



**Attorney General v Ndungo & 5 others (Civil Appeal
158 of 2019) [2023] KECA 979 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KECA 979 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 158 OF 2019
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JULY 28, 2023**

BETWEEN

ATTORNEY GENERAL APPELLANT

AND

JUMA NYAMAWI NDUNGO 1ST RESPONDENT

PETER LUNGWE SHALU 2ND RESPONDENT

PATRICK KISALI ODANGA 3RD RESPONDENT

JOHN OSORO OMAYO 4TH RESPONDENT

SADIKI RAMADHAN MCHECHEMO 5TH RESPONDENT

MOMBASA LAW SOCIETY 6TH RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Mombasa (Ogola, J.) delivered on 10th June 2019 in High Court Constitutional Petition No. 196 of 2018)

JUDGMENT

1. Following a Constitutional Petition filed by the 1st to the 5th respondents, the High Court at Mombasa (E.K. Ogola, J.) in a judgment delivered on 10th June 2019 declared that Sections 10, 16, 23, 26 and 53(2)(d) and 2(e) and the entire Part IV and V of the *Work Injury Benefits Act* No. 13 of 2007 (WIBA):
 - a. ...are *ultra vires* the *Constitution* of Kenya 2010 and are null and void to the extent that they place judicial authority in an entity that is not part of the judiciary.
 - b. violate the doctrine of separation of powers and are therefore unconstitutional.
 - c. violate the injured employee's right to a fair hearing as provided for under Article 50 of the *Constitution*.



- d. violate the injured worker's right to property under Article 40 of the Constitution.
 - e. violate the right to access to justice and undermined the doctrine of devolution.
2. The High Court also declared that Part V of WIBA violates an injured employee's right to equality, freedom from discrimination and the right to human dignity as provided under Article 27 and 28 of the Constitution; and that the provisions of the Employment and Labour Relations Act No. 20 of 2011 (ELRC Act) Section 12(a), 22, 29, and 35 and the Magistrate's Court Act Section 9(b) by dint of Article 261(1) of the Constitution of Kenya 2010 and Section 7 of Schedule 6 of the Constitution of Kenya, override all provisions in WIBA that are in conflict with them. The High Court also awarded the costs of the petition to the 1st to 6th respondents.
 3. The appellant has challenged that judgment in this appeal on grounds set out in the memorandum of appeal, among them, that the Judge overlooked: the doctrine of exhaustion of administrative remedies as the office of Director under WIBA was the first avenue of dispute resolution with appeals to the High Court; the doctrine of constitutionality of statute; and the historical uniqueness in enactment of the labour statutes in 2007.
 4. During the hearing of the appeal before us on 4th October 2022 learned counsel Miss. Langat, relied on and orally highlighted the appellant's written submissions dated 22nd February 2021 and urged that the High Court overstepped its mandate in declaring several of the provisions of WIBA unconstitutional despite the Court of Appeal and the Supreme Court having already pronounced on the same; that by the time the High Court delivered the impugned judgment on 10th June 2019, the Court of Appeal had already pronounced judgment on 17th November 2017 in the case of Attorney General vs. Law Society of Kenya & COTU, Civil Appeal No. 133 of 2011 (hereafter Civil Appeal No. 133 of 2011); that that judgment of the Court of Appeal was binding and the High Court did not have jurisdiction to alter the precedent created by this Court; that moreover, the High Court proceeded with the petition despite the pendency before the Supreme Court, of Law Society of Kenya vs. Attorney General & COTU, S.C. Petition No. 4 of 2019}} [2019] eKLR (hereafter S.C. Petition No. 4 of 2019) in which judgment was subsequently delivered on 3rd December 2019 which decision is binding on all courts below the Supreme Court under Article 163(7) of the Constitution; that furthermore, on the strength of the case of Dodhia vs. National & Grindlays Bank Ltd & another [1970] EA 195, decisions of the higher courts are binding on the High Court under the doctrine of judicial precedent.
 5. It was urged that in the judgment from which those appeals emanated, namely, High Court Petition No. 185 of 2008, the High Court had declared Sections 4, 16, 21(1), 25(1)(3), 52(1)(2) and 58(2) of WIBA inconsistent with the retired Constitution but the Court of Appeal in Civil Appeal No. 133 of 2011 reversed that decision only finding Section 7 and 10(4) of WIBA inconsistent with the Constitution, which decision was upheld by the Supreme Court in its judgment in S.C. Petition No. 4 of 2019.
 6. Counsel further faulted the High Court for disregarding the decision of the Court of Appeal Civil Appeal No. 133 of 2011 on grounds that its pronouncements were *obiter dictum* and therefore not binding as a precedent on the faulty premise that the Court did not in that case consider the impugned provisions of WIBA against the Constitution of Kenya, 2010 when in fact the Court of Appeal had done so, and was upheld by the Supreme Court; that although the High Court decision in Petition No. 185 of 2008, the subject of Court of Appeal Civil Appeal No. 133 of 2011, was based on the retired Constitution, the Court of Appeal did, in accordance with the requirement as to conformity with the new Constitution test the impugned provisions of WIBA against the Constitution of Kenya 2010.



