



**Dock Workers Union (K) v Director of Occupational Safety and Health Services  
& 5 others; Federation of Kenya Employers & another (Interested Parties)  
(Petition E004 of 2024) [2025] KEELRC 51 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 51 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
PETITION E004 OF 2024  
M MBARŪ, J  
JANUARY 23, 2025**

**BETWEEN**

**DOCK WORKERS UNION (K) ..... PETITIONER**

**AND**

**DIRECTOR OF OCCUPATIONAL SAFETY AND HEALTH SERVICES ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL POLICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF THE KENYA POLICE SERVICE .... 3<sup>RD</sup> RESPONDENT**

**CABINET SECRETARY MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT ..... 4<sup>TH</sup> RESPONDENT**

**CABINET SECRETARY MINISTRY OF LABOUR AND SOCIAL SERVICES ..... 5<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**FEDERATION OF KENYA EMPLOYERS ..... INTERESTED PARTY**

**MARGARET BOSIBORI NYAMWATA (SUED ON BEHALF OF THE ESTATE OF THE LATER SAMUEL ONYANCHA KINAGA - DECEASED) ..... INTERESTED PARTY**

**JUDGMENT**

1. The petitioner is seeking the following orders;



- a. An order of declaration does issue that the order issued by the 1<sup>st</sup> respondent vides DOSH/WIBA 4 form and dated 11 March 2022 was unlawful to the extent that it was not issued by the office established under Section 53 of the [Work Injury Benefits Act](#), 2007.
- b. An order of declaration does issue that under the 1<sup>st</sup> and 2<sup>nd</sup> Schedule of the [Occupational Safety and Health Act](#), 2007 the accident which occasioned the death of the deceased person, 2<sup>nd</sup> interested party did not arise from work injury and therefore did not constitute an occupational accident.
- c. An order of declaration does issue that the compensation did not arise from an accident which did not flow from an occupational safety as provided under the [Occupational Safety and Health Act](#), 2007 and even if the 1<sup>st</sup> respondent were to be found as had such mandate under Section 28 and 30 of WIBA to issue the order of 11 march 2022.
- d. An order of declaration does issue that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are liable for accidents caused by criminals and or unlawful groupings organizations and their networks as the power and authority to ensure security to the property and life of citizens in Kenya have been vested upon them and therefore they are culpable for those accidents which are not connected to the extended occupation of the employer but have occurred due to insecurity or to accidents caused by crime, busters in pursuit of criminal benefits.
- e. An order of certiorari is issued to quash the order issued under sections 28 and 30 of the [Occupational Safety and Health Act](#), 2007 dated 11 March 2022 and contained in form DOSH/WIBA 4.
- f. An order of prohibition to stop the proceedings in Mombasa Misc. Application No.E016 of 2014 [2024];
- g. Any other order this court may deem fit to grant.
- h. Costs of the petition be provided for.

## **Petition**

2. The petitioner is a trade union under the provisions of the [Labour Relations Act](#) (LRA).
3. The 1st respondent is the office established under Section 23 of the [Occupational Safety and Health Act](#) (OSHA). The 2nd respondent is the office established under Article 245 of the [Constitution](#) with functions stipulated under the National Police Commission Act. The 3rd and 4th respondents are appointed under Section 152 of the [Constitution](#). The 5th respondent is established under Article 155 of the [Constitution](#).
4. The 1st interested party is an employer organization under the [Labour Relations Act](#). The 2nd interested party is the widow of Samuel Onyancha Kinaga (the Deceased), who sued as the legal representative of the Estate under the Letter of Administration of Ad Litem issued in Mombasa CMC Succession Cause No.E011 of 2023.
5. The petition is that the administration of OSHA and the [Work Injury Benefits Act](#) (WIBA) is provided under Sections 23 and 53 respectively. Under the law, work injury, occupational accident, workplace, occupational safety, occupational health or disease is regulated under WIBA and OSHA. Compensation for such injury or deceases is supposed to follow the principles set out in the law of tort and compensation under WIBA. Other government agencies should be held culpable for mandates



expressly provided under the Constitution and the law that arise through negligence, omission or abdication of duty leading to injury and, hence, violation of the Constitution.

