IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: M'INOTI, MUCHELULE & ODUNGA, JJ.A.)

CIVIL APPEAL NO. 392 OF

2019 BETWEEN

KIRINYAGA CONSTRUCTION LIMITED...................APPELLANT

AND

KATHERINE WAIRIMU NDUNGU ***(suing as the administrator of the Estate of Francis Ndungu Githinji)***
.. RESPONDENT

(Being an Appeal from the Judgment and Decree of the Employment and Labour Relations Court at Nairobi (Wasilwa, J.) delivered on 18th July 2018
in
ELRC Cause No. 1124 of 2023**)**
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JUDGEMENT OF THE COURT

1. The respondent, ***Katherine Wairimu Ndungu***, filed an undated Memorandum of Claim on 18th July 2013, in her capacity as the widow and the administrator of the Estate of Francis Ndungu Githinji (deceased) in the Employment and Labour Relations Court against the appellant. In the said claim, she sought general damages, damages under the ***Fatal Accidents Act*** and ***Law***

Reform Act, costs of the suit, interests and any other relief the court may deem just. The cause of action, according to the claim, arose on 9th July 2007 when the deceased, who was employed by the appellant, was instructed by the appellant, in the company of one Timothy Gatimu, to tow a lorry registration No. KAL 583K, that had broken down. It was alleged that in the process of towing the lorry, the deceased was ran over, resulting in his instant death. In the respondent's view, the accident was caused by the appellant's want of due care and attention for the safety of the deceased and poor mechanical state of the said motor vehicle.

2. According to the claim, the deceased was 51 years at the time of his death, was in good health and enjoying a productive life and was earning Kshs.14,000. He was survived by his wife, the claimant and his two daughters and two sons. The matter was reported both to the police and the District Labour Office and after negotiations, the appellant was

ordered to compensate the

respondent in the sum of Kshs.1,116,000. The appellant, however, declined to pay the said sum.

3. In reply to the claim, the appellant challenged the respondent's capacity to bring the suit and denied that the said accident occurred as alleged in the Statement of Claim. It pleaded, in the alternative, that the accident was wholly caused, and/or substantially contributed to, by the deceased's own negligence. The particulars of negligence were that the deceased: was drunk while driving; failed to have proper control of the said motor vehicle; failed to observe the road safety rules; drove the said vehicle without care and attention; and was reckless on the road. The particulars of dependency of the deceased's estate were similarly denied.

4. In her evidence, the respondent reiterated the substance of the pleadings and added that: the deceased had been the appellant's lorry driver for 15 years; that she was informed that the deceased was crushed by another vehicle at work but she could not tell which vehicle crushed him; that the

deceased was not a

drunkard; that after the burial, she discovered that the deceased was earning Kshs.10,000 per month; and that he was supporting his said family of five. Although she admitted in cross examination that a driver cannot be crushed by a vehicle he is driving, she insisted that the vehicle that crushed the deceased was being driven by him.

5. The appellant called 2 witnesses. According to RW1, an insurance investigator, his investigation of the accident revealed: that the accident occurred as a result of a brawl in which the driver, who was drunk, was involved; and that the vehicle involved in the accident was not the one that broke down. He, however, conceded that the postmortem report of the deceased did not make any reference to traces of alcohol in his system.

6. RW2 was the appellant's spanner boy. In his rather incoherent evidence, he stated: that he was with 4 other people when they left to go to repair a vehicle that was spoilt in Karatina; that at Mitini, they stopped for food but the driver and

mechanic went away together; that upon return, they started the vehicle but it

landed into ditch when the driver and the mechanic were struggling over the steering wheel on the allegation by the mechanic that the driver was too drunk to drive; and that as result, the vehicle gave way and ran over both of them.

7. In her judgement, the learned Judge identified the issues for determination as: whether the claim was properly before the court; whether the court had jurisdiction to entertain the claim; whether the respondent established the case as against the appellant; and what remedies, if any, were available to the parties.

8. On the first issue, the learned Judge found; that the matter having arisen in July 2007, the correct court to hear the case would have been the Magistrate's Court; that however, when the ***Work Injury Benefits Act*** (the Act) was passed, the Industrial Court acquired appellate jurisdiction in such work injury cases as provided for under section 51 of the Act; that the matter, which ought to have been brought by way of objection was properly before the court, despite it being

lodged by way of a

claim; that despite the denial by the appellant, it was evident that the deceased was an employee of the appellant; that the manner in which the accident occurred was, however, not very clear as the only eyewitness was RW2 who, in his initial statement to the insurance investigator, never mentioned that the driver was drunk; that the same witness did not state that he was present when the deceased and the mechanic went to the bar to drink; and that notwithstanding the many unanswered questions, the deceased died as a result of the accident whilst on duty and therefore the appellant ought to have compensated the respondent as required by the law.

9. On the quantum, it was the learned Judge's finding that, in the absence of an appeal against the decision of the Labour Officer awarding the respondent Kshs 1,116,000 in 2007, that amount was payable. The learned Judge also awarded interest at court rates on the said sum with effect from 2007, when the finding was made, till payment in full and directed the appellant to meet the costs of the suit.

