

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT NAIROBI

ELRC JUDICIAL REVIEW NO. E058 OF 2025

(Before Hon. Lady Justice Hellen Wasilwa, J)

**THE NUCLEAR POWER AND ENERGY AGENCY.....
APPLICANT**

VS

**THE DIRECTOR OF OCCUPATIONAL SAFETY
AND HEALTH SERVICES (DOSH).....
.....RESPONDENT**

AND

**ENG. ELVIS NJENGA KIMANI.....1ST INTERESTED
PARTY**

**TRUSTMARK INSURANCE BROKERS.....2ND INTERESTED
PARTY**

**CIC INSURANCE.....3RD INTERESTED
PARTY**

JUDGMENT

1 The Applicant filed a Notice of Motion dated 3rd October 2025 seeking orders that: -

1. *this Honorable Court be pleased to issue an order of CERTIORARI, to quash and/or set aside the decision of the Director of Occupational Safety and Health Services (DOSH) dated 29th November 2024 in the matter of Eng. Elvis Njenga Kimani (Work Injury Benefit Claim Reference Number*

WIBA/NRB/03221 /2024) in the sum of KES 17,048,684.00.

2. *this Honorable Court be pleased to issue an order of stay of all proceedings in NAIROBI ELRC MISC. APPLICATION NO. E239 OF 2025, to stay the execution and/or implementation of the award of the Respondent dated 29th November 2024, pending the hearing and determination of this Application, and stay issued on 25th September, 2025 in this regard be extended pending the hearing and determination of this Application*
3. *the costs of this Application be provided for.*

Applicant's Case

- 2 It is the Applicant's case that the Judicial Review proceedings arise from the illegality, irrationality and procedural impropriety of the DOSH Award dated 29th November 2024, by which compensation in the sum of KES 17,048,684.00 was awarded to the 1st Interested Party.
- 3 The Applicant avers that its main complaint is that the Respondent acted *ultra vires* its statutory mandate by entertaining a claim that did not satisfy the mandatory jurisdictional threshold under the Work Injury Benefits Act (WIBA).
- 4 The Applicant avers that under WIBA, an "accident" must arise out of and in the course of employment. In the instant case, the injury forming the basis of the impugned award occurred at about 0300 hours while the 1st

Interested Party was driving his personal motor vehicle along the Mombasa–Nairobi Highway, far removed from the Applicant’s premises and outside any official assignment. These circumstances failed to meet the statutory test of causation and the scope of employment contemplated under WIBA, as demonstrated by the police abstract annexed to the application.

- 5 The Applicant avers that by finding in favour of the 1st Interested Party, the Respondent improperly extended the scope of WIBA to cover private activities unrelated to its business. Thus, the Respondent acted outside its statutory mandate, thereby committing a fatal jurisdictional error.
- 6 The Applicant further avers that the impugned award is tainted by procedural unfairness and a violation of the right to fair administrative action.
- 7 It is the Applicant’s case that it was never served with the Respondent’s final decision and award dated 29th November 2024, nor was it served with the critical underlying documents, including the mandatory DOSH Form 4.
- 8 The Applicant avers that the failure to effect service deprived it of the opportunity to lodge a statutory objection within thirty days as provided under section 51(1) of WIBA, thereby extinguishing its right of appeal. This amounted to a fundamental breach of the *audi alteram partem* principle and rendered the Respondent’s

actions procedurally unfair, prejudicial, and the entire award null and void.

Respondent's Case

- 9 In opposition to the application, the Respondent filed a replying affidavit dated 3rd November 2025, sworn by Bernard Simiyu, the Assistant Director of Occupational Safety & Health in-charge of Nairobi County.
- 10 It is the Respondent's case that it heads a department within the Ministry of Labour and Social Protection, mandated to process compensation for injuries sustained at work in accordance with the provisions of the Work Injury Benefits Act (WIBA).
- 11 The Respondent avers that it did not fail and/or refuse to involve or inform the Applicant in respect of the injury claim in question and reiterates that the entire claim was processed strictly in line with the statutory framework established under WIBA.
- 12 The Respondent avers that upon the occurrence of an accident at work, the injured employee is conveyed for medical treatment and a notice of the accident is required to be submitted to the area office of the Directorate of Occupational Safety and Health Services (DOSHS) in the prescribed form DOSHS 1. Pursuant to section 22 of WIBA, such notification must be made within seven (7) days in the case of non-fatal injuries, and pursuant to section 21 of WIBA, within twenty-four (24) hours in the case of fatal injuries.