6. The petition relates to compensation directed by the 1st respondent against the petitioner to pay the beneficiaries of the deceased, whom the 2nd interested party represents. This arose from an incident that occurred outside the definable workplace and does not fall under the definable occupational-related accident.
7. The petitioner's offices are along Kenyatta Avenue (Sparki), a few meters from Makupa Police Station. The building comprises two-storeyed floors, with the ground floor exclusively rented out to other business owners while the petitioner conducts business exclusively on the first floor. The petitioner's business is bookkeeping and record keeping for members and officials.
8. The petitioner employed the deceased as a clerical officer in 1980. On 29 January 2020, he was promoted to senior clerical officer and bookkeeper, earning Ksh.171 691 monthly.
9. The deceased was gunned down by unknown assailants on 29 January 2020 on the ground floor of the petitioner's building and pronounced dead at Makadara Hospital on the same day. The assailants escaped on a motorbike after committing the crime.
10. The target of the attack was Mr Katana Kenga, the then registered trustee of the petitioner, who had withdrawn money from the petitioner's bank account from ABSA bank along Nkurumah Road, Mombasa. He had gone to the bank to withdraw cash to pay shop stewards, and after reaching the main entrance of the petitioner's building, he was accosted by the assailants who shot him in the leg and was disabled. The assailants picked up the money in an envelope. The officers of the petitioner who arrived at the scene immediately found Kenga and the deceased in pain, already unconscious. Both were taken to hospital, where the deceased succumbed to his injuries.
11. The petition is that when Kenga was shot at, the deceased went to the ground floor to see what had happened, but when he noticed the assailants, they shot him in the chest. The incident occurred on the ground floor. The petitioner does not operate any business on such floor.
12. The petitioner reported the accident to the Makupa Police Station, which covered the scene and commenced investigations.
13. The petitioner reported the accident to the 1st respondent under Sections 21 and 22 of WIBA as a statutory requirement. Still, the 1st respondent construed it as an admission of liability arising from the accident which caused the death of the deceased.
14. By dint of sections 23 and 26 of WIBA, the 1<sup>st</sup> respondent has to investigate and inquire about the nature of the incident that caused the accident under OSHA. Such investigations should address the level of contributions by the victim, petitioner, or other extraneous factors for policy formulations and developing mitigating processes and/or programmes.
15. The 1st respondent, through a letter dated 11 March 2022 and issued to the petitioner on 15 June 2022, purported to have assessed the compensation due to the deceased without subjecting the same to the provisions of Section 53 of WIBA. Under Section 23 of OSHA, the 1st respondent does not have power under Sections 28 and 30 of WIBA, which is reserved for the Director under WIBA. The 1st respondent misapplied the law to the extent that only the Director under WIBA is mandated to assess compensation following work injury or disease.
16. The reporting provision under WIBA to the 1<sup>st</sup> respondent was meant to enable him to be aware of the operational challenges emerging at workplaces under the mandate of Section 23 OSHA. Under OSHA and WIBA, there are definitions of work injury, compensation, occupation, and occupational accident.



The elements require occupational safety, health, and/or disease. WIBA established procedures for compensation for work injury and disease.

17. Upon the 1st respondent receiving the DOSH Form dated 8 February 2020 under Sections 21 and 22 WIBA, no investigations were conducted. Such was abdication of duty under Articles 6(3), 238, 239, 218 and 242 of the *Constitution*. The respondents have not given the petitioner any reasons why there were no investigations into the matter under the criminal incident and death of the deceased. Such negligence of duty should not be shifted to the innocent party, the petitioner, following the criminal assail of its former employee, the deceased. The decision by the 1st respondent to direct the petitioner to make payment under WIBA without conducting any investigations into the events leading to the death of the deceased is an abdication of duty.
18. Unknown persons shot the deceased. This accident occurred on the ground floor of the building owned by the petitioner but not in use by other business owners. There can be no liability on the petitioner for the accident and death of the deceased person. The 2nd and 3rd respondents should address this.
19. By dint of section 17 of WIBA, the petitioner finds itself precarious to the extent the 2nd and 3rd respondents have not been judicially brought to account for liability. Unless there is a pronouncement, there will be no reimbursement.
20. A situation such as this has removed the correct parties from being held liable for negligence in the duty of care under the *Constitution*, WIBA, and OSHA. These liabilities cannot be shifted to the petitioner.
21. The interested party has instituted a suit seeking to enforce the compensation award in Mombasa ELRC Misc. Application E016 of 2024, dated 30 January 2024. Whereas there is no express provision under the law for the enforcement of such awards as a judgment of the court, there are judgments in this regard.
22. The petitioner is seeking an interpretation of the following;
  - a. What is a work injury, and who should be considered to have suffered from the work injury, including the place and circumstances leading to the same?
  - b. What is an occupation relating to a workplace/business and occupational accident? Occupational safety and or health/diseases as provided under OSHA and WIBA.
  - c. Should the nature of the workplace be in consideration, such as constructional/infrastructural, temperature, light, plants (physical), harmful dust, chemicals, fumes, streams and diseases associated with those factors at the workplace/business?
  - d. What is a workplace, and where should an accident occur to constitute a work injury or workplace accident?
  - e. What is compensation, and what constitutes circumstances which may compel a party to pay for compensation?
  - f. Where is the position of government agencies in circumstances they are found responsible and or culpable?
23. The petition is that the accident on 29 January 2020, which caused the death of the deceased, fell within a public place, which should ordinarily fall under the jurisdiction of the 2nd and 3rd respondents by dint of Article 238 of the *Constitution*. This is the office established to investigate the prosecution of