10. Dissatisfied with the said decision, the appellant appealed to this Court on the grounds: that the learned Judge erred in law and in fact when, in spite of the respondent electing, by conduct, pleading and the evidence at the trial, to proceed only on the claim for damages under the ***Fatal Accidents Act*** and the ***Law Reform Act***, she treated the claim as an Objection under section 52 of the ***Work Injury Benefits Act*** and assumed a jurisdiction not available to her without warning the appellant hence occasioning an injustice; in failing to find that the accident was caused by the deceased's intoxication, recklessness and negligence; in failing to appreciate the evidence adduced by the appellant including the accident report, which confirmed that the accident was as a result of a brawl during drunken driving; in upholding the decision of the District Labour Officer without considering the circumstances surrounding the report; in failing to determine the fact that under the ***Workmen's Compensation Act***, liability does not arise where the accident is as a result of intoxication; in failing to determine that the appellant was in

no

way involved in the accident or the negligence leading to it; in awarding Kshs 1,116,000 with interest effective from 2007 till payment in full when the same was not pleaded and there was no evidence to support pre-trial interest; and in failing to consider the deceased's negligence and summarily rejecting the appellant's evidence.

11. At the virtual plenary hearing on 20th May 2025, learned counsel, ***Mr C. N Kihara*** appeared for the appellant while learned counsel, ***Mr Ronald Wakhisi Makokha***, appeared for the respondent. Both counsel relied on their respective clients' written submissions which they briefly highlighted.

12. In urging the Court to allow the appeal, it was submitted on behalf of the appellant: that the trial court treated the claim as one of Objection brought under section 52 of the Act yet the claim was in respect of damages under the ***Fatal Accidents Act*** and the ***Law Reform Act***; that the learned Judge erred in treating the lapse as procedural, contrary to the finding of this Court in ***Law Society of Kenya v The***

Centre for Human Rights &

Democracy & 12 Others Petition No 14 of 2013 and Raila Odinga v IEBC **[2013] eKLR**, when it was an error of substance; that the essence of raising the matter as an Objection is to obviate condemning the appellant unheard; and that in entertaining the matter, the trial court wrongly assumed jurisdiction and the decision occasioned a miscarriage of justice.

13. It was further contended: that the learned Judge erred in not finding that the respondent failed to prove her case to the required standard as no negligence on the part of the appellant was proved since the respondent's evidence was merely hearsay evidence; that the learned Judge erred in not finding that, just as in the case of ***CMC Motors Group Ltd v Rousals and Another*** **Civil Appeal No. 231 of 2000**, the evidence on record proved that the deceased was intoxicated at the time of the accident; that the learned Judge erred in merely adopting the report of the District Labour Officer without interrogating it and not having the benefit of the

evidence that might have been placed before the District Labour Officer; and based on various authorities

including that of ***Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others*** **[2014] eKLR**, that the learned Judge erred in awarding interest from 2007 until payment in full when no such claim was pleaded.

14. In urging this Court to confirm the judgment, based on our mandate to re-evaluate the evidence and arrive at our own conclusions, it was submitted on behalf of the respondent: that the filing of the Memorandum of Claim as opposed to an Objection under the Act, did not invalidate the cause of action against the appellant, in light of the fact that the respondent was directed in Miscellaneous Application No. 1534 of 2010 to file the claim by an order of 13th June 2013; that the issue was not pleaded in the Reply to the Claim and the appellant merely submitted that the court had no jurisdiction to entertain the claim under the ***Fatal Accidents Act*** and the ***Law Reform Act*** without particularities; that since at the time the respondent lodged her claim, sections 52(1) and (2)

of the Act had been declared unconstitutional, pursuant to the decision in ***ROK***

Industries Limited v Wambua **[2024] KEELRC 715 (KLR)**, the claim was properly filed; that considering the fact that the decision of the District Labour officer was not challenged, the filing of the Memorandum of Claim in 2013 before the trial court was the correct approach to adopt; that in the circumstances, the trial court's view that the form of the claim was improper was not correct; and that since the issue of intoxication was introduced by the appellant, in line with the holding in ***Mudenyo & 3 Others v County Government of Kakamega & Another*** **[2025] KECA,** it was upon it to adduce evidence to prove the said allegation, which it failed to do.

15. We have considered the judgment of the trial court impugned in this appeal, the proceedings before the trial court, and the submissions, oral and written, by the parties. This being a first appeal, our mandate is anchored in rule 31(1) (a) of the Rules of this Court as read with section 78 of the ***Civil Procedure Act***, which provides that a first appellate court is under a duty

to re- evaluate the evidence before the trial court and reach its own

conclusions. In doing so, we have to bear in mind that we did not have the opportunity to see and hear the witnesses, which the trial court did. See also ***Selle v Associated Motor Boat Co.*** **[1968] EA** 123 and ***Peters v Sunday Post Limited*** **[1958] EA 424.**

16. In our view, the issues for determination in this appeal are: whether suit was properly before the trial court; whether the learned Judge erred in awarding the reliefs sought; and whether interest ought to have been awarded from 2007.

