

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E327 OF 2024

CONSOLIDATED WITH APPEAL NUMBER E332 OF 2024

MAERSK LOGISTICS AND SERVICES KENYA LIMITED.....1ST

APPELLANT

(Formerly Damco Logistics Kenya Limited Subsidiary of Maersk (K) Limited)

ABSA INSURANCE KENYA LIMITED.....2ND APPELLANT

(Formerly Barclays Life Assurance Kenya Limited)

-VERSUS-

DIRECTORATE OF OCCUPATIONAL SAFETY.....1ST RESPONDENT

SARAH AKOTH ASIYO.....2ND RESPONDENT

(Being an appeal against the Decision of Dr. Andrew Muruka, Director of Occupational Safety and Health Services/Head Work Injury Benefits Administration delivered on 1st August 2024 and Objection Decision delivered on 23rd October 2024 under Reference Number ML/DOSHS/WIBA/DLL/2024)

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

1. The 1st Appellant herein, being dissatisfied with the Decision of Dr. Andrew Muruka, Director of Occupational Safety and Health Services/Head Work Injury Benefits Administration delivered on 1st August 2024 and Objection Decision delivered on 23rd October 2024 under Reference

Number ML/DOSHS/WIBA/DLL/2024 in the dispute between the parties before the said Director, filed a memorandum of appeal dated 20th November 2024 seeking the following orders:

- i. A declaration be issued that the Director's failure to avail the Report by Eng. Khalid to the parties was a violation of the parties' right to a fair hearing and renders the Director's decisions dated 1st August 2024 and 23rd October 2024 null and void.
- ii. The decisions dated 1st August 2024 and 23rd October 2024 be set aside.
- iii. A declaration be issued that the 2nd Respondent is not entitled to any compensation under the Work Injury Benefits Act, Cap 236 Laws of Kenya.
- iv. The 2nd Respondent's claim for compensation filed with the Director on 16th June 2022 be and is hereby dismissed.
- v. The costs of this Appeal be awarded to the Appellant

2. The 2nd Appellant filed a cross appeal vide a memorandum of appeal dated the 22nd of November 2024 seeking the following orders:-

- i. This Appeal be allowed with costs.
- ii. The Decision of the Director of Occupational Safety and Health Services/Head, Work Injury Benefits Administration delivered on 1st August 2024 and Objection Decision delivered on 23rd October 2024 under Reference Number ML/DOSHS/WIBA/DLL/2024 be set aside in their entirety.
- iii. This Honourable Court be pleased to substitute the findings of the Director of Occupational Safety and Health Services/Head, Work Injury Benefits Administration with an order dismissing the 2nd Respondent's claim with costs.

iv. Any further relief this Court may deem fit in the interest of justice

GROUND OF THE APPEAL

3. The Director of Occupational Safety and Health Services ("the Director") erred in law in delivering his decision to the Appellant's Objection over two (2) weeks later than the fourteen (14) day period prescribed in the Work Injury Benefits Act (CAP 236) ["the Act"]. As such, the Director acted beyond the limits of his jurisdiction as delineated under the Act.
4. The Director erred in law and in fact in failing to overturn his initial decision of declining to avail to the parties the investigation report prepared by one Eng. Khalid Salim with respect to the workplace incident alleged to have taken place on 11th May 2018 ("the Report"), despite the Appellant's Advocates on record Messrs. Oraro and Company Advocates ("the Appellant's Advocates") requesting for the same orally during the meeting of 21st June 2024 and later in writing via emails sent on 11th and 12th July 2024. The Report was a critical document on factual matters disputed amongst the parties, which would inform the submissions of the parties to the Director, prior to a decision being made by the Director.
5. The Director erred in law and in fact in making a finding that he did not err in failing to provide the Report and further compounded the said error by stating that the Report constituted information obtained from the Appellant and the 2nd Respondent in an attempt to justify his erroneous actions. This was a breach of Articles 35, 47 and 50 (3) of the Constitution which guarantee the Appellant the rights to access to information, fair administrative action and provision of information pursuant to the right to a fair hearing respectively. Keeping the Report effectively "hidden" from the parties was also a violent affront to the national values and

principles of governance under Article 10 of the Constitution and destroyed any notion of a fair hearing or fair process.

6. The Director also compounded the above error by upholding his erroneous decision dated 1st August 2024 (“the 1st Decision”) with respect to the workplace incident, which was rendered without informing the Appellant and/or the Appellant’s Advocates of the decision to move forward in this unprocedural manner. The Appellant’s Advocates required the Report to be shared in order to effectively and comprehensively prepare and file submissions with respect to the claim. As such, the Appellant was denied its right to be heard as provided under Article 50 (1) and (3) of the Constitution. All the Director indicated via email dated 12th July 2024 was that the Director had elected to “postpone rendering my decision until next week.”