- crime perpetrators. The deceased died in a public place due to gunshots by unknown assailants. The petition should be allowed as prayed.
24. The petition is supported by the Supporting Affidavit of Simon Kiprono Sang, the petitioner's general secretary.
  25. In reply, the 1st respondent filed the Replying Affidavit of Bernard Simiyu, the Assistant Director of Occupational Safety and Health Services in charge of Mombasa County, under whose office the matters in this case lie. The director of OSHA is responsible for administering and enforcing OSHA and processing compensation for work injuries under WIBA.
  26. Upon a report of work injury, the director must injury and conduct investigations upon which assessment of compensation is done. The employer who has reported a work injury is issued with notice to pay for the assessed compensation; if aggrieved, an objection or appeal is allowed. The petitioner did not file any objections or lodge an appeal with the court as required under WIBA.
  27. On 9 March 2022, the 1st respondent received notice from the employer, the petitioner, of an accident involving its employee, the late Samuel Onyancha Kinanga, in ML/DOSH 1. Attached was a copy of the Death Certificate and, on this basis, the information shared by the employer; the 1st respondent assessed the due compensation by requiring the petitioner to pay ksh.16, 482,336 being the assessed compensation to the dependents of the deceased represented by the 2nd interested party.
  28. The 1st respondent appointed under Section 53 of WIBA computed the claimable amounts based on DOSH 1. There were no objections by the employer, and on 25 May 2022, the 1st respondent revived the Certificate of Dependency under DOSH/WIBA 6 dated 18 May 2022. On 15 June 2022, the 1st respondent wrote to the petitioner and gave a breakdown of how to allocate the sum of Ksh.16, 482,336 to the dependents of the Estate of the deceased within 60 days or file objections or appeal within the provisions of Section 51 and 52 of WIBA.
  29. The petitioner did not file any objection or seek more time to comply but proceeded to file this petition.
  30. The statutory role of the 1st respondent is to receive accident notification and execute such duties under the WIBA based on section 53. There is no appeal against the assessment and award of compensation by the 1<sup>st</sup> respondent. The petition is without merit and should be dismissed with costs.
  31. The 1st respondent also filed Objections to the Petition on the basis that;
    - a. The court must reject the petition and grounds in the petitioner's Notice of Motion in its entity.
    - b. The court declines to declare as unlawful the decision arrived at vide DOSH/WIBA 4 by the 1st respondent in the assessment dated 11 March 2022 with allegations that such a decision was made by an office not established under section 53 of the WIBA.
    - c. The court declines to declare as non-occupational the incident that occasioned the death of the petitioner's employee, Samuel Onyancha Kinanga (Deceased), with allegations that the 1st respondent's decision in the assessment dated 11 March 2022 was made without consideration of the First and second schedules of the OSHA.
    - d. The court declines to declare that the petitioner is not liable to settle the amount compensable to the dependents of the petitioner's employee, Samuel Onyancha Kinanga (Deceased).
    - e. The court declined to issue an order of Certiorari quashing the 1st respondent's assessment dated 11 March 2022.



- f. The court declines to declare that the 1st respondent was not mandated under Sections 28 and 30 of WIBA and that the compensation did not arise from an accident as provided for in the OSHA.
32. These objections are based on the petitioner's seeking another interpretation of terms such as work injury, workplace, occupational safety, occupational diseases, and compensation that are provided for under the law.
33. The petitioner has admitted that the deceased, Samuel Onyancha Kinaga, was its employee until his death on 29 January 2020. He died while on duty through fatal injuries while in the company of a colleague, Katana Kenga. The petitioner filed DOSH 1 dated 8 February 2020 because the deceased, Samuel Kinaga, was performing his duties at the time of his death.
34. The employee died within the premises of the petitioner and not in a public place. The petitioner had a duty to provide the deceased with a safe working environment and was, hence, responsible for injuries sustained by the deceased.
35. The 2<sup>nd</sup> interested party, Margaret Bosibori Nyamwaya, the administrator of the Estate of Samuel Onyancha Kinaga (Deceased), filed her Replying Affidavit and averred that her late husband was employed by the petitioner and earned Ksh.171, 691 per month. He died during his employment, and the petitioner, through the general secretary, reported the matter to the 1st respondent through DOSH 1 on 9 March 2022 under the law; this was to be reported within 7 days under Section 2 of WIBA.
36. Bosibori avers that the contention by the petitioner that the deceased did not suffer accident work injury while at the workplace or as a consequence of occupational hazard is false. The law does not regulate the place of death but protects an employee who dies in the course of employment. Section 2 of OSHA defines 'workplace' as any land, premises, or location. Where a worker is in the course of employment, and hence the position that the deceased was on the ground floor, does not change the fact that he was in the course of his employment at the time of death.
37. Having reported the matter to the 1st respondent, the petitioner accepted the power and mandate of such office under Sections 23, 24, 25 and 26 of WIBA. The director has the power to determine whether an act or omission amounts to accident and work injury, and it is a contradiction that the petitioner concedes that the deceased and Katana Kenga were shot because of funds they had withdrawn from the bank to pay shop stewards. Such a function would not have been undertaken without the deceased accountant.
38. The petitioner made the report under DOSH 1 as the employer. OSHA does not have a mechanism for determining compensation for work injuries, but the same is provided for under WIBA. The injuries sustained arose from a dangerous occurrence, which is provided for under Section 21 OSHA, and hence, the deceased was entitled to compensation under WIBA. The petitioner acknowledged the director award and assessment through a letter dated 20 June 2022 and further requested details of the beneficiaries to organize payment.
39. There is no dispute of the award assessed by the 1st respondent. There are no objections or appeals thereof. The petition should be dismissed with costs.
40. The petitioner filed a Supplementary Affidavit of Simon Kiprono Sang, who avers that the officer of the 1st Respondent does not deny that he issued the order for compensation although alternately stating that the officer who did the computation is that which is appointed under Section 53(1) of WIBA. He only received the prescribed form reporting the accident. He admits to carrying the functions of the



