



**Malome & 170 others v Associated Battery Manufacturers (EA) Ltd; Directorate of Occupational Safety and Health Services (Interested Party) (Employment and Labour Relations Petition E004 of 2025) [2025] KEELRC 3710 (KLR) (17 December 2025) (Ruling)**

Neutral citation: [2025] KEELRC 3710 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS  
EMPLOYMENT AND LABOUR RELATIONS PETITION E004 OF 2025**

**JW KELL, J  
DECEMBER 17, 2025**

**BETWEEN**

**DAVID MALOME & 170 OTHERS ..... PETITIONER**

**AND**

**ASSOCIATED BATTERY MANUFACTURERS (EA) LTD ..... RESPONDENT**

**AND**

**DIRECTORATE OF OCCUPATIONAL SAFETY AND HEALTH SERVICES ..... INTERESTED PARTY**

**RULING**

1. The 171 Petitioners filed a petition dated 2<sup>nd</sup> May 2025 against the respondent seeking for the following relief-
  - a. A declaration that the action of the Respondent in failing to conduct medical examination of the petitioners before commencement of employment and periodically during employment was in violation of the right to fair labour practice under articles 35 and 41 of *the Constitution* of Kenya. The Respondent in failing to conduct medical examination of the petitioners at the termination of their employment was in violation of the petitioner's rights under Articles 35 and 41 of *the Constitution* of Kenya.
  - b. A declaration that the action of the Respondent in failing to conduct medical examination of the petitioners while other workers underwent the required medical examinations without any justification was discriminatory and in violation of article 27 of *the Constitution* of Kenya 2010.
  - c. A declaration that the actions of the respondent in failing to fill and submit the notice by an employer of an occupational accident to an employee to the Directorate of Occupational



Safety and Health Services violated the petitioners' right under article 41 of *the Constitution* of Kenya, 2010.

- d. A declaration that the actions of the respondent in failing to fill and submit the notice by an employer of an occupational accident to an employee despite knowing of the risks to the health of the petitioners violated the petitioner's right under article 35 of *the Constitution* of Kenya, 2010.
  - e. A declaration that the actions of the respondent in failing to fill and submit the notice by an employer of an occupational accident to an employee and failing to give any justifiable reason violated the petitioner's right under article 47 of *the Constitution* of Kenya, 2010.
  - f. A declaration order that the actions of the respondent contravened and violated the provisions of *the Constitution* under articles 2, 3, 10, 19, 22(1) & (3), 23(1) & (3), 25(a), 27, 28, 29(d) and (f), 35,41 and thus contravened and violated the rights and freedoms of the petitioner under the Bill of Rights of *the Constitution* of Kenya, 2010.
  - g. An order directing the Respondent to fill the notice by an employer of an occupational accident to an employee and forward the same to the Directorate of Occupational Safety and Health Services for purposes of computation of compensation payable to the petitioners.
  - h. An order for compensation against the respondent for violating the petitioner's constitutional rights and freedoms.
  - i. Costs of the suit and interest thereon.
  - j. Any other order that this honourable court deems fit and just in the circumstances.
2. The respondent filed their response and the instant application dated 24<sup>th</sup> July 2025 seeking for the following Orders-
- a. That the petition herein be struck out in its entirety
  - b. That the suit be dismissed
  - c. That the respondent be awarded costs of the suit and costs of the application.
3. The application was supported by the affidavit of Emma Ndiga and annexed copy of suit in ELRC Machakos Cause No. E005 of 2024 by 157 claimants with the 1<sup>st</sup> petitioner as 1<sup>st</sup> claimant. The applicant contended that in the suit, similar issues as in the petition were pleaded, or it was open for the petitioners to plead the matters claimed herein. This was further to the following grounds of the application- This Honourable Court lacks jurisdiction to hear and determine this Petition. The Petition seeks compensation arising from alleged occupational injuries and/or diseases that allegedly occurred when the Petitioners were allegedly engaged as casual labourers with the Respondent. The jurisdiction to assess compensation arising from a workplace injury or disease, as mandated by law, lies with the Director of Occupational Health Services under the Work Injuries Benefits Act, 2007. ("WIBA"). The Petition herein is bad in law and should be struck out for offending the rule against Constitutional avoidance, as all the issues raised and the prayers in the Petition could have been dealt with under statutory mechanisms under WIBA. The Petition herein is a gross abuse of the process of this Court, as it is filed pending the subsistence of Machakos ELRC Case No. E005 of 2024--David Malome & Others vs Associated Battery Manufacturers, where the Petitioners raised similar issues as raised herein. The Petitioners have, in bad faith, failed to disclose the existence of Machakos ELRC Case No. E005 of 2024 herein. Consequently, the Petition herein dated 2 May 2025, and the suit herein



should be struck out, as this Petition is an abuse of the process of the Court, and the Court does not in any event have jurisdiction to deal with the Petition.