7. The Director erred in law and in fact by failing to consider, initially at the first instance and again on appeal, that during the meeting of 21st June 2024 at the Director’s offices, the Appellant’s Advocates submitted to the Director (a fact confirmed by the 2nd Respondent during the same meeting), that she resumed work on 14th May 2018, a mere two (2) days after the alleged workplace incident and was not at any one moment admitted in hospital. Further, the 2nd Respondent continued to fulfil her duties as an Airfreight Associate until the termination of her employment for just cause on 22nd November 2019. The Director, whilst being charged with the implementation of the Act failed in his duty to consider that these circumstances rendered compensation for temporary, total or partial disablement expired in line with the provisions of section 29(1) of the Act, rendering his initial and second decisions contrary to the law.

8. The Director also erred in law and in fact in failing to consider the inconsistencies with regard to the alleged incident as reported by the 2nd Respondent. In the Complaint dated 16th June 2022,

DOSH1 Form, letters dated 30th March 2022 and 5th May 2022 from Muma and Kanjama Advocates ("the 2nd Respondent's Advocates") to the Director, and letter dated 8th April 2022 from the 2nd Respondent's Advocates to the Appellant, the incident is described as the 2nd Respondent being "*involved in an accident resulting from commotion at the cargo terminus where she fell and was trampled on by others and overwhelmed on the ground*". This reporting contradicts the email correspondence referring to the alleged incident in the email correspondence between the 2nd Respondent and a former employee of the Appellant (Bernard Oriama), which took place between 14th July 2021 and 15th July 2021 wherein the 2nd Respondents describes the alleged incident as "falling on staircase while at the airport". It is further noted that in a demand letter dated 20th April 2021 from the 2nd Respondent's Advocates to the Appellant, it is alleged that "She has remained bedridden since then.", which is a bare falsity since the 2nd Respondent resumed work on 14th May 2018 and continued in the said employment until it was terminated for cause on 22nd November 2018. As such, the 2nd Respondent's averments with respect to the incident are contradictory hence removing any sense of credibility on her part. This therefore rendered the 2nd Respondent's claim untenable, which finding the Director erred grievously in not making at the first instance and failed to reverse once in receipt of the Appellant's Objection dated 27th September 2024.

9. The Director also failed to consider that there was no correlation between the alleged incident that took place on 11th May 2018 and the 2nd Respondent's alleged health status as the Work Injury Evaluation Clinic that was done on 6th June 2024 over six (6) years from the date of the alleged workplace incident. Further, there was no assessment as to whether the 2nd Respondent's health status as at 6th June 2024 could have been caused by other factors and not the alleged workplace injury given the time lapse as she did continue her employment until it was

terminated on 22nd November 2019 without any complaints of back pain or incapacity to the Appellant. It should further be noted that the 2nd Respondent disclosed to the Appellant via email dated 15th December 2019 that she was involved in an accident in the month of July 2019. This accident was not disclosed to the doctors undertaking the Work Injury Evaluation, hence making it impossible for this issue to be taken into account in the consideration of the cause of the 2nd Respondent's alleged health status.

10. The Director erred in failing to make a finding that his action of availing the first Decision to the parties eighteen (18) days after it had been rendered is a violation of the right to fair administrative action as enshrined under Article 47 of the Constitution. The Decision, which is dated 1st August 2024, required the Appellant to take action within fourteen (14) days of the date of the Decision but was not shared with the Appellant or its Advocates on record yet the Director threatened to take legal action against the Appellant for non-compliance with the first Decision.
11. Finally, the Director erred in upholding his decision of requiring the Appellant to file an incident report with respect to the alleged incident, yet the time for doing so under the Act lapsed over six (6) years ago. This is a superfluous requirement that would serve no purpose, especially noting that the Appellant was not aware of the alleged incident at the material time and has always maintained that the alleged incident did not take place either as alleged or at all.

GROUPS OF THE CROSS-APPEAL

12. The Director of Occupational Safety and Health Services fundamentally erred in law by failing to cogently evaluate evidence that was placed before him thus arriving at an erroneous decision.

13. The Director of Occupational Safety and Health Services erred in law and in fact by failing to disclose/avail to the parties the Investigation Report prepared by Engineer Khalid Salim on the circumstances surrounding the occurrence of the impugned accident which conduct amounts to a gross contravention of Articles 47 and 50 of the Constitution of Kenya on access to justice and the right to a fair and impartial hearing.
14. The Director of Occupational Safety and Health Services erred in law and in fact by making a finding on the Investigation Report without availing the same to the parties, and further denying the parties the report, in violation of the provisions of Article 35 of the Constitution on the right to access to information.
15. The Director of Occupational Safety and Health Services erred in law and in fact by failing to avail the Investigation report, despite, the parties seeking to have the same availed, thus illegally ousting the Appellant's fundamental rights under Section 4(4) of the Fair Administrative Action Act (FAAA), to such extent that the parties ought to cross examine a party giving adverse evidence.
16. The Director's conduct in concealing the Investigation Report grossly violated the salient provisions of the FAAA to the extent that a party ought to be availed with information, material and evidence to be relied upon in making the decision or taking the administrative action.

