, which shall be conducted

concurrently with any other investigations, before making a decision upon any claim or liability.

Section 24 of WIBA states that an employee who is injured in an accident or his dependant, shall, when reporting the accident or thereafter at the request of the employer or Director, furnish such information and documents as may be prescribed or as the employer or Director may request.

Section 24 (2) states that an employer shall, within seven days after having received a claim, medical report or other document or information concerning such claim, submit the claim, report, document or information to the Director.

Section 34(1) of WIBA provides if an employee dies as a result of an injury caused by an accident, compensation shall be paid to the dependants of the employee in accordance with the provisions of the Third Schedule, subject to the maximum and minimum amount determined by the Minister after consultation with the Council.

Violations

Personal Injury of the employee at work affects his rights and pose a negative social and economic ramification not only to the employee, but also to his or her family and the society at large hence decisions in disputes therefrom must observe and apply the principles of natural justice

The two principles of natural justice are enshrined under Article 25 (c), 27 (1) (2), 47,48, and 50(1) of the Constitution.

Determination of whether an accident has or has not resulted in serious disablement under and / or is caused by deliberate and willful misconduct of the injured employee as stipulated under section 10(3) of WIBA must be through fair hearing void of bias, partiality and lopsided forum under Article 25 (c), 27 (1), 47, and 50 (1) of the Constitution.

Under section 10 (3) and 10 (6) of WIBA, an employee's injury that has resulted in serious disablement or death but is caused by the deliberate and willful misconduct of the employee is entitled to compensation contravene Article 25 (c), 47 and 50 (1) of the Constitution since it is lopsided against the employer by the fact that the employer is bound to compensate the employee when the accident has resulted in serious disablement notwithstanding whether it was caused deliberately or by willful act of the employee.

Sections 10 (1) and (3) of the WIBA raises questions of negligence under the law of torts which is a judicial question thus cannot be heard and determined by a Director who has no training and statutory qualifications in laws thus contravening the parties right to fair hearing under Article 50 of the Constitution

DOSH 1 which is a form filled by the employer on behalf of the injured employee is unconstitutional since it does not observe or regard the principles of natural justice and does not give the averments of the circumstances of injury to determine whether it was caused out of willful act of employee or deliberately. Further it stifles the right of appeal by the aggrieved person.

The condition under section 21 of WIBA which requires that written or verbal notice of any accident provided for in section 22 which occurs during employment shall be given by or on behalf of the employee concerned to the employer and a copy of the written notice or a notice of the verbal notice shall be sent to the Director within twenty-four hours of its occurrence in the case of a fatal accident raises a reasonable apprehension of bias.

Section 21 of WIBA not only creates a reasonable apprehension of bias to the detriment of the injured employee but also infringes on his right to a fair hearing and tends to create fertile ground for lopsided and partial decision. The employer is likely to unfairly influence the director taking into account human probabilities and ordinary course of human conduct.

Requirement under section 22(1) of the WIBA that an employer shall report an accident to the Director in the prescribed manner within seven days after having received notice of an accident or having learned that an employee has been injured in an accident not only contravenes principles of natural justice, but is also tantamount to giving self-inflicting evidence contrary to Article 50 (2)(1) of the Constitution.

Section 22 (5) of the WIBA is unconstitutional as it is discriminatory contrary to Article 27 (1) & (2) inter alia since it does not give the injured employee who wants to report injury directly to the Director a clear procedure, through forms, thus subjecting the injured employee to difficulties and hurdles of being sent back to the employer for DOSH 1 form.

Both sections 21 and 22 of the WIBA require that a notice is first issued to the employer who then report to the Director. The procedure of issuing a

notice to employer who has an interest in the outcome of the case raises a reasonable apprehension of bias and undue influence on the outcome of the case, thus offends the principle of natural justice under Article 25 (c), 47, and 50(1) of the Constitution

In ensuring that justice is not only done but also seen to be done a judicial or quasi-judicial body must ensure that it manifests fairness, impartiality and independence in its decision-making process.

Jurisdiction of the Director

The Director of Work Injury Benefits under the WIBA is not a tribunal or a court of law, but a 'body' under Article 50 of the Constitution and therefore is not clothed with requisite features of a quasi-judicial authority to hear and determine matters of negligence and liability under civil wrong.

Decision of the Director of Work Injury Benefits, being an administrator with quasi-judicial authority cannot be subject to appeal, since the Director does not form part of the subordinate courts under the judicial system. This is in contravention of Article 23 (2) of the Constitution since parliament confer original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights, and for reason that Director of Work Injury Benefits does not fall within the meaning stipulated under Article 169 (1) (d) of the Constitution.

Resjudicata

The decision in the case of **Attorney General v Law Society of Kenya & Central Organization of Trade Unions Civil Appeal No. 1333 of 2011** handed down on 17th November 2017 upheld the Constitutionality of sections 4, 7(1) (2), 16, 21(1), 23 (1), 25(1)(3), 52(1) and 58(2) of the Work Injury Benefits Act and declared section 10 (4) of Work Injury Benefits Act to be inconsistent with the current constitution. The constitutionality of the forementioned sections of WIBA were upheld by the Supreme Court in **Petition No. 4 of 2019 Law Society of Kenya v Attorney General & Central Organization of Trade Unions.**

In the Civil Appeal No. 133 of 2011 the Court of Appeal in response to the unconstitutionality of section 51 of the WIBA on the right of appeal observed that

> 'The learned judge himself observed that the drafting of the Act was not elegant. We ourselves think that, in its context, this is a pure drafting error and although it may convey the meaning the learned judge assigned to it, applying legislative intent, we cannot think in an adversarial litigation only one party would have the right of appeal. We, however, do not think the subsection is therefore inconsistent with the constitution. It is an error that can be amended by Parliament'.

The fact that it is more than five years since the said judgment yet Parliament has not amended the mentioned section 51 of the WIBA shows that the Parliament intended it to be so.