- 13 The Respondent avers that upon receipt of the accident notification in form DOSH 1, the Directorate undertakes investigations into the accident in accordance with section 23 of WIBA. In fatal accidents, computation of benefits payable to dependants is undertaken and a demand is lodged with the employer through DOSH/WIBA Form 4, while the process of identifying dependants is conducted pursuant to section 36 and the Third Schedule of WIBA.

- 14 The Respondent avers that in non-fatal accidents, upon completion of medical treatment, the injured employee is assessed by a primary medical practitioner who awards a percentage of permanent incapacity in Part II of DOSH 1, as required under section 30(2) of WIBA. The assessment, together with supporting documentation including pay slips, police abstracts, medical reports and other prescribed documents, is then submitted to the Directorate for processing of benefits under sections 30 and 37 of WIBA.

- 15 The Respondent avers that once compensation is computed in non-fatal cases, a demand is lodged with the employer through DOSH/WIBA Form 4. Effective 11th May 2024, this process is undertaken electronically through the Occupational Safety and Health Management Information System (OSHMIS) portal, directly to the employer's online account.

- 16 The Respondent further avers that pursuant to section 26 of WIBA, an employer is required to settle the claim within ninety (90) days from the date of lodgement.
- 17 It is the Respondent's case that in the event of a dispute relating to the assessment of incapacity or a decision of the Director, an aggrieved party is required to lodge an objection and appeal in accordance with sections 51 and 52 of WIBA, and thereafter escalate the matter to the Employment and Labour Relations Court (ELRC) if dissatisfied.
- 18 The Respondent avers that on 18th July 2024, the 1st Interested Party sustained injuries when he was involved in a road traffic accident at about 4.00 a.m. along University Way Roundabout while driving towards the Applicant's office. The Applicant did not notify the occurrence of the accident to the Respondent within the prescribed time and in the prescribed form as required under section 22 of WIBA.
- 19 The Respondent avers that subsequently, by a letter dated 25th October 2024 and signed by Mr. Justus A. Wabuyabo, LLM (UoN), the Applicant's Chief Executive Officer, the Applicant formally requested the Respondent to process the WIBA claim for the 1st Interested Party.
- 20 It is the Respondent's case that the prescribed ML/DOSH Form 1 (Rev. 2018) was thereafter submitted by the Applicant through its OSHMIS online account on 19th

November 2024 at 12:19 p.m., with Part I of the form having been duly signed by the Applicant's Human Resource Manager on 24th October 2024.

- 21 The Respondent avers that Part II of the ML/DOSH Form 1, being the medical report, was completed and signed by Dr. Patrick Akuku, who assessed the 1st Interested Party's permanent incapacity at 35%.
- 22 It is the Respondent's case that the Applicant provided supporting documentation through the OSHMIS portal, including a cover letter from the Chief Executive Officer, a copy of the 1st Interested Party's National ID and his payslip, and confirmed through its letter dated 25th October 2024 that the 1st Interested Party was its employee.
- 23 The Respondent avers that the Applicant voluntarily completed and submitted the accident notification form as required under section 22 of WIBA, and was neither coerced nor misled into doing so. The Applicant did not claim to have misunderstood its statutory obligations nor to have been incapable of comprehending the contents of the form it executed and submitted.
- 24 The Respondent avers that arising from the medical assessment of 35% permanent incapacity and four (4) days temporary incapacity, compensation was computed on 29th November 2024 pursuant to sections 28 and 30 of WIBA, resulting in an award of KES 17,048,684.