7. Counsel concluded by stressing that the issues in this appeal were fully addressed by the Supreme Court of Kenya in S.C. Petition No. 4 of 2019 and this Court should, in accordance with the dictates of Article 163(7) of the *Constitution*, apply the same to this matter and set aside the judgment of the High Court and dismiss the petition by the 1st to 5th respondents.
8. Learned counsel Ms. Osino and Miss. Julu held brief for Mr. Njengo for the 1st to 5th respondents and relied on, and highlighted their written submissions dated 25th February 2022. In their view, the appellant essentially abandoned its appeal in that the arguments canvassed in the appellant's submissions have no relation to the grounds of appeal; that rather than expound on the grounds of appeal in the memorandum of appeal, the appellant in its submissions has introduced new grounds of challenge, a totally different matter, based on the decision of this Court in Civil Appeal No. 133 of 2011 and of the Supreme Court in S.C. Petition No. 4 of 2019.
9. It was submitted that for this Court to interfere with the decision of the High Court, the appellant must demonstrate that the learned Judge acted on wrong principles or disregarded some material considerations or that the findings are not at all supported by any evidence or that no reasonable court could arrive at the conclusion that he did.
10. It was submitted that under Article 159 of the *Constitution*, judicial authority is vested in courts and tribunals; that in relation to establishment of a Director under WIBA, there is no reference in that Act that he is to be a tribunal or a quasi-judicial tribunal tasked to hear and determine matters under that Act; that had that been the intention of the legislature, it would have stated so expressly; that it was not the intention of the legislature to vest judicial authority on the Director, an office appointed directly by the executive, to receive complaints, perform investigations, adjudicate on the matter at the first instance, perform judicial function of assessing damages in an office that does not fall under Article 159 of the *Constitution* which violates the doctrine of separation of powers; that vesting judicial authority on the Director is tantamount to violation of the constitutional principle of separation of powers. In that regard, the case of *In the Matter of Interim Independent Electoral Commission*, SC Advisory Opinion No. 2 of 2011 [2011] eKLR and decision of this Court in *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others*, C.A. No. 290 of 2021 [2013] eKLR were cited for the proposition that the Constitution does not contemplate a scenario where one organ of the Government usurps the functions of other organs which is what WIBA does.
11. It was submitted further that the substance of WIBA is to take away judicial power from Magistrates effectively taking away accrued rights in cases that were pending in court contrary to the doctrine of legitimate expectation; that it curtails the quest to access court for assessment of damages, a pure judicial function as held in *Justus Mutiga & 2 others vs. Law Society of Kenya & another* [2017] eKLR.
12. It was submitted that the ELRC is constitutionally established, and its powers devolved to the Magistrates Court; that the Magistrate's Courts declined to discharge that duty which necessitated the filing of the suit giving rise to the instant appeal; that it was an anomaly in the drafting and operation of WIBA to give the office of Director, duties that are constitutionally conferred on courts.
13. Regarding the complaint by the appellant that the trial judge disregarded the doctrine of exhaustion of remedies, it was submitted that this does not arise in this case; that that doctrine seeks to protect the autonomy of administrative agencies and promote judicial efficiency and applies, counsel submitted, in judicial review actions. The decision in *Speaker of the National Assembly vs. Karume*, Civil Application No. NAI. 92 of 1992 [1992] KECA 42 (KLR), was cited; that the doctrine does not apply here as the 1st to 5th respondent challenged the existence and constitutionality of the provisions of WIBA as opposed to the implementation of the same; and that a constitutional petition is an exceptional circumstance



