



**Mung'ara v Director of Occupational Safety and Health Services
(DOSH) & another (Employment and Labour Relations Appeal
E120 of 2023) [2025] KEELRC 1710 (KLR) (12 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1710 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E120 OF 2023**

**JW KELL, J
JUNE 12, 2025**

BETWEEN

JOSEPH KURIA MUNG'ARA APPELLANT

AND

**DIRECTOR OF OCCUPATIONAL SAFETY AND HEALTH SERVICES
(DOSH) 1ST RESPONDENT**

AFRAHA FLOUR MILLS 2ND RESPONDENT

(Being an Appeal from the assessment of the Director of Occupational Safety and Health Services(DOSH) at Nairobi dated the 25th of May, 2023 in WIBA/ATR/134/22-23)

JUDGMENT

1. The Appellant herein, being dissatisfied with the assessment of the Director of Occupational Safety and Health Services at Nairobi dated the 25th of May, 2023 in WIBA/ATR/134/22-23 between the parties, filed a memorandum of appeal dated the 25th of November 2024 seeking the following orders:-
 - i. This appeal be allowed.
 - ii. The amount of Kshs. 47,011.20 being the assessment by the 1st Respondent and compensation issued to the Appellant be set aside and the award made therein be re-assessed.
 - iii. The Appellant be awarded general damages for pain, disfigurement, emotional distress, future loss of benefit and negligence by the 2nd Respondent.
 - iv. Costs of this appeal be borne by the Respondents.
 - v. This Honourable court be pleased to grant any other orders as it may deem just.



Grounds Of The Appeal

2. The Director erred in law and fact by issuing an assessment/award of Kshs. 47, 011.20 without conducting an inquiry and/or investigation into the nature and extent of the injury or accident on the Appellant as required under law.
3. The Director erred in law and fact by issuing an assessment/award without having the Appellant submit himself for medical examination by a medical practitioner designated by the Director or the Appellant with the approval of the Director as required under law.
4. The Director erred in law and fact by issuing an assessment/award without allowing the Appellant a medical practitioner of his choice present during examination to which he is entitled to.
5. The Director erred and misdirected himself as to the exact nature of the Appellant's injuries and therefore erred in law in his assessment of damages.
6. The Director erred in law and fact by issuing an assessment/ award without the director providing proper particulars including documents concerning the injury and how the compensation was arrived at upon request by the Appellant.
7. The Director erred in law and fact by dismissing the Appellant's objection on the ground that the objection was time barred. The Director's computation is misdirected as the objection was raised well within the required timeline pursuant to Section 51(1) of the [Work Injury Benefits Act](#).
8. The Director clearly ignored and was misdirected on provisions of law and procedure therefore making their decision invalid and a clear error on record.

Background To The Appeal

9. A claim was filed before the Director of Occupational Safety and Health in relation to the Appellant and against the Respondent vide ML/Dosh Form 1 seeking compensation for a work injury sustained by the Appellant on 22nd October 2022 at the Respondent's work premises at Athi River, whereby the Appellant suffered a traumatic amputation of his right middle finger and lost his nail and nail bed (pages 19-20 of the Supplementary ROA dated 24th February 2025).
10. The Director of Occupational Safety and Health Services delivered his Decision and issued form Dosh/Wiba 4 "Demand for Payment of Work Injury Benefit", on 17th March 2023, designating the Appellant's permanent disablement at 1% and awarding compensation of Kshs. 47,011.20 calculated as follows: -
$$17,472.00 \text{ (Monthly Total Earning)} \times 96 \text{ months} \times 1\% \text{ Disablement}$$

(page 21 of Supplementary ROA dated 24th February 2025).
11. Being dissatisfied with the award issued by the Director, the Appellant lodged an Objection dated 18th May 2023 vide form Dosh/Wiba 12 "Form of Objection to the Decision of the Director of Occupational Safety and Health Services", taking issue with the lack of a proper investigation/assessment on the extent of the injury; the failure of the Director to subject the Appellant to a medical examination by a medical practitioner, with a medical practitioner of his choice present; and the lack of a medical report/investigation to guide the compensation awarded (pages 15-16 of ROA dated 25th November 2024). The Appellant also authored a letter dated 18th May 2023 to the Director, raising the same objections.



