

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

ELRC APPEAL NO. E020 OF 2022

**NATIONAL GENDER & EQUALITY
COMMISSION.....**

APPELLANT

V. S U S

**THE DIRECTOR OF OCCUPATIONAL SAFETY & HEALTH
SERVICES..... 1ST
RESPONDENT**

**JOHN NZOMO..... 2ND
RESPONDENT**

(Being an appeal arising from the decision of the Director of Occupational Safety and Health Services (Director of Work Injury Benefits Administration) on 21st January 2022)

JUDGMENT

1. Through the Memorandum of Appeal dated 18 February 2022, the Appellant appeals against the decision of the Director of Occupational Safety and Health Services (Dr. Andrew Muruka) dated 21st January, 2022 and communicated to the Appellant on 28th February, 2022.

2. The Appeal was based on the grounds that:

i. The Hon. Director erred in law and in fact as he did in finding and holding that the objection by the Appellant dated 22nd July 2021 under Section 51(1) of Work Injury Benefits Act against the findings of Work Injury Evaluation Clinic referenced ML/DOSH/WIBA/NBI/2021 dated 1st July 2021 was submitted outside the stipulated period of sixty (60) days.

ii. The Hon. Director erred in law and in fact as he did in failing to find that the objection by the Appellant dated 22nd July 2021 under Section 51(1) of the Work Injury Benefits Act against the findings of Work Injury Evaluation Clinic referenced ML/DOSH/WIBA/NBI/2021 dated 1st July 2021 was within the prescribed time and warranted consideration on its merits.

iii. The Hon. Director erred in law and in fact as he did by consequently failing to consider the objection on its full merits in light of the available evidence and further failing to find that the objection by the Appellant dated 22nd July 2021 under section 51(1) of the Work Injury Benefits Act against the findings of Work Injury Evaluation Clinic referenced ML/DOSH/WIBA/NBI/2021 dated 1st July 2021 was merited and consequently find that the Claimant did not suffer a permanent disability and as such was not entitled to an award for permanent disability.

3. The Appellant prayed that the Appeal be allowed, the court to find that the objection by the Appellant dated 22nd July 2021 was submitted within the prescribed time, the decision of the Director of the Occupational Health and Safety (Dr.Andrew

Muruka) dated 21st January 2022 be set aside and substituted with an order that the Claimant did not suffer any permanent disability and to proceed to make an assessment of the appropriate award under the reminder of the head(s), to refer the matter back to the Director Occupational Safety and Health Services for assessment of the appropriate award.

4. The Appeal was disposed of by written submissions.

APPELLANT'S SUBMISSIONS

5. The Appellant's Advocates Ochieng & Kari Associates filed written submissions dated 1st May, 2021.

6. On the issue of whether the Appellant's Objection dated 22nd July, 2021 was submitted within the period of statutory limits, counsel submitted that the 2nd Respondent had only sustained a work-related injury and the Appellant by letter dated 28th April 2021 informed its insurer and on 29th April 2021 lodged his claim with the Director of Occupational Health Services (DOSHS) and an award was issued on the same day in the sum of Kshs. 5,976,735/- in favour of the 2nd Respondent.

7. Counsel submitted that the insurer referred the 2nd Respondent to a medical examination and by a report dated 12th June, 2021