In Petition No. 4 of the 2019 mentioned hereinabove, contention on section 25(1) and (3) of the WIBA was that it is discriminatory on the employee

thus it contravenes Article 27 of the Constitution. ***However, the current Petition herein contends on the very sections but that it violates the principles of natural justice as enshrined under Article 25 (c), 47, 48, 50 (1) of the Constitution.***

Replying Affidavit

The Deputy Director of Occupational Safety and Health (DOSH) deposed to an affidavit sworn to on 4th September 2024 in opposition to the petition as follows: -

The Deputy Director of Occupational Safety & Health, Mr Justus Bosire Nyakego deposed that the processing of claims save for the final stage when it proceeds to the ELRC does not in any way entail hearing and determination as in judicial process and that the Director computes the amount compensable for injury in accordance with sections 28, 30, 34 and 37 of WIBA which provide formulae for computation using the data in the documents submitted in respect of the injured and under no circumstance can the director make a decision to compute compensable amount different from what is provided by the law.

That the computation of the amount compensable to an injured is not arrived at by way of a hearing but by use of documented data from reports developed after medical examinations by medical practitioners.

That the inquiry contemplated under section 23 of the Work Injury Benefits Act. Cap. 236 is purely investigative whose outcome is arrived at from verifiable tests & examinations not by way of hearing and determination as in a judicial process. **That in paragraph 64 of the Judgment of Petition No. 4 of 2019 between LSK vs AG & Cotu it was held that the**

Director's inquiry under section 23 of WIBA is entirely an investigation.

It is deposed that because the processing of amount compensable to the injured is out of verifiable tests examinations and documents in respect of the injured under the provisions of Article 47 coupled with fair Administrative Actions, Act 2015 it is not a hearing within the meaning ascribed to it by the petitioner.

That the matter is *resjudicata,* wholly misconceived and it be struck out for lack of jurisdiction or it be dismissed for lack of merit.

Replying Affidavit by Interested Party

The interested party (LSK) vide the affidavit of its CEO Florence Muturi deposes that in so far as the Director acts under the control and direction of another party contrary to Article 160(1) of the Constitution, which mandate the independence of the Judiciary, in so far as he/she is subject to appointment and direction from the Cabinet Secretary for Labour matter and that in so far as appointments to the Directorate are undertaken by the Cabinet Secretary for Labour matters, alongside the Public Service Commission, this invariably violates the principle of separation of powers.

That in so far as the mandate under the Act grants the Directorate and its officers the authority to be investigator, prosecutor and adjudicator in cases of work injuries, it is inimical to the exercise of judicial authority that must be exercised in a fair manner that ensures justice is not only done but seen to be done.

That the rules of judicial fairness demand that the adjudicator must not only be fair but must be seen to be fair which cannot be the case where the adjudicator also doubles as the investigator and prosecutor.

That the appellate mechanism as set out in the Act, under section 51 stipulates the Director as its own appellate chamber meaning that the Director exercises supervisory jurisdiction upon itself creating a legal oxymoron of immense magnitude that overturns all known appellate mechanisms.

That section 10(3) of WIBA is a gross violation of the right to a fair hearing as set out under Article 50 of the Constitution in so far as it creates a fetter to entitlements by employees at a preliminary stage without a proper determination of whether an act resulting in employee's disablement or death is a tortious claim.

Submissions

The Petitioner, 1st Interested Party and Respondents filed submissions which the court has carefully considered together with the depositions before court. The issues for determination are as follows: -

(i) Whether this suit is *resjudicata.*

(ii) Whether sections 10(3), 21, 22(1)(d), 23(1), 24(2), 25(1), of WIBA violate the parties right to fair trial under the Constitution.

(iii) Whether the hearing procedure under WIBA violates the principles of natural justice set out under Articles 25(c), 27(1), 47, 48 and 50(1) of the Constitution

(iv) Whether DOSH I and DOSH 4 forms under WIBA are unconstitutional.

(v) Whether section 10(3) of WIBA contravenes Articles 10(2), 47 and 50(1) of the Constitution.

Resjudicata and the merits of the petition

Petitioner

The Petitioner addressed the question of resjudicata/previous litigation on WIBA at paragraph 15, 16 and 17 of the submissions by the Petitioner. The Petitioner submitted that the Supreme Court in the ***Law Society of Kenya versus The Attorney General and Another [2019] KLR, [2019] KESC 16 KLR***, put the last nail on the constitutionality of WIBA in its judgment handed down on 3rd December 2019 in which it declared sections 7 and 10(4) of WIBA to be inconsistent with the constitution. The Petitioner submitted that this was an appeal from the judgment of the court of appeal in which the constitutionality of sections 4, 16, 21(1),25(1) and (3), 52(1) and (2) and 58(2) of WIBA was in issue.

The court observes that the Petitioner in its submissions did not address the pertinent issue of whether the Supreme Court in the judgment in the case of ***Law Society of Kenya versus The Attorney General and Another [2019] KLR, [2019] KESC 16 KLR***, heard and determined all the issues raised for determination in the present petition.

The court however notes paragraph 90 of the petition where the petitioner stated as follows:

"In Petition No.4 of 2019 mentioned herein above, contention on section 25(1) and (3) of the WIBA was that it is discriminatory on the employee thus it contravenes Article 27 of the constitution. However, our petitioner herein contends on the very sections, but that it violates, the principles of natural justice as enshrined under Article 25(c), 47, 48, 50(1) of the constitution."

The petitioner submitted that the court in this petition should determine the following issues:

1. Whether Director of Work Injury benefits under the Work Injury Benefits Act is an administrator with *quasi-judicial* authority.
2. Whether the procedure for institution of complaint for injury compensation under the Work Injury Benefits Act conform to principles of natural justice.
3. Whether personal injury in the course of employment is an administrative matter to be decided by a *quasi-judicial* authority.
4. Whether the Director of Work Injury Benefits is clothed with discretionary powers in his *quasi-judicial* function.
5. Whether section 10(3) of the WIBA raises questions/issues of negligence under the law of torts thus cannot be heard and determined by the Director who is not trained and statutorily qualified to practice law.
6. Whether the original jurisdiction of the Director of Work Injury Benefits is constitutional.
7. Whether section 10(3) 21, 22(1), 24(1)(2), 25(1) of WIBA contravene Article 25(c), 47, 50(1) and 50(2)(i) of the Constitution.

The petitioner submitted further that the director is not a tribunal or a court of law but a body under Article 50(1) of the constitution and therefore is not clothed with the perquisite features of a quasi-judicial authority to hear and determine matters of negligence and liability under civil wrong. That the decision of the director cannot be subject to appeal, since the director does not form part of the subordinate courts under the judicial system. That this contravenes Article 23(2) of the constitution which confers jurisdiction on subordinate courts with original jurisdiction to hear cases of that nature and the director does not fall within the meaning stipulated under Article 169(1)(d) of the constitution.