12. The Director of Occupational Safety and Health Services considered the Appellant's Objection as aforesaid, and delivered an answer dated 25th May 2023. In his answer, the Director indicated that he had computed the compensation payable to the Appellant on the basis of a Medical Report by one Dr. Diana Osoro of Nairobi Women's Hospital Kitengela Outpatient, which was included in the ML/Dosh Form 1 submitted, where the Appellant's permanent incapacity was assessed at 1%. He therefore rejected the Appellant's allegation that he was not assessed medically. Further, the Director asserted that a thorough investigation was conducted into the accident, and an investigation report is available together with other records. The Director also stated that the Appellant's Objection dated 18th May 2023 was filed outside the mandatory statutory time limit for objections (60 days) as per Section 51 (1) of the *Work Injury Benefits Act* 2007, bearing in mind that the subject form Dosh/Wiba 4 is dated 17th March 2023. He pointed out that the Appellant had not submitted another medical report contradicting the permanent incapacity assessed in the first Medical Report in order to influence the Director to vary his earlier decision. For the above reasons, the Director dismissed the Appellant's objection.
13. In response to the Director's answer to objection as aforesaid, the Appellant submitted a letter dated 25th May 2023 decriing the Director's failure to acknowledge that the Appellant was denied his right to have a medical practitioner of his choice present during his examination/assessment by Dr. Diana Osoro. He also clarified that while the form Dosh/Wiba 4 issued by the Director was dated 17th March 2023, it was actually emailed to the Appellant on 20th March 2023, hence by 18th May 2023 when he filed his Objection, the 60-day time limit for objections had not lapsed, if properly tabulated from the date of service (pages 19-20 of ROA dated 25th November 2024).

Determination

14. The appeal was canvassed by way of written submissions. The Appellant and 2nd Respondent filed.
15. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:-

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

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

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



Issues for determination

16. The court discerned that the parties had placed before it the following issues for determination in the appeal-
- i. Whether the Director of Occupational Safety and Health Services erred by failing to consider the Appellant's Objection dated 18th May 2015 because it was time-barred.
 - ii. Whether the compensation of Kshs. 47,011.20 awarded to the Appellant by the Director of Occupational Safety and Health Services should be set aside and the award re-assessed.
 - iii. Whether the Appellant should be awarded general damages for pain, disfigurement, emotional distress, future loss of benefit and negligence.

Whether the Director of Occupational Safety and Health Services erred by failing to consider the Appellant's Objection dated 18th May 2015 because it was time barred.

17. The Director issued decision on assessment of the injury suffered by the appellant on the 17th March 2023 (page 3 of ROA) being a Demand for Payment to the employer under section 26 (4) of WIBA which states:- '26 (4) An employer or insurer against whom a claim for compensation is lodged by the Director under this section, shall settle the claim within ninety days of the lodging of the claim.' The appellant through his advocates filed objection dated 18th May 2023 against the assessment alleging flawed procedure followed by the Director in the assessment. (pages 15-16 of ROA). The objection was done pursuant to the provisions of section 51 of WIBA which states:- '51. Objections and appeals against decisions of the Director
- (1) Any person aggrieved by a decision of the Director on any matter under this Act, may within sixty days of such decision, lodge an objection with the Director against such decision.
 - (2) The objection shall be in writing in the prescribed form accompanied by particulars containing a concise statement of the circumstances in which the objection is made and the relief or order which the objector claims, or the question which he desires to have determined.'
18. The Director in response dated 25th May 2023 contended that the objection as statutory time barred for have been filed out of time, the WIBA 4 form having been completed on the 17th March 2023 and the objection done 25th May 2023. The appellant contended that the Director erred for failure to factor in that the claimant only became aware of the decision on the 20th March 2023 when he was asked to collect his compensation cheque vide email of the respondent (page 9 of ROA), good Friday of 7th April 2023, 10th April Easter Monday, 21st April 2023 Idd-ul-fitr and 1st May 2023 Labour day. The appellant submitted that it was 60 day calendar days and if not so the legislators would have said so in section 51 of WIBA. The court finds that the Director counted 60 calendar days under section 51 of the WIBA correctly. There is nothing under the WIBA Act that the public holidays would be excluded in computation of the period.

Whether the compensation of Kshs. 47,011.20 awarded to the Appellant by the Director of Occupational Safety and Health Services should be set aside and the award re-assessed.

