REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELRC APPEAL NO. E077 OF 2024

CENTRAL BANK OF KENYA…….……..……..APPELLANT

VERSUS

DIRECTORATE OF OCCUPATIONAL SAFETY AND HEALTH SERVICES (DOSHS)…..……..…1ST RESPONDENT

MICHAEL LANZEY WANDU....……2ND RESPONDENT

(Being an Appeal from the Objection Decision of the Director of Occupational Safety and Health Services at Nairobi dated the 26th of February, 2024 referenced as ML/DOSHS/WIBA/COMPL/02/2024 (2)

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

1. The Appellant herein, being dissatisfied with the Objection Decision of the Director of Occupational Safety and Health Services at Nairobi dated the 26th of February, 2024 referenced as ML/DOSHS/WIBA/COMPL/02/2024 (2) in the dispute between the parties before the said Director, filed a memorandum of appeal dated the 26th of March 2024 seeking the following orders:-

i) **This appeal be allowed.**

ii) **The 1st Respondent's decision referenced as ML/DOSHS/WIBA/COMPL/02/2024 (2) dated 26th February 2024, and the Director's award referenced as ML/DOSHS/WIBA/5586/2023 dated 29th June 2023 be set aside.**

iii) **The Appellant be awarded the costs of this appeal.**

GROUNDS OF THE APPEAL

2. The Director erred in fact and in law by arrogating to himself jurisdiction to entertain an injury claim that was outside the scope of Work Injury Benefit Act, 2007 CAP 236, Laws of Kenya.

3. The Director erred in law and in fact in failing to appreciate that the accident sustained by the 2nd Respondent was not an accident arising out of and in the course and scope of an employee's employment.

4. The Director erred in law and in fact in failing to give any consideration to the evidence by the Appellant indicating that the 2nd Respondent was at the time of the accident employed as a senior bank officer whose duty was to process cheques and verify documents and did not have any duty in maintaining or managing the Appellant's gym facility.

5. It was not open in law and in fact for the Director to expand the meaning of the term "accident" contrary to the definition provided under Section 2 of the Work Injury Benefit Act, 2007 CAP 236, Laws of Kenya.

6. The Director erred in law and in fact by purporting to hear and determine a matter that was statutorily time barred by dint of Section 26(1) & (2) of the Work Injury Benefit Act, 2007 CAP 236, Laws of Kenya.

7. It was not open in law and in fact for the Director to arbitrarily enlarge the statutory time limitation for considering claims under the Work Injury Benefit Act, 2007 CAP 236, Laws of Kenya.

8. The Director erred in law and in fact in finding that the claim by the 2nd Respondent was not time barred since the Appellant did not lodge the claim as mandated by the law.

9. The Director erred in law and in fact by failing to appreciate and take into consideration the Appellant's objection dated 21st August 2023 thereby arriving at an erroneous decision referenced as ML/DOSHS/WIBA/COMPL/02/2024, DATED 26TH February 2024.

10. In response to the Memorandum of Appeal as aforesaid, the 2nd Respondent filed a Replying Affidavit sworn on 2nd May 2024.

BACKGROUND TO THE APPEAL

11. A claim was filed by the 2nd Respondent on 16th June 2023 before the Director of Occupational Safety and Health Services in relation to the 2nd Respondent and against the Appellant vide seeking compensation for an injury sustained by the 2nd Respondent on 13th November 2013 while exercising the Appellant's gym facility, whereby the 2nd Respondent suffered a head injury. The 1st Respondent, vide form DOSHS/WIBA 3 issued the Appellant with Notice of Accident/Disease by or on behalf of an employee dated 29th June 2023 (page 12 of Record of Appeal dated 26th March 2024).

12. Following A Work Injury Evaluation Clinic held on 13th November 2013 at Safety House which culminated in a Report dated 13th November 2013, the Director of Occupational Safety and Health Services delivered his Decision and issued form DOSHS/WIBA 4

"Demand for Payment of Work Injury Benefit", dated 29th June 2023, designating the 2nd Respondent's permanent disablement at 40% and awarding compensation of Kshs. 9,045,542.40 calculated as follows: **235,561.90 (Monthly Total Earning) x 96 months x 40% Disablement** (page 13 of ROA).

13. Being dissatisfied with the award issued by the Director, the Appellant lodged an Objection dated 21st August 2023 vide form DOSH/WIBA 12 "Form of Objection to the Decision of the Director of Occupational Safety and Health Services" (page 15-16 of ROA) citing their reasons for objecting as:

    a) The claim is time barred having been filed approximately 10 years after the fate of the accident; and
    b) Mr. Mike Lanzey Wandu's injury is not a work injury since it was sustained at the staff gym.

