

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CIVIL APPEAL NO E037 OF 2024

HATARI SECURITY GUARDS Limited.....

APPELLANT

VERSUS

JAPHETH NYAKUNDI MAREMA.....

RESPONDENT

**(Appeal from the ruling passed on 06/11/2024 in Nanyuki CM Civil
Case No. E141 of 2023- Kithinji A.R (CM)**

J U D G M E N T

1. The Respondent instituted a suit against the Appellant vide a plaint dated 07/11/2023 where he averred that on 01/07/2022, he was a lawful co-driver in motor vehicle registration number KCJ 068X make Isuzu Dmax which was travelling along Nanyuki-Segera road when the Defendant's driver, servant and/or employee negligently, recklessly and/or carelessly drove, managed and controlled the subject vehicle causing it to lose control and veered off the road thereby causing him to sustain serious injuries. He therefore sought for general damages, special damages, costs and interest.

2. The Appellant on the other hand filed a preliminary objection dated 24/07/2024 on account that the court lacked jurisdiction to entertain, hear and/or determine the matter pursuant to the provisions of **section 16** of the **Work Injury Benefits Act (WIBA)**.

3. In its ruling dated 06/11/2024, the lower court dismissed the preliminary objection and held that the preliminary objection was unmeritorious since it was based on the provision of the Act which was declared unconstitutional. Further, the Respondent had not touched on employment issues despite the fact that the cause of action arose during employment.

4. Being dissatisfied by the said ruling, the Appellant preferred the present appeal and filed a memorandum of appeal dated 15/11/2024 raising the following grounds of appeal;

- i. That the learned magistrate erred in law and fact in finding that **section 16** of the **Work Injury Benefits Act** was unconstitutional notwithstanding the Supremes' court judgment in ***Law Society of Kenya v Attorney General & another (Petition 4 of 2019) KESC 16 (KLR)***

and the practice directions on WIBA matters issued by the Chief Justice vide Kenya Gazette of 28/04/2023.

- ii. The learned magistrate erred by dismissing the Appellant's preliminary objection dated 24/07/2024 which had the effect of granting jurisdiction to a magistrate to hear and determine claims with respect to compensation for work related injuries filed after the supreme court's decision.
- iii. The learned magistrate erred by basing his ruling on irrelevant considerations.

5. The appeal was canvassed by way of written submissions. The Appellant submitted that the trial court dismissed the preliminary objection on the strength that **section 16 of WIBA** was declared unconstitutional in ***Law Society of Kenya vs Attorney General: Central organisation of Trade Unions (K) (Interested Party) [2009] KEHC 4250 (KLR)***. That however, the same case was subjected to appeal and the Supreme Court in in ***Law Society of Kenya v Attorney***

General & another (2019) KESC 16(KLR) stated that **section 16** could not be said to be inconsistent with the former and current Constitution. He submitted that based on that, **section 16** of **WIBA** is valid and constitutional. Additionally, the Chief Justice issued practise directions vide *Kenya Gazette Notice No. 5476* that all claims with respect to compensation for work related injuries and diseases shall commence before the director of occupational safety and health services.

6. He submitted that the Respondent's suit was filed after supreme court determination in 2019. The Respondent also acknowledged that the injuries he sustained were work related injuries as admitted in his submissions dated 23/01/2025. Therefore, the learned magistrate erred by relying on annulled judgment to hold that **section 16** of **WIBA** was unconstitutional.

7. In rejoinder, the Respondent's counsel submitted that the cause of action is founded on tort law and specifically negligence arising from a road traffic accident caused by negligent driving of the defendant, his servant/agents hence the matter is on tort law and not employment law. That the claim before the trial court is governed by the Traffic Act, Highway

Code, common law principles of negligence and the police abstract. The Defendant is sued in its capacity as the insured owner of the subject motor vehicle and not in the capacity of an employer. The Respondent is not seeking compensation under WIBA for workplace injury but general and special damages for negligence in a road traffic accident. Therefore, the jurisdiction lies in civil court regardless of the employment relationship between the driver and the defendant.

