



**Kibind v Director of Occupational Safety & Health Services & another (Employment and Labour Relations Appeal E101 of 2024) [2025] KEELRC 880 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 880 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E101 OF 2024**

**K OCHARO, J  
MARCH 13, 2025**

**BETWEEN**

**SHABAN ABDALLAH KIBIND ..... APPELLANT**

**AND**

**DIRETOR OF OCCUPATIONAL SAFETY & HEALTH  
SERVICES ..... 1<sup>ST</sup> RESPONDENT**

**READY CONSULTANCY CO. LTD ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. Before me is an appeal against the decision of the Director of Occupational Safety & Health Services [the Director], in terms of Section 54 of the [Work Injury Benefits Act](#).
2. The Appeal concerns the process after the Director's initial award under Section 52 of the Act and a decline by the Director to review the same upwards.

**Background facts**

3. At all material times, the Appellant was an employee of the 2<sup>nd</sup> Respondent as a Machine Operator. On 31<sup>st</sup> October 2022, he sustained injuries following a workplace accident.
4. The accident was reported to the Labour Officer, pursuant to the provisions of the [Work Injury Benefits Act](#). Consequently, he was issued with a DOSHI-1 form, which was forwarded to and received by the 1<sup>st</sup> Respondent on 7<sup>th</sup> September 2023. Dr. A. Mohammed of Coast Teaching and Referral filled out part II of the form on 3<sup>rd</sup> August 2023. The Doctor assessed the permanent disability of the Appellant as 5% and temporary incapacity as being 123 days.



5. Based on the medical report, the demand for the claim [WIBA 4] Form was raised on 14<sup>th</sup> November 2023, awarding KShs. 176, 326.00 as compensation due to the Appellant.
6. The Appellant objected to the 1<sup>st</sup> Respondent's decision abovementioned of 14<sup>th</sup> November 2023, on 8<sup>th</sup> December 2023. The objection was received by the 1<sup>st</sup> Respondent on 8<sup>th</sup> December 2023. By a letter dated 11<sup>th</sup> December 2023, the 2<sup>nd</sup> Respondent was informed of the objection by the Appellant.
7. Upon receipt of the objection, the 1<sup>st</sup> Respondent referred the Appellant to the Work Injury Evaluation Clinic at Nairobi for re-assessment of the injuries. A team of three doctors assessed the Appellant on 11<sup>th</sup> March 2024. They assessed the permanent disability at the same 5%, the same percentage as the primary attending Doctor.
8. Following the re-assessment, the 1<sup>st</sup> Respondent raised a revised demand for the claim on 14<sup>th</sup> May 2024, awarding KShs. 176,336. 00 as the compensation due to the Appellant.

### **The Appeal**

9. Through the instant appeal, the Appellant herein challenges the 1<sup>st</sup> Respondent's decision on his objection, setting forth the following grounds:
  - I. That the Director erred in law and in fact when he arrived at the decision that the Appellant is entitled to KShs. 176,336 as compensation for the work injury accident.
  - II. That the Director erred in law and fact when he arrived at the decision that the Appellant suffered 5% incapacity considering the injuries sustained.
  - III. That Director erred in law and fact in failing to give any consideration to the Report by Dr. Darius Kiema dated 27<sup>th</sup> November, 2023, which assessed the Appellant's permanent incapacity at 15%.
  - IV. That by declining in limine to review and or vary his decision following the Appellant's objection lodged before him on 8<sup>th</sup> December 2024, the Director made fundamental errors of law and fact.
  - V. That by failing to give reasons for his decision and directive, the Director, Occupational Safety and Health Services acted in overt breach of the statutory provisions of the law and, therefore, the decision and or the directive was made per in curium, spurious and hence bad in law.
  - VI. That the Director erred in law and fact when he failed to consider, analyse and or evaluate the Appellant's entire body of material evidence presented before him, thereby arriving at an erroneous conclusion.

### **The Appellant's Submissions**

10. The Appellant filed his written submissions dated 2<sup>nd</sup> December 2024, pursuant to the directions of this Court. He submitted that the six [6] grounds of appeal can be effectively argued and determined under two broad issues, thus whether the decision by the Director, Occupational Safety and Health Services can be set aside, reviewed and or varied, and who should bear the costs of this Appeal.
11. The Appellant submitted that despite the objection and supporting documents, the 1<sup>st</sup> Respondent assessed compensation for his injuries at KShs. 176, 336.00 maintaining 5% incapacity and completely disregarded the 15% permanent incapacity as per the medical report dated 27<sup>th</sup> November 2023, by Dr. Kiema.