### **Response to the application**

4. The application was opposed by the petitioners through the replying affidavit jointly sworn by David Malome, Antony Munjaru, Johnson Mwaniki and Shadrack Kimotho on the 10<sup>th</sup> September 2025 stating as follows-

- ‘1. That we are all male adults of sound mind and petitioners herein with the authority of the other petitioners herein and conversant with the facts of this case and therefore competent to swear this affidavit.
2. That we have read and had explained to us the Respondent’s application dated 24th July 2025 as well as the contents of the Supporting Affidavit sworn by Emma Ndiga on 23rd July 2025 and wish to respond hereto as hereunder.
3. That the said application is misconceived and contains misrepresentations and material non-disclosure of facts.
4. That we have been advised by our advocates on record which advice we verily believe to be true that the remedies sought in our petition herein are outside the scope and mandate of the jurisdiction conferred under the Work Injury Benefits Act.
5. That by this petition we wish, in addition to seeking compensation, to bring to the attention of this honorable court and to highlight the gross failures and violations of the law laid down in the regulations regulating work, and which constitute gross violation of rights and freedoms outlined under the Constitution and for which the Respondent must be held accountable.
6. That from the Petition it is clear that the Petitioners’ employment was terminated sometime between January 2023 and February 2023.<sup>7</sup> That provisions of the Factories And Other Places Of Work Act (Medical Examination Rules) 2005, the Employment Act are very clear in terms of the obligations of the Respondent while the petitioners are in employment, and at termination, which statutory obligations the Respondent violated with impunity and without due regard to the welfare and health of the petitioners as the claim is no longer a simple statutory claim whose limits are not compatible with constitutional guarantee of adequate remedy for rights violation, and as such, the inadequacy of the remedies under WIBA becomes a constitutional issue for this honorable court to determine.
8. That the Respondent was and has been well aware that, contrary to the express regulations of the Factories And Other Places Of Work Act (Medical Examination Rules), no testing was ever done on the Respondents and even more importantly, no testing was conducted at the time of unlawful termination of the petitioners.
9. That the same Respondent, even after such termination, and up until the filing of this petition, and to date, the Respondent has not made any effort to regularize or comply with the regulations to our detriment and to the detriment of all the petitioners and clearly had no intention to do the same.
10. That the Respondent cannot now rely on the provisions of WIBA to escape the fact that they have clearly violated the rights and freedoms and human decency.
11. That we are advised by our advocates on record, which advice we verily believe to be true that the compensation scope provided under WIBA only provides for compensation for injuries



sustained in the course of employment, which the petitioners have not declined to seek, whereas the compensation sought by this petition does encompass violations that go beyond WIBA provisions.

12. That we have been advised by our advocates on record, which advise we verily believe to be true that the compensation envisaged by WIBA is nowhere near adequate to compensate the petitioners.
13. That in our petition, we have raised issues directly and expressly protected by *the Constitution* of Kenya with regard to the violations of freedom from discrimination, the right to health, the right to safe working conditions, the right to information, which the Respondent has systematically, deliberately and intentionally violated with no regard to the health of the petitioners, and these violations are outside the scope and jurisdiction of the compensation envisaged under WIBA.
14. That by the application, the Respondent seeks to avoid statutory duty which, in the first place it had no intention to comply with, and which if left unaddressed by this honorable court will not only cause irreparable harm to the petitioners, but also other unsuspecting members of the public who are or would, in the future, be employees of the Respondent.
15. That it is in the interest of public policy that this honorable court does hear the grievances presented by the petitioners and make a determination on the same, and subsequently dismiss the Respondent's application.”