17. The Director of Occupational Safety and Health Services fundamentally erred in law and fact by failing to tersely consider the salient and binding terms and conditions of the Combined Solution Master Policy entered into between the Employer and the Insurer.
18. The Director of Occupational Safety and Health Services erred in law and fact by completely disregarding salient terms and conditions of the Combined Solution Master Policy.
19. The Director of Occupational Safety and Health Services erred in law and fact by failing to consider the Appellant's Objection dated 26th September 2024, the oral submissions presented during the physical hearing held on 17th May 2024 thus leading to an erroneous finding.
20. The Director of Occupational Safety and Health Services erred in law and fact by making an award of Kenya Shillings Three Million, Three Hundred and Twenty-Four Thousand, Two Hundred and Forty-Seven and Twenty Cents (Kshs. 3,324,247.20) without due consideration to the attendant legal procedure set out at Section 30 and the First Schedule of the Work Injury Benefits Act Cap. 236 Laws of Kenya.
21. The Director of Occupational Safety and Health Services erred in law and fact in finding that the claim was merited despite the following adverse inferences:
 - (a) Contradictory and unclear circumstances surrounding the alleged accident;
 - (b) Non-disclosure of the Investigation Report prepared by Engineer Khalid Salim;
 - (c) Complete disregard of the terms and conditions of the Combined Solution Master Policy entered into between the Employer and the Insurer;
 - (d) Outright breach of the sacrosanct principle of Utmost Good Faith by upholding a claim on disputed particulars of the impugned accident;

- (e) Utter breach of the Principle of Insurable Interest wherein no claim was lodged with employer as encapsulated in the Combined Solution Master Policy. Accordingly, no benefit can be derived even by the employee.
- (f) Disregard to the principle of privity of contract, to the extent that the terms and conditions and obligations of the Combined Solution Master Policy strictly bind the contracting parties

BACKGROUND TO THE APPEAL

22. The 2nd Respondent filed suit against the 1st and 2nd Appellants vide a Complaint dated 16th June 2022 filed before the Employment and Labour Relations Court at Nairobi seeking the following orders:

- a) The 2nd Defendant to pay the Plaintiff compensation for permanent disablement.
- b) General damages for mental and emotional anguish.
- c) An Order do hereby issue compelling the 1st Defendant to avail a copy of the compensation policy between itself and the 2nd Defendant.
- d) A declaration do hereby issue that the 2nd Defendant is in breach of compensation policy between itself and the 1st Defendant.
- e) Interest on prayers (a) & (b) above at Court rates.
- f) Any other relief that that Court may deem fit to grant in the circumstances
- g) Costs of the suit.

(pages 7-8 of the 2nd Appellant's ROA dated 26th March 2025).

23. The Complaint was accompanied by a list of witnesses dated 16th June 2022; witness statement of even date; and list of documents with the bundle of documents attached, also of even date (pages 9-63 of ROA).

24. Following a successful application challenging the jurisdiction of the Court to hear and determine the matter under the Work Injury Benefits Act, the 2nd Respondent's case was referred to the Director of Occupational Safety and Health Services for hearing and determination vide an order of the court dated 14th March 2024 (page 490 of the 1st Appellant's ROA dated 25th March 2025). The Director confirmed this transfer vide a letter dated 27th April 2024 to the 2nd Appellant's Advocates (page 204 of 2nd Appellant's ROA).
25. The 2nd Respondent sought compensation before the Director of Occupational Safety and Health Services vide form ML/DOSH FORM 1 for an injury sustained by her on 11th May 2018 at the airport, whereby the 2nd Respondent suffered a lifetime injury on the back and hip caused by cargo terminus commotion where she fell and was trampled on by others (pages 50-51 of 2nd Appellant's ROA).
26. Vide a decision dated 1st August 2024, the Director of Occupational Safety and Health Services allowed the 2nd Respondent's claim following a Work Injury Evaluation Clinic held on 6th June 2024; awarding the 2nd Respondent a sum of Kshs. 3,324,247.20. The Director also directed the 1st Appellant to report the accident that occasioned the injury to the 2nd Respondent by submitting a fresh form ML/DOSH FORM 1, after which he would make an assessment of temporary incapacity (pages 205-207 of 2nd Appellant's ROA).
27. Being dissatisfied with the award issued by the Director, the 2nd Appellant lodged an Objection dated 26th September 2024 vide form DOSH/WIBA 12 citing their reasons for objecting as:

- a) That the Director of Occupational Safety and Health Services fundamentally erred in law by failing to cogently evaluate evidence that was placed before him thus arriving at an erroneous decision.
- b) The Director of Occupational Safety and Health Services erred in law and in fact by failing to disclose/avail to the parties the Investigation Report prepared by Engineer Khalid Salim on the circumstances surrounding the occurrence of the impugned accident whose dates are plainly contradictory from the face of record. This conduct by the Director amounts to a gross contravention of Articles 47 and 50 of the Constitution of Kenya on access to justice and the right to a fair and impartial hearing.
- c) Further it is noted that the failure to avail the Investigation report, despite, the parties seeking to have the same availed, illegally ousted the parties rights under Section 4(4) of the Fair Administrative Action Act (FAAA),to such extent that the parties ought to cross examine a party giving adverse evidence. Additionally, the FAAA provides that the Administrator shall avail to parties information, material and evidence to be relied upon in making the decision or taking the administrative action.
- d) In light of the above, for the Director conduct to unlawfully withhold the Investigation report, and subsequently declining to share the same with the parties is an affront of the parties' rights to Fair Administrative Action, thus, the outcome is contra the law.
- e) The Director of Occupational Safety and Health Services fundamentally erred in law by failing to tersely consider the salient and binding terms and conditions of the Combined Solution Master Policy entered into between the Employer, Damco Logistics Kenya Limited and ABSA Bank Kenya Plc formerly Barclays Life Assurance Kenya Limited as the insurer for a Group Life Assurance with GPA and WIBA Scheme.