- 25 It is the Respondent's case that a demand in ML/DOSH/WIBA Form 4, dated 29th November 2024 and bearing reference WIBA/NRB/03221/2024, was generated and delivered to the Applicant through its OSHMIS account on the same day at 16:37 hours.
- 26 The Respondent avers that the Applicant did not lodge any objection, dispute or appeal within the statutory period prescribed under section 51 of WIBA, nor did it seek leave to file such an objection out of time.
- 27 It is the Respondent's case that due process under WIBA was not followed by the Applicant and that the Respondent cannot therefore be faulted for actions taken within the statutory framework.
- 28 The Respondent denies having acted unreasonably, unlawfully or in violation of Article 47 of the Constitution or the Fair Administrative Action Act, and maintains that any grievance relating to the award ought to have been pursued through the dispute resolution mechanisms provided under sections 51 and 52 of WIBA.
- 29 **However, vide a supplementary affidavit dated 10th November 2025 sworn by Justus Bosire Nyakego, Deputy Director of Occupational Safety & Health in-charge of Nairobi County; the Respondent retracted its earlier stance as stated below.**

- 30 The Respondent avers that pursuant to section 10(5) of WIBA, an employee is deemed to be in the course of employment only where conveyance to or from work is by a vehicle provided by the employer. The 1st Interested Party was driving his personal motor vehicle at the time of the accident and was therefore not in the course of employment for purposes of WIBA compensation.
- 31 The Respondent also avers that under the Applicant's Human Resource Policy and Procedures Manual dated August 2020, specifically Section 10.6 on office hours, the accident occurred at a time well outside official working hours, and no explanation was provided to justify travel to the office at 4.00 a.m. Therefore, the accident was not occupational in nature.
- 32 The Respondent avers that the WIBA claim was system-generated through the OSHMIS portal based on data inputted by the Applicant, in accordance with statutory formulae under sections 28 and 30 of WIBA.
- 33 It is the Respondent's case that while the 1st Interested Party may be entitled to compensation; such compensation does not fall within the ambit of WIBA.
- 34 The Respondent avers that the Applicant's insurer correctly advised vide a letter dated 26th June 2025 that the claim was not compensable under WIBA but was more appropriately covered under the Group Personal Accident Policy.

35 It is the Respondent's case that as a government agency, the Applicant's employees are covered under alternative insurance arrangements as communicated by the Government in a circular dated 13th June 2019 issued to all Principal Secretaries and Accounting Officers on the provision of work injury benefits and group personal accident cover for civil servants.

1st Interested Party's Case

36 In opposition, the 1st Interested Party filed a replying affidavit dated 5th November 2025.

37 It is the 1st Interested Party's case that the Applicant's attempt to quash the Respondent's award through judicial review is misconceived, without merit, and amounts to an abuse of the Court process. The Application improperly seeks to transform judicial review proceedings into an appeal on the merits, contrary to settled principles governing the jurisdiction of this Court.

38 The 1st Interested Party avers that the Respondent's award dated 29th November 2024 arose from serious personal injuries he sustained in a road traffic accident on or about 18th July 2024, while in the course of his employment with the Applicant.

39 Following the accident, the Applicant duly notified the Respondent, whereupon the Respondent undertook statutory inquiries and facilitated medical examinations to

ascertain the nature and extent of his injuries, processes of which the Applicant was fully aware.

- 40 It is the 1st Interested Party's case that ML/DOSH Form 1 (Part I), completed and signed by the Applicant on 24th October 2024, demonstrates the Applicant's knowledge of the accident and its participation in initiating the statutory compensation process under the Work Injury Benefits Act. He avers that upon inquiry and medical assessment, the Respondent lawfully determined that he was entitled to compensation and issued an award in the sum of KES 17,048,684.
- 41 The 1st Interested Party avers that to effect settlement, the Respondent issued a demand dated 29th November 2024 through ML/DOSH/WIBA Form 4, which was served upon the Applicant at about 4:37 p.m., with copies simultaneously forwarded to the Applicant's insurer and to himself. The demand marked the culmination of the statutory inquiry and assessment process and that the Applicant's claim of lack of service or awareness of the award is unfounded.
- 42 The 1st Interested Party avers that under section 51(1) of WIBA, any party aggrieved by a decision of the Director is required to lodge an objection within sixty (60) days, and that under section 24(4) of WIBA, an employer or insurer is obligated to settle the claim within ninety (90) days of lodgement. The Applicant neither lodged an objection nor pursued an appeal within the statutory framework and

now seeks to challenge the award through a collateral and impermissible route.