8. He submitted that the Appellant's reliance on **section 16** of **WIBA** is misguided for reasons that the said section was declared unconstitutional in ***Law Society of Kenya v Attorney General & another [2009] eKLR*** and in ***Global Apparels (EPZ) Ltd v Kelvin Musyoki Kimanzi (2019) eKLR*** and his claim is not a statutory compensation claim under WIBA but common law tort claim. Hence courts retained jurisdiction to hear and determine work related injury claims. That the court of appeal in ***West Kenya Sugar Co. Ltd v Tito Lucheli Tangale (2021) eKLR*** confirmed that an employee is entitled to sue in negligence in court despite the provisions of **section 16** of WIBA. Further, the Appellant's preliminary objection failed to raise a pure point of

law as it relied on a statutory provision that has been declared unconstitutional, it tried to characterise his cause of action as employment injury which required court to examine facts beyond the pleadings.

9. I have considered the written submissions by the parties herein including the cases cited. I have also read the ruling of the trial court.

10. The trial court dismissed the preliminary objection on account that **section 16** of **WIBA** was declared unconstitutional in the case of ***Global Apparels (EPZ) Ltd v Kelvin Musyoki Kimanzi (supra)*** whereby the court quoted ***Law Society of Kenya v attorney General & Another (2009) eKLR***. The court further found that the Respondent had not touched on employment issues despite the fact that the cause of action arose during employment.

11. It is noteworthy that the Respondent did not deny in this appeal that the cause of action arose in the cause of his duty. In his plaint at paragraph 3, it was averred that he was a lawful co-driver in the motor vehicle registration number KCJ O68X which was travelling along Nanyuki-Segera road when the driver

controlled the vehicle carelessly veering off the road causing him to sustain serious injuries. In the submissions filed before this court dated 23/01/2025 under paragraph 5, he admitted that he was injured while at work and he is suing the owner or agents of motor vehicle for negligence and not an employer **under WIBA. He however** contends that the accident involved the negligence of a third party vehicle owner and not an issue of employer liability under WIBA. The subject motor vehicle is said to be owned by the Appellant.

12. Section 2 of WIBA defines an accident as;

“accident” means an accident arising out of and in the course and scope of the employee’s employment and resulting in personal injury.

13. Section 10(5) of WIBA provides that;

“For the purposes of this Act, the conveyance of an employee to and from the employee’s place of employment for the purposes of the employee’s employment by means of a vehicle provided by the employer for purposes of conveying employees is deemed to be in the course of the employee’s employment.”

14. It therefore follows that if the Respondent was injured in the course of his duty on board the company vehicle, then this is a WIBA matter.

15. The trial magistrate opined that this was not a WIBA matter since **section 16** of WIBA was declared unconstitutional in the ***Law Society of Kenya vs Attorney General & another (2009) eKLR***.

16. The said section provides that;

“No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee’s employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.”

17. The said section had been declared unconstitutional in the above case but the Supreme Court in ***Law Society of Kenya v Attorney General & another [2019] KESC 16 (KLR)*** stated that **section 16** of WIBA could not be said to be inconsistent with the former and current Constitution. The court inter alia held that;

“Furthermore, this court should consider the Constitution 2010’s provisions to help deduce whether or not the impugned provisions, when read alongside the purpose of WIBA would assist in bringing clarity and justice to the issues in contest. In doing so, a plain reading of section 16 of the Act would reveal that its intention is not to limit access to courts but to create a statutory mechanism where any claim by an employee under the Act is subjected, initially, to a process of

dispute resolution starting with an investigation and award by the Director aforesaid and thereafter, under section 52 an appeal mechanism to the then Industrial Court. As we previously stated in Petition No 33 of 2018, Sammy Ndungu Waity v IEBC and 3 others (2019) eKLR; Where the Constitution or any other law establishes an organ, with a clear mandate for the resolution of a given genre of disputes, no other body can lawfully usurp such power, nor can it append such organ from the pedestal of execution of its mandate. To hold otherwise, would be to render the constitutional provision inoperable, a territory into which no judicial tribunal, however daring, would dare to fly.” We reiterate the above holding and in the present context therefore we further find that Section 16 cannot be read in isolation so as to create the impression that it curtails the right to immediately access the courts, because by looking at the intention of section 16, the purpose it fulfils is apparent. That purpose is revealed in section 23 which calls for initial resolution of dispute via the Director and this can be deemed as an alternative dispute resolution mechanism. But what if one is still aggrieved by the decision of the Director? The answer to that question lies in section 52 of the Act which allows aggrieved parties to seek redress in a court process. In the circumstances, access to justice cannot be said to have been denied. Having so held, it is evident that by granting the Director authority to make inquiries that are necessary to decide upon any claim or liability in accordance with WIBA the jurisdiction of the High Court to deal with constitutional questions and violations that may arise from such claims under article 165 of the Constituion 2010 is not ousted at all. Similarly, the appellate mechanism to the Industrial Court, in the