#### **Applicant's submissions**

5. These are the Respondent's Submissions in response to the Petitioner's submissions dated 1 October 2025. The Respondent reiterates and entirely relies on its submissions dated 24 July 2025 in support of its Notice of Motion Application dated 24 July 2025 (the "Application"). The Respondent will restrict its response to the key issue raised in their submissions of whether this Honourable Court has jurisdiction to entertain the petition.
6. Whether this Court has jurisdiction to entertain the petition herein:- This Court lacks jurisdiction to hear and determine the petition. The Petitioners' primary cause of action is premised on seeking compensation for the alleged injuries and/ or diseases that they allegedly suffered when they were allegedly engaged as casual workers by the Respondent. These matters fall squarely within the purview of the Directorate of Occupational Safety and Health and ought to be lodged under the statutory mechanism of the *Work Injury Benefits Act, 2007* ("WIBA") Contrary to the allegations of the Petitioners, the reliefs and/ prayers sought in the Petition must be dealt with under the statutory mechanism outlined in WIBA and not the Employment Court. The Petitioners admit at page 3 of their submissions that they are seeking compensation for the alleged injuries sustained in the course of alleged employment. The reliefs and/or prayers sought in the petition are attendant to the primary cause of action, which is the alleged claim of compensation, and as such the jurisdiction to assess the compensation lies with the Director of Occupational Safety and Health. The Court in *Mung'ara v Director of Occupational Safety and Health Services (DOSHS) & another (Employment and Labour Relations Appeal E120 of 2023) [2025] KEELRC 1710 (KLR) (12 June 2025) (Judgment)* held as follows: - "WIBA is a special law to deal with claim for injuries at the workplace. The preamble of WIBA provides: - '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'. The jurisdiction to assess the compensation lies with the Director of Occupational Safety and Health." This Court's jurisdiction is limited to matters of appeal arising out of the decision of the Directorate of



Occupational Safety and Health, as provided under Section 52 of the [Work Injury Benefits Act](#). The Petition is thus bad in law and has been filed in order to avoid the prescribed statutory mechanism under WIBA.

7. The decision of *Wasika v Caddell Construction Co (DE) LLC; Directorate of Occupational Safety and Health Services (Interested Party) (Petition E073 of 2023) [2023] KEELRC 3383 (KLR) (20 December 2023) (Judgment)* relied upon by the Petitioners is separate and distinct from the Petition herein. In the said decision, the petition emanates from the failure of the respondent to fill and submit the notice by an employer of the occupation accident or occupation disease. In the instant petition, the Petitioners' claim is compensation for the alleged injuries and/ or diseases allegedly suffered when they allegedly engaged as casual workers by the Respondent. The Petitioners have failed to follow the statutory mechanisms before petitioning this Court as a Constitutional Court. The Petitioners have not raised any of the grievances before Director of Occupation Safety and Health as required under the Act. There is a clear remedy and statutory mechanism under WIBA for addressing the grievances that the Petitioners seek to raise but have declined and/or failed to follow. It is therefore evident that the Petitioners have failed to exhaust the statutory remedy available to them. In addition to that, the Petition offends the doctrine of the constitutional avoidance as the Petitioners have failed to follow the statutory mechanism under WIBA. Contrary to the submissions of the Petitioners at page 4 of their submissions, the Respondent reiterates that the Petition does not raise any constitutional issues not attendant to the question of whether the Petitioners suffered any alleged injury or illnesses arising out of their alleged work as casual labourers with the Respondent. The Petitioners have failed to exhaust the statutory remedy under WIBA, and as such their Petition offends the rule against constitutional avoidance

#### **The Petitioner's/Response submissions**

8. The background of this case is that the Petitioners are former employees of the Respondent who were employed on casual basis as battery breakers. The petitioners contend that their rights and freedoms under [the constitution](#) have been violated by the Respondent, and that based on the constitutional provisions which protect these rights, the petitioners seek redress from the honorable court for compensation for injuries suffered by the petitioners as a result of these violations by the Respondent. The Respondents filed the application before this court dated 24th July 2025 and which forms the subject of these submissions. By the said application, the Respondent has sought that the Petition be struck out. The main ground for seeking that the petition be struck out is that the Respondent contends that this is a matter which should be dealt with by the Directorate of Occupational Safety and Health. The Respondent has invoked the doctrine of constitutional avoidance as a basis of their application. In Response, the Petitioners have filed a Replying Affidavit sworn on 10th September 2025 opposing the application dated 24th July 2024.
9. The petitioner submitted that the main contention by the Petitioners in this petition is that the Respondent has not only failed and neglected their statutory duty to ensure the welfare of the petitioners as employees but have systematically and intentionally denied the petitioners their labor rights and thereby intentionally avoided to ensure that the petitioners are in good health while in its employment and at the point of separation. It is important to note that the grounds on which the petitioners have brought this petition is the failure, neglect and intentional violation of the right to information, right to healthy working conditions and freedom from discrimination. These violations have been done by the Respondent in a manner that has resulted in detrimental physical effects to the petitioners. Your Ladyship, while it is a legal duty imposed upon the Respondent to conduct medical examination and tests in terms of blood and urine analysis on a regular basis as provided by the Factories and other Places of Work Act, it has never been the intention of the Respondent to