- f) The Director of Occupational Safety and Health Services completely disregarded the following salient particulars of the Combined Solution Master Policy;
- g) That the policy was an agreement between the Employer and the Insurer and any benefit(s) arising therefrom was to be paid upon fulfilment of four conditions;
 - A. The insured was mandatorily required to make payment of premiums as per the prescribed terms of the policy;
 - B. The insured was to ensure wholesome compliance with the provisions of the policy on Notification of Claims in case of an accident;
 - C. The Insured was mandated to make notification of any Claim(s) within the stipulated timelines under the Policy;
 - D. That the confirmation and acceptance of the policy was to be made by both the Insurer and the Employer and the same be strictly executed upon.
- i. Pursuant to Clause 1, the commencement date of the Insurance Policy was 1st February 2019. The Policy has since ceased effect and the same cannot apply retrospectively in any manner whatsoever;
- ii. Pursuant to Clause 2.1.1 and 2.1.2, an employee became eligible under a Group Accident Benefits scheme based on the terms of the employment contract with the Employer whereas an employee became eligible under the Occupational Benefits scheme in terms of Section 5 of the Work Injury Benefits Act, 2007;
- iii. Pursuant to Clause 5.12 on Notification of Claims, the insurer ought to have been notified in writing of the claim not later than six (6) months from the date of the accident failing which the claim would not be admitted, unless there are extenuating circumstances for the late advice thereof to the insurer. It is vital to point out that the Insurer/Objector was not

Notified of any claim during the period of the Policy and as such cannot be required in any manner whatsoever to settle any claim at this juncture, four (4) years after the Policy ceased effect. Accordingly, the exclusion clause ousts any right to claim and parties are bound by the terms of the contract. For the Director to make any adverse finding against the objector, would be tantamount to rewriting the contract between the parties.

- iv. Pursuant to Clause 5.12.7, the insurer/Objector was to pay the benefits accruing from the Policy upon admission of a claim and satisfaction of the provisions of the policy. There was no notification made during the pendency of the Insurance Relationship and it would thus occasion grave prejudice to have the Insurer/Objector settle a claim that allegedly arose four (4) years ago after the Policy ceased effect.
- v. Pursuant to Clause 5.15, the Insurer/Objector was to pay for disability claims upon being supplied with documentation by the Policyholder. The Policyholder did not supply the said documentation during the Policy period and as such contravened the salient and binding terms and conditions thereto.
- vi. Pursuant to Clause 5.17 on exclusions, the Insurer/Objector could not settle any claim whose nature is uncertain and more so when it is discovered that the accident was self-inflicted. In this case, the Insurer/Objector has never been furnished with a copy of the Investigation Report by Engineer Khalid to ascertain the circumstances of the impugned accident. In fact, from the Decision rendered by the Director, the date of the accident is unclear and contradictory. It is unknown to the insurer on whether the accident happened on 11th May 2018 or 18th May 2018. This uncertainty raises eyebrows on the credibility of the Report which remains concealed to date.
- vii. Pursuant to Clause 5.19, Any dispute arising from the interpretation or implementation of the policy ought to have been referred to arbitration within 12 months failing which the

claim against the insurer shall cease. In the event that the employer or employee has an issue with the implementation of the Policy, such an issue ought to have been referred to Arbitration and not the Directorate of Occupational Safety and Health Services.

- viii. It is noted that in all insurance policies it is imperative for the parties to engage with utmost good faith. It is noted that in this case particulars of the accident are disputed. This has been noted in the impugned decision of director OSHA, wherein the same noted varying dates of the alleged accident, thus, no clear or concise information has been provided. On this premise alone, the claim ought to be dismissed.
- ix. The policy is between the Objector and the 2nd Respondent, thus, at all times, the party to lodge the claim is the 2nd Respondent by virtue of the terms of the policy, and being the alleged employer of the 1st Respondent.
- x. Wherein no claim was lodged with the objector by the 2nd Respondent, then, no benefit can be derived even by the 1st Respondent. It is paramount to note that insurable interest further extends to the principle of privity of contract to access to the justice system particularly the formal adjudicatory processes and provision of a conducive environment within the judicial system.