- 43 It is the 1st Interested Party's case that no evidence has been placed before the Court to demonstrate illegality, irrationality or procedural impropriety on the part of the Respondent. Therefore, the allegations of violations of Articles 47 and 50 of the Constitution and sections 4, 5 and 6 of the Fair Administrative Action Act, 2015 are unsupported and arise solely from dissatisfaction with the award.
- 44 The 1st Interested Party avers that the Respondent acted within its statutory mandate under WIBA and that the award was lawful, rational and procedurally fair.
- 45 He contends that the Applicant's argument that the accident occurred in a personal vehicle and outside official working hours is misconceived, and that under the doctrine of incidental activity, injuries sustained in activities reasonably connected to employment fall within the scope of employment. He further relies on the Applicant's Human Resource Policy and Procedures Manual dated August 2020, particularly Clause 5.4, to support this position.
- 46 The 1st Interested Party avers that by its conduct, including a letter dated 25th October 2024 requesting finalisation of the claim assessment to facilitate settlement by its

insurer, the Applicant acknowledged liability and is estopped from denying it.

- 47 He further avers that on or about 24th January 2025, the Applicant and its insurer engaged him in negotiations and proposed a reduced settlement of KES 14,459,492, which was neither approved by the Respondent nor honoured.
- 48 It is the 1st Interested Party's case that the Applicant bears primary liability for settlement of the award, and that any dispute between the Applicant and its insurer does not affect his right to compensation.
- 49 He contends that reliance on police abstracts and motor vehicle accident reports relating to property damage is irrelevant to the personal injury claim and should not be used to defeat a lawfully issued statutory award.
- 50 The 1st Interested Party avers that the Respondent's award, having not been challenged within the statutory timelines provided under WIBA, attained finality and is binding upon the Applicant. He maintains that the Applicant cannot rely on its own inaction to defeat the enforcement of a valid award and prays that the Application be dismissed with costs, the award dated 29th November 2024 be adopted as a judgment of the Court, and in the alternative, that the Applicant and its insurer be held jointly and severally liable for the sum of KES 17,048,684.00.

51 In opposition to the Respondent's supplementary affidavit, the 1st Interested Party filed a replying affidavit dated 10th December 2025.

52 The 1st Interested Party contends that the Supplementary Affidavit fundamentally contradicts the Respondent's Replying Affidavit dated 3rd November 2025.

53 It is the 1st Interested Party's case that a supplementary affidavit cannot lawfully be used to retract, reverse or materially contradict a primary affidavit on substantive issues, and that such contradiction renders the later Affidavit untrustworthy, self-serving, and of diminished probative value.

54 He avers that the Respondent's sudden alignment with the Applicant's position invites an inference that the change of stance is actuated by extraneous considerations inconsistent with the Respondent's statutory mandate.

55 The 1st Interested Party reiterates that on 29th November 2024, the Respondent lawfully exercised its jurisdiction and made an award in his favour after conducting inquiries in compliance with WIBA, including receiving relevant documentation and medical evaluations from both parties. Throughout the statutory process, the Applicant actively participated, submitted the required documents, and never raised any objection on jurisdiction, causation or procedural fairness.