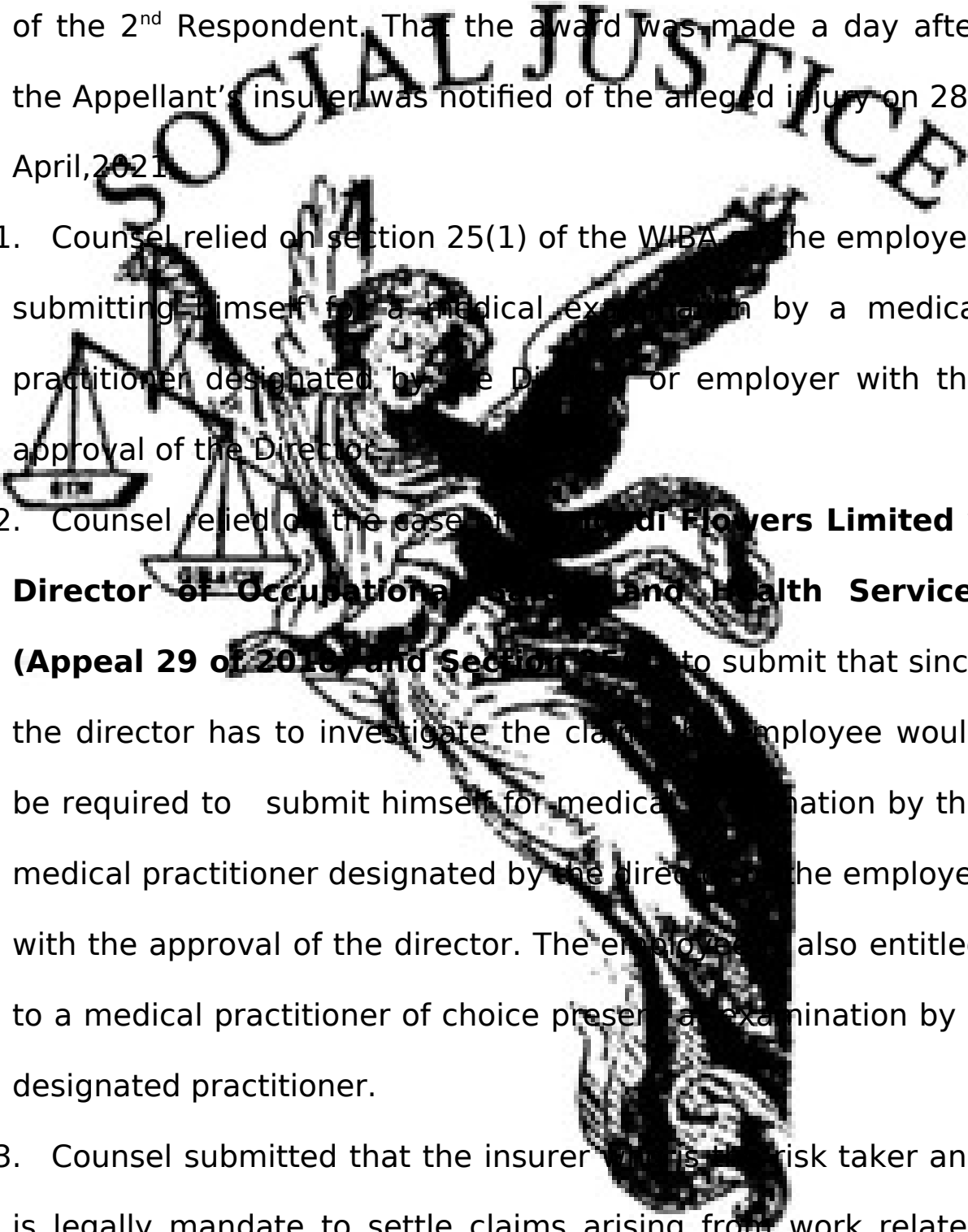
it was established that the 2nd Respondent did not sustain any degree of permanent incapacity from his alleged injury.

8. Counsel submitted that the DOSH referred the 2nd Respondent to a re-examination which by a letter dated 6th July 2021 indicated that the 2nd Respondent's degree of permanent incapacity had been confirmed at 20%.

9. Counsel submitted that the Appellant's insurer was aggrieved by the assessment and that an objection dated 22nd July 2021 and by a letter dated 1st October 2021, the DOSH responded indicating that the objection had been filed outside the required timelines. By a letter dated 5th November 2021, the Appellant's insurer clarified that the objection was against the evaluation of DOSH Clinic dated 1st July 2021 and the objection was therefore submitted within the required timelines.