- Director of Work Injury Benefits, which are the subject of this petition. It is not in dispute that the documents giving rise to the claim emanated from the 1st Respondent herein.
41. The Petitioner employed the deceased in a position where he earned Ksh. 171, 691. The deceased person was not registered with ICPK and, therefore, he was not an Accountant within the context of the law. In any case, the 2<sup>nd</sup> interested party has not debunked the same.
  42. It is good practice and lawful that an employer should report all deaths of their employees, and the death of the 2nd interested party-deceased person was done to the 1st Respondent.
  43. Mr Sang said that the 1st Respondent had no statutory power to address his mind to the compensation as the same fell within the power of the Director of Work Injury Benefits, appointed under Section 53(1) of WIBA.
  44. Katana Kenga was designated to withdraw cash, a signatory of the petitioner's bank account, and was not accompanied by the deceased, as alleged by the 2nd interested party. The deceased had suffered from gunshots on the ground floor and was as he rushed down to see the cause or source of the sound or explosion with less regard for his safety.
  45. There are two distinct offices of Directors established under OSHA and WIBA. Under Section 23 of OSHA, the Director of Occupational Safety and Health Services has an established office with functions as enumerated thereunder. Section 53 of WIBA establishes the office of the Director of Work Injury Benefits, whose functions fall under the subject matter. The 2nd interested party alleges that since both Acts define the Director as "Director of Occupational Safety and Health Services", it is, therefore, proper for the Director of OSHS to have done all those processes concerning compensation. These two offices are separate and distinct from each other.
  46. Parties attended and agreed to address the petition by way of written submissions.
  47. The petitioner submitted and made reiterations of the petition and the supporting affidavits.
  48. The office of the Attorney General filed submissions for the respondents save for the 2nd respondent and submitted that the petitioner contests the filing of the Replying Affidavit of Bernard Simiyu because he is not a State Counsel to represent the respondent's case. However, the overriding objective of Article 159 of the Constitution must be read together with Section 3 of the ELRC Act. The court should address the substantive issue and not rely on technicalities. The 1st respondent is an office under the government agencies represented by the 6 respondent offices in proceedings such as herein. The pleadings filed by its officers are proper as held in *D. T. Dobbie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR.
  49. The respondents submitted that the Supreme Court in *Law Society of Kenya v Attorney General & Another* Petition 4 of 2019 addressed the provisions of WIBA and the functions of the Director. Under OSHA and WIBA, the laws set out the legal instruments to manage factory employees' safety, health and welfare. Under OSHA, workers' safety, health, and welfare are addressed, while under WIBA, compensation for work injuries is addressed. The director under WIBA is responsible for enforcing employees' occupational safety and health. Both statutes are complimentary to protect employees.
  50. Section 53 of WIBA is not meant to vitiate or render the interpretation of the director obtuse but to provide for the administrative function of WIBA in correlation to OSHA as held in *Paul G. Muthumbi v Chairman, Samuel Njuguna & others v Cabinet Secretary for Transport JR No.2 of 2014* where the court held that the two enactments can stand side by side without contradiction as long as the functions established by the latter Act are kept distinct.



51. The OSHA Director was tasked with investigating workplace incidents; under WIBA, compensation is assessed. The dual nature of both OSHA and WIBA was done to ensure efficiency, as held in *Popat & 7 others v Capital Markets Authority* Petition 29 of 2019. The functions of the director under both statutes were merged, as the petitioner believed, but rather separated into operations under each statute.
52. The apprehensions by the petitioner were misconceived and procedurally invoked the court's jurisdiction by filing the instant petition. The doctrine of avoidance should be invoked.
53. The incident that took place on 29 January 2020 and caused the death of the petitioner's employee constituted work injury as defined under OSHA. The petitioner is the owner of the building where the deceased died. The premises are managed and owned by the petitioner; hence, the petitioner is responsible for the safety of its employees within the building. The fact that businesses operate on the ground floor does not defeat the point of ownership, control, and duty to the residents, particularly the petitioner's employees.
54. The order issued by the 1<sup>st</sup> respondent on 11 March 2022 for compensation to the deceased's beneficiaries is lawful and binding. Under Section 23(1) of WIBA, the 1<sup>st</sup> respondent is allowed to make inquiries as necessary. The police who received the accident report are regulated differently, while the director must investigate a work-related injury.
55. The 2nd and 4th respondents do not owe a duty of care at common law merely because they have statutory power to prevent the deceased from suffering harm. In the case of *Poole Borough Council v GN* (through his litigation friend 'The Official Solicitor') and *Another* [2019] UKSC 25, the court held that a distinction must be drawn between the duty to take reasonable care not to cause injury and a duty to take reasonable care to protect against injury caused by a third party.
56. In this case, the petitioner is liable for the death of Samuel Onyancha under the law and such duty cannot be diverted to the 3rd and 4th respondents.
57. The court has the jurisdiction to enforce awards assessed by the 1st respondent under the power granted under Article 162(2) (a) of the *Constitution* as held in *Law Society of Kenya v Attorney General & another* that the director was, in essence performing quasi-judicial functions under Section 23 of WIBA and by dint of Article 165(6) of the *Constitution* fell under the supervisory jurisdiction of the court. The director's decisions, even without review or appeal, were therefore still subject to the overriding authority of the court under this role. The court addressed Misc. Application E016 of 2024 for the payment of the assessed award by the 1st respondent.

The petition is without merit and should be dismissed with costs.

58. The 2nd interested party submitted that section 23 of OSHA provides that there shall be a Director of Occupational Safety and Health Services who shall be responsible for the administration of the Act. OSHA provide for the safety, health and welfare of workers and all persons lawfully present at workplaces, to provide for the establishment of the National Council for Occupational Safety and Health and connected purposes. All the Director's duties under the Act aim to pursue the purpose for which the Act was enacted and for connected purposes.
59. Section 2 of WIBA provides that "Director" means the Director of Occupational Safety and Health Services. Sections 21 and 22 provide for notification of the accident to the Director and the manner of making the notice. In contrast, Section 16 of WIBA provides that no action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer.



No liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.

60. Under Section 17 of WIBA, an occupational accident or disease in which compensation is payable was caused in circumstances resulting in another person other than the employer concerned or a third party liable for damages for such accident or disease. In this regard, the employee may claim compensation or institute action for damages against the third party, the employer or the insurer by whom compensation for that accident or disease is payable.
61. Under Section 53 of WIBA, the Director is responsible for ensuring that all employers insure their employees for work injuries, conducting investigations into such accidents upon occurrence, and ensuring that employees who are injured are compensated under the provisions of WIBA as held in *Law Society of Kenya v The Attorney General and Central Organization of Trade Unions*.
62. The issues raised in this Petition were raised before the Supreme Court, and Practice Directions were issued. To this extent, WIBA is absolutely nothing unconstitutional.
63. DOSH/WIBA 4 form dated 11 March 2022 was not issued by the Office established under section 53 WIBA. There is no illegality in the issuance of the Dosh/WIBA 4 form. Once a matter has been reported to the Director, the Director has to make a ruling. The ruling is in Dosh/WIBA form 4. According to the Petitioner, the ruling was made by the Director under OSHA and not WIBA. This position is false and incorrect. Section 53 of WIBA must be read together with section 2 of WIBA on the meaning of a director. The director under WIBA is the same as the one under OSHA.
64. The death of the deceased does not amount to an occupational accident under OSHA because the deceased died in the course of employment. The deceased died on the ground floor of the Petitioner's premises, according to their documents. It does not change the fact that he was in the course of employment. An occupational accident can occur irrespective of the employer's place of business, especially when the work involves getting out of the premises. The said accident amounted to an occupational accident. For this reason, the Petitioner's employee filled out Dosh form 1 and reported the matter to the Director WIBA for assessment of compensation.
65. Since the assessment for compensation, the petitioner did not object or file an appeal. Instead of proposing how to pay the claim in Miscellaneous E016 OF 2024, the Petitioner is hell-bent on denying the 2nd Interested Party justice. We urge the court to deceased death arose from an occupational accident.
66. The 2nd and 3rd Respondents are not liable for the accidents caused by criminals and unlawful groupings organizations and their networks. The petitioner has not invoked Section 17 of WIBA, which provides that if an occupational accident or disease in respect of which compensation is payable, was caused in the circumstances resulting in another person other than the employer concerned (in this section referred to as the „third-party#) being liable for damages in respect of such accident or disease. The Petitioner can only seek to be indemnified by a third party after compensating the 2nd Interested Party, which has the right to sue the Petitioner for compensation.
67. The orders sought by Certiorari are not due since the Director's decision to award compensation to the 2nd Interested Party is an administrative decision. The law provides for an appeal, which the Petitioner did not do. An order of Certiorari is a Judicial Review Remedy, and the proceedings herein are not judicial review proceedings. The Petitioner should have filed judicial review proceedings if they believed the Director had taken actions beyond his mandate.
68. The Petition is not filed correctly and should be struck off for reasons for being filed by incompetent persons who lack capacity under section 2 of the [Labour Relations Act](#), which requires an Authorized



- Representative to file such a Petition. The present Petition and the Application were filed by Mr. Ochieng, who has since been appearing in court and is not the Petitioner's authorized representative, as there is no evidence of his appointment. Even if the said authority is obtained later, the same does not cure the mischief herein, and for this reason, the Petition and the Application should be struck off.
69. In determining the present matter, the Court should take judicial notice of the doctrine of constitutional avoidance as held in *Anarita Karimi Njeru vs The Republic* (1976-1980) KLR 1272; the Courts have been vigilant in examining constitutional petitions to ensure that they are drafted with a certain degree of precision.
70. The petitioner filed Supplementary Written submissions that Section 2 of the *Labour Relations Act* was meant to bring institutional harmony in institution suits by all labour players and authorized persons to institute suits as in Order 4 Rule 1 (4) of the Civil Procedure Rules. However, it is not substantive and does not go to the root of the dispute. Section 2 of the *Labour Relations Act* does not specifically state that the authority be filed contemporaneously with the pleadings. As was the case when filing the Resolutions of the Board with the pleadings, the lack of filing authority is not substantive and does not go into the root of the suit. In the case of *Diesel Inject Services v Shajand Holdings Ltd (Civil Appeal 53 of 2020)* [2024] KEHC, the court held Section 2 of the LRA does not expressly state that such authority should be filed together with the pleadings which instituted the suit. In the case of *Kenya Union of Domestic Workers, Hotels, Educational Institutions, Hotels and Allied Workers (KUDHEIHA) v United Kenya Club (Cause 425 of 2019)* (2024) KEELRC the court held that although there is no legal requirement that evidence of such authority is filed together with the pleadings, this fact must nevertheless be established through evidence during the trial.
71. The 1st Respondent is not the officer contemplated in Section 53(1) of WIBA. If the Parliament wanted also to designate the 1st Respondent as the Director responsible for WIBA, there was nothing difficult for the Parliament to have designated a different name from the one identifiable with him in Section 23(1) of OSHA rather than to re-designate him as the Director of Work Injury Benefit. The intention of the Parliament throughout the Act, including the officers appointed under Section 53(3) of WIBA, gives the intention that the Parliament had intended to have different officers for the two Statutes as it is deliberate that officers appointed under Section 26 of OSHA were designated the titles of Occupational Safety and Health Officers, while those appointed under Section 53(3) of WIBA were designated the title of WIBA officers. The 1st Respondent appointed in Section 23(1) of OSHA was not the officer contemplated in Section 53(1) of OSHA, and he lacked the statutory capacity to have issued an order for compensation under Sections 28 and 30 of WIBA. In the case of *Olive Mwhaki Mugendi & Another v Okiya Omtata Okoiti & 4 Others* [2016] eKLR, the court held that if a Statute has provided for the procedure to do a certain act, that procedure must be followed. In *Senate and Others v Council of Governors and Others in Petition No. 25 of 2019*, the court held that determining whether the amendment was constitutional, an unconstitutional purpose, or an unconstitutional effect can lead to the invalidation of legislation. The court must seek to identify the mischief sought to be remedied by considering the historical background of the legislation.
72. The petitioner submitted that the incident which caused the death of the deceased person on 29 January 2020 did not constitute an accident at all and whatsoever. It was an intentional action of a human intervention purposed to kill and harm the person. In contrast, the definition of accident is unintentional omission through unseen/undetected failure of systems and or structures which may cause harm to a person. Section 21 of OSHA, as read in the 1st Schedule of OSHA, was intended to exclude any occurrences Parliament did not include in the 1st Schedule of OSHA. If the Parliament intended the Director of WIBA to apply any discretionary powers, nothing