- that ousts the applicability of the doctrine. The case of *Republic v Firearms Licencing Board & another, Ex Parte Boniface Mwaura* [2019] eKLR was cited.
14. It was submitted that in interpreting the constitutionality of the specific provisions of WIBA, it must be done in a manner that promotes the purposes, values and principles of the Constitution and advances the rule of law, human rights and fundamental freedoms, permits development of the law and contributes to good governance; that the Court should adopt a purposive interpretation that recognises that the Constitution is a living and durable instrument as pronounced by the Supreme Court in *Council of Governors & 47 others vs. Attorney General & 3 others(interested parties); Katiba Institute & 2 others (Amicus Curiae)* [2020] eKLR. It was urged that the dominant feature in WIBA is to take away judicial power in assessing damages from the courts in the first instance and to vest it in the Director which is in breach of the Constitution.
 15. Learned counsel Mr. Njoroge Mwangi for Mombasa Law Society, the 6th respondent, submitted in his written and oral submissions that the previous decisions of the Court of Appeal and the Supreme Court in C.A. No. 133 of 2011 and in S.C. Petition No. 4 of 2019 respectively were based on the retired *Constitution* as opposed to the impugned decision of the High Court which is based on the *Constitution* of Kenya 2010; that the present case involves different parties with different set of circumstances and the doctrine of *res judicata* does not therefore apply and neither is Article 163(7) of the *Constitution* applicable and this Court is therefore properly seized of the matter; that in any event, to the extent that the Court of Appeal and the Supreme Court expressed themselves regarding the constitutionality of WIBA vis-à-vis the *Constitution* of Kenya 2010, those pronouncements were *obiter dictum* in that the constitutionality of WIBA under the 2010 *Constitution* had not been raised either in the High Court, the Court of Appeal or in the Supreme Court; that the issues identified in C.A. No. 133 of 2011 related to the retired Constitution while the issues raised in the petition giving rise to the present appeal relate to the 2010 Constitution.
 16. It was submitted that under the Constitution of Kenya, 2010, unlike the retired Constitution, Parliament cannot locate or confer judicial authority outside the judiciary. The case of *A. O. O & 6 Others vs. Attorney General & another* [2017] eKLR was cited. That to the extent that WIBA seeks to empower a Director to exercise judicial authority, it is unconstitutional; that Section 16 of *WIBA* bars the filing of suits, yet the ELRC Act which confers exclusive original and appellate jurisdiction on ELRC is a creature of the *Constitution* of Kenya, 2010; that Sections 12, 22, and 29(4) of the *ELRC Act* and S. 7 and 9 of the *Magistrate's Courts Act* clearly show that WIBA is unconstitutional as there is no bar in those statutes against an employee injured at work seeking redress in court; that S.16 of *WIBA* is therefore in conflict with those statutes which were enacted under the *Constitution* of Kenya, 2010; and that WIBA, an older statute, must give way to the new statutes.
 17. Moreover, counsel submitted, WIBA has no transitional provisions and does not cater for the many pending cases at different stages before the courts; that considering that WIBA was based on strict liability, and bearing in mind that Sections 7 and 10(4) of *WIBA* having been declared unconstitutional, strict liability no longer applies and if an employee who is injured at work lodges a claim and the employer denies liability, the employee cannot benefit from WIBA; equally the obligation of the employer to insure was removed as Section 7 was declared unconstitutional. It was submitted that what remains of WIBA after those provisions were declared unconstitutional is a useless relic incapable of safeguarding workers' rights.
 18. Counsel also faulted WIBA in so far as it has or incorporates structured compensation created under the Schedules which were declared unconstitutional in *Justus Mutiga & 2 others vs. Law Society of Kenya & another* [2018] eKLR.