10. Counsel relied on section 23(1) of the WIA to submit that the award of the Director dated 29th April 2021 was premature. There was no evidence of any inquiries made by the Director before making the award in favour of the 2nd Respondent. That the claim by the 2nd Respondent was lodged with DOSH on 29th

April, 2021 and on the same day an award was issued in favour of the 2nd Respondent. That the award was made a day after the Appellant's insurer was notified of the alleged injury on 28th April, 2021.

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11. Counsel relied on section 25(1) of the WIBA as the employee submitting himself for a medical examination by a medical practitioner designated by the Director or employer with the approval of the Director.
12. Counsel relied on the case of **Di Flowers Limited v Director of Occupational Safety and Health Service; (Appeal 29 of 2018)** and **Section 25(1)** to submit that since the director has to investigate the claim, the employee would be required to submit himself for medical examination by the medical practitioner designated by the director or the employer with the approval of the director. The employee is also entitled to a medical practitioner of choice present at examination by a designated practitioner.
13. Counsel submitted that the insurer is the risk taker and is legally mandate to settle claims arising from work related deaths and/or injuries on behalf of the Appellant had the right

to conduct a medical examination to ascertain the extent of the 2nd Respondent's injury before any award can be made. However, the process was rushed to the extent the award was made on the same day the claim was lodged denying the Appellant an opportunity to conduct a medical examination of the 2nd Respondent.

14. Counsel further submitted that the 1st Respondent failed to conduct its own medical examination of the 2nd Respondent to ascertain the extent of his injury and the same was only conducted after the Appellant's medical examination of the 2nd Respondent revealed that the 2nd Respondent did not sustain any disability and the 2nd Respondent objected to the said medical assessment.

15. Counsel submitted that the assessment by the 1st Respondent conducted on 1st July, 2021, which allegedly confirmed the 2nd Respondent's degree of permanent incapacity at 20% is what necessitated the filing of the Appellant's objection dated 22nd July, 2021 which the 1st Respondent declined to consider on the ground that it was

allegedly submitted outside the prescribed timelines and thus the instant Appeal.

16. Counsel relied on Sections 51 and 52 of the Work Injury Benefits Act to submit that section 51(1) provides for a decision of the Director on any matter. That the objection raised by the Appellant's insurer on 22nd July, 2022 was against the assessment made by the 1st Respondent on the degree of permanent incapacity sustained by the 2nd Respondent. That the 2nd Respondent evaluation was done on 1st July 2021 and the Director's decision to maintain the degree of permanent incapacity at 20% was communicated on 6th July 2021 and therefore the Appellant's objection dated 10 July 2021 was filed within required timelines.

17. On the issue of whether the 2nd Respondent sustained any permanent disability from the alleged injury, counsel submitted that upon being notified of the alleged accident and injury of the 2nd Respondent the Appellant's insurer referred the 2nd Respondent to a medical evaluation by the insurance doctor who by a report dated 12th June, 2021 indicated that the 2nd Respondent was dissatisfied by the assessment done by the

insurance doctor and requested to be re-examined by the 1st Respondent's panel of doctors and the said evaluation was scheduled for 1st July, 2021. That by a letter dated 6th July, 2021, the 1st Respondent maintained the degree of permanent disability suffered by the 2nd Respondent at 20% with no further information to support such findings.

18. Counsel submitted that the Appellant's insurer appointed an investigator to conduct a detailed inquiry into the circumstances leading to the occurrence of the accident and who prepared a report dated 17th November, 2021, which revealed various discrepancies which led to the conclusion that no such accident had occurred or any permanent disability was caused.

19. Counsel submitted that the investigation also revealed that the 2nd Respondent had lied about who he was with at the time of accident. At first the 2nd Respondent had stated that he was in the company of his driver and his personal assistant one Gideon Ndeti who refused to give the investigator a statement on the accident. That the 2nd Respondent attempted to substitute the statement of Mr. Ndeti with one of his wife one

Caroline Nzisa who he then insisted was the one who was with him on the day of the accident and not the said Gideon Ndeti.