The petitioner in furthering the case that the impugned sections violate the principles of natural justice submitted that;-*

Personal injury of the employee at work affects his rights and pose a negative social and economic ramification not only to the employee, but also to his/her family and the society at large hence decisions in disputes therefrom must observe and apply the principles of natural justice.

The two principles of natural justice are enshrined under Article 25(c), 27(1)(2), 47, 48, 50(1), 159(2)(a)(b) of the Constitution.

Determination of whether an accident has or has not resulted in serious disablement under and/or is caused by deliberate and wilful misconduct of the injured employee as stipulated under section 10(3) of WIBA must be through fair hearing void of bias, partiality and lopsided forum under Article 25(c), 27(1), 47, 50(1) of the Constitution.

Under section 10(3) and 10(6) of WIBA, an employee injury that has resulted in serious disablement or death but is caused by the deliberate and wilful misconduct of the employee is entitled to compensation contravene Article 25(c), 47 and 50(1) of the Constitution since it is lopsided against the employer by the fact that the employer is bound to compensate the injured employee when the accident has resulted in serious disablement notwithstanding whether it was caused deliberately or by wilful act of the employee.

Section 10(1) and (3) of the WIBA raises questions of negligence under the law of torts which is a judicial question thus cannot be heard and determined by a Director who has no training and statutory qualifications in laws thus contravening the parties right to fair hearing under Article 50 of the Constitution.

DOSH 1 which is a form filled by the employer on behalf of the injured employees is unconstitutional since it does not observe or regard the principles of natural justice and does not give the averments of the circumstances of injury to determine whether it was caused out of willful act of the employee or deliberately. Further it stifles the right of appeal by the aggrieved person

The condition under section 21 of WIBA which requires that a written or verbal notice of any accident which occurs during employment shall be given by or on behalf of the employee concerned to the employer and a copy of the written notice or a notice of the verbal notice shall be sent to the Director within twenty four hours of its occurrence in the case of fatal

accident raises a reasonable apprehension of bias contrary to Articles 25(c), 27(1), 47 and 50(1) of the Constitution.

Section 21 of WIBA not only creates a reasonable apprehension of bias to the detriment of the injured employee but also infringes on his right to fair hearing and tends to create fertile ground for a lopsided and partial decision. The employer is likely to unfairly influence the Director taking into account human probabilities and ordinary course of human conduct.

Requirement under section 22(1) of the WIBA that an employer shall report an accident to the Director in the prescribed manner within seven days after having received notice of an accident or having learned that an employee has been injured in an accident not only contravenes principles of natural justice, but is also tantamount to giving out self-inflicting evidence contrary to Article 50(2)(1) of the Constitution.

Section 22(5) of the WIBA is unconstitutional as it is discriminatory contrary to Article 27(1)(2) inter alia since it does not give the injured employee who wants to report injury directly to the Director a clear procedure, through forms, thus subjecting the injured employee to difficulties and hurdles of still being sent back to the employer for DOSH 1 form.

Both section 21 and 22 of the WIBA require that a notice is first issued to the employer who then report to the Director. The procedure of issuing a notice to employer who has an interest in the outcome of the case raises a reasonable apprehension of bias and undue influence on the outcome of

the case. Thus offends the principle of natural justice under Article 25(c), 47, 50(1) of the Constitution.

In ensuring that justice is not only done but also seen to be done a judicial or quasi-judicial body must ensure that it manifests fairness, impartiality and independence in its decision-making process.

The procedure for institution of complaint and decision making in the Work Injury Benefits Act does not conform to the principles set out in Article 47 of the Constitution.
Deciding on the degree of injury and the commensurate compensation strictly as dictated by the Act (section 10(2)(6) and schedules) denies the powers of discretion which is a fundamental recipe in decision making. The Director is totally restricted from applying the power of discretion.

The Director under Work Injury Benefits Act is clothed with supervisory, investigative, interrogatory and supervisory powers in the dispute between injured employee and the employer. Balancing such powers against the principles of natural justice is bound to tilt the scale of justice to the detriment of the employee since he is the weaker party in the dispute.

Section 25(1) of the WIBA creates a reasonable apprehension of bias contrary to the principles of natural justice by the fact that the employer chooses who to refer the injured employee to for medical report. The employer is bound to collude with the Director and the medical practitioner to get a desired result in their (employer's) favour.

The DOSH/WIBA 4 which form is filled by the Director of Injury Benefits is unconstitutional by the reason that it does not contain reason of the decision pursuant to Article 47 of the Constitution. By this fact section 51 and 52 of the WIBA is unconstitutional for it denies the aggrieved party right to appeal thus technically making the decision of the director final

The petitioner prays that the petition be allowed with costs.

Interested Party

The interested party (LSK), in its submissions delineated the following matters for determination:

i. Whether there was legislative intent to create a contradistinction between the Director of Work Injury Benefits and the Director of Occupational Safety and Health Services;
ii. Whether the determination of tortious liability is an exclusive mandate of courts/tribunals/bodies through the exercise of judicial authority;
iii. Whether the Director of WIBA exercises judicial authority duly vested under Article 169 of the Constitution;
iv. Whether the operational framework and composition of the Director of Work Injury Benefits violates the principles of judicial authority, separation of powers and judicial independence;
v. Whether the roles of the Director as an Investigator, Prosecutor and Adjudicator violates the rules of natural justice and judicial fairness; and

vi. Whether the setup, mandate and authority of the Directorate violates the Constitution and whether the court ought to interfere and reinstate the sanctity of the judicial authority.

In elaborating on all the issues above, the interested party (LSK) submitted the following:

In canvassing this first issue, we must restate, as has already been held by the courts, that WIBA was an inelegantly drawn piece of legislation. Part of the inelegance relates to latent ambiguity on who is considered the Director for purposes of the Act. At section 53 of the Act is established a Director of Work Injury Benefits who is responsible for management of the Act which is at odds with section 2 of the Act which defines the Director as the Director of Occupational Safety and Health as established by the Occupational Safety and Health Services Act.

