



Priyguru Limited v Tuyisenge (Suing as an Administrator and Personal Representative of the Estate of Emmanuel Ndayizeye) (Employment and Labour Relations Appeal E356 of 2024) [2025] KEELRC 2135 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2135 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E356 OF 2024**

**JW KELL, J
JULY 18, 2025**

BETWEEN

PRIYGURU LIMITED APPELLANT

AND

**GEORGES TUYISENGE (SUING AS AN ADMINISTRATOR AND
PERSONAL REPRESENTATIVE OF THE ESTATE OF EMMANUEL
NDAYIZEYE) RESPONDENT**

(Being an Appeal from the decision of the Director of Occupational Safety and Health Services at Nairobi dated the 19th of November, 2024 in Civil Suit No. 617 of 2023)

JUDGMENT

1. The Appellant herein, being dissatisfied with the decision of the Director of Occupational Safety and Health Services at Nairobi dated the 19th of November, 2024 in Civil Suit No. 617 of 2023 between the parties filed a memorandum of appeal dated the 4th of December, 2024 seeking the following orders:-
 - a. The decision of the Director of Occupational Safety and Health Services dated 19th November 2024 be varied to represent the correct balance of Kshs. 577,824/-.
 - b. The Respondents bear the costs of the Appeal.

Grounds of the Appeal

2. The Director of Occupational Safety and Health Services erred in both law and fact by applying Section 34 (2) of the *Work Injury Benefits Act* to the advance payment of Kshs. 120,000/- made to Mr. George Tusiyenge as funeral expenses, thus erroneously concluding that it was not subject to deduction from the award, despite demonstrating that the amount in question was an advance payment rather than an actual expense as the Appellant had previously paid all expenses as required by law.



3. The Respondent filed a Reply to Memorandum of Appeal dated the 13th March 2025 and Supplementary index of record of appeal dated the same day.

Background to the Appeal

4. A claim was filed before the Director of Occupational Safety and Health by the Appellant against the Respondent, resulting in a decision of the Director of Occupational Safety and Health Services contained in form DOSH/WIBA 4 “Demand for Payment of Work Injury Benefit”, dated the 15th of July 2024, designating the Appellant’s permanent disablement at 100% and awarding compensation of Kshs. 1,248,000.00 calculated as follows:-

13,000.00 (Monthly Earning) x 96 months x 100% Disablement

(page 12 of ROA dated 4th December 2024).

5. Upon payment of the award by the Respondent, the Director issued form ML/DOSH/WIBA/7 “Certificate of Payment” dated the 13th of August 2024 (page 9 of ROA).

6. The Director of Occupational Safety and Health Services revised the award vide form ML/DOSH/WIBA/Form 4(Revised) issued on 16th September 2024 as follows:

19,019.00 (Monthly Earning) x 96 months x 100% Disablement = Kshs.1,825,824.00.

The erroneously deducted amount of Kshs. 120,000.00, and deducted the computed and compensated amount of Kshs. 1,128,000.00, and indicated that the outstanding balance is Kshs. 817,824.00 (page 10 of ROA).

7. Being dissatisfied with the award issued by the Director, the Appellant lodged an Objection dated the 14th of November 2024 vide form DOSH/WIBA 12 “Form of Objection to the Decision of the Director of Occupational Safety and Health Services”, taking issue with the inclusion of the advance payment of Kshs. 120,000.00 in the assessed award. He contended that the revision resulted to an incorrect determination of the outstanding balance, which was calculated at Kshs. 817,824.00 instead of 577,824.00 (pages 4-5 of ROA).
8. The Director of Occupational Safety and Health Services considered the Appellant’s Objection as aforesaid, and delivered an answer dated the 19th of November 2024. In his answer, the Director dismissed the Appellant’s objection.

Determination

9. The appeal was canvassed by way of written submissions. Both parties filed.
10. 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.”



11. 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

12. In their submissions dated the 20th of May 2025, the Appellant identified the following issue for determination:-
- a. Whether the Director of Occupational Safety and Health Services erred in law and fact by applying Section 34 (2) of the Work Injury Benefits Act to treat the Kshs. 120,000.00 paid to the estate of the deceased as non-deductible funeral expenses, despite evidence that it was an advance payment.
13. The Respondent filed two sets of submissions, one dated 21st May 2025, and the other 24th May 2025. In the later submissions, he identified two issues for determination, namely:
- i. Whether this appeal is time barred; and
 - ii. Whether the Kshs. 120,000.00 is deductible.
14. The court finds that the issue for determination are as follows:-
- i. Whether this appeal is time barred; and if in the negative;
 - ii. Whether the Director of Occupational Safety and Health Services erred in law and fact by applying Section 34 (2) of the Work Injury Benefits Act to treat the Kshs. 120,000.00 paid to the estate of the deceased as non-deductible funeral expense.

Whether this appeal is time barred

15. The respondent submitted that the appeal was time barred.

Respondent's submissions

16. The Appellant never objected to the original decision of 15th July 2024 of the Director of Occupational Safety and Health Services within 60 days as required by Section 51 (1) Work Injury Benefits Act No. 13 of 2007. 9. The timelines in respect to the said original decision of 15th July, 2024 for the Appellant to lodge an objection, with the Director of Occupational Safety and Health Services lapsed on 15th September, 2024. 10. The timelines in respect to the said decision of 15th July, 2024 , for the Appellant to lodge an appeal to this Court lapsed on 15th September, 2024. 11. The Appellant never appealed to this Court the decision of 15th July 2024 of the Director of Occupational Safety & Health services as required by Section 52(2) of the Work Injury Benefits Act No. 13 of 2007. 12. The Appellant's memorandum of appeal is time barred on account of Section 51 (1) & 52 of the Work Injury Benefits Act No. 13 of 2007. b. Whether this Court has jurisdiction to entertain the Appellant's Memorandum of Appeal that is time barred. 13. The Appellant never objected to the original decision of 15th July 2024 of the Director of Occupational Safety and Health Services within 60 days as required by Section 51 (1) Work Injury Benefits Act No. 13 of 2007. 14. In