19. The appellant's case was he was not called for medical examination as per the law before the assessment. The Respondent contended that the assessment was based on the doctor's report of the hospital where the appellant was treated and there was no contrary medical report presented to indicate otherwise. The court sitting on appeal would re-evaluate the material before the Director to find if it would reach a contrary opinion. At page 14 of the Record of Appeal, the injury was to the middle finger of which



the doctor in report dated 22nd October 2022 wrote that nail and nailbed were missing, bone exposed. (medical report by attending Doctor Larpei). The medical report relied on was of Dr. Osoro who stated injury to be to a right middle finger deep cut wound on the distal part of the finger and assessed the injury disablement at 1%. The report was dated 17th March 2023. The court noted that there was no indication that Dr. Osoro was appointed by the Director and that she examined the appellant. (page 20 of ROA) The court concluded that Dr. Osoro relied on records of the treatment notes at the hospital. The appellant contends that this was unprocedural and he ought to have been examined by a Doctor appointed by the Director. The WIBA states as follows under section 24 and 25- '24. Particulars in support of claim

- (1) An employee who is injured in an accident or his dependant, shall, when reporting the accident or thereafter at the request of the employer or Director, furnish such information and documents as may be prescribed or as the employer or Director may request.
- (2) An employer shall, within seven days after having received a claim, medical report or other document or information concerning such claim, submit the claim, report, document or information to the Director.

25. Employee to submit to medical examination

- (1) An employee who claims compensation or to whom compensation has been paid or is payable, shall when required by the Director or the employer as the case may be, after reasonable notice, submit himself at the time and place mentioned in the notice to an examination by the medical practitioner designated by the Director or the employer with the approval of the Director.” The Court of Appeal in Attorney General v Law Society of Kenya & another 2017 e KLR held that the employee is required to be examined by a medical practitioner designated by the Director or the employer with the approval of the Director. That the section provides equality of arms for the employee by giving him the option of also having his medical practitioner of choice present at the examination.

20. The appellant further relied on the decision in Muga v Sagala General Construction Ltd e KLR 2023 where the court held that the assessment by the Director is based on the employee being subjected to a medical examination in terms of section 25 of WIBA. That the medical examination report is meant to ensure the Director in assessing the compensation due to the employee is objective, fair, accurate and sound. To that extent, the court found the Director erred by relying on the report of Dr. Osoro who did not examine the appellant and further was not indicated as having been appointed by the Director. The court took note that Dr. Osoro issued the report based on treatment notes by the hospital chosen by employer to treat its injured employees.

21. The Respondent raised issue of the appeal having been time barred under section 52(2) of WIBA as the decision on objection was of 25th May 2023 and the original defective appeal Was only paid for on 30th June 2023 outside 30 days. Section 52(2) of WIBA states:- “(2) An objector may, within thirty days of the Director’s reply being received by him, appeal to the Industrial Court against such decision” The court established that indeed the said defective appeal of which substitution was allowed was paid for on 30th June 2023 outside the 30 days hence was filed out of time. No extension of time was sought and hence the appeal was defective. (The court upheld the decision in Otieno v Director of Occupational Safety and Health services & another e KLR 2024).

Whether the compensation of Kshs. 47,011.20 awarded to the Appellant by the Director of Occupational Safety and Health Services should be set aside and the award re-assessed.

22. The court having held the appeal was time-barred, this prayer is not available.



Whether the Appellant should be awarded general damages for pain, disfigurement, emotional distress, future loss of benefit and negligence.

23. WIBA is a special law to deal with claim for injuries at the work place. The preamble of WIBA provides:- ‘An Act of Parliament to provide for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes’. The jurisdiction to assess the compensation lies with the Director of Occupational Safety and Health. The law does not envisage any other type of compensation for injuries and diseases incurred at the workplace outside the legal framework of WIBA. Consequently, the prayers for general damages for pain, disfigurement, emotional distress, future loss of benefit and negligence are denied for lack of legal basis.
24. The appeal is disallowed for being time-barred. The Respondent should release the assessed compensation amount to the appellant with immediate effect.
25. Taking into account nature of the case, the court makes no order as to costs. The appeal is dismissed with no order as to costs. The file is closed.
26. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12TH DAY OF JUNE 2025.

J.W. KELI,

JUDGE.

in the presence of:

Court Assistant: Otieno

Appellant – absent

2nd Respondent: Otieno h/b Kigatha