While it may be said that WIBA and Occupational Safety and Health Services Act (OSHA) must be interpreted in *pari materia*, as they are both statutes dealing with the regulation of workplace safety and compensation entitlements of employments for injuries arising in the course of employment their scope is vastly different as one relates to the maintenance of safety standards at the work place while the other relates to the compensation for work injuries.

That being said it is clear that we are faced with a situation where an Act refers and seems to create the office of the Director of Occupational Safety and Health Services without actually doing so. The Act does not state that the Director of Occupational Safety and Health Services it refers to is the Director as established in a secondary piece of legislation leading to the

absurd conclusion that there exists an office with a specified mandate set out in the Act that is actually not established by the Act.

It therefore behoves this court to duly interpret the Act and grant guidance on which Director is responsible for management of WIBA.

LSK submitted further that for guidance, the court should be aware of the need for purposeful interpretation of statutes as set out by the Supreme Court, in the case of ***Gatirau Peter Munya versus Dickson Mwenda Kithinji and 2 others [2014] eKLR***, to wit:

> ***"In this regard, where the literal words used in a statute create an ambiguity, the court is not to be held captive to such phraseology. Where the court is not sure of what the legislature meant, it is free to look beyond the works themselves, and consider the historical contexts underpinning the legislation."***

The Apex court went on to further reiterate the words of the Learned Judge in Prepper versus Hart as follows: -

> ***"The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous, I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the works were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation, which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true***

purpose of legislation and are prepared to look at much extraneous material that bears upon the back ground against which the legislation was enacted."

In light of the foregoing and exercising a purposeful interpretation of the Act we duly submit that all references in WIBA to the Director must be deemed to refer to the Director of Work Injury Benefits as created under section 53. This is due to the fact that the reference of the Director of Occupational Safety and Health as set out in the definition of the Act does not indicate the mandate and scope of the role. A purposeful interpretation of the Act would be to refer to the role that is well defined and the functions duly set out.

We therefore urge the court to find that reference to Director with regard to the Act refers to the Director of Work Injury Benefits as set out under section 53 of the Work Injury Benefits Act.

Whether the determination of tortious liability is an exclusive mandate of courts/tribunals/bodies through the exercise of judicial authority:

The Black's Law Dictionary, 6th Ed. defines a "tort" as:

A violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other involved in a given transaction.

We contend that the ascertainment of tortious liability and apportioning of compensation is within the realm of private law. Winfield on Tort defines

Tortious liability arises from the breach of a duty primarily fixed by the law such duty is towards persons generally and its breach is redressable by an action for unliquidated damages.

LSK submitted that it is clear that for there to be tortious liability there must always be a violation of some duty owed by one party to its counterpart and that generally such a duty must arise by operation of law.

The basic tenets of tort law are to vindicate the rights of an individual and compensate the victim for loss, injury or damage suffered by him. An award of damages is the principal remedy in a tort claim. To justify compensation for the tort there must be a sufficient casual link between the defendant's conduct and the Claimant's loss.

In the context of work-injuries, compensation under the Act requires that the injury arises out of and in the course of employment, thereby establishing a clear nexus between the injury sustained and the employee's occupational duties. Further, it is a rebuttable presumption that where an injury results from an accident that occurs in the course of employment, it is presumed to have arisen out of employment, unless evidence to the contrary is proven.

That being said we duly submit that the establishment of liability for work injuries and the consequent assessment of compensation is an exercise in determination of tortious liability. This is because it is necessary in determining liability to inquire into a number of crucial factors, including but not limited to; (i) whether there exists an employer-employee relationship,

(ii) whether the injury occurred at the workplace or in the course of their work, (iii) an inquiry into the duty of care, and (iv) determination if the employee acted in a deliberate and willful misconduct that led to the accident at work. The existence of a duty of care is also a question of law.

Having stated the foregoing, it behoves us to establish what is meant by "judicial authority" to enable us ascertain whether the functions and mandate of the Director as set under section 53 of WIBA constitutes an exercise of judicial authority.

We find guidance from the decision of the ***Privy Council in the AG of the Commonwealth of Australia and the Queen and the Boilermakers Society of Australia and others versus Kirby and others [1957] UKPC 4*** where the court held that:

> ***"…judicial power is concerned with the ascertainment, declaration and enforcement of rights and liabilities as they exist or are deemed to exist at the moment the proceedings are initiated."***

In the present proceedings, it is clear that there are rights in this area of workman compensation that existed even before the enactment of WIBA and these rights were previously ascertained, declared and enforced by the courts. However, upon the enactment of WIBA the mandate to ascertain, declare and enforce compensation were vested in the Director.

We duly submit that in legislating the WIBA, parliament duly vested the judicial power of ascertaining and declaring tortious liability to the Director.

Further, the legislature granted the Director the ability to enforce the ascertained and declared tortious liability by granting it the authority to ensure that compensation was paid.

We duly submit that given the scope of authority granted to the Director it is clear that what it undertakes in ascertaining, declaring and enforcing workman compensation is clearly an exercise in judicial authority. Our submission is buttressed by the fact that the role was previously the exclusive mandate of the courts and secondly by the decision of ***Waterside Workers' Federation of Australia versus J. W. Alexander Ltd [1918] HCA 56***, to wit:

> ***"Without attempting and exhaustive definition of the term "judicial power" it may be said that it includes the power to compel the appearance of persons before the tribunal in which it is vested to adjudicate between adverse parties as to legal claims, rights and obligations, whatever their origin and to order right be done in the matter.***
>
> ***…***
>
> ***In my opinion, a law which allows a right to be claimed and at the same time is declared and ordered to have effect, is, in any view, conclusive as to the existence of the right from the moment of the declaration. It must therefore be prior, if only momentarily, to the exercise of the judicial power in respect of it, whether the declaration itself be (as I think it is) or be not a judicial act. The judicial function begins not later than at that moment."***

We therefore duly urge the court to find that determination of tortious liability to wit workman's injury and compensation is an exercise of judicial authority.

Whether the Director under WIBA exercises judicial authority duly vested under Article 159 of the Constitution:

Article 1 of the Constitution delineates that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution. Under sub-article (3) provides that sovereign power under the Constitution is delegated to the following state organs, which shall perform their functions in accordance with this Constitution – Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the judiciary and independent tribunals.