19. It was submitted that whereas WIBA was enacted with the good intention, hope and expectation that it would improve and safeguard the rights of the workers in getting compensation, it did not do so; that relative to the repealed Workmen Compensation Act, WIBA grossly limited or extinguished the rights that were available to employees; that Section 16 of WIBA for instance outlawed application of common law and the law of tort in case of workmen compensation to the detriment of workers; that for WIBA to be efficacious, it must operate in a no fault system; that with the invalidation of Section 10(4), the Director is incapable of safeguarding workers' rights to compensation because there would be need to ascertain causation and determination of liability which would require evidence to be adduced which cannot be done administratively; consequently upholding the constitutionality of WIBA would be tantamount to upholding exercise of judicial authority by a Director in violation of Articles 1(1), 1(3)(c) and 159(1) the Constitution of Kenya 2010; that assessment of damages, determination of liability are not powers that can be donated to the Director of WIBA; and that the office of Director created under section 53 of WIBA and all his assistants or Director of Occupational Safety and Health Services cannot be deemed to be a tribunal under the Constitution.
20. We have reviewed the record and considered the appeal and submissions. Although, as already indicated, the appellant in his memorandum of appeal raised several complaints regarding the impugned judgment, the critical preliminary question is whether the matters that were the subject of the 1st to 5th respondents' petition before the High Court, and by extension this appeal, have already been determined by this Court in its judgment in Civil Appeal No. 133 of 2011 which was upheld the Supreme Court of Kenya in S.C. Petition No. 4 of 2020. In other words, are the decisions of the Court of Appeal and the Supreme Court in those cases dispositive of the issues raised in this appeal.
21. In their petition before the High Court, the 1st to 5th respondents, supported by the 6th respondent as an interested party, challenged the constitutionality of Sections 10, 16, 23, 26, 28, 30, 33, 37, 51, 53 (2)(d), (e), 58(2) and the First Schedule of WIBA. Broadly, their complaints were that the provision of the WIBA that purport to vest judicial authority in the Director whose office is created under Section 53 of the WIBA, and who is neither a court nor a tribunal usurps judicial power from the judiciary contrary to Article 159 (1) of the constitution}}; that the provisions of Section 10, 16 and 53 of the WIBA undermine a litigant's right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal; that the provisions of Section 53 that give the "Director" who is an appointee of the Executive the right to receive complaints, investigate them and ultimately adjudicate over them and even receive appeals from dissatisfied parties is an affront to the doctrine of separation of powers that runs through the 2010 Constitution; that the application of the WIBA to cases that have been pending in courts before the delivery of the judgment of Court of Appeal in Civil Appeal No. 133 of 2011 goes against judicial wisdom that deems legitimate all actions done under the legal regime that existed at a given time; and that the provisions of part V of WIBA are discriminatory, unequitable and undermine the human dignity of those with low income.
22. It was there case that there are accrued rights and expectations that crystallized under the legal regime that existed before the Court of Appeal's judgment in Civil Appeal No. 133 of 2011, which cannot be taken away without undermining the right to property; that the magistrate's Courts are littered all over the Republic and have the relevant structures and manpower to handle the work injury claims; that to purport to prefer that the work injury claims be lodged with the Director whose office has not been set up and lacks the relevant reach in the grassroots is an affront to the right of access to justice; that to uplift the provisions of the statutes that existed before the passage of the new Constitution over the Acts that were passed pursuant to Articles 261 and 262 of the Constitution, its fifth Schedule and Section 7(1) of the Sixth Schedule is to undermine those provisions of the Constitution and its spirit;



that the provisions of WIBA in question infringe on the constitutional provisions and undermine it and also infringe on the rights of the citizenry and or employees injured at their place of work; and that there is a confusion in judicial precedent between the statutes that existed prior to the new constitution and the ones that were passed pursuant to its provision to put it into effect.