12. It was further submitted that contrary to Section 52 of the *Work Injury Benefits Act*, which provides;
- “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.”
- The 1<sup>st</sup> Respondent failed to give a written answer to the objection within 14 days. It received the objection on 8<sup>th</sup> December 2023 and delivered its written answer on the objection on 14<sup>th</sup> May 2024, months after the objection was received. The answer to the objection was not accompanied by any reasons for the Director’s decision.
13. It was further submitted that the Appellant sustained severe injuries as enumerated in the medical report dated 27<sup>th</sup> November 2023, namely, Fracture 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> metacarpals left hand displacement, and Fracture metacarpal right hand with displacement. The award of KShs. 176,336.00 was significantly low considering the severity of the injuries. Relying on the decision in *Kenya Steel Fabricators v Tom Moki* [2018] eKLR where the Respondent suffered a fracture of the right index finger and was awarded general damages of KShs. 270,000, the Appellant suggested that an award of KShs. 300,000 could be sufficient for the injuries he suffered.
14. On diminished earning capacity to work and undertake other activities, the Appellant submitted this Court should award him general damages of KShs. 500,000 for loss of future earnings. He placed reliance on the case of *Mumias Sugar Company Limited v Francis Wanalo* [Civil Appeal 91 of 2003] 2007 KECA 485[KLR] [31 July 2007] [Judgment].
15. The Appellant further submitted that he should be awarded special damages of KShs. 48,000 as future medical expenses, as indicated in the medical report dated 27<sup>th</sup> November 2023. Further, the costs of this appeal.
16. In conclusion, this Court was urged to award the Appellant KShs. 848,000, pursuant to Section 52[2] of the *Work Injury Benefits Act*.

### **The 1<sup>st</sup> Respondent’s Submissions.**

17. The 1<sup>st</sup> Respondent filed a replying affidavit sworn on the 3<sup>rd</sup> of December, 2024. I deem it the 1<sup>st</sup> Respondent’s submissions against the Appellant’s appeal. The Affidavit largely contained the factual issues as brought out in the Background facts section of this judgment. However, I note the following two key points raised;
- I. That upon receipt of the objection by the Appellant, the Director referred to a Work Injury Evaluation Clinic at Nairobi for re-assessment of his injuries. The Work Injury Evaluation Clinic was made up of a team of doctors. Their decision percentage incapacity is often deemed final.
  - II. That the 1<sup>st</sup> Respondent didn’t, at all, violate the stipulations of the Act.

### **Analysis and Determination**

18. As a first Appellate Court, I am enjoined to re-consider and re-valuate the material that was placed before the Director and make my own conclusions without necessarily being bound by the Director’s.
19. I have carefully considered the record of the Appeal, and the submissions filed by the parties herein, and take the view that the instant appeal can be adequately, fairly and justly determined under two



issues thus, whether the Director erred in law and fact in upholding the initial decision, and whether the Director erred in law and fact when he failed to give reasons for his decision on the objection.

20. It isn't in dispute that following a workplace accident, the Appellant suffered injuries. Further, pursuant to the provisions of the [Work Injury Benefits Act](#), 2007, the accident and the resultant injuries were reported to the 1<sup>st</sup> Respondent, who subsequently, had the injuries assessed and consequently assessed the damages payable to the Appellant at KShs. 176,336.300. This amount was based on the report by the initial doctor who examined the Appellant.
21. Aggrieved by the decision of the Director, the Appellant objected to the assessment and decision pursuant to the provisions of section 52 of the Act. In his objection, the Appellant set out the prime ground that he suffered severe injuries, being fracture of 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> metacarpals hand with displacement and fracture of 2<sup>nd</sup> metacarpal right hand with displacement, as such, the 5% disability assessed was too low in the circumstances. The objection was supported by a Medical Report dated 27<sup>th</sup> November 2023.
22. In my view, as the Medical Report dated 27<sup>th</sup> November was the foundation for the Appellant's objection to the Director's decision, the report was a vital document for consideration by the Director before reaching a final decision on the objection. No decision could be fairly and justly reached without considering it. With reasons, the Director could either accept the report or reject the same. I have carefully considered the record of appeal, and the replying affidavit/submissions by the Respondent, and it clearly comes out, that the report wasn't considered. The 1<sup>st</sup> Respondent didn't consider relevant material.
23. The detailed report concluded inter alia that the work-related accident led to, a fracture 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> metacarpals left hand with displacement and fracture 2<sup>nd</sup> metacarpal right hand with displacement. This conclusion aligned to the findings of the initial Doctor.
24. In the report dated 27<sup>th</sup> November 2023, the concluded;