20. Counsel further submitted that the 2nd Respondent had further indicated that after the accident he initially received treatment at Ekalakara Health Centre but there was apparently no record of his treatment at the said health centre.

21. Counsel further submitted that part 11 of the DOSH 1 Form was required to be filled by a doctor attending to the sick or injured employee. That in this case the said part was filed by a doctor from Machakos County Hospital whereas the 2nd Respondent was actually treated at Bishop Kioko Catholic Hospital. Further the said part 11 of the DOSH 1 form on the question if there was permanent incapacity the same is filled as NO and the next question of detailed nature of permanent incapacity the answer is N/A or not Applicable yet on the percentage of permanent incapacity is indicated as 20%.

22. Counsel submitted that the discrepancies found indicate that there was a scheme at fraudulently benefitting from a non-existent disability at the expense of the Appellant's insurer

which is why the process was initially rushed to issue an award without even assessing the 2nd Respondent's injury.

1ST RESPONDENT'S SUBMISSIONS

23. The 1st Respondent filed written submissions dated 5th June, 2025 and on the issue of whether the employer insurer's objection to the Director's Decision (WIBA 4 dated 29/04/2021) was in accordance with the law, the Respondent relied on Section 51 of the Work Injury Benefits Act, 2007 to submit that lodgement of an objection with the Director has timelines, and the timelines prescribed in the law were not adhered to by the Appellant. The Appellant neither sought leave from a court of law to lodge an objection out of time nor attempted to demonstrate what hindered lodgement within the prescribed time.

24. The 1st Respondent submitted that the law does not provide for the Director to expand the prescribed period for lodgement of an objection or allow lodgement of an objection out of time.

25. The 1st Respondent submitted that in considering the provisions of section 51 of Work Injury Benefits Act, the employer insurer's objection to the Director's decision was not

in accordance with the law. The 1st Respondent further submitted that the 2nd Respondent's employer had distanced itself by denying to have instructed the insurer, APA Insurance Limited and/or legal representatives to lodge any Appeal in Court.

26. On the issue of whether there was permanent incapacity in the accident on 13/11/2020 involving the 2nd Respondent, the 1st Respondent submitted that the Appellant did not object/dispute the accident occurrence and objected to permanent incapacity which objection was not outside the provisions of the law and therefore null and void.

27. The 1st Respondent relied on Sections 2 and 22 of the Work Injury Benefits Act, 2007 to submit that the Employer and 2nd Respondent adhered to the provisions provided. That by completing the notification form DOSI, filling it, then certifying the 2nd Respondent's three months pay slips on 28th April, 2021 and then writing to the 1st Respondent to officially confirm that 2nd Respondent was indeed an employee was not only in compliance with section 22 of the WIBA but also was confirming that the accident involving the 2nd Respondent had

actually occurred. The insurer did not raise any objection/dispute about the accident having or having not occurred but after realising the magnitude of the claim decided to commence some sort of investigation to purportedly establish if the accident ever occurred.

28. The 1st Respondent submitted that the insurer's investigation was not based on any provision of the law, the purported investigation was conducted without consultation with the employer, 1st Respondent or 2nd Respondent. No notification was given to anyone of the existence of the purported investigation or any input from anyone in the matter. The level of purported forensics and expertise of the persons conducting the purported investigation was low.

29. Counsel submitted that the Director is the only person mandated to conduct investigations on workplace accidents as per section 23 of the WIBA and section 31 of the Occupational Safety and Health Act. That the Director was never involved in such investigations. The Appellant's investigations were invalid and the conclusion that the accident never occurred. It would make no sense also for the Appellant's Insurer to subject the

2nd Respondent to their doctor if at all the accident never occurred. The Investigation was an afterthought.

30. The 1st Respondent submitted that the Dr. George Museve appointed by the insurer neither made any reference nor consulted the previous medical practitioners. He did not highlight the basis of ignoring all other medical examinations by medical practitioners at Bishop Moko Catholic hospital, Machakos Level 5 Hospital and all the tests of imaging done at the Machakos Imaging Centre.