23. It was on the basis of those grievances, that the the 1st to 5th respondents, supported by the 6th respondent as an interested party sought declarations that: Section 10, 16, 23, 26 and 53 and the entire part IV and V are *ultra vires* the Constitution of Kenya and are null and void to the extent that they place judicial authority in an entity that is not part of the Judiciary; violate the doctrine of separation of powers; violate the injured employee's right to a fair hearing as provided for under Article 50 of the Constitution of Kenya; violate the injured worker's right to property under Article 40 of the Constitution of Kenya; violate the right of access to justice and undermines the doctrine of devolution; violates an injured employee's right to equality, freedom from discrimination and the right to human dignity as provided under Articles 27 and 28 of the Constitution of Kenya; and a declaration that the provisions of the Employment and Labour Relations Act No. 20 of 2011 Section 12(a), 22, 29 and 35 and the Magistrate's Court Act Section 9(b) by dint of Article 261 (1) of the Constitution of Kenya 2010 and Section 7 of Schedule 6 of the Constitution of Kenya, override all provisions in WIBA that are in conflict with them.
24. In opposing the petition, the Attorney General contended before the High Court, as he has done in this appeal, that the constitutionality of WIBA was determined by this Court in Civil Appeal No. 133 of 2011 and the petition was therefore an abuse of the court process since the aforesaid Judgment settled all the issues raised in the present matter. In rejecting the argument that the matter was already determined, the learned trial Judge expressed:
- “It is the finding hereof that WIBA was only subjected to the test of constitutionality in High Court Petition No. 185 of 2008 which was only limited to the retired constitution. WIBA has never been subjected to the constitutionality test against the constitution of Kenya, 2010 other than by these proceedings. Therefore, the reference to the 2010 Constitution in Civil Appeal No. 133 of 2011 was only but orbiter and this decision cannot in law be said to have subjected WIBA to the constitutional test.”
25. The Judge then pronounced himself thus:
- “The position taken by this Court is that the issues raised in Civil Appeal No. 133 of 2011 were all based on the former constitution. The constitution 2010 was never an issue before the Court of Appeal. It is my position here that the comments made by the learned Justices of the Court of Appeal both in the body of their Judgment and as an order referring to the Constitution of Kenya 2010 were made per *in-curium, obiter dictum*, and were not intended to form the *raison d'être* of the learned Judges decision. That being the finding of this Court it is therefore not true that the issues raised here are *res judicata* on account of the aforesaid Judgment of the Court of Appeal in Civil Appeal No. 133 of 2011.”
26. Based on the foregoing, the question whether the High Court, in its impugned judgment, dealt with matters that had already been addressed by this Court in Civil Appeal No. 133 of 2011 was a live issue. It is therefore an issue properly before us.
27. There is no dispute that, the constitutionality of some of the provisions of WIBA had been challenged, and the High Court (J. B. Ojwang, J. (as he then was)) in a judgment delivered on 4th March 2009 declared Section 4, 7(1)(2), 10(4), 16(2)(1), 23(1), 25(1)(3), 52(1)(2) and 58(2) unconstitutional under



the retired Constitution. That is the judgment that was the subject of appeal before this Court in Civil Appeal No. 133 of 2011. In reviewing the judgment of the High Court, the Court of Appeal stated:

“...at the heart of this appeal lies the construction of the former Constitution vis a vis the nine impugned sections to ascertain whether they are in conflict or inconsistent with the former Constitution. It is important, as we do so, to also test those sections against the Constitution of Kenya, 2010, which was promulgated after the decision of the High Court in this matter to ensure that those provisions do not also offend the current constitutional order.” [Emphasis added]

28. It is evident from that passage that the Court examined the constitutionality of the impugned provisions from the perspective of the retired Constitution as well as from the prism of the Constitution of Kenya, 2010. Having done so, this Court in its judgment delivered on 17th November 2017 allowed the appeal against the judgment of the High Court, to the extent of setting aside orders of the High Court:

“...declaring Sections 4, 16, 21(1), 25(1) (3), 52(1) (2) and 58(2) to be inconsistent with the former Constitution. The result is that only sections 7 (in so far as it provides for the Minister’s approval or exemption) and 10(4) are inconsistent with the former and current Constitution.” [Emphasis added]

29. Dissatisfied, an appeal to the Supreme Court was lodged and in upholding the judgment of the Court of Appeal, the Supreme Court, in its judgment considered whether Sections 16, 23(1) and 52(1) & (2) of WIBA are inconsistent with the Constitution. In doing so, the Supreme Court referred to Section 7 of Schedule 6 of the Constitution 2010 and expressed that all legislation prior to 2010:

“Ought in their application and interpretation to be brought into conformity with the Constitution 2010”

adding that:

“Furthermore, this Court should consider the Constitution 2010’s provisions to help deduce whether or not the impugned provisions, when read alongside the purpose of WIBA would assist in bringing clarity and justice to the issues in contest”.