Article 159 of the Constitution vests judicial authority, duly derived from the people, to courts and tribunals. It proceeds to duly set out the principles for the exercise of that authority *inter alia* justice shall be done to all, irrespective of status; justice shall not be delayed; alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted; justice shall be administered without undue regard to procedural technicalities; and the purpose and principles of this Constitution shall be protected and promoted.

Article 169 sets out subordinate courts including any other courts or tribunals as established by an Act of Parliament.

We duly submit that the Director as established by WIBA is a tribunal under the scope of Article 159. This is due to the fact that as we have stated above the Director exercises judicial authority in ascertaining, determining and ensuring compensation for workplace injuries. We submit that as per the elaborate criteria set out in ***Okoiti versus Judicial Service Commission and 2 others; Katiba Institute (Interested Party) [2021] KEHC 461(KLR)*** the Directorate meets the qualities of a tribunal under Article 159 in the following manner:

a. It is a court of law dealing with private law aspects of the law of torts
b. It is subordinate to the superior courts
c. Its decisions are not advisory but binding in nature
d. It is not an administrative tribunal
e. It is not presided over by or includes in its membership a Judge of the Superior courts
f. It is formed by an Act of Parliament
g. It is not formed by the Constitution.

We duly submit that given the quality of the Director as set out above, it is clear that it is a tribunal as envisioned under Article 169 of the Constitution. It therefore follows that being a tribunal under Article 169 its exercise of judicial authority must flow from Article 159 of the Constitution.

It is clear that Director exercises judicial powers wherein he must consider facts, asses evidence, interpret and apply the statutory provisions of the act and conclusively render a decision that affects the legal rights, obligations and compensation entitlements of both employers and employees. This

exercise of powers further underscores its inherent judicial nature and goes beyond mere administrative role as it involves legal reasoning and adjudication. In addition, the Employment and Labour Relations Court can only invoke its jurisdiction while sitting as an appellate court in determination of liability and assessment of compensation under the provisions of WIBA.

Further inference from the fact that the Director exercises judicial authority is the appellate mechanism for his actions which lies at the Employment and Labour Relations Court established under Article 162(2) of the Constitution.

In light of the foregoing, we urge to the court to find that the Directorate exercises judicial authority duly vested under Article 159 of the Constitution.

Whether the operational framework and composition of the Director of Work Injury Benefits violates the principles of judicial authority, separation of powers and judicial independence:

We duly submit that the framework and composition of the Directorate which falls within the mandate of the Cabinet Secretary for Labour matters means that the tribunal cannot be deemed to be exercising, judicial authority in line with the principles of separation of powers and judicial independence.

Our first issue is in relation to the appointment of members of the Directorate who are duly appointed by the Public Service Commission and act at the instruction of the Cabinet Secretary for Labour matters. This

means that their appointment is made by the executive branch of government.

We duly submit that the appointment of members of the Directorate by the Cabinet Secretary for Labour matters and the Public Service Commission violates the principles of judicial independence and separation of powers as the membership of the Directorate, in light of its exercise of judicial authority, are deemed to be other judicial officers under Article 172(1)(c) of the Constitution. See ***Okoiti versus Judicial Service Commission (Supra)***

Further, the appointment of these officers who exercise judicial authority by the executive meant that they were under the control of that branch of the government contrary to the provisions of Article 160(1) of the Constitution. As such the state of affairs violated the independence of the Judiciary.

It is our considered opinion that any attempt to vest any part of judicial power in any body other than a court or tribunal is a priori ineffective and unconstitutional. The judicial power is exclusive of the legislative and executive powers, in the sense that such power can be exercised only by courts and tribunals.

Whether the role of the Director as an Investigator, Prosecutor and Adjudicator violates the rules of natural justice and judicial fairness:

In submitting on this limb, it is essential to set out the provisions of section 53(2) of the Act which states:

The Director of Work Injury Benefits shall perform the following functions –

(a) register employers;

(b) supervise the implementation of this Act;

(c) ensure that all employers insure their employees;

(d) receive reports of accidents and carry out investigations into such accidents; and

(e) ensure that employees who are injured are compensated in accordance with the provisions of this Act.

It is clear that from its mandate the Directorate is involved in the investigation of work place injuries upon reports being lodged with its office. Secondly, the Directorate carries out investigations to establish the scope of the injury and its authenticity. Thirdly, an order for compensation is made by the Director who thereafter ensures that the compensation is paid.

From the foregoing it is clear that the Directorate plays a number of roles in the process of establishing, ascertaining and determining the scope of workman compensation. This is alongside its supervisory role when it comes to matters of registration of employers and supervision of their insurance status. We duly submit that this combination of roles is such that the Directorate is an investigator, overseer, prosecutor and adjudicator with regards to workplace injuries clearly in violation of the rules of natural justice and judicial fairness.

We urge the court in reaching this conclusion to be guided by the decision in Msagha versus Chief Justice and 7 others (2006) 2 KLR 553 where the court held that;

> ***"The court observes firstly that the rules of natural justice "audi alteram partem" hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonization of the globe during the hey-days of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision…it is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a***

decision maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased and when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material."

Further, in the concurring opinion, Njoki Ndungu, SCJ in ***Evans Odhiambo Kidero and 4 others versus Ferdinand Ndungu Waititu and 4 others SC Petition No. 18 of 2014 as consolidated with Petition No. 20 of 2014 [2014] eKLR*** to wit:

"Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem (hear the other side or no one is to be condemned unheard) and nemo judex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias."

In the present case, WIBA deliberately authorizes overlapping, functions with the Director performing investigatory and prosecutorial functions. We posit that the combination of roles, vis, investigation, prosecution and adjudication by the same entity breaches the general principles of natural justice. We posit that the principles of natural justice function as implied and compulsory procedural safeguards, the breach of which renders the exercise of power invalid or ultra vires.

In light of foregoing, we pray that the court to issue the following orders:

a) A declaration that the Director of Work Injury Benefits as established in the Work Injury Benefits Act is a Tribunal under the prescripts of Article 169 of the Constitution;
b) A declaration that the operational framework and composition of the Director of Work Injury Benefits violates the principles of judicial authority as set out under Article 159 of the Constitution.
c) A declaration that the composition of the Director of Work Injury Benefits violates the principles of separation of powers and judicial independence.
d) A declaration that the operational framework of the Director of Work Injury Benefits as set out under sections 10, 22, 23, 26, 27, 37, 44 and 51 of the Work Injury Benefits Act violates the right to a fair hearing as set out under Article 50 of the Constitution.
e) A declaration that the procedure under WIBA for ascertaining, determining and mandating compensation for work injuries does not conform to the constitutional principles of natural justice.
f) A declaration that the original jurisdiction of the Director of Work Injury Benefits under WIBA is unconstitutional for contravention of Article 23(2) and 169(1) of the Constitution.