(pages 208-214 of 2nd Appellant's ROA)

- 28. The 1st Respondent vide a letter dated 23rd October 2024 dismissed the 2nd Appellant's Objection on the premise that the all the parties attended the hearing that took place on 17th May 2024 before the Chair of the Director of Work Injury Benefits Administration, and were accorded an opportunity to be heard either personally or through their Advocates on record. He further noted that any information in the Investigation Report prepared by Eng. Khalid was in the possession

of the employee and the employer, having been obtained from them (response to objection on pages 225-247 of 2nd Appellant's ROA).

29. In response to the memoranda of appeal, the 1st Respondent, Directorate of Occupational Safety and Health Services, filed a Replying Affidavit sworn by JUSTUS BOSIRE NYAKEGO on 25th March 2025; and a Further Affidavit sworn by the same Deponent on 30th May 2025. They later filed a Further Affidavit sworn by KHALID AWADH SALIM on 3rd June 2025.
30. The 2nd Respondent filed a Replying Affidavit dated 2nd July 2025.
31. On its part, the 1st Appellant filed a Replying Affidavit sworn by MARGRET RUGURU WANJUGI on 12th June 2025.
32. The 2nd Appellant filed a Further Affidavit sworn by MICHAEL NGILA on 13th June 2025.

DETERMINATION

33. The appeal was canvassed by way of written submissions. The parties complied.
34. This being a first appellate court, it was held in Selle v Associated Motor Boat Co. [1968] EA 123 that:- *“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial*

Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

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

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

Issues for determination

36. In their submissions dated 5th August 2025, the 1st Appellant identified the following issues for determination, namely:-

- i. Whether the 1st Respondent erred in law and in fact in rendering the Second Decision beyond the statutorily imposed timelines.
- ii. Whether the 1st Respondent erred in law and in fact in failing to overturn its decision to withhold the Investigation Report from the parties.
- iii. Whether the 1st Respondent erred in law and in fact in failing to make a finding that the 2nd Respondent was not entitled to compensation under the Act

- iv. Whether the 1st Respondent erred in law and in fact in directing the 2nd Respondent to file an incident report under the Act over six (6) years after the alleged workplace accident
- v. Whether the Appellant is entitled to the reliefs sought in the Memorandum of Appeal
- vi. Who should bear the costs of the Appeal

37. On their part, the 2nd Appellant identified the following issues for determination in their submissions dated 24th July 2025:

- i. Whether the decision dated 26th October 2024 is a nullity having been made outside the statutory timelines.
- ii. Whether the decisions made by the Director of Occupational Safety and Health Services grossly contravene the sacrosanct Principle of Uberrimae Fidei and the principle of Insurable Interest.
- iii. Whether the Director of Occupational Safety and Health Services decisions grossly contravene Section 30 and the First Schedule of the Work Injury Benefits Act on assessment of compensation.
- iv. Whether the decisions made by the Director of Occupational Safety and Health Services grossly contravenes Articles 47 and 50 of the Constitution and or otherwise impedes the right to access to Justice and Fair Administration Action.
- v. Who should bear costs of the Appeal.

38. In her submissions dated 6th October 2025, the 2nd Respondent identified the following issues for determination:

- i. Whether this Honourable Court has the jurisdiction to interfere with the 1st Respondent's decision.

- ii. Whether the decisions by the 1st Respondent were properly made.
- iii. Who should bear the costs of this matter.

39. Upon perusal of the documents before the court, I gather that the 1st and 2nd Appellants complain of the following actions of the 1st Respondent herein, the Director of Occupational Safety & Health Services:

- vi. The failure to deliver the Objection Decision dated 26th October 2024 within 14 days as mandated by Section 52 of the Work Injury Benefits Act.
- vii. The failure to provide the 1st and 2nd Appellants with the Report of Eng. Salim despite express requests to do so.
- viii. The award of Kshs. 3,324,247.20 to the 2nd Respondent despite inconsistencies in her account of the accident, and against the guidelines under Section 30 of WIBA read alongside the First Schedule to the same Act.

40. It is important to state that Section 52 (2) of the Work Injury Benefits Act Cap 236 of the Laws of Kenya, empowers this court to entertain appeals filed against the decisions of the Director of Occupational Safety and Health Services. It provides that:

“An objector may, within thirty days of the Director’s reply being received by him, appeal to the Industrial Court against such decision.” There is no limit placed on the appellate court by the above set out Section in respect of which aspects of the Director’s decision it may or may not scrutinize on appeal. In other words, the court is not limited to only considering the merits of the substantive decision, and barred from considering the procedure before the Director, as implied by the 1st Respondent.

41. I am persuaded by the case of *Joash Shisia Cheto v Thepot Patrick Charles [2022] eKLR*, where the Court held that: “51. *The general position established by a majority of these decisions is as follows: -*

...

d. Unless by way of appeal under section 52 of the WIBA, it is not open to the court to consider the merits of the Director’s award or indeed go on a fact finding mission. This jurisdiction is the preserve of the Director.

If an employer wishes to challenge the decision of the Director after the period for appeal has lapsed, having become aware of the decision at the point when the application for enforcement is made, they may file a judicial review case to quash the decision, prior to the enforcement order.”