31. The 1st Respondent further submitted that Dr. George Museve did not carry out any imaging tests or other tests to justify his opinion. It was later confirmed by a panel of 3 doctors empanelled by the 1st Respondent that the Respondent had suffered 20% permanent incapacity.

32. The 1st Respondent submitted that the medical report by Dr. George Museve cannot stand on the way of a panel of 3 doctors whose opinion is amplified by primary medical practitioners who had attended to the 2nd Respondent during the initial health care.

33. On the issue of whether the Appellant should pay a sum of Kshs. 5,976,735 to the Respondent, the 1st Respondent submitted that from the available medical reports from Bishop Kioko Catholic hospital, Machakos Level 5, tests done at Machakos Imaging Centre and medical practitioners empanelled by the 1st Respondent, it is clear that the 2nd Respondent suffered permanent injury at work.

34. The 1st Respondent submitted that the 2nd Respondent stayed away from duty for 9 days for treatment and medication due to the injuries sustained. The 1st Respondent relied on sections 28 and 30 of the Work Injury Benefits Act 2007 to submit that the 2nd Respondent should be compensated for injuries sustained while at work. A demand of Kshs 5,976,735 was made to the employer of the 2nd Respondent.

2ND RESPONDENT'S SUBMISSIONS

35. The 2nd Respondent filed written submissions dated 6th June, 2025 and on the issue of whether the appeal giving rise to the Appeal herein was filed within the prescribed time, the Respondent relied on Rules 12 & 13 of the Employment and

Labour relations Court (Practice) Rules 2024 to submit on the time for filing and service of memorandum of appeal.

36. The 2nd Respondent submitted that the Appellant wants to confuse the court by terming it as “evaluation” whereas it was a re-evaluation, and more importantly the Appellant deliberately, without any explanation, re-evaluated the said re-evaluation report dated 15th July 2021 which was concluded by three qualified doctors. The decision of the first evaluation conducted on 1st April 2021 was not as a consequence of a valid objection but out of dissatisfaction registered through his letter dated 22nd June 2021. That it followed that the objection in issue was not the one provided under section 51(1) of WIBA.

37. The 2nd Respondent relied on **Onyiah v China Communications Construction Company Limited (Employment and Labour Relations Case E093 of 2021) [2023] KEELRC** to submit that a decision is a positive determination upon consideration of facts and law. It is not in dispute that the 1st Respondent made his decision on 29th April, 2021 after considering all the medical facts and law.

38. The 2nd Respondent submitted that the Claim including the decision and other medical documents were shared via email to the insurer as the law requires on 29th April, 2021.

39. The 2nd Respondent posed a question of when his employer lodged the claim on his behalf as required under section 26 of WIBA and submitted that the claim and other medical documents were shared via email to the insurer on 29th April, 2021.

40. The 2nd Respondent relied on section 52 of the WIBA and the case of **Ng'ang'a vs County Government of Nakuru (Miscellaneous Origin Application No. 10 of 2023)** to submit that the time started running immediately the claim was lodged with the insurer.

41. The 2nd Respondent submitted that the Appellant ignored to strictly follow the procedure on timelines. The Appellant ought to have raised objection within 60 days and that is to say from the 29th April, 2021 when the claim was lodged up to the 27th June, 2021.

42. On the issue of whether Director of Occupational Safety and Health Services was right in declining to entertain the

objection, the 2nd Respondent submitted that the Appellant having failed to satisfy the determination of the first ground of appeal in the affirmative the answer herein should be in the affirmative. That the 1st Respondent did not have any legal obligation to consider the objection as it was filed outside the legal parameters.

43. On the issue of whether the appeal as filed had merit the 2nd Respondent submitted that the appeal as filed offends Rule 11(1) of the Employment and Labour Relations Court (Practices) Rules, 2024. That the decision of the court dated 23rd January, 2022 and communicated to the Appellant on 2nd February, 2022 was non-existent and not anywhere in the record of appeal.