Response by 1st Respondent

It is submitted by the 1st Respondent that the issues raised by the Petitioner concerning the Constitutionality of section 10(3), 21,22(1)(5),23(1), 24(2) and 25(1) of the Work Injury Benefits Act, 2007 (WIBA) as well as the legal status and mandate of the Director of Occupational Safety and Health Services have been substantively determined by the Supreme Court of

Kenya in the case of ***Law Society of Kenya versus Attorney General and another (Petition No. 4 of 2019) [2019] KESC 16 KLR***. It is submitted therefore that this petition is *resjudicata.*

The Respondent submits that the present Petition is *res judicata* and should be dismissed in *limine*. That the issues raised concerning constitutionality of sections 10(3), 21, 22(1)(5), 23(1), 24(2) and 25(1) of the Work Injury Benefits Act, 2007 have already been conclusively determined by the Supreme Court of Kenya in the case of Law Society of Kenya and Another(supra). That the doctrine of *resjudicata and staredecisis* bar this Court from reopening matters already settled with finality by superior Court of record.

The Supreme Court of Kenya, in **Law Society of Kenya v Attorney General & Another (Petition No. 4 of 2019) [2019] KESC 16 (KLR)**, delivered a judgment on 3rd. December 2019. In this decision, the Court upheld the constitutionality of sections 21, 24, and 25 of the Work Injury Benefits Act, 2007 (WIBA), and affirmed the legal mandate of the Director of Occupational Safety and Health Services (hereinafter "the Director") to adjudicate work injury claims under the Act.

The Court clarified that the Director performs a quasi-judicial function and that his decisions are subject to the supervisory jurisdiction of the High Court under Article 165(6) of the Constitution.

The Petitioner proceeded to file the present Petition on 12thJune 2024, challenging the very same provisions of WIBA and disputing the qualifications and legal authority of the Director to determine work injury claims.

While determining the issues raised by the Petitioner, the court should consider the following cases:

In ***Hamdarddawa Khana v Union of India and Others*** 1960 AIR 554 in construing whether statutory provisions offend the *Constitution*, courts must subject the same to an objective inquiry as to whether they conform with the constitution and stated thus:

> *"Another principle which has to be borne in mind in examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment."*

In ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others***, Supreme Court Petition No 26 of 2014 [2014] eKLR, was opined that a purposive interpretation should be given to statutes so as to reveal the intention of the Legislature and the Statute itself. It was thus observed as follows:

> *"In **Pepper v Hart** [1992] 3 WLR, Lord Griffiths observed that the "purposive approach to legislative interpretation" has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the court is not to be held captive to such phraseology. Where the court is not sure of what the legislature meant, it is free to look beyond the words*

themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself: "The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous, I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at such extraneous material that bears upon the background against which the legislation was enacted."

The respondent further referred to ***County Government of Nyeri & Anor v Cecilia Wangechi Ndungu*** [2015] eKLR where the learned judges held thus:

"Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be

attained, bearing in mind that each case must be resolved by reference to its particular factors."

a) <u>Whether the present Petition is res judicata?</u>

The Supreme Court expressed itself on the doctrine of *res judicata* in ***Petition 14, 14A, 14B & 14C of 2014 (Consolidated) Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others*** [2014] eKLR where it delineated the operation of the doctrine of *res-judicata* in the following terms;

> *[317] The concept of res judicata operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings. In this case, the High Court relied on "issue estoppel", to bar the 1st, 2nd and 3rd respondents' claims. Issue estoppel prevents a party who previously litigated a claim (and lost), from taking a second bite at the cherry. This is a long-standing common law doctrine for bringing finality to the process of litigation; for avoiding multiplicities of proceedings; and for the protection of the integrity of the administration of justice all in the cause of fairness in the settlement of disputes.*
>
> *[318] This concept is incorporated in Section 7 of the Civil Procedure Act (Cap. 21, Laws of Kenya) which prohibits a Court from trying any issue which has been substantially in issue in an earlier suit. It thus provides:*

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

[319] There are conditions to the application of the doctrine of res judicata: (i) the issue in the first suit must have been decided by a competent Court; (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title. Karia and Another v. The Attorney General and Others, [2005] 1 EA 83, 89.

[320] So, in the instant case, the argument concerning res judicata can only succeed when it is established that the issue brought before a Court is essentially the same as another one already satisfactorily decided, before a competent court.

[333] We find that the petition at the High Court had sought to relitigate an issue already determined by the Public Procurement Administrative Review Tribunal. Instead of contesting the Tribunal's decision through the prescribed route of judicial review at the High Court, the 1st, 2nd and 3rd respondents instituted

fresh proceedings, two years later, to challenge a decision on facts and issues finally determined. This strategy, we would observe, constitutes the very mischief that the common law doctrine of "issue estoppel" is meant to forestall. ***Issue estoppel "prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route"*** *(Workers' Compensation Board v. Figliola [2011] 3 S.C.R. 422, 438 (paragraph 28)).*

[334] Whatever mode the 1st, 2nd and 3rd respondents adopted in couching their prayers, it is plain to us, they were challenging the decision of the Tribunal, in the High Court. It is a typical case that puts the Courts on guard, against litigants attempting to sidestep the doctrine of "issue estoppel", by appending new causes of action to their grievance, while pursuing the very same case they lost previously. In Omondi v. National Bank of Kenya Ltd. & Others, [2001] EA 177 the Court held that ***"parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit." (emphasis added)***

17. In the case of ***Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi ([2017] eKLR)*** i the Court of Appeal noted that:

(f) "The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectra of being vexed,

haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favorable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice." (Emphasis added)

It is evident that the issues raised in the present petition specifically the constitutionality of Sections 10(3), 21, 22(1)(5), 23, 24(2), and 25(1) of the Work Injury Benefits Act, 2007, and the legal mandate of the Director of Occupational Safety and Health Services were conclusively determined by the Supreme Court in **Law Society of Kenya v Attorney General & Another (Petition No. 4 of 2019)**. (supra)

In line with the principles outlined **in MKA v NKA (Civil Appeal E120 of 2023)**, the doctrine of res judicata bars re-litigation of matters that have been finally settled by a competent court. To allow the Petitioner to reopen these issues would not only offend the principle of finality but would also result in an abuse of the court process. Consequently, the present petition is fatally defective and ought to be dismissed in limine for being *res judicata.*

Whether the Director of Occupation al Safety and Health Services has the mandate and qualifications to adjudicate work in injury claims under WIBA?