73. In the incident which caused the death of the deceased person did not fall within the confines of either work injury or occupational. The incident which caused the death of the deceased person was not a consequence of either an occupational accident or work injury. The 1st Respondent misapplied Section 21 of OSHA to conclude that the incident was a consequence of an occupational accident and or work injury and to bring him to invoke the provisions of Section 21 of WIBA to commence the inquiry of the said occurrence. For compensation to ensue under the tort principles, the law and the contributory factor and an omission on the part of the petitioner must give proof of duty of care.
74. The 2nd and 3rd Respondents should be held liable as held in the case of *Kimani v Attorney General (Civil Appeal 2 of 2019)* [2024] KECA under Articles 6(3) of the *Constitution*, as read with Articles 26 and 238 of the *Constitution* the government cannot be exonerated from its constitutional duties of protection of life or property as also decreed with international charters, conventions and treaties
75. On jurisdiction, in the case of *Wambua v Capital D Elegance Limited & another (Miscellaneous Application E055 of 2024)* [2024] KEELRC, the court held that as far as work injury claims are concerned, the only jurisdiction granted to the Employment and Labour Relations Court is appellate. There can be no room to expand this jurisdiction to cover issues that arise in the course of processing claims before the Director. This Court lacks jurisdiction to entertain the applicants' motion.

### **Determination**

76. The issues which emerge for determination in this case can be summarized as follows;
77. Whether the order issued by the 1<sup>st</sup> respondent through DOSH/WIBA 4 is lawful under Section 53 of WIBA;
78. Whether the accident which occasioned the death of the 2<sup>nd</sup> interested party constitutes an occupational accident;
79. Whether the 1<sup>st</sup> respondent has a mandate under Sections 28 and 30 of WIBA to issue an order for work injury compensation;
80. Whether the court should quash the order dated 11 March 2022 issued by the 1<sup>st</sup> respondent under DOSH/WIBA 4;
81. Whether an order should be issued prohibiting proceedings in Mombasa Misc. Application No.E016 of 2014 [2024];

### **Who should pay the costs?**

82. Before delving into the issues above, the respondents filed objections. The petition is by the Dock Workers Union, a trade union registered under the LRA.
83. Leonard Ochieng drafted the petition dated 6 May 2024 and filed it on 8 May 2024.
84. Simon Kiprono Sang, the petitioner's general secretary, supports the petition.
85. The respondents have raised the question as to whether Leonard Ochieng is the proper person to represent the petitioner in these proceedings. The petitioner filed the Letter of Authority appointing Leonard Ochieng to act for the union after the fact and challenging his attendance herein.
86. Under section 2 of the LRA, the office given authority to act for a trade union is that of the general secretary. Such office and officer is given authority to appoint in writing any other person or officer attending for and on behalf of the union.



87. For this purpose, section 2 of the LRA has defined authorized representative to include;  
In this Act, unless the context otherwise requires—

Authorised representative” means—

- (a) The general secretary of a trade union;
- (b) An employer or the chief executive officer of an employer;
- (c) The secretary of a group of employers;
- (d) The chief executive or association secretary of an employers’ organization; or
- (e) Any person appointed in writing by an authorised representative to perform the functions of the authorised representative;

88. For a trade union, a general secretary being the legally authorized representative can only sub-delegate such mandate to another person appointed in writing to perform the functions outlined under the written authority. Delegated authority cannot be assumed. Delegated authority is specific and as written down by the authorizing officer, person or entity as held in *Anthony v Communications Authority of Kenya & 3 others* [2022] KEELRC 1117 (KLR). The court emphasized the role of the principal as against the one delegated with authority to act for the principal. One holding delegated power cannot act beyond such a letter giving authority.

89. The Court of Appeal in addressing the question of what delegation of authority in the case of *Attorney General & 2 others v Independent Policing Oversight Authority & another* [2015] eKLR held that;

What then amounts to delegation?

Delegation is the assignment of responsibility or authority to another person usually one’s subordinate, or another officer of a lower rank. It is instructive however that the person delegating must remain fully accountable for the outcome of the delegated work. One can delegate authority but not responsibility. If a person delegates both authority and responsibility, then this becomes abdication of duty or denudation of authority and it is not acceptable.