30. In reference to Section 16, and to the argument that WIBA denies parties access to justice, the Supreme Court stated:

“...that Section 16 cannot be read in isolation so as to create the impression that it curtails the right to immediately access the courts, because by looking at the intention of Section 16, the purpose it fulfils is apparent. That purpose is revealed in Section 23 which calls for initial resolution of dispute via the Director and this can be deemed as an alternative dispute resolution mechanism. But what if one is still aggrieved by the decision of the Director” The answer to that question lies in Section 52 of the Act which allows aggrieved parties to seek redress in a court process. In the circumstances, access to justice cannot be said to have been denied.”

31. The Supreme Court further held that the jurisdiction of the High Court to deal with constitutional questions and violations that may arise was not ousted by granting the Director authority to make



inquiries, which are essentially preliminary investigation, that are necessary to decide upon any claim or liability in accordance with WIBA. The Supreme Court expressed further that:

“Such mechanisms, set out by statute must be left to run their full course before a court intervenes. Not only does this simplify procedures to ensure that courts focus on substantive rather than procedural justice, but also potentially addresses the problem of backlog of cases, enhances access to justice, encourages expeditious disposal of disputes, and lowers the costs of accessing justice.”

32. The Supreme Court went on to state that the Director is in essence performing a quasi-judicial function under Section 23 which is subject to supervisory jurisdiction of the High Court and his actions and decisions, even without review or appeal, are therefore still subject to the over-riding authority of the High Court. In that regard, the Supreme Court concluded:

“it is apparent that in considering the nature and extent of the limitation placed under Section 16 of the Act, it becomes clear that it does not permanently limit the right to access courts by an aggrieved party. It is only the initial point of call for decisions in workers’ compensation. When read in whole with Section 23 and 52 of the Act, therefore, a party is not left without access to justice nor do employees or employers have to resort to self-help mechanisms. What the section does, is that it allows the use of alternative dispute resolution mechanisms to be invoked before one can approach a court.”

33. In rejecting the contention that Section 25(1) and (3) of WIBA is inconsistent with the Constitution to the extent that it purports to discriminate against employees, the Supreme Court stated:

“Discrimination therefore entails the unjust or prejudicial treatment of different categories of people in the same circumstances and in the present matter, the Petitioner contends that the impugned Section 25(1) and (3) discriminate against employers and in some instances, employees. We disagree and instead agree with the Court of Appeal that there is no prejudicial treatment in the manner medical examinations are conducted. We say so because, firstly, while the Director can designate a medical practitioner to examine an employee, we agree with the 1st Respondent’s submissions that the Director is a neutral adjudicating party who neither acts for the employer nor an employee in doing so. Secondly, and as a safeguard against the Director’s arbitrary use of this power, the employer can, with the approval of the Director, refer the employee to its own medical practitioners. Last but not least, an employee, at his/her own expense is at liberty to have a medical practitioner of his/her choice present at the time of the examination.

- (81) The effect of Section 25 of the Act therefore, is to ensure that the medical examination and ensuing report is objective, fair, accurate and sound. This section consequently secures the interests of both employees and employers, advances equality and does not accord differential treatment to any party. Thus, it cannot be said to contravene either the former Constitution or the Constitution 2010”



34. Regarding the complaint that Section 58(2) of WIBA is “inconsistent with the former and the Constitution 2010” to the extent that it purports to promote retrospective application, the Supreme Court in agreeing with the Court of Appeal stated:

“...it is not in dispute that prior to the enactment of the Act, litigation relating to work-injuries had gone on and a number of the suits had progressed up to decree stage; some of which were still being heard; while others were still at the preliminary stage. All such matters were being dealt with under the then existing and completely different regimes of law. We thus agree with the Appellate Court that claimants in those pending cases have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked. However, were it not for such legitimate expectation, WIBA, not being unconstitutional and an even more progressive statute, as we have shown above we opine that it is best that all matters are finalized under Section 52 aforesaid.”

And later:

“...that retrospective operation of statutes is not per se illegal or in contravention of the Constitution. Indeed, Section 58(2) clearly expresses the intention that the Act shall apply retrospectively in terms of our decision in the S.K. Macharia case. Consequently, we do not agree with the Petitioner that the effect of Section 58 (2) of the Act is to take away the right to legal process, extinguish access to the courts and to take away property rights without due process”

35. In our view, the fundamental concerns raised by the 1st to 5th respondents in their petition, as well as by the 6th respondent, relating to the complaints that WIBA: entailed usurpation of judicial power; undermines a litigant’s right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal; is an affront to the doctrine of separation of powers; is discriminatory in its compensation structure; takes away accrued rights and expectations that have crystallized under the legal regime that existed; and that it is affront to the right of access to justice; were all addressed by the Supreme Court in the context of the Constitution of Kenya, 2010.