The Petitioner challenges the constitutionality of section 10(3) of the Work Injury Benefits Act, arguing that the issues therein particularly employer liability and negligence are tortious in nature and therefore fall exclusively within the jurisdiction of a court of law, and not a public officer lacking judicial training. It is our humble submission that, this argument has already been addressed and conclusively settled by the Supreme Court.

In **Law Society of Kenya v Attorney General & Another (Petition No. 4 of 2019) [2019] KESC 16 (KLR)**, the Supreme Court held that:

> *"The Director of Occupational Safety and Health Services is a quasi-judicial authority entrusted by statute to make inquiries that are necessary to decide upon claims or liability in accordance with WIBA."*

The Court emphasized that such determinations do not in any way oust the jurisdiction of the High Court under Article 165(6) of the Constitution, which retains supervisory powers over bodies exercising judicial or quasi-judicial authority. It is Respondent's submission that the presence of elements such as negligence or causation in such claims does not transform the Director's role into an exercise of pure judicial power, nor does it render WIBA unconstitutional.

Section 10(3) must therefore be read within the broader framework of WIBA's intention to provide a mechanism for resolving work injury claims

expeditiously and without undue formality. As was reiterated in the Supreme Court decision ***Law Society of Kenya v Attorney General & Another*** **(Petition No. 4 of 2019) [2019] KESC 16 (KLR)**

such bodies simplify procedures to ensure that courts focus on substantive rather than procedural justice but also potentially address the problem of backlog of cases, enhance access to justice, encourage expeditious disposal of disputes and lower the costs of accessing justice.

It is Respondent's submission that the Petitioner's insistence on judicial determination at the first instance would undermine the very objective of the statute, which is to provide accessible, cost-effective, and specialized resolution of such claims, subject to the supervision of the higher courts.

Consequently, the assertion that the Director is unqualified to handle matters is misplaced. The Supreme Court in **Law Society of Kenya v Attorney General & Another (Petition No. 4 of 2019) [2019] KESC 16 (KLR)** stated that

> *"The Director is in essence performing a quasi-judicial function under section 23 and by dint of article 165 (6) "The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function." His actions and decisions, even without review or appeal, are therefore still subject to the over-riding authority of the High Court."*

It is the Respondent's submission that the Director's role under WIBA is not that of a final arbiter insulated from judicial scrutiny, but rather that of a quasi-judicial officer whose decisions remain firmly within the oversight of the High Court. As such, the assertion that the Director is unqualified to handle such matters is without merit, and fails to appreciate both the statutory design of WIBA and the constitutional framework under Article 165(6) which ensures judicial accountability and procedural fairness.

Whether sections 21 and 22 of WIBA violate the principles of natural justice and constitutional rights to fair administrative action and access to justice?

The Petitioner contends that sections 21 and 22 of the Work Injury Benefits Act, 2007 (WIBA), particularly the reporting requirements placed on employers under section 22(1), are unconstitutional and offend the principles of natural justice. The Respondent submits that this argument is flawed.

The objective of sections 21 and 22 is to establish a clear, efficient, and accountable reporting framework for work-related injuries and fatalities. These provisions facilitate prompt notification to the Director of Occupational Safety and Health Services, thereby enabling timely investigation and assessment of claims. Rather than undermining natural justice, they serve to safeguard the rights of employees by ensuring claims are not lost to time or administrative neglect.

The Petitioner's assertion that section 22(1) is unconstitutional ignores the existence and effect of section 22(5), which provides that:

"The provisions of this section do not prevent an employee from reporting an occupational accident or disease to the Director at any stage."

This provision is a critical safeguard, ensuring that an employee's right to report an accident and seek redress is not dependent on employer compliance. It preserves the employee's autonomy and access to justice, and ensures that no procedural default by the employer can bar a legitimate claim.

It is a well-established principle of statutory interpretation that a provision of law must not be interpreted in isolation, but rather in the context of the statute as a whole.

Thus, where a section of a statute is sought to be interpreted, the Court should consider other sections as was applied in the case of **Tegwunor *v. State (2008) 1 NWLR (Pt. 1069) 630 at 656*** and ***Rotimi Ameachi v INEC (supra) at page 314 paragraphs G – H.***

It is thus the respondent's submission that, the Petitioner's narrow focus on section 22(1) without appreciating the balancing effect of section 22(5) is a selective and legally impermissible reading of the statute.

The Petitioner also alleges that sections 21 and 22 offend the principles of natural justice. With respect, this argument reflects a fundamental misunderstanding of what natural justice entails, and how it applies to statutory procedures.

In **Chunky Limited v Director of Criminal Investigations (Petition E004 of 2022) [2022] KEHC 297 (KLR) (27 April 2022) (Judgment)** the judge reiterated the words in Supreme Court of India in **Canara Bank v Debasis *Das*** where natural justice was defined*:*

> *"Natural justice has been variously defined. It is another name for common sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice."*

Natural justice, as has been aptly stated, is "another name for common sense justice." It is the administration of justice in a manner that is fair, liberal, and human-centered, free from the rigidity of technical and overly formalistic legal interpretations. It is based on the idea that justice must reflect natural ideals and human values, and that decisions affecting

individuals must be made with fairness, reasonableness, and due process.

It is the respondent's submission that sections 21 and 22 of WIBA, when read holistically, do not offend these principles. These provisions merely establish a procedural framework for the reporting of workplace injuries or fatalities not for the determination of liability. They do not in any way determine rights or impose consequences without affording parties the opportunity to be heard. Importantly, section 22(5) expressly safeguards the right of the employee to independently report an incident to the Director "at any stage," thereby ensuring that procedural lapses by the employer do not prejudice the employee's access to justice.