circumstances, cannot be legitimately questioned. The Director's inquiries are also essentially preliminary investigations. Such mechanisms, set out by statute must be left to run their full course before a court intervenes. Not only does this simplify procedures to ensure that courts focus on substantive rather than procedural justice, but also potentially addresses the problem of backlog of cases, enhances access to justice, encourages expeditious disposal of disputes, and lowers the costs of accessing justice. There is also the added benefit that inquiries by the Director inevitably means that work injuries and accidents are well captured and understood by his office. He can for example take measures or instruct his officers to hasten remedial administrative measures to avoid further occurrence of similar incidents.

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Flowing from the above analysis, it is apparent that in considering the nature and extent of the limitation placed under section 16 of the Act it becomes clear that it does not permanently limit the right to access courts by an aggrieved party. It is only the initial point of call for decisions in workers' compensation. When read in whole with section 23 and 52 of the Act therefore, a party is not left without access to justice nor do employees or employers have to resort to self-help mechanisms. What the section does, is that it allows the use of alternative dispute resolution mechanisms to be invoked before one can approach a court. We must in concluding on this issue also acknowledge, that this is a system that has been operational without complaint from employees through their union as divulged in court by the COTU for over a decade and we therefore find no reason to interfere with an already efficient system. It is

our finding, therefore, that neither section 16, 23, nor 52(1) of WIBA can be said to be inconsistent with the former Constitution or the Constitution 2010.

18. Following the above decision, the Chief Justice subsequently issued Practice Directions vide the Kenya Gazette Notice Vol. CXXV—No. 99 and dated 28.04.2023, reaffirming the Supreme Court’s position and therefore clarifying the status of pending claims filed either before or after the enactment of WIBA and/or the Supreme Court judgment. For the avoidance of doubt, the Practice Directions stated as follows under paragraph 8;

“Claims Filed after the Supreme Court Decision

8.(a) All claims with respect to compensation for work related injuries and diseases shall commence before the Director of Occupational Safety and Health Services.

(b) All appeals emanating from the decision of the Director of Occupational Safety and Health Services shall lie before the Employment and Labour Relations Court.

(c) Such appeal shall be heard and determined through the appropriate appellate mechanism within the judicial hierarchy.”

19. The court in ***Musango v Brinks Security Services Ltd & another [2024] KEHC 1797 (KLR)*** held that;

“The record is clear and it is not disputed that at the time of the accident, the appellant was on duty as a passenger in his employer’s motor vehicle. An accident is defined in WIBA thus; "accident" means an accident arising out of and in the course and scope of an

employee's employment and resulting in personal injury; It is evident from the record that the appellant's was a response crew guard who would be transited from one Safaricom booster site to another in his employer's motor vehicle as he was the custodian of the various Safaricom booster keys. The WIBA has a mechanism of dealing with compensation claims that arise in the course of employment and as such, the appellant's claim in the trial court offends the doctrine of exhaustion of remedies. In Benard Murage -vs- Fine Serve Africa Limited & 3 others [2015] eKLR the Supreme Court of Kenya stated that: "Where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy should be pursued first."

20. And in **Geoffrey Muthinja Kabiru & 2 others -vs- Samuel Munga Henry & 1756 others [2015] eKLR** the Court of Appeal stated:-

"It is imperative that where a dispute resolution mechanism exists outside courts the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be of last resort and not the first port of call the moment a storm brews.....The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement in judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts....This accords with Article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution."

21. Flowing from the above, it is manifestly clear that the dismissal of the preliminary objection by the trial court arose from a misapprehension of the law.

22. In the end, I must make the inevitable finding; that the appeal herein has merit and is allowed. The ruling and orders of the trial court are hereby set aside and substituted thereof with an order upholding the preliminary objection and in the processes dismissing the suit with costs to the Applicant.

**Dated signed and delivered this 28th day of November
2025.**



A.K. NDUNG'U
JUDGE