“Based on above and in reference to the schedule of degree of disablement, [Work Injury Benefits Act](#), 2007, injury to upper limbs -ankylosis/stiffness fingers and Annex II of the European Physical and Mental Disability Rating for Medical purposes article 36-2[stiffness of any long fingers], article 37-2[hypoesthesia with loss of grip], Shaban's partial permanent disability /incapacity and in consideration of prognostic outcome of this injury is rated at fifteen percent [15%].”
25. The report that flowed from the re-assessment of the Appellant's injuries, like the initial report does not indicate how the 5% percent disability was arrived at. I am persuaded that the Report dated 27<sup>th</sup> November 2023, doesn't suffer from lack of sufficiency in detail and how the percentage of incapacity set out therein was arrived at, making it more reasonable and persuading. By reason of this premise, I am convinced that had the Director considered the report, he could have reviewed the incapacity percentage, and upheld as a consequence the 15%.
26. I note and agree with the Appellant's submissions that the Director didn't give reasons for declining his objection. Section 52 of the Act, in its wording, contemplates that the decision to affirm or decline an objection brought pursuant thereunder, be based on reasons, that must be communicated to the objector and person[s] interested in the matter. As such, the giving of reasons by the Director, has been made a statutory requirement on the part of the Director.
27. It is imperative to point out that the value served by requiring decision makers to give reasons in the exercise of their power is primarily three-fold, reasons; make the decision more acceptable by the



parties involved, promote better administrative decision making, facilitate the courts exercise of their supervisory power, either by way of statute appeal or judicial review over inferior decision-makers. It is high time the Director appreciated the existence in statute, of the duty on his part to give reasons and clear ones for that matter, for the decision[s] on objections and appeals under sections 52 and 54, respectively.

28. The Appellant has sought inter alia that this Court directs that he be paid damages for diminished capacity to work and undertake other activities. To support his argument for the damages, he placed reliance on the Mumias Sugar Company decision [supra] where the Court held;

“From the above analysis of the English case law and the decision of this Court in *Butler v Butler*, the following principles among others, emerge. The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when the plaintiff is employed is compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employment at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”

29. Urging the Court to award the Appellant general damages of KShs. 500,000 for diminished earning capacity, the Appellant relied on the holding in the fore cited decision, thus:

“..... The only incapacity that he suffered is loss of the fifth finger of the right hand and inability to fully extend the right fourth finger for which permanent incapacity was assessed at 15% by Dr. Juma and at 10% by Dr Raburu. Thus, the right hand lost a maximum of 15% of its function. ....We think that an award of Shs. 500,000 would be adequate compensation for diminution of the respondent’s chances of employment in the labour market.”

30. In my view, the issue of diminished earning capacity and compensation thereof, weren’t subject matters in the objection to the Director. The structure of the *Work Injury Benefits Act* does not give any room to this Court to consider and evaluate grounds that weren’t raised in an objection under section 52, or an appeal under section 54, thereof. Consequently, this Court lacks the jurisdiction to consider the matters diminished earning capacity and or make an award thereon. This position equally applies to his plea for future medical expenses.

31. Having found that the Appellant suffered a 15% incapacity, as per the report dated 27<sup>th</sup> November, 2023, and applying the formula that the Director did to arrive at general damages of KShs. 176,336.00 for 5% incapacity, I award the Appellant KShs. 529,008 general damages for the injuries he suffered.

32. In the upshot, I find the Appellant’s appeal meritorious, it is hereby allowed. Consequently:



- I. The Director's decision to uphold the initial award of Kshs. 176,336.00 as compensation for the injuries suffered by the Appellant is set aside, and in place thereof this Court awards him KShs. 529,008.
- II. Costs of this Appeal shall be in favour of the Appellant.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 13<sup>TH</sup> DAY OF MARCH, 2025.**

**OCHARO KEBIRA**  
**JUDGE**