The essence of natural justice is not undermined by these provisions; rather, it is upheld. By ensuring that incidents are reported swiftly and that affected parties retain access to the Director regardless of employer compliance, the statute promotes transparency, accountability, and fairness all pillars of natural justice. The process thereafter, including any determinations by the Director, is carried out under a quasi-judicial mandate, and is subject to the High Court's supervisory jurisdiction under Article 165(6) of the Constitution.

In sum, the Petitioner's reliance on natural justice is misplaced. The reporting provisions under sections 21 and 22 do not give rise to any form of arbitrariness or procedural unfairness. Instead, they are common sense administrative mechanisms aimed at ensuring timely access to

compensation processes, in line with the broader constitutional imperatives of access to justice and fair administrative action.

The respondent prays that the Court dismiss the Petition in limine with costs, as it is an abuse of the court process and devoid of merit.

DETERMINATION

Having carefully considered the facts set out in the petition, supporting affidavits and statement of facts, having also considered the replying affidavits by the interested party and the respondents and upon consideration of the comprehensive submissions by the parties, the court has arrived at the following decision:

That the present petition is not only **res judicata** but also legally untenable. The issues raised concerning the constitutionality of sections 10(3), 21, 22, 24, and 25 of the Work Injury Benefits Act, 2007 and the objectives and principles of WIBA under which the director, operates have already been conclusively determined by the Supreme Court of Kenya in **Law Society of Kenya versus AG and Another (Petition) No 4 of 2019 KESC 16 klr (**supra**).** The doctrine of *res judicata* bars this Court from reopening matters already settled with finality by a higher superior court of record.

In addition, decisions of the Supreme court bind all other courts except the Supreme court itself.

In **Law Society of Kenya versus AG and Another (Petition) No 4 of 2019 KESC 16 KLR** the Supreme Court held that:

‘**The Director is in essence performing a quasi-judicial function under section 23 and by dint of Article 165 (6) ‘The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.’ His actions and decisions even without review or appeal are therefore still subject to the overriding authority of the High Court’**

The allegations regarding the qualifications and mandate of the Director under WIBA are therefore misplaced. The Director’s role is quasi- judicial in nature and is subject to the supervisory jurisdiction of the High Court under Article 165(6) of the Constitution. This ensures adherence to due process and safeguards against any abuse of power.

In addition, awards and decisions by the Director under WIBA are subject to objection to the Director within 60 days and the decision upon objection is appealable to the Employment and Labour Relations Court within 30 days in terms of section 51(1) and 52(2) of the Act respectively.

In **Chunky Limited v Director of Criminal Investigations (Petition E004 of 2022 KEHC 297 KLR** it was held that;

> “**Natural justice has been variously defined. It is another name for common sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and**

grammatical niceties. It is the substance of justice which has to determine its form. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice."

From the determination of the supreme court aforesaid it is clear that:

(a) the Director of Work Injury Benefits as established in the Work Injury Benefits Act is not a Tribunal within the meaning of Article 169 of the Constitution;

(b) the operational framework and composition of the Director of Work Injury Benefits does not violate the principles of judicial authority as set out under Article 159 of the Constitution;

(c) the composition of the Director of Work Injury Benefits does not violate the principles of separation of powers and judicial independence;

(d) the operational framework of the Director of Work Injury Benefits as set out under sections 10, 22, 23, 26, 27, 37, 44 and 51 of the Work Injury Benefits Act does not violate the right to a fair hearing as set out under Article 50 of the Constitution;

(e) the procedure under WIBA for ascertaining, determining and mandating compensation for work injuries conforms to the constitutional principles of natural justice; and

(f) the original jurisdiction of the Director of Work Injury Benefits under WIBA is not unconstitutional for contravention of Article 23(2) and 169(1) of the Constitution.

In strict adherence to the doctrine of *stare decisis*, this court is bound by the decision of the supreme court in **Law Society of Kenya versus AG and Another (Petition) No 4 of 2019 KESC 16 klr**. (supra)

The court agrees with and upholds the submissions by the respondent that the impugned provisions do not offend the principles of natural justice. That When read holistically, the provisions under WIBA are geared towards promoting access to justice, ensuring expeditious resolution of workplace injury claims and maintaining procedural fairness for all parties involved and the statute strikes a balance between administrative efficiency and legal accountability.

There is nothing new at all in this petition, except those related provisions of WIBA which may not have been expressly cited in previous litigation and are cited in this petition, which provisions must be read in context, and in the finding of this court were addressed in the judgment of the Supreme court in principle and substance.

To remove any doubt, that the Supreme Court declared the entire WIBA constitutional we refer to the finding of the court in the Law Society of Kenya case (Supra) where the court stated as follows:

> ***"In agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of the Act, litigation relating to work injuries had gone on and a number of the suits had progressed up to decree stage; some of which were still being***

heard; while others were still at the preliminary stage. All such matters were being dealt with under the then existing completely different regimes of law. We thus agree with the Appellate Court that Claimants in those pending cases have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked. <u>However, were it not for such legitimate expectation, WIBA, not being unconstitutional and an even more progressive statute… we opine that it is best that all matters are finalized under section 52 aforesaid</u>." (Emphasis added)

This court, observes that ILO Convention 121(C12) – Employment Injury Benefits Convention 1964 (Schedule I amended in 1980(No. 121) provides at Article 4.

"1. National Legislation concerning employment injury benefits shall protect all employees, including apprentices, in the public and private sectors, including cooperatives and in respect of death of the bread winners prescribed categories of beneficiaries."

The Convention under Schedules I has a list of occupational diseases replicated under WIBA 2007.

The global family of nations who comprise members of ILO made commitments to develop legislation of Work Injury Benefits. It is therefore pertinent that WIBA cannot be wished away being a child born of ILO

commitment by Kenya and which obligation is cemented under Article 2(5) and (6) of the Constitution of Kenya 2010.

Therefore, all the issues raised by the petitioner for determination in this suit are *resjudicata* and this court lacks jurisdiction to revisit them afresh.

Accordingly, this court in full obedience to the revered doctrine of *stare decisis* finds that it is bound by the decision of the Supreme Court.
The petition is dismissed in its entirety with no order as to costs.

Dated at Nairobi this **16th Day of October 2025.**

Mathews Nduma

JUDGE

Appearance:

Mr. Arunda for Petitioner

Ms. Aluoch for 1st Respondent

Mr. Michuki for Interested Party

Mr. Kemboi – Court Assistant