44. The 2nd Respondent submitted that in the event the court finds the objection and memorandum of appeal were filed within statutory timelines he urged the court to evaluate the evidence on record afresh and admit the supplementary record of appeal he filed while relying on the case of **Sifuna & Another v Wasike (Environment and Land Appeal E051 of 2021(2023) KEELC 22450(KLR) (19 December 2023) (Judgment)** on role of first appellate court.

45. The 2nd Respondent relied on the case of **Beatrice Wairimu Kariuki v Solomon Njoroge Kiote & 4 others [2019] eKLR** among other cases to urge the Court to admit the supplementary record of appeal filed which does not introduce any extraneous matter but only completes the Appellant's Record of Appeal by furnishing the documents submitted.

46. The 2nd Respondent relied on the case of **Sifuna & another v Wasike** to submit that the Appellant has failed to plead fraud thus the allegation of fraud is a mere thought only calculated to defeat the ends of justice by stopping payment of the work injury compensation.

47. The 2nd Respondent further relied on the case of **Ben Wangusi Nyongesa v Dot.Com Bakery Limited [2022] eKLR** to submit that the investigations by the Appellant's insurer are not envisaged in law under WIBA thus not acceptable and that the Appellant was urging the court to reject an investigation report that had no place in law. Investigations under WIBA were purely a reserve of the 1st Respondent. The 2nd Respondent relied on the case of **Lagat v Kenya Ordinance Factories (Miscellaneous Cause E038 of 2023) [2024]** to submit that

the court should do substantive justice and act without undue regard to technicalities. If an employee is injured and the employer fails to implement the award or to appeal against the award. He urged the court to adopt the 1st Respondent's decision of 29th April, 2021 as the court's judgment.

48. The court has considered the appeal, the record of Appeal and the submissions by the parties and this being an Appeal from the DOSH which is more of an administrative action, the court will scrutinize the decision of the DOSH to find if the Director's decision to disallow the Appellant's objection was justified or not.

49. In this case, the employee claimed he was injured while on duty on 13th November, 2020 and the Appellant reported the accident to 1st Respondent after acknowledging that the 2nd Respondent was their employee and that he was injured. They also supplied the requested documents including three months' pay slips belonging to the 2nd Respondent.

50. On 29th April, 2021 the 1st Respondent assessed the 2nd Respondent award at Kshs 5,976,735.00/= . The degree of

permanent incapacity was assessed at 20%. The Appellant's insurer after being notified of the award went on to submit the 2nd Respondent to its medical doctor on 12th June 2021 at Hazina Medical Consultants Clinic and Dr. George Museve recommended that the 2nd Respondent never suffered any permanent incapacity.

51. The 2nd Respondent objected to the Appellant's Insurer assessment vide a letter dated 1st June, 2021. The 1st Respondent vide the letter dated 1st June, 2021 advised the 2nd Respondent to visit the Insurer's consultant at safety house for re-evaluation on 1st July, 2021.

52. The 2nd Respondent appeared on 1st July, 2021 for the re-evaluation and he was examined by Dr. Kowino J, Dr. Kimani J. and Dr. Kimani W. who retained the degree of permanent incapacity at 20%. The 1st Respondent notified the Appellant on 6th July, 2021 of the evaluation of the 2nd Respondent and the fact that the degree of permanent incapacity being retained at 20%. The Appellant's Insurer filed their objection dated 22nd July, 2021 challenging the award made on 29th April, 2021.

53. From the above chronology of events, the Court notes that the Appellant after the assessment of the 2nd Respondent award did not raise any objection to the occurrence of the accident or the award but its insurer went on to conduct a separate medical examination without involving the 1st Respondent.

54. It is important to note that section 25(1) allows the Director to designate a medical practitioner to examine the injured employee and if the employer is to subject the injured employee to such medical examination they can only do so with approval of the Director.

55. This therefore meant the Appellant's insurer medical examination of the 2nd Respondent was null and void for failure to seek the Director's approval.