42. The Honourable Court of Appeal affirmed the position of the trial court on the place of judicial review proceedings in respect of decision of the Director of Occupational Safety and Health Services in the above set out case in *Charles v Cheto (Civil Appeal E046 of 2022)[2025] KECA 784 (KLR) (9 May 2025) (Judgment)* when it held that: “*In this case, the learned Judge correctly observed that sections 51 and 52 of the Wiba are silent on the avenues for redress for a party who becomes aware of the proceedings before the Director after the time for lodging an objection and/or filing an appeal against the Director’s decision has already lapsed. We agree with the learned Judge that the solution in such circumstances would be to lodge a Motion for Judicial Review to quash the award before adoption by the court...*”

43. As can be gathered from the above, contrary to the submissions of the 1st Respondent on the issue, a party is only limited to filing judicial review proceedings if the period for appeal has lapsed, and they wish to quash the decision of the Director on procedural grounds.

44. The foregoing was also held in the case of *Ng'ang'a v County Government of Nakuru (Miscellaneous Civil Application E007 of 2022) [2023] KEELRC 789 (KLR) (29 March 2023) (Ruling)*, the Court held as follows:-

“28. There is no obscurity in this issue. An employer or an employee who is dissatisfied with the award of the director and who elects to pursue the issue beyond the director shall follow the procedure as provided for in Sections 51 and 52 of WIBA culminating in an appeal against the award in this court. Logically, such an appeal shall be attacking the legality of the award in as many ways as one can fathom including such aspects as whether the Claimant was an employee, the nature and extent of injury, the quantum of the award, etc.

29. On appeal this court may either uphold the award or set it aside or give such orders as it may be deem lawful in the circumstances. “

45. Pursuant to the foregoing, I find that the present appeal is properly before the court which has jurisdiction to consider all the facets of the decision of the Director and the procedure before him to determine if the same complied with provisions before the Work Injury Benefits Act.

46. The relevant provisions of the Work Injury Benefits Act on proceedings before the Director are as follows:-

“21. Notice of accident by employee to employer

Written or verbal notice of any accident provided for in section 22 which occurs during employment shall be given by or on behalf of the employee concerned to the employer and a copy of the written notice or a notice of the verbal notice shall be sent to the Director within twenty-four hours of its occurrence in the case of a fatal accident.

22. Notice of injury or accident by employer to Director

(1) Subject to the provisions of this section, an employer shall report an accident to the Director in the prescribed manner within seven days after having received notice of an accident or having learned that an employee has been injured in an accident.

(2) For the purposes of this section, an accident includes any injury reported by an employee, to his employer, if the employee when reporting the injury, alleges that it arose out of and in the course of his employment and irrespective of the fact that the employer is of the opinion that the alleged accident did not so arise out of and in the course of employment.

(3) An employer shall, at the request of an employee or the dependant of an employee, furnish the employee, or dependants with a copy of the notice of the accident furnished by the employer to the Director in respect of a claim for compensation by such employee or dependant.

(4) An employer who fails to comply with subsection (1) commits an offence.

(5) The provisions of this section do not prevent an employee from reporting an occupational accident or disease to the Director at any stage.

23. Inquiry by Director

(1)After having received notice of an accident or having learned that an employee has been injured in an accident the Director shall make such inquiries as are necessary to decide upon any claim or liability in accordance with this Act.

(2)An inquiry made under subsection (1) may be conducted concurrently with any other investigation.

(3)An employer or employee shall, at the request of the Director, furnish such further particulars regarding the accident as the Director may require.

(4)A person who fails to comply with the provisions of subsection (3) commits an offence.

24. Particulars in support of claim

(1)An employee who is injured in an accident or his dependant, shall, when reporting the accident or thereafter at the request of the employer or Director, furnish such information and documents as may be prescribed or as the employer or Director may request.

(2)An employer shall, within seven days after having received a claim, medical report or other document or information concerning such claim, submit the claim, report, document or information to the Director.

25. Employee to submit to medical examination

(1)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.

(2)If, in the opinion of any medical practitioner, an employee is not capable of travelling to be examined by the designated medical practitioner, the employee shall inform the party

requiring the examination thereof or cause him to be so informed, and the designated medical practitioner shall then examine the employee at a time and place as agreed upon.

(3)An employee shall be entitled at his own expense, to have a medical practitioner of his choice present at an examination by a designated medical practitioner.

26. Claim for compensation

(1)A claim for compensation in accordance with this Act shall be lodged by or on behalf of the claimant in the prescribed manner within twelve months after the date of the accident or, in the case of death, within twelve months after the date of death.

(2)If a claim for compensation is not lodged in accordance with subsection (1), the claim for compensation may not be considered under this Act, except where the accident concerned has been reported in accordance with section 21.

(3)If an employer fails to report an accident or to provide information requested by the Director as specified in the request, the Director may—

(a)conduct an investigation and recover the cost of the investigation from the employer as a debt due from the employer; or

(b)levy a penalty on the employer.

(4)An employer or insurer against whom a claim for compensation is lodged by the Director under this section, shall settle the claim within ninety days of the lodging of the claim.

(5)The Director shall, within thirty days of receipt of the money claimed under subsection (1), pay the money to the employee who made the claim or his dependants.