- 56 He further avers that the Applicant did not lodge an objection or appeal within the statutory timelines prescribed under WIBA, with the consequence that the award became final, conclusive and binding upon the parties.
- 57 The 1st Interested Party contends that it defies common sense and logic for the Respondent to suddenly support the Applicant's attempt to impeach the same award, either directly or indirectly, after legitimately exercising its statutory authority and rendering a lawful award.
- 58 The 1st Interested Party avers that the Respondent has put considerable effort into claiming that the accident did not arise out of and in the course of my employment, which is in direct opposition to the factual and jurisdictional basis upon which it initially assumed jurisdiction, conducted necessary inquiries, and issued the impugned award.
- 59 He maintains that as a Principal Engineer employed by the Applicant, the scope of his employment was not confined to fixed working hours or a single workstation, but extended to incidental and ancillary activities reasonably connected to the discharge of his duties, as evidenced by his employment contract.
- 60 It is the 1st Interested Party's case that the travel during which the accident occurred was not for personal convenience but arose out of operational necessity. He had been required at short notice to chair a meeting on

behalf of Eng. Eric Ohaga, the Applicant's Director, on the morning of 18th July 2024, which was later deferred to 19th July 2024 following the accident that occurred at approximately 4:00 a.m. on 18th July 2024. He relied on the email correspondence marked "ENK-2A" to demonstrate the scheduling of the meeting.

- 61 The 1st Interested Party avers that owing to the exigencies of the assignment and the need to avoid Nairobi traffic in order to report early and adequately prepare for the meeting, he commenced his commute earlier than usual, an act undertaken wholly in furtherance of the Applicant's business and within the scope of his employment.
- 62 He further avers that the Applicant was at all material times aware of the work-related circumstances surrounding the accident, a position confirmed by the Applicant's own act of reporting the accident to the Respondent through ML/DOSH Form 1, thereby treating the incident as one arising in the course of employment.
- 63 It is the 1st Interested Party's case that the doctrine of incidental activity recognises that injuries that occur while an employee is engaged in activities reasonably connected to, or in pursuance of, duties owed to the employer fall within the scope of employment. Thus, the *ex post facto* claim by the Applicant and supported by the Respondent should not be countenanced, as they are calculated to frustrate a duly issued statutory award and to defeat the ends of justice.

64 The 1st Interested Party avers that he had a legitimate expectation that the award, once lawfully made, would be complied with in good faith, and that the coordinated stance adopted by the Applicant and the Respondent undermines that principle. Therefore, he urged the court to strike out the Respondent's Supplementary Affidavit dated 10th November 2025.

Applicant's Submissions

65 The Applicant submitted that the Respondent lacked jurisdiction to entertain the 1st Interested Party's claim and to issue the impugned award under the Work Injury Benefits Act. WIBA is limited in application to injuries arising out of and in the course of employment, however, the accident forming the basis of the award fell wholly outside that statutory framework.

66 It was submitted that the undisputed facts show that the accident occurred at about 3.40 a.m. along University Way while the 1st Interested Party was driving his personal motor vehicle. Therefore, the accident occurred outside working hours, outside the workplace, and in circumstances it was unconnected with the performance of any duty owed to the employer.

67 It was the Applicant's submissions that no evidence was placed before the Respondent or this Court to demonstrate that the 1st Interested Party was on official duty or acting in furtherance of the employer's business at

the material time. Thus, the Applicant the injury did not meet the statutory definition of a work injury under WIBA.

68 It was submitted that jurisdiction flows strictly from statute and cannot be assumed or extended by a decision-maker. It cited ***Owners of the Motor Vessel "Lilian S" v Caltex (Kenya) Ltd (1989) eKLR*** where the Court of Appeal found that "jurisdiction is everything". It follows then that if a court lacks jurisdiction, it must make no further step; this principle applies squarely to Respondent which is a quasi-judicial body. The Applicant further cited ***Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR***, where the Supreme Court held that: *"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law."*

69 It was the Applicant's submission that the Respondent's jurisdiction is derived solely from WIBA, whose preamble limits compensation to work-related injuries and diseases contracted in the course of employment.

70 The Applicant further submitted that Section 10(4) of WIBA, states that: *"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.”