17. As regards the first issue, it is clear that the claim was for general damages, under the ***Law Reform Act*** and the ***Fatal Accidents Act***. The respondent did not expressly bring the claim under the ***Work Injury Benefits Act***. However, in the judgment, the learned Judge did not make any award under either the ***Law Reform Act*** or the ***Fatal Accidents Act.*** Instead, the learned Judge expressed herself as hereunder:

> ***"23. There is no other eye witness who gave evidence in Court. There is no report form the***

> ***police on the mechanical condition of the accident vehicle. With many questions unanswered, it is my finding that the Claimant deceased died as a result of the accident whilst on duty and therefore the Respondent should compensate him as required by the law.***
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> ***24. On the issue of the quantum, the matter was already reported to the Labour Officer who after investigation of the matter found the amount payable to be 1,116,000/= and ordered payment in 2007. To date the Respondent have never paid. They never appealed the Labour Officer's finding.***
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> ***25. I will therefore confirm the amount of damages payable as 1,116,000/= as directed by the Labour Officer with interest at court rates with effect from 2007 when the finding was made till payment in full."***

18. Clearly, no finding was made by the learned Judge regarding the claim under the ***Law Reform Act*** or ***Fatal Accidents Act***. Having found that the "same should have been lodged as an Objection as envisaged under Section 52 of WIBA", the learned Judge proceeded as if what was before the court was a claim for adoption of the District Labour Officer's Report. Part VIII of the ***Work Injury Benefits Act,*** which deals with objections and appeals, comprises of sections 51 and 52 which state that:

51. (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.
52. Director's reply
(1)The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.
(2) An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such decision.

19. Clearly Part VIII aforesaid prescribes a specific procedure for dealing with objections by "***Any person aggrieved by a decision of the Director".*** The only person who could have been aggrieved by the decision regarding the award of damages was the appellant against whom the award was made. However, the claim before the trial court was brought by the respondent. There is no evidence before us that any Objection was made. Pursuant to section 52 of the Act, it is

the Objector who may appeal to the court after receiving the Director’s reply. In this case it was the

respondent who, while not objecting to the award, instituted proceedings before the trial court. Whereas the Act provides the avenue for invoking the jurisdiction of the court by way of an appeal, the respondent moved to court by way of a Memorandum of Claim. It is clear that the procedure prescribed under the Act was not complied with. As was held by this Court in the oft-cited decision of ***Speaker of National Assembly v Njenga Karume*** **(1990-1994) EA 546**, where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed**.** This Court, in ***Jaldesa Tuke Dabelo v Independent Electoral & Boundaries Commission & Another*** **[2015] eKLR** further pronounced itself on the issue as follows:

> ***"The appellant having chosen the wrong procedure cannot turn around and rely on Article 159 of the Constitution. Article 159 was neither aimed at conferring jurisdiction where none exists nor intended to derogate from express statutory procedures for initiating a cause of action before courts…It is our considered view that the jurisdictional competence of a court and***

> ***the statutory procedure for commencing a cause of action are aimed at facilitating and enabling a party to be heard. A litigant cannot ignore the jurisdictional competence of a court or the procedure for commencing a cause of action and then aver that he has not been heard. Article 159 of the Constitution or the Overriding Objective principles are not blanket provisions that shelter a party who disregards the proper forum or jurisdictional competence of a court or fails to follow the procedure for commencing a cause of action."***

20. By making an award, separate from the one that had been assessed by the District Labour Officer, under the guise of affirming it, the learned Judge was clearly in error. The consequential award was a convolution of an award under the ***Work Injury Benefits Act,*** on the one hand, and one under the ***Law Reform Act*** and the ***Fatal Accidents Act*** on the other hand, when clearly the learned Judge appreciated that there was no sufficient evidence to support the claim under the latter. We agree that by treating the claim before the court as an Objection when it was not, the learned Judge, in her judgement ambushed the appellant and failed to afford the appellant the opportunity to answer to that claim.

21. In effect two fundamental errors were committed by the learned Judge. The first error was treating the Memorandum of Claim as an Objection when what was before the court was a Memorandum of Claim and when the procedure for making an Objection was not followed. Secondly, the learned Judge's decision to make a second award in a Memorandum of Claim when no negligence was proved, was an error. The making of the award had the effect of having two decisions for the same cause of action.

22. We have said enough to show that the judgment of the trial court is for setting aside. In the circumstances, we find it unnecessary to deal with the other issues in the appeal, which were dependent on the determination of this issue. Consequently, we find merit in this appeal, set aside the judgment delivered on 18th July 2018 in ELRC Cause No. 1124 of 2023 and substitute therefor an order dismissing the claim.

23. Considering that the respondent may have been misled by the uncertainty in the state of the law regarding the legal position of the claims under the ***Work Injury Benefits Act*** at that time, we make no order as to costs.

24. It is so ordered.

Dated and delivered at Nairobi this 24th day of October, 2025.

K. M'INOTI

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JUDGE OF APPEAL

O. MUCHELULE

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original signed
DEPUTY REGISTRAR