(6)An employer or an insurer who fails to pay the compensation claimed under this subsection commits an offence and shall on conviction be liable to a fine not exceeding five

hundred thousand shillings or to imprisonment for a term not exceeding one year or to both.

27. Lapse of right to benefits

(1)A right to benefits in accordance with this Act shall lapse if the accident is not reported to the employer within twelve months after the date of such accident.

(2)Notwithstanding the provisions of subsection (1), the failure to report an accident to an employer as required in subsection (1) is not a bar to compensation if it is proved that the employer had knowledge of the accident from any other source.

(3)Subject to section 26, failure to report an accident to an employer as required in subsection (1), or any error or inaccuracy in such a notice, is not a bar to compensation if

—

(a)the employer is not or would not be seriously prejudiced by such failure, error or inaccuracy if notice is then given or the error or inaccuracy is corrected; or

(b)if such failure, error or inaccuracy was unforeseeable or was caused by the employee's absence from Kenya.”

44. The facts of this case are that the 1st Respondent claims that on 11th May 2018, she suffered an accident resulting from commotion at the cargo terminus where she fell and was trampled on by others and overwhelmed on the ground, and she was injured on her back and hip (plaint at pages 8-10 of Record of Appeal dated 25th March 2025). The 2nd Respondent contends that she reported the accident to the 1st Appellant, through the Health Safety Security and Environment Manager verbally on the same day (pages 265-26 of ROA dated 25th March 2025). Despite reporting the accident to her employer, it is clear that the employer (1st Appellant) failed to

report the accident to the Director of Occupational Safety and Health Services within the prescribed period pursuant to Section 22 (1) of the Work Injury Benefits Act.

47. It is not in dispute that subsequently, the 2nd Respondent filed a plaint dated 16th June 2022 in the Magistrate's Court at Nairobi, which was later transferred to the Director by an order of the Employment and Labour Relations Court dated 26th February 2024 (page 490 of ROA dated 25th March 2025). Prior to the said transfer, the 2nd Respondent had lodged a complaint/claim for compensation to the Director of Occupational Safety and Health Services vide letters dated 30th March 2022 and 5th May 2022, attaching the duly filled mandatory ML/DOSH FORM 1, as admitted by counsel for the 2nd Appellant (pages 493-514 of the ROA dated 25th March 2025). The parties to the dispute were invited for a clarification meeting on 17th May 2024, following which the (pages 548, 552-554 of ROA dated 25th March 2024), the Director carried out an inquiry, subjected the 2nd Respondent to a Work Injury Evaluation Clinic on 6th June 2024, then rendered a decision vide a letter of 1st August 2024 (pages 589-591 of the ROA dated 25th March 2025). It is also not in dispute that, being aggrieved with the decision of the Director, the 1st and 2nd Appellants registered Objections to the same dated 26th September 2024 and 27th September 2024 (pages 594-665 of the ROA dated 25th March 2025), and the Director delivered its Objection Decision on 23rd October 2024 (pages 666-668 of the ROA dated 25th March 2025) dismissing the Objections and upholding its award of 1st August 2024.

48. The first grievance raised by the Appellants against the Director is that he delivered his objection decision dated 23rd October 2024 outside the statutory timelines for delivering such a decision. On this issue, Section 52 (1) of the Work Injury Benefits Act states as follows:

“The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.”

49. There is no doubt in my mind that the Objection decision of the Director, having been delivered on 23rd October 2024 in respect of Objections dated 26th September 2024 and 27th September 2024, contravened the mandatory provisions of Section 52 (1) of the Work Injury Benefits Act. The Director therefore erred in delivering the said decision outside of the statutory 14-day period. However, do the actions of the Director warrant the nullification of both the Objection decision of 23rd October 2024 and his original decision of 1st August 2024? I find that they do not. This is because the late delivery of the decision did not prejudice either Appellant who were admitted to this court to present their appeals.

50. The second grievance raised by the Appellants is that the Director failed/refused to provide them with a Report prepared by Eng. Salim which the Director heavily relied on in making its decision of 1st August 2024. I have seen the email of the Director on page 637 of the ROA dated 25th March 2025 where he stated as follows: *“I need to clarify that the Report by Eng. Khalid was for the consumption of the Director WIBA”*.

51. Section 23 of the Work Injury Benefits Act provides that:

“(1) After having received notice of an accident or having learned that an employee has been injured in an accident the Director shall make such inquiries as are necessary to decide upon any claim or liability in accordance with this Act.

(2) An inquiry made under subsection (1) may be conducted concurrently with any other investigation.

(3) An employer or employee shall, at the request of the Director, furnish such further particulars regarding the accident as the Director may require.”

52. What the Director is mandated to do, therefore, is to make an enquiry into the incident from which the report arises. An “inquiry” is defined in the Black’s Law Dictionary, 9th Edition as “*fact finding; a request for information either procedural or substantive*”. The Act does not require the Director to carry out a hearing, if the legislators had intended that a hearing be conducted, nothing would have been easier than to expressly state as much. Within the Kenyan jurisdiction, a judicial officer or adjudicator who is conducting a hearing is obligated to ensure that all the case documents are availed to the parties. The threshold for an inquiry by the DOSH while lower still require disclosure of all material to be relied on in decision of DOSH.