14. The 1st Respondent vide a letter dated 1st September 2023 acknowledged receipt of the Objection and confirmed that it was made within 60 days as required by WIBA 2007. They indicated that they were carrying out investigations into the matter and would communicate their decision presently (page 28 of ROA).

15. On 26th February 2024, by a letter bearing the same date, the 1st Respondent dismissed the Appellant's Objection on the premise that the 2nd Respondent was an employee of the Appellant on the material date; he suffered a personal injury while at the Appellant's staff gymnasium, a facility owned and staffed by the Appellant and available for use by its

employees during their scope of work; the injury suffered by the 2nd Respondent was a deep cut to the left of his face and concussion to his right eye, as witnessed by several staff of the Appellant; and the 2nd Respondent received medical attention at the Appellant's Staff Clinic. They further noted that later, in the course of 2014, the 2nd Respondent began suffering loss of sight in the right eye and by 16th December 2014, he completely lost his sight in the right eye, leading to a diagnosis of retinal detachment made at Lions Eye First Hospital -Loresho; his retina was re-attached and the cut in the left eye sewn up, but the 2nd Respondent suffered 40% permanent disablement; the 2nd Respondent's injury was well documented at the Appellant's Staff Clinic on 13th November 2023 , but was not reported to the Director despite being in the knowledge of the Appellant; and the claim is not time barred since the lapse in reporting the accident to the Director was on the part of the Appellant who is mandated by law to report accidents (response to objection on pages 29-30 of ROA).

16. In his Replying Affidavit sworn on 2nd May 2024, the 2nd Respondent largely agreed with the Appellant's account of events, save to add that the accident was covered by the Appellant's Group Personal Accident Cover, which covered staff members against all injuries of whatever nature 24 hours a day, whether the injury was suffered in the staff member's actual work station or elsewhere within the Appellant's premises. He states that after suffering the said accident, he reported the matter to the Appellant and submitted the necessary medical claim form, but the Appellant failed to follow up with the insurer to process the claim for compensation to the 2nd Respondent. The 2nd Respondent avers that he later learnt that the insurers had declined to pay his compensation as the Appellant was late to report the accident. Subsequently, the 2nd Respondent states that he reported the accident

to the 1st Respondent due to the Appellant's failure to remit his compensation, despite assurances that it would settle his claim.

17. The 2nd Respondent is adamant that the injury that his left eye developed was a direct consequence of the accident that he suffered while in the Appellant's gym, and was not a result of any other historical medical condition. He also denies that the claim is time barred and states that the Appellant had the primarily responsibility of reporting the accident to the Director. The Appellant had been following up on the payment with the insurer since the time he reported the accident until he filed the claim with the Director, and was is solely responsible for the delay in reporting the accident to the Director.

DETERMINATION

18. The appeal was canvassed by way of written submissions. The parties all filed their respective submissions.

19. This being a first appellate court, it was held in Selle v Associated Motor Boat Co. [1968] EA 123 that:-

"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on

some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

20. Further in on principles for appeal decisions in Mbogo V Shah [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed At Page 94:

"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.''

Issues for determination

21. In its submissions dated 23rd May 2025, the Appellant identified two issues for determination, namely:-

i) Whether the 1st Respondent had jurisdiction to entertain claims and issue awards compensating injuries from accidents that are not work injury related; and

ii) Whether the 1st Respondent had jurisdiction to arbitrarily enlarge the statutory timeline for considering claims and making decisions under WIBA.

22. On their part, the 1st Respondent identified the following issues for determination in their submissions dated 31st July 2025:

i. Whether the injuries sustained by the 2nd Respondent on 13/11/2013 while at the Appellant's staff gymnasium were occupational;

ii. Whether the employer/Appellant should pay a sum of Kshs. 9,945,542.40 to the 2nd Respondent; and

iii. Whether the 1st Respondent was justified in considering and entertaining the injury claim in respect of the 2nd Respondent out of time.

23. Finally, the 2nd Respondent, in his submissions dated 16th July 2025, identified the following issues for determination:

i) Whether the 1st Respondent had jurisdiction under WIBA to entertain and award compensation for the injury sustained by the 2nd Respondent;

ii) Whether the 1st Respondent acted lawfully in admitting and determining the claim under Section 22(5) of WIBA and whether the claim was time-barred under Section 26 (1);

iii) Whether the 1st Respondent's computation and award of Kshs. 9,045,542.40 was based on valid medical evidence in accordance with Section 30 and 37 of WIBA; and

iv) Whether the Appellant failed to exhaust statutory remedies under WIBA prior to lodging the present Appeal.