36. Apart from the command under Article 163(7) of the Constitution that all courts are bound by decisions of the Supreme Court, and although some of the parties in this matter are different from the parties in Supreme Court of Kenya in Petition No. 4 of 2020, the decision of the Supreme Court in that petition is a judgment in rem. *Black’s Law Dictionary*, 9th Edition defines a judgment in rem as:

“An action in rem is one in which the judgment of the Court determines the title to the property and the rights of the parties, not merely as between themselves, but also as against all persons at any time dealing with them or with the property upon which the court had adjudicated.”

37. In *Pattni vs. Ali & Anor* (Isle of Mann (Staff of Government Division) [2006] UKPC 51 in which reliance was sought from Jowitt’s Dictionary of English Law (2nd Edn.) p. 1025-6 to the effect that:

“A judgement in rem is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the



status of the thing adjudicated upon is also declared by the adjudication...So a declaration of legitimacy is in effect a judgement in rem.”

38. In *Kamunyu & Others v Attorney General & Others* (2007) 1 EA 116 the Court stated:

“In a suit seeking judgement in rem, that is a judgement applicable to the whole world, an individual does not sue on behalf of the whole world, but sues for judgement which is effective against the whole world. In other words, in the present case, the appellants when successful in the suit obtain judgement, which is effective against the whole world but does not confer benefits upon the whole world.”

39. In *Japheth Nzila Muangi vs. Kenya Safari Lodges & Hotels Ltd* [2008] eKLR it was held:

“It is trite law that ordinarily a judgement binds only the parties to it. This is known as Judgement in personam. A judgement may also be conclusive not only against the parties to it but also against all the world. This is known as a judgement in rem. This is a judgement which declares, defines or otherwise determines the status of a person or of a thing i.e. the jural relation of the person or thing to the world generally.”

40. Whereas the doctrine of *res judicata* may not in the strict sense apply here, we have no doubt that the decision of the Supreme Court, being a judgment in rem is binding and dispositive of this matter. It is no wonder that in concluding its judgment delivered on 3rd December 2019 in Petition No. 4 of 2019, the Supreme Court expressed itself thus:

“However, before we conclude we must take note of a matter that was brought to our attention at the hearing of this Appeal. While this matter was before us awaiting determination, E.K. Ogola J, on 10th June 2019, in the High Court of Kenya at Mombasa, rendered a decision in the case of Juma Nyamawi Ndungo & 5 others v Attorney General; Mombasa Law Society (Interested Party), Constitutional Petition No. 196 of 2018 [2019] eKLR. Broadly, some of the issues for determination in that matter included whether the WIBA was unconstitutional in light of the Constitution 2010.

(91) We are greatly dismayed that the learned Judge did not take judicial notice of the pendency of this Appeal although he was aware of it. As a matter of fact, he stated so in his judgment that an appeal had been preferred to us against the decision of the Court of Appeal to the apex court on matters whose determination may well have been binding on him. The learned judge ought to have held his horses and acknowledge the hierarchy of the courts and await for this court to pronounce itself before rendering himself, if at all. As we perceive it, his judgment has created unnecessary confusion in the application of WIBA and cannot be allowed to stand as it may [may or is]” also be contrary to this Judgement. The findings and Orders expressed in that judgment must therefore be read in the context of the decision of the Court of Appeal and our finding and Orders in this appeal.”

41. For those reasons, we allow the appeal and set aside the judgment of the High Court in its entirety.

42. We further note that during the pendency of this appeal, on 24th April 2023, the Chief Justice published in the Kenya Gazette Practice Directions relating to pending claims regarding compensation for work related injuries and diseases instituted prior to the Supreme Court decision in [Law Society of Kenya](#)



vs. Attorney General and another Petition No. 4 of 2019; [2019] eKLR that provide further guidance on the matter.

43. We order each party to bear its own costs.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