71 It is the Applicant’s submission that the accident involving the 1st Interested Party is not such accident that is covered under the scope of WIBA hence the Respondent acted without jurisdiction when it awarded compensation for injury benefits to the 1st Interested Party through its decision of 29th November 2024. Reliance was placed on paragraph 28 in ***Central Bank of Kenya v Directorate of Occupational Safety and Health Services (DOSHS) & another [2025] KEELRC 3246 (KLR)***.

72 It was submitted that the Respondent itself admitted lack of jurisdiction in its Supplementary Affidavit sworn on 10th November 2025, acknowledging that the impugned award was issued in error as the 1st Interested Party was driving his personal car when he was involved in an accident thus it did not amount to injury compensation under WIBA. This admission confirmed that the decision of 29th November 2024 was made without jurisdiction and is therefore null and void.

73 The Applicant submitted that Order 13 Rule 2 of the Civil Procedure Rules provides for judgment on admission: *“Any party may at any stage of a suit, where admission of facts*

has been made, either on the pleadings or otherwise, apply to the Court for such judgment or order as upon such admissions as he may be entitled to, without waiting for determination of any other question between the parties; and the court may upon such application make such order, or give such order, as the court may think just.”

Therefore, vide its supplementary affidavit, it is clear that DOSH acted without authority, illegally and erroneously in granting the decision for compensation of work injury benefit claims

- 74 The Applicant submitted that the argument by the 1st Interested Party that the Applicant ought to have pursued an appeal under sections 51 and 52 of WIBA is misplaced. Reliance was placed on the Court of Appeal decision in ***Charles v Cheto [2025] KECA 784 (KLR)***, where it was held that the only realistic remedy for a party who learns belatedly of DOSH proceedings and wants to challenge them, should do so through a Judicial Review Application which the Applicant has done herein, thus in compliance.
- 75 It is the Applicant’s submission that the Respondent acted without jurisdiction in issuing the impugned award, that the accident was not a work injury within the meaning of WIBA, and that the Respondent has expressly admitted as much. The Applicant therefore urged the Court to grant the orders sought and quash the impugned decision.

Respondent’s Submissions

- 76 The Respondent submitted on three issues: whether the accident that occurred on 18th July 2024 involving the 1st Interested Party, Eng. Elvis Njenga Kimani was occupational; Whether the Employer/Applicant should pay a sum of KES 17,048,684 to the 1st Interested Party, Eng. Elvis Njenga Kimani; Whether the Respondent should have entertained the claim under the provisions of the Work Injury Benefits Act, 2007.
- 77 On the first issue, the Respondent submitted that the accident was not an occupational accident within the meaning of the Work Injury Benefits Act. While conceding that the 1st Interested Party was an employee of the Applicant at the material time, the Respondent submitted that employment alone is insufficient to trigger liability under WIBA unless the injury arises out of and in the course and scope of employment.
- 78 It was submitted that section 2 of WIBA defines an accident as one arising out of and in the course of employment, while section 10(4) limits deemed occupational accidents to acts undertaken for the purpose of, in the interest of, or in connection with the employer's business. In the instant case, investigations revealed that the accident occurred at about 4.10 a.m. at the University Way roundabout while the 1st Interested Party was driving his personal vehicle allegedly heading to work.
- 79 The Respondent submitted that Section 10(5) of WIBA expressly limits compensable commuting accidents to

circumstances where the conveyance is provided by the employer. However, the vehicle involved in the accident did not belong to the Applicant, was not facilitated by the Applicant or its agent, and the journey was neither authorized nor within the knowledge of the employer. On that basis, the 1st Interested Party could not be deemed to have been in the course of employment at the time of the accident.

80 The Respondent further submitted that the surrounding circumstances invalidated any suggestion that the accident was work-related. The Applicant's Human Resource Policy and Procedures Manual fixes official working hours between 8.00 a.m. and 5.00 p.m., yet the accident occurred at about 4.00 a.m., well outside both working hours and reasonable commuting time. Additionally, the Applicant's offices are located in South C, Nairobi, an area in which the 1st Interested Party also resides, and no reasonable explanation was given as to why the 1st Interested Party would be travelling at such an early hour or why he would be at University Way, which was not on the normal route to the Applicant's premises.