comply with these obligations to the detriment and at the expense of the Petitioners health. While the Respondent benefitted from the work of the Petitioners, the petitioners have suffered and continue to suffer. We submit that the remedies sought in our petition herein are outside the scope and mandate of the jurisdiction conferred under the *Work Injury Benefits Act*, which only deal compensation for injuries occasioned at the workplace. The Directorate of Occupational Health does not deal with compensation for violations of constitutionally protected rights and freedoms. Your Ladyship, we have submitted that the Petitioners' employment was terminated sometime between January 2023 and February 2023. This fact is not in contention. Indeed, provisions of the Factories And Other Places Of Work Act (Medical Examination Rules) 2005, the *Employment Act* are very clear in terms of the obligations of the Respondent while the petitioners are in employment, and at termination, which statutory obligations the Respondent violated with impunity and without due regard to the welfare and health of the petitioners as the claim is no longer a simple statutory claim whose limits are not compatible with constitutional guarantee of adequate remedy for rights violation, and as such, the inadequacy of the remedies under WIBA becomes a constitutional issue for this honorable court to determine. The legislature had every intention of protecting employees from exploitation of health by employers who would want to leverage their position to evade providing sufficiently healthy working conditions. Your Ladyship, the fact that the Respondent was and has been well aware that, contrary to the express regulations of the Factories And Other Places Of Work Act (Medical Examination Rules), no testing was ever done on the Respondents and even more importantly, no testing was conducted at the time of unlawful termination of the petitioners speaks to the impunity of its actions. Leaving the Respondent without sanctions for continuous and pre-meditated violations of human rights would go against public policy and decency. It is clear that the same Respondent, even after such termination, and up until the filing of this petition, and to date, the Respondent has not made any effort to regularize or comply with the regulations to the detriment of all the petitioners and clearly had no intention to do the same. The Respondent cannot now hide on the pretext of the provisions of WIBA to escape the fact that they have clearly violated the rights and freedoms and human decency, an action they never intended to take in the first place. In addition, the same Directorate of Occupational Health is the same institution which has facilitated and condoned such blatant violations of the Respondent over the many years that the Petitioners have been in the employment of the Respondent. It is the institution which should have overseen the regulatory compliance required of the Respondent, and the Respondent cannot now be seen to be running to the same institution. We submit that the compensation scope provided under WIBA only provides for compensation for injuries sustained in the course of employment, which the petitioners have not declined to seek, whereas the compensation sought by this petition does encompasses violations that go beyond WIBA provisions. As such we contend that the compensation envisaged by WIBA is nowhere near adequate to compensate the petitioners. Your Lordship, in addition to the above, the Petitioners have stated categorically, that despite being the first people in contact with lead acid material, other categories of employees were tested whereas they were not. This is the very basis of the violation of the freedom from discrimination, which the petitioners seek to address under the petition. Clearly, the Directorate of Occupational Safety In this petition, what has been raised are issues directly and expressly protected by *the Constitution* of Kenya with regard to the violations of freedom from discrimination, the right to health, the right to safe working conditions, the right to information, which the Respondent has systematically, deliberately and intentionally violated with no regard to the health of the petitioners, and these violations are outside the scope and jurisdiction of the compensation envisaged under WIBA. By the application, the Respondent seeks to avoid statutory duty which, in the first place it had no intention to comply with, and which if left unaddressed by this honorable court will not only cause irreparable harm to the petitioners, but also other unsuspecting members of the public who are or would, in the future, be employees of the Respondent. We reiterate that it is in the