56. Section 25(1) of the WIBA provides as follows:

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

57. The drafters of the WIBA must have foreseen a scenario where employers would come up with their medical reports or

those of their insurers which would be detrimental to the injured employees. This is the reason why the Act under section 25(1) requires that an employer can only undertake such second medical examination with approval of the Director. In this case no such approval was sought by the Appellant.

58. In the case of **Stephen Wangusi Mwangi v Dot.Com Bakery Limited [2022] KLRJ 101 (KLR)** court held as follows: -

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

59. The court notes that since the Appellant was already served with the demand, the best they could have done was to appeal and seek approval of the Director for a second medical examination on the 2nd Respondent. In addition after the 2nd Respondent objected to the Appellant's insurer medical examination the Director through WILCO constituted three medical doctors to do a further medical examination which was done by experienced professionals in work injury claims. The same committee considered the scans done on the 2nd

Respondent which were used by the three doctors to assess the nature and extent of injuries. There is therefore no way an opinion of one doctor albeit unprocedurally hired by the employer/insurer could outweigh opinion of three independent doctors constituted by WIEC.

60. The Appellant's assertions that the report was not supported by any documents is not true since the scans formed part of documents and the respondent explained the reason they gave the 2nd Respondent 20% of permanent incapacity due to the nature of the injuries.

61. The committee received the percentage assessed by the Director and reminded the Appellant to pay the payment. The Appellant's insurer therefore appeared to accept the Director's assessment on 22nd July, 2021.

62. The Appellant has alleged that they objected the WIEC evaluation of 1st July,2021 which they were notified on 6th July,2021. A closer scrutiny of the objection dated 22nd July, 2021 indicates the decision being objected to be that of the award and not the evaluation of 1st July,2021.

63. The Appellant was served with the demand for payment of the assessed amount on 29th April, 2021 and could have objected to the same as required under section 51 of WIBA which provides:

*“(1) any person aggrieved by a decision of the director on any matter under this Act, may within sixty days of such decision, lodge an objection with the Director against such decision.
(2) the objection shall be in writing in the prescribed form accompanied by particulars containing a concise statement of the circumstances in which the objection is made and the relief or order which the objector claims, the grounds in which he desires to have determined.”*

38. In the *Stephen Wangusi's case* (supra), the court stated:

The Respondent did not dispute the Director's assessment and award, either as a matter of law provided for at all. Indeed the Respondent passed on the assessed sum to its insurers for settlement.

7. In the Respondent's words,

“The Insurance opted to conduct an independent assessment and directed that the Claimant undergo a second medical evaluation by a different doctor...”

8. The Respondent did not tell the court in any way that this kind of procedure is domiciled...

39. The Appellant's Insurer objected to the award on 22nd July, 2021 and the 1st Respondent responded vide a letter dated 14th October, 2021 that the objection was time barred having being filed past 60 days from 29th April, 2021.

40. The court agrees with the 1st Respondent that any objection to the assessment could only be done within 60 days from 29th April, 2021 up to 27th June 2021. The Appellant instead of appealing the decision as required served its insurer with the demand instead of appealing caused the 2nd Respondent to undergo a second illegal medical examination.

41. This court agrees with the position taken by the Director that nothing prevented the Appellant from appealing within the stipulated timelines and their assertion that they were appealing from the WEC evaluation is not correct as it is not stated as such in the objection. The Appellant's allegations of investigation done by private investigator could not hold water because it was only the Director who was empowered to do an investigation about the accident and injury. The report was rightly submitted by counsel for the respondent as an afterthought by the Appellant having complied initially to report the accident to DOSH and never disputing the accident or injuries sustained.

42. In conclusion the Court upholds the determination by the Director that the appeal by the appellant concerning the assessment was an afterthought. The present appeal to this Court is therefore found unmerited and is hereby dismissed with costs.

43. The court further directs that the Director's award be enforced by the writ of the court.

44. It is so ordered.

Dated at Nairobi this 13th day of November 2025

Delivered virtually this 13th day of November

2025

Abuodha Nelson Jorum

Presiding Judge-Appeals Division