53. It is not in dispute that the Director sought information from both the employer (1st Appellant) and the employee (2nd Respondent), and ordered the preparation of a Report on the incident, by one Eng. Salim, an official at the Ministry. Following the submission of the Report, all the parties were permitted to file submissions, after which the Director delivered his decision. It is the finding of this Court that the failure to provide the Report to the parties contravened their right to fair hearing, as the Director relied on the said report in decision making on the whether the 2nd respondent suffered work injury. Director allowed the parties to participate in the

proceedings before him by submitting documents and filing submissions, but the appellant's remained in dark as to the evidence garnered by the investigator.

54. The court on appeal is allowed to re-evaluate material before the DOSH to reach own conclusion. The 2nd respondent alleged an accident on 11th May 2018 at the workplace and stated that on 11th May 2018 she "was involved in an accident resulting from commotion at the cargo terminus where I fell and was stamped on by others and overwhelmed at the ground" The appellants denied the report of the accident. The 2nd respondent, to prove having suffered the work injury, stated that she had reported to one Bernard and produced an email dated 14th July 2021, Oriama, in which she recounted having informed him that she had fallen down a staircase at the airport. The said Oriama confirmed the incident and stated that he recalled the incident and the 2nd respondent's pain, but did not require his assistance. The court found the correspondence did not mention any commotion, and the 2nd respondent did need the assistance of the employer. On perusal of the correspondence by the 2nd respondent's advocate, there was an allegation that she sought medical assistance from the Mater Hospital, but the report of the medical at the hospital was dated 8th August 2019 (page 28 of ROA). The court perused the letter of termination and it was not related to alleged accident. Indeed, the letter and email of the 2nd respondent disclosed an employee in good health (pages 661-663 of ROA). The court noted that the 2nd respondent in an email to the employer dated 15th December 2019, informed the employer that she had been involved in an accident in the year, meaning 2019 (page 664 of ROA). The medical clinic assessment was done in 2024, and the disability was assessed at 50 %. The court finds no correlation between the said injury and the workplace since, at the time of termination, the employee was at work and had no claim of accident injury. it is unreasonable to expect an employee with 50% disability to be active in

work. There was no evidence of the 2nd respondent having been admitted in the hospital for any injury before the termination of services. She was working well as per her email of 15th December 2019 to the employer. Section 29 of the WIBA states- ‘The right to compensation for temporary, total or partial disablement expires—(a) upon the termination of the disablement or if the employee resumes work;’ The 2nd respondent worked all through, hence the claim of 50% of disability was not connected to work injury. It is possible the claimant sustained the injuries in 2024 when medically examined, but there is no evidence linking them to the workplace of the 1st appellant. The court holds that, for lack of proof of a work injury, the award lacks legs to stand on and is set aside.

55. Finally, the quantum of the award made by the Director is challenged, for failure to comply with Section 30 and the First Schedule to the Act. Firstly, I must state that the Honourable Court of Appeal (GBM Kariuki, P. O. Kiage & Murgor K JJA) in the case of *Denshire Muteti Wambua Vs KPLC CA 60 of 2004 decided on 21/6/2013* citing with approval the case of *Kemfro Africa Ltd T/A Meru Express Service & Gathogo Kanini Vs A.M.M. Lubia & Another (1982-988) KAR 777 at P. 730 Keller JA held that:-*

“The principles to be considered by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal for Eastern Africa to be that it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Lango vs Manyoka (1961)EA 705, 709, 713, Lukenya Ranching & Farming Co-operative Society Ltd Vs Kavoloto (1970) EA 414, 418, 419.” I note that the Director did not set out his formula for tabulating the award.

Section 30 of the Work Injury Benefits Act provides that compensation for permanent disablement shall be calculated on the basis of ninety six months earnings subject to the minimum and maximum amounts determined by the Cabinet Secretary, after consultation with the Board, and set out in the Third Schedule. In the ML/DOSH FORM 1 submitted by the Claimant, she indicated that her salary was Kshs. 69,255.15 per month. The tabulation of the award was therefore: $69,255.15 \times 96 \times 50\% \text{ Disability} = 3,324,247.20$. The computation would have been upheld if the court had found work injury as claimed. The court held there was no proof of work injury at the time of employment. The appeal is allowed, and the Decision of Dr. Andrew Muruka, Director of Occupational Safety and Health Services/Head Work Injury Benefits Administration, delivered on 1st August 2024, and the Objection Decision delivered on 23rd October 2024 under Reference Number ML/DOSHS/WIBA/DLL/2024 is set aside in its entirety. The appellants are awarded costs of the appeal payable by the 1st respondent.

56. The 2nd respondent is granted leave to appeal.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF FEBRUARY, 2026.

J.W. KELI,
JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

1ST Appellant – Ms Mutua

2nd Respondent – Khatete hb/ Kanjama SC