24. The court on perusal of the submissions finds the issues for determination in the appeal to be-

a. Whether the 1st Respondent had jurisdiction under WIBA to entertain and award compensation for the injury sustained by the 2nd Respondent;

b. Whether the 1st Respondent acted lawfully in admitting and determining the claim under Section 22(5) of WIBA and whether the claim was time-barred under Section 26 (1); and Whether the 1st Respondent was justified in considering and entertaining the injury claim in respect of the 2nd Respondent out of time.

c. (if a, and b above are positive) Whether the 1st respondent was entitled to the compensation awarded.

Whether the 1st Respondent had jurisdiction under WIBA to entertain and award compensation for the injury sustained by the 2nd Respondent;

25. The facts of the background of the appeal are not disputed. That the impugned assessment arose out of injury of the 2nd respondent while working out in the gym, a work facility by the Appellant and that he was lawfully at the facility. It was also not in dispute that the work of the 1st respondent was not related to working out in the gym. He was a senior bank officer (page 26 of ROA was the certificate of service dated 3rd June 2016). It was further not in dispute that the 1st respondent was treated at the appellant facility at the first instance and assessed by its medical officer who found no permanent disability (page 6 of ROA). The injury was reported to the insurer (pages 4-5 was the claim form). The injury was captured in the insurance forms as Deep cut on the left hand side of the forehead. The Insurer rejected the claim vide letter dated 19th October 2021 on the basis that the claim was reported late and I will get back to the form later (page 23 of the ROA).

26. Was the injury suffered at the gym by the 2nd respondent who was a senior bank officer a work injury? The appellant contended it was not. The appellant had indeed filed an objection dated 21st August 2023 with DOSH raising 2 grounds namely- The injury was not work injury as it was suffered by the 2nd respondent while working out in the gym, hence did not arise out of an in the course of employment with the bank and was not related in any way to his job. The 2nd ground of the objection was that the claim was time barred contrary to section 26(a) of WIBA the accident having happened on the 13th November 2013 and the claim lodged with the 1st respondent on the 16th June 2023**.** On the jurisdiction under WIBA, the respondents contended that the injury was occupational and within section 2 of WIBA.

27. The Court established that the purpose of WIBA is as stated under the preamble to be **"***An Act of Parliament to provide for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes"* **(see Court of Appeal in Attorney General v Law Society of Kenya & another 2017 e KLR** stating that the claims under WIBA as per the preamble of WIBA**).** The word accident is defined under WIBA as "*accident" means an accident arising out of and in the course and scope of an employee's employment and resulting in personal injury; "injury" means a personal injury and includes the contracting of a scheduled disease;''.* Section 10 (4) of WIBA reads- *''For the purposes of this Act, an occupational accident or disease resulting in serious disablement or death of an employee is deemed to have arisen out of and in the course of employment if the accident was due to an act done by the employee for the purpose of, in the interests of or in connection with, the business of the employer despite the fact that the employee was, at the time of the accident acting— (a) in contravention of any law or any*

instructions by or on behalf of his employer; or (b) without any instructions from his employer.'' (emphasis given).

28. The court upheld the test of identifying whether an employee is "in the course and scope of employment" as established by Lord Atkinson in St. Helen's Colliery Co v Hewitson, 1924 A.C. 59 at p 70 and has been cited in approval by many cases including De Gee v Transnet SOC Ltd (30085/2015) [2019] ZAGPJHC 2; 2020 (2) SA 488 (GJ) (29 January 2019) which stated that:-

> "*The general principle is stated as follows in St. Helen's Colliery Co v Hewitson, 1924 A.C. 59 at p 70 by Lord Atkinson: "The difficulty of reconciling all the authorities on this question as to the course of a workman's employment arises, I think, from the omission on the part of some of the Courts to frame some test which must be satisfied in order to bring an accident within the course of a workman's employment. rash enough to suggest a test - namely, that a workman is acting in the course I myself have been of his employment when he is engaged 'in doing something he was employed to do.' Or what is, in other and I think better words, in effect the same thing - namely, when he is doing something in discharge of a duty to his employer, directly or indirectly, imposed upon him by his contract of service.* **''**The court applying the decision and the scope of WIBA finds that the 2nd respondent who was injured while exercising in the gym facility of the employer and his job not being related to the exercise or the gym, was not work injury. The court holds and finds that the injury was outside the scope of DOSH and the award compensation 10 years later was null and void for lack of jurisdiction. The court noted the appellant's

insurance had covered such accidents. The court noted the insurer blamed the 2nd respondent for failing to report the injury as per policy as follows-'' *we sought reasons for late notification and the claimant responded that he was not aware of the extent of the injury at the time of the accident as he thought it was a simple cut* ''. That was the reason for rejection of the claim by the insurer (see page 23 of ROA). The 2nd respondent ought to have lodged appeal with the Commissioner of Insurance if he was aggrieved with the decision. In the upshot, the court finds the injury was not a work injury/occupational injury under WIBA and the DOSH (1st respondent) had no jurisdiction to assess the injury and award compensation to the 2nd respondent.