Where delegation is underpinned in statute, and there is a requirement that the delegation be in writing, then such delegation must be in writing. There must be an instrument clearly defining the extent of the delegated authority and the duties involved. In such a case, if the person delegating power does so verbally contrary to the statute allowing him to delegate, then such delegation becomes null and void for all intents and purposes. [Emphasis added].

90. This position is reiterated in the case of the *Judicial Service Commission & another v Onyango* [2023] KECA 1109 (KLR) that delegated authority must arise from the instrument conferring such mandate. It must be in writing and cannot be assumed. See also *Attorney General, National Police Service Commission & National Police Service v Independent Policing Oversight Authority & Charles Kiptarus Chesire* [2015] KECA 734 (KLR).

91. In this case, the petitioner as an entity is recognized under the LRA. Section 2 of the LRA gives power to act to the office of the general secretary. The statutory power to act for the petitioner can only be delegated as defined under the same law, through written authority. The instrument to act in this case is the Letter of Authority with defined mandate.

92. In this regard, Leonard Ochieng is not an officer of the petitioner under the returns filed by the petitioner from the Registrar of Trade Unions. He is not an employee of the petitioner nor an Advocate



as defined under Section 20 of the *Employment and Labour Relations Court Act* giving him authority to attend before the court to represent the petitioner as herein done. Indeed, this is confirmed by the petitioner who filed the Letter of Authority as an attachment to the Supplementary Affidavit of Simon Kiprono Sang dated 6 September 2024. This allowed Leonard Ochieng to attend after the fact.

93. However, without the Letter of Authority, Leonard Ochieng lacked a crucial instrument and mandate, as defined under Section 2 of the LRA, to act and represent the petitioner while initiating these proceedings. Such authority cannot be applied after the fact to sanitize the proceedings. He is not a proper party to file this petition.

94. The petition is filed by a person without authority. Leonard Ochieng does not state his interest in the matter. He is not the authorized officer of the petitioner and does not hold any position with the petitioner.

This invalidates the petition.

The petition cannot stand.

95. Dealing with the substantive matters set out above, On whether the order issued by the 1<sup>st</sup> respondent through DOSH/WIBA 4 is lawful under Section 53 of WIBA, the petitioner's case is that the 1<sup>st</sup> respondent is an office established under Section 23 of the OSHA to administer matters as provided under the Act and that such office has no mandate to issue an order under Section 28 and 30 of the WIBA as these functions are the preserve of the Director appointed under Section 53 of WIBA.

96. The impugned order dated 11 March 2022 issued under DOSH/WIBA 4 was issued to the petitioner under the provisions of Sections 28 and 30 of WIBA.

97. The Director defined under Section 53 of WIBA is further mandated under Section 53(3) to;

(3) The Director of Work Injury Benefits shall be assisted in the performance of the functions, specified in subsection (1) by such other officers as are necessary, for the proper administration of the Act.

98. A proper reading of Section 53 and 2 of WIBA cannot be separated. The Director is defined as;

“Director” means the Director of Occupational Safety and Health Services (Cap. 253);

99. Hence, for work or occupational safety and health as well as work injury benefits, the provisions of WIBA must be read in whole and not in part. To read each section exclusively from the other parts would negate the entirety of the law and purpose set out under the preamble, to provide compensation to employees for work-related injuries and diseases contracted in the course of their employment and for connected purposes.

100. According to the WIBA, a work injury is a personal injury to an employee arising out of and in the course of employment. The *Occupational Safety and Health Act* (OSHA), 2007 deals with the safety, health, and welfare of workers by setting standards to prevent work-related injuries and illnesses. It requires employers to maintain safe working environments and to report any workplace accidents or occupational diseases to the regulatory authority using statutory forms.

101. The Second Schedule of OSHA outlines recognized occupational diseases. In cases of exposure, a Claimant must identify the specific occupational disease they were exposed as held in the case of Phillip Anyiego Gaya, Wycliffe Okoth, Paul Nyakach & 79 others v H. Young Co. E.A. Limited [2021] KEELRC 1068 (KLR) held that the exposure to and risk of contracting is complex and calls for proof. To prove exposure to the risk, an Employee or other Person claiming exposure must unravel the