interest of public policy that this honorable court does hear the grievances presented by the petitioners and make a determination on the same, and subsequently dismiss the Respondent's application. We support the Petitioner's submissions with the case of Wasika v Caddell Construction Co (DE) LLC; Directorate of Occupational Safety and Health Services (Interested Party) (Petition E073 of 2023) in which the honorable court held that such a petition was not a claim for compensation under WIBA, but it was to enforce the Act and to secure rights and fundamental freedoms as claimed. We also seek to rely on the case of CNM v WMG [2018] eKLR, where the court weighed in on the constitutional question as follows: "A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute. When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider constitutional rights or values. Further, in considering the question of what constitutes a constitutional question, the South African Case of Fredricks & Others vs MEC for Education and Training, Eastern Cape & Others in which Justice O'Regan recalling the Constitutional Court's observation in S vs Boesak notes that: -"The Constitution provides no definition of "constitutional matter." What is a constitutional matter must be gleaned from a reading of the constitution itself: if regard is had to the provisions of... the Constitution, as well as issues concerning the status, powers and functions of an organ of state..., the interpretation, application and upholding of the Constitution are also constitutional matters. So too...is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. ....At the heart of the cases within each type or classification is an analysis of the same thing- the constitutionally entrenched fundamental rights. Therefore, the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organize an analysis of the nature of constitutional matters arising from the cases before court." On the strength of the above submissions, we urge this honorable court to dismiss the Respondents application with costs.

## Decision

10. Whether the court has jurisdiction -The Petitioner relied on the decision In Wasika v Caddell Construction Co (DE) LLC; Directorate of Occupational Safety and Health Services (Interested Party) [2023] KEELRC 3383 (KLR) where Judge Ongaya held-"The preliminary objection filed by the respondent on grounds that section 16 of the Work Injury Benefits Act precluded filing of claims for the recovery of damages in respect of any occupational accident or disease failed. The petition sought that the respondent who had refused or neglected its voluntary submission to Work Injury Benefits Act be compelled to do so. It was not a claim for compensation for the disablement arising from the occupational disease in issue but it was to enforce the Act and to secure rights and fundamental freedoms as claimed. The preliminary objection was liable to dismissal with costs." In reply the applicant submitted as follows- The decision of Wasika v Caddell Construction Co (DE) LLC; Directorate of Occupational Safety and Health Services (Interested Party) (Petition E073 of 2023) [2023] KEELRC 3383 (KLR) (20 December 2023) (Judgment) relied upon by the Petitioners is separate and distinct from the Petition herein. In the said decision, the petition emanates from the failure of the respondent to fill and submit the notice by an employer of the occupation accident or occupation disease. In the instant petition, the Petitioners' claim is compensation for the alleged injuries and/ or diseases allegedly suffered when they allegedly engaged as casual workers by the Respondent. The Petitioners have failed to follow the statutory mechanisms before petitioning this Court as a Constitutional Court. The Petitioners have not raised any of the grievances before Director of Occupation Safety and Health as required under the Act. The doctrine of constitutional avoidance is as stated in the Communications Commission of Kenya and 5 others –Versus- Royal Media Services Ltd and 5 Others (2014) eKLR where it was held that the principle of constitutional avoidance



entails that a Court will not determine a constitutional issue where a matter may properly be decided on another basis. Further, where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, then that is the course which should be followed. It is true the germane of the petition related to issue of disease and accidents at work place a jurisdictions of DOSH under WIBA. The court is seized of jurisdiction in any constitutional claims of violation raised arising from employer employee relationships pursuant to Article 162(2)(a) of *the Constitution*. One of the prayers in the petition is – ‘3. A declaration that the action of the Respondent in failing to conduct medical examination of the petitioners while other workers underwent the required medical examinations without any justification was discriminatory and in violation of article 27 of *the Constitution* of Kenya 2010.’ The DOSH has no jurisdiction to handle constitutional violation claim of discrimination. A constitutional issue is not affected by doctrine of exhaustion of remedies. The court has jurisdiction to determine the validity and merit of the claims of constitutional violations raised. The court, in the circumstances, finds that it had jurisdiction in the petition. The application to strike out the petition is dismissed with costs to the petitioners in the cause.

11. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17<sup>TH</sup> DAY OF DECEMBER, 2025.**

**J. W. KELI,**

**JUDGE.**

IN THE PRESENCE OF:

Court Assistant: Otieno

Petitioners – Ms Ouko

Respondent- Ms. Miima