Whether the 1st Respondent acted lawfully in admitting and determining the claim under Section 22(5) of WIBA and whether the claim was time-barred under Section 26 (1); and Whether the 1st Respondent was justified in considering and entertaining the injury claim in respect of the 2nd Respondent out of time.

29. The respondents stated the claim was valid under section 26 of WIBA. The appellant contended the claim was lodged outside the 12 months under section 26 of WIBA and that the 1st respondent had no jurisdiction to extent time. The 2nd respondent contended that it was out of failure of compensation by the insurer on basis of delay in reporting accident by the employer that he lodged the claim with the director. To buttress his case the 2nd respondent submitted that scenario was anticipated by Parliament and judicially interpreted in support of access to justice for injured workers. In Douglas Shikoli Nasiali v Citam Schools Woodley [2021] eKLR the Employment Court held: "*It is apt to note that under*

*Section 22(4) thereof, an employer who fails to report an injury or accident reported by an employee or on behalf of the employee to the Director within 7 days of receipt of the report commits an offence and is liable to criminal prosecution. (Emphasis added by the 2nd Respondent)"*Similarly, In Wanyama v Danree Multihandling Services Ltd (Misc App E180 of 2023) [2024] KEELRC 765 (KLR), the Employment Court observed that: "*At this Juncture it is important to point out that the Work Injury Benefits Act does not specifically provide for the extension of time for reporting the workplace accident resultant injury to the Director. In my view, and employing the maxim, equity will not suffer a wrong without a remedy, those deserving of an order for an extension of time to lodge a claim under the Work Injury Benefits Act, cannot be left helpless and without recourse simply because the Act is silent on extension of time.* ***…..****This Court is cognizant of the fact that under the provisions of the Limitation of Actions Act, Cap 22 Laws of Kenya, the time for initiation of injury claims is extendable. The Work Injury Benefits Act hasn't ousted the applicability of the Limitation of Actions Act, there cannot be any reason to hold therefore that an application for an extension of time to approach the Director"* (Emphasis added by the 2nd Respondent). That Judicial reasoning mirrors the 2nd Respondent's predicament, where the inaction led to procedural delay and align with Article 159(2)(d) of Constitution of Kenya, which provides that:

"Justice shall be administered without undue regard to procedural technicalities.'' The appellant submitted and relied on the same to the decision and conversely, asserted that only the court could extend time for lodging of late claims with the 1st respondent.

30. Section 26 of WIBA states- ‘’*(1) A claim for compensation in accordance with this Act shall be lodged by or on behalf of the claimant in the prescribed manner within twelve months after the date of the accident or, in the case of death, within twelve months after the date of death. (2) If a claim for compensation is not lodged in accordance with subsection (1), the claim for compensation may not be considered under this Act, except where the accident concerned has been reported in accordance with section 21. (3) If an employer fails to report an accident or to provide information requested by the Director as specified in the request, the Director may— (a) conduct an investigation and recover the cost of the investigation from the employer as a debt due from the employer; or (b) levy a penalty on the employer.’’* The employer did not report the accident. The 2nd respondent lodged the claim for compensation in 2023 for an accident that occurred in 2013 approximately 10 years later instead of within 12 months (section 26(1)). Section 26(2) of WIBA provides for exception to the 12-month time as follows- *‘’2) If a claim for compensation is not lodged in accordance with subsection (1), the claim for compensation may not be considered under this Act, except where the accident concerned has been reported in accordance with section 21’’*Section 21 reads- *‘’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. ‘’* The court held that Section 21 did not apply to the 2nd respondent as his injury was not fatal. The court finds that the 1st respondent had no jurisdiction then under section 26(2) to extend time and the same ought to have been sought before the court. The court has already decided that the injury was not an occupational injury/work injury.

CONCLUSION

31. The appeal is allowed. The court holds that the 1st respondent lacked jurisdiction in the claim for compensation by the 2nd respondent as against the appellant. The 1st Respondent's decision, referenced as ML/DOSHS/WIBA/COMPL/02/2024 (2) dated 26th February 2024, and the Director's award, referenced as ML/DOSHS/WIBA/5586/2023 dated 29th June 2023, are set aside.

32. On costs of the appeal, the Appellant and 1st respondent are government bodies. I find it is not prudent to order the one government body to pay the other costs and that justified the failure by the court not to uphold the principle that costs follow the event. The court orders each party to bear its own costs in the appeal.

33. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF NOVEMBER, 2025.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Ochieng'

1st Respondent: Theuri

2nd Respondent: Kiamba h/b Mutava