81 The Respondent submitted that the 1st Interested Party's assertion that he was travelling for an official meeting was unsupported by evidence. The email correspondence relied upon did not assign him any role in the alleged meeting, the meeting was scheduled to be virtual and for the following day, and the communication was sent after the accident had already occurred. Thus, there was no

evidence of any official instruction or necessity requiring the 1st Interested Party to travel at 4.00 a.m. on the material date.

- 82 It is the Respondent' submission that the time, location and circumstance es of the accident demonstrated that the 1stInterested Party was not on duty or engaged in any act connected to the employer's business.
- 83 On the second issue, the Respondent submitted that compensation under WIBA is governed by Section 10(2), which limits an employer's liability to injuries sustained while an employee is at work. An inquiry conducted pursuant to Section 23 of WIBA established that the 1st Interested Party was engaged in a private activity at the time of the accident and not in furtherance of the Applicant's business.
- 84 It was submitted that neither of the statutory deeming provisions under sections 10(4) or 10(5) of WIBA applied to the circumstances of the accident. Consequently, the Applicant could not lawfully be compelled to pay the assessed sum of Kshs. 17,048,684 under WIBA, as the statutory foundation for such compensation was absent.
- 85 The Respondent submitted that the injuries sustained by the 1st Interested Party did not qualify for compensation under WIBA and that the proper avenue lay under the Group Personal Accident insurance cover procured by the Applicant. Reliance was placed on correspondence from the Applicant's insurer dated 26th June 2025, which

advised that the accident did not fall within WIBA but was appropriately covered under the Group Personal Accident scheme, which applies regardless of whether an accident occurs on or off duty.

- 86 On the final issue, the Respondent submitted that the impugned demand arose from an automated process within the Occupational Safety and Health Management Information System (OSHMIS). ML/DOSH Form 1 was uploaded by the Applicant through its online OSHMIS account and that the system automatically generated the DOSHS WIBA 4 demand based on the data entered and statutory computation formulas under sections 28 and 30 of WIBA.
- 87 It was the Respondent's submissions that no substantive inquiry into the circumstances of the accident preceded the generation of the demand and that the automated system does not conduct a factual countercheck before computing compensation. This automation explains how a demand was generated despite the accident not meeting the statutory threshold of a work injury.
- 88 The Respondent further submitted that the claim ought not to have been entertained under WIBA and that the system-generated outcome required correction once the true facts emerged. It was submitted that while digitization of services has enhanced efficiency, it has also resulted in system-generated outcomes that may bypass

human scrutiny, necessitating corrective intervention by the Respondent where errors occur.

89 It is the Respondent's submission that the accident involving the 1st Interested Party did not arise out of or in the course of employment, that the provisions of WIBA were wrongly invoked, and that the Respondent lacked jurisdiction to assess and award compensation under the Act. The Respondent maintains that although the 1st Interested Party may pursue compensation through alternative insurance mechanisms, the award made under WIBA cannot stand in law.

90 I have considered all the averments and submissions of the parties herein. This court will endeavour to determine the following issues: -

1. Whether the claim before court would fall under WIBA or not.
2. Whether the Judicial review application is properly before this court.
3. What remedies if at all to grant.

ISSUE NO 1

91 To answer the 1st issue, the applicants have submitted that the accident occurred outside working hours and cannot fall under WIBA category.

92 The applicants submitted that the claim falls outside the purview of a work-related assignment. I have looked at the Work Injury Benefits Act 2007 at section 10 (2) and (5) which states as follow:

(2) An employer is liable to pay compensation in

accordance with the provisions of this Act to an employee injured while at work.

(5) For the purposes of this Act, the conveyance of an employee to or from the employee's place of employment for the purpose of the employee's employment by means of a vehicle provided by the employer for the purpose of conveying employees is deemed to be in the course of the employee's employment.