- attendant risk and exposure. Hence, WIBA applies to all employees, and the Government as it would any private employer.
102. Employers are required to report any workplace accidents to the Director upon receiving notice or becoming aware of an employee's injury. An accident includes any injury reported by an employee that the employee claims occurred during employment, regardless of the employer's opinion on the validity of the claim. This report is to be submitted using the DOSH 1 form.
  103. In this case, the deceased, 2<sup>nd</sup> interested party was the employee of the petitioner who became exposed to injury resulting in death. The matter came to the attention of the petitioner since the injury occurred within its premises. The petitioner lodged a report to the Director under DOSH Form 1. The report noted that an accident occurred to the deceased employee.
  104. Importantly, through a letter dated 20 June 2022, the petitioner through the general secretary and authorised officer wrote to the 2<sup>nd</sup> respondent seeking details to make payments to the bona fide beneficiaries.
  105. Once notified of an accident or injury, the Director took into account that the accident resulted in death. The necessary tabulations were undertaken and the petitioner advised through DOSH/WIBA 4 dated 11 March 2022. The notice issued is lawful and legitimate.
  106. Where the petitioner was dissatisfied with the order of the director to make payment and the award, there was a right to object within 60 days to the Director. Further, the petitioner had the right to appeal to the Employment and Labour Relations Court within 30 days.
  107. There are no objections or appeals under Section 51 or 52 of WIBA respectively.
  108. On whether the accident leading to the death of the 2<sup>nd</sup> interested party occurred within his employment, as outlined above, OSHA and WIBA work in tandem. The director appointed under WIBA is responsible for investigations and assessment of work injuries. At his disposal are other officers who facilitate such a mandate.
  109. On the definition of work injury under WIBA, the director appointed thereof issued an order dated 11 March 2022 and served the petitioner. The work injury resulting in the death of the 2<sup>nd</sup> interested party arose out of events connected and related to his duties. The facts as outlined by the petitioner that he was responding to gunshots fired at the treasurer, Katana Kenga are directly linked to his death as the employee of the petitioner. In the case of *Joash Shisia Cheto v Thepot Patrick Charles Cause No.E005 of 2021* the court held that under section 10 of the WIBA, an employee who suffers an occupational injury or disease may only be compensated under the provisions of WIBA. The injury or disease must have arisen in the course of the employee executing his mandate under the employment contract.
  110. The caustic link between employment and work-related injury is addressed by the different courts with the agreement that an accident is something external to the employee, such as an explosion or a fall from a ladder, including internal injuries occasioned by performing the work of the employee. In the case of *Fenton v J Thorley & Co Limited* 1903 AC 443, the court held that;

Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause, and if the cause is not known the loss or hurt itself would certainly be called an accident. The word 'accident' is also often used to denote both the cause and the effect, with no attempt being made to discriminate between them.



111. The resulting position is that almost anything which unexpectedly causes an injury to, or illness or death of, an employee falls within the concept of an accident. The requirement that the accident occurred 'in the course of' the employee's duties is satisfied if it occurred while the employee was engaged in their basic duties and responsibilities.
112. In this case, while the deceased, 2<sup>nd</sup> interested party was on duty, knowing Katana Kenga had gone to the bank to collect cash to pay the shop stewards, he responded to gunshots where Katana was wounded and suffered fatal injuries. The series of events cannot be removed from occurrences taking place in the course of his duties. There was a causal connection between the employee's service and the accident.
113. Under Section 23 of WIBA, determination of liability and assessment of compensation payable thereon in work injury claims is the preserve of the director of occupational safety and health services. Once the director assesses the compensation payable and the same is not objected to under section 51 of the WIBA, the assessed sum becomes the injured employee's right and entitlement regarding which the employee can move to court and seek enforcement of that right by seeking entry of judgment in terms of the director's assessment, and issuance of a decree which can then be executed to realize that right. See *Amir Swaleh Omar v Mackenzie Maritime (E.A) Limited Cause No.E030 of 2021*.
114. The broad scope of the WIBA covers both accidents leading to injuries or death at work as well as occupational diseases. The petitioner had a legal duty under WIBA and OSHA to prevent work injury, work accident and the death of the 2<sup>nd</sup> interested party while in the course of his duties.
115. A determination of this crucial question revolves around the issue of causation. In the case of *Statpack Industries v James Munyao [2005] eKLR*, the court held that;
- It is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same.
116. The petitioner cannot justify the claim that the deceased deliberately exposed himself to injury leading to his death. The same series of events cannot be blamed on the inaction of the 2<sup>nd</sup> respondent who has not apprehended the assailants. Whereas the 2<sup>nd</sup> respondent bears the public duty to apprehend offenders and ensure justice to the injured party, under WIBA and OSHA, when there is a work-related injury, accident or death, such statutes are established to ensure the employer provides compensation to employees for work-related injuries and diseases contracted in the course of their employment and for connected purposes. In the case of *Zipporah Machocho v Badala Nursery & Primary School Cause No.866 of 2016* an employee who was exposed to hash chemicals while at work developed a skin disease and the court held that there was a causation link with her employment hence the employer was liable to pay compensation under WIBA.
117. In this case, the court finds the deceased, 2<sup>nd</sup> interested party suffered death during his employment. The petitioner as the employer is liable to pay compensation under WIBA.
118. The order dated 11 March 2022 directing the petitioner to pay the 2<sup>nd</sup> interested party is lawful and legitimate.
119. On whether an order should be issued prohibiting proceedings in Mombasa Misc. Application No.E016 of 2014 [2024] addresses the enforcement of a director's award. I have extracted these proceedings, which have since concluded. What emerges from the proceedings is that the petitioner



was invited to participate but failed to attend. There were no objections filed upon the director's orders of 11 March 2022, nor was there an appeal.

120. The option to file this petition was after the fact of Mombasa Misc. Application No.E016 of 2014 [2024]. Made aware of these proceedings by the Estate of the late Samuel Onyancha Kinaga through the legal representative, Margaret Bosibori Nyamwaya, the petitioner did not attend to defend any interests therefrom. To file this petition as addressed above cannot negate legitimate and lawful proceedings.
121. On who should pay the costs, the petition filed by an improper person cannot stand. The filing of the petition instead of attending to proceedings initiated to address the core of the dispute under Mombasa Misc. Application No.E016 of 2024 does not place the petitioner in good standing and must therefore bear costs due to the respondents and 2<sup>nd</sup> interested party.
122. Accordingly, the petition is hereby dismissed. Costs to the respondents and the 2<sup>nd</sup> interested party.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 23 DAY OF JANUARY 2025.**

**M. MBARŪ**

**JUDGE**

**In the presence of:**

Court Assistant: Japhet

..... and .....