93 A look at the law will show that commuting to or from work in a personal vehicle though not expressly stated would fall outside a work environment. There is however evidence that the respondent received wind of the occurrence of the accident and filed reported the same to the Director.

94 The applicants CEO one Mr CS Justus Wabuyabo wrote to the Director Wiba vide a letter of 25th October 2024 reporting the accident in terms of the "Occupational and Safety Health Act, 2007 and the WIBA,..... fulfilled its obligation by completing part 1 of DOSH form, which outlines the incident details and pertinent information regarding the injuries sustained...."

95 The letter stated in part that:

"... the agency wishes to submit the form to your office for the completion of part III which is a necessary step before it is forwarded to

the Agency's Insurance provides for processing of the work injury claim....”

- 96 The respondent indeed by their action acquiescence to the fact there existed a work injury case. This was the finding of the court in **Toub v Vintage Concept & Another (Miss App No. 026 of 2022 KEELRC 4063 (KLR)** June 2022 where the court made a finding that having acknowledged the accident report and having advised the applicant on the applicable claim process and issuing a discharge voucher or delivery of the compensation award decision, the 3rd party accepted liability and should therefore be estopped from approbating and reprobating.
- 97 The COA in **AG VS LSK & Another (C.A) NO 133 of 2011 (CA)** and upheld by the Supreme Court, upheld the constitutionality of WIBA that defined employer liability to injuries arising out of and in the course of employment.
- 98 It is not disputed that the respondent in this case was on his way to work and it is on this basis that the employer the applicant in the JR application proceeded to fill the form A Dosh 1 reporting the accident and therefore cannot renege on this position. After the form A Dosh was filled the rest of the processes proceeded until form 4 dated 29th November 2024 reference no WIBA/NRB/0321/2024 was generated and delivered to the applicant through the WIBA system on the same day at 16.37 hrs.
- 99 It is therefore this court's finding that the application before me falls under WIBA.

ISSUE NO 2

- 100 The next issue to determine is whether upon finding that the applicants are aggrieved by the director's decision this Judicial Review application would be the appropriate forum to seek their reliefs.
- 101 As explained by the respondent herein, the process of filing WIBA claim is explicitly provided for under section 22 of WIBA. Under this section notification of accidents is made within 7 days (non-fatal) and 24 hours (fatal).
- 102 Upon receipt of the notification under DOSH the director undertakes investigation in accordance with section 23 of WIBA. Once compensation is computed in non-fatal cases, a demand is lodged with the employer through DOSH (WIBA Form 4. Effective 11th May 2024 the process was undertaken electronically through the OSHM portal.
- 103 The employer is expected to settle the claim within 90 days under section 26 of WIBA.
- 104 In event of a dispute in relation to the decision of the director, an aggrieved party is required to lodge an objection and appeal in accordance with section 51 and 52 of WIBA and thereafter escalate the matter to ELRC if dissatisfied.
- 105 Section 51 of the WIBA Act provides as follows:
- 51.(1) Any person aggrieved by a decision of the Director on any matter under this Act, may within sixty days of such decision, lodge an objection with the Director an objection against**

such decision. (2) The objection shall be in writing in the prescribed form accompanied by particulars containing a concise statement of the circumstances in which the objection is made and the relief or order which the objector claims, or the question which he desires to have determined

106 There is no evidence that the applicant proceeded to file any appeal to the director's decision. Under section 52 of WIBA, once an objection to the director is responded to, an appeal can be filed to the industrial court.

107 The issue then is whether the applicant who is dissatisfied with the decision made by the director can proceed and file a judicial review application before this court.

108 My understanding is that this court's jurisdiction can only be seized as an appeal as provided under section 52(2) of WIBA which states as follows;-

(2) An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such decision.

109 The judicial review thus filed is filed improperly and the correct approach to any discontent should be as an appeal before this court. It is therefore my position that this judicial review application is improperly before this court and is dismissed accordingly with costs.

Dated, Signed and Delivered Virtually at Nairobi this 25th Day of February, 2026.

HELLEN WASILWA
JUDGE