the case of Masai & another (Suing as Administrators of the Estate of the Late Muinde Mwendwa) v China Communication Construction Company Limited & 2 others (Appeal E003 of 2023) [2024] KEELRC 2685 (KLR), the Court observed and held that: "The 1st respondent submitted that the court lacks jurisdiction to hear this appeal. The appellants filed the appeal before exhaustion of procedure and objection under Section 51(1) of the Work Injury Benefits Act (WIBA). The right to appeal a decision of the Director is provided under Section 52(1) of WIBA and should be lodged against a reply of the Director under Section 52(1) of the Act. The objection should be lodged within 60 days whereupon the Director should reply within 14 days. In this appeal, the Director's original decision was on 26 May 2022. The appellants were required to lodge objections within 60 days, and failure to do so meant that they consented to the decision and were precluded from appealing against it since the right of appeal cannot precede an objection under Section 51(1) of WIBA. Under the law, the doctrine of avoidance and exhaustion of available remedies required the appellants to exhaust the procedure of objecting to the Director's decision before filing this appeal. In the case of Attorney General v Law Society of Kenya & another [2017] eKLR the court held that where there is a clear procedure for the redress of any particular grievance prescribed by the constitution or statute, that procedure should be exhausted before approaching the court." Without any objections to the award of the Director, to proceed and file this appeal is to circumvent the provisions under Sections 51 and 52(1) of the WIBA. There are no reasons, for reviewing or approval of the award by the Director subject to an appeal. Such invalidates the appeal. Further, from the date of the assessment and award on 26 May 2022, no objections or appeals were filed within the allowed statutory period. No efforts were made to address the lapse in time to justify the direct filing of an appeal, as herein done. This is incurable and renders the appeal a fatal blow. Accordingly, the 1st respondent's objections are meritorious. The court's jurisdiction was invoked prematurely, and the appeal was filed out of time. The appeal was dismissed. The 1st respondent is to be paid full costs, while the second and 3rd respondents get 25% of due cost." (Emphasis Ours) The Respondent has established that Appellant's Memorandum of Appeal is time barred, this Court lack jurisdiction to entertain it and should down its tools.

17. The appellant did not submit on this issue.

Decision

18. The court noted that the appeal was against the decision of DOSH dated 19th November 2024. The decision was produced under the record of appeal at page 3. It was a decision on the objection dated 4th November 2024 by the appellant (the objection was produced at page 4 and 5 of the ROA). The decision objected to was dated 16th September 2024. The respondent in his submission referred to the original decision of 15th July 2024 which was amended by the Director on 16th September 2024 to add the Kshs 120,000 which became the subject of the dismissed objection.
19. The decision appealed on was dated 19th November 2024. The appeal was filed on 16th December 2024 to challenge the said decision of 19th November 2024. The objection by the appellant before the Director was pursuant to section 51 of WIBA to wit:- '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.' The objection was admitted and determined by the Director. The issue of the appellant having not objected to the original decision was irrelevant as the appellant was only aggrieved by the amended



decision. The appellant being dissatisfied by the decision on his objection approached the court on appeal. The appeal to the court is provided under section 52 of WIBA as follows:- ‘52(2) An objector may, within thirty days of the Director’s reply being received by him, appeal to the Industrial Court against such decision.’ I find that the appeal was compliant with the law having been filed on 16th December 2024 within 30 days of the decision dated 19th November 2024 of the Director.

Whether the Director of Occupational Safety and Health Services erred in law and fact by applying Section 34 (2) of the Work Injury Benefits Act to treat the Kshs. 120,000.00 paid to the estate of the deceased as non-deductible funeral expense.

20. The objection before the Director was that the assessment was erroneous having included the sum of Kshs. 120,000 which the appellant told the Director was an advance payment to the respondent taken on 18th October 2023 and proof was attached (page 48 of ROA). The Director in his decision declined the objection and stated that the advance payment was received by the dependant on 18th October 2023 in compliance with section 34(4) of WIBA as employer is liable to pay reasonable expenses for the funeral of the deceased employee.
21. Section 34 of WIBA states as follows:- ‘34. Amount of compensation in case of death
 - (1) If an employee dies as a result of an injury caused by an accident, compensation shall be paid to the dependants of the employee in accordance with the provisions of the Third Schedule, subject to the maximum and minimum amount determined by the Minister after consultation with the Council.
 - (2) No amount may be deducted from the compensation awarded under this section to a dependant in respect of any compensation awarded to the employee in respect of the same or any other accident.
 - (3) For the purposes of this section, a dependant is deemed to have been wholly financially dependent upon the employee at the time of the accident, unless the contrary is proved.
 - (4) In addition to the compensation payable under this section, the employer is liable to pay reasonable expenses for the funeral of the deceased employee subject to the maximum amount determined by the Minister, after consultation with the Council.’ (Emphasis given).
22. The court noted that the Respondent filed response to the memorandum of appeal. The response was dated 13th March 2025. The response did not controvert the document at page 8 of the Record of appeal to the effect that the Appellant had paid Kshs. 238000 for funeral, post-mortem and medical bills (page 8 of ROA). The appellant produced the note dated 18th October 2023 in which the respondent in receiving the money signed off that the Kshs.120,000 was refundable from the assessed insurance amount (Page 6 of ROA). The wording of the document signed by the respondent and not disputed was clear that this was advance payment under the final insurance settlement. The court found no basis to doubt that the appellant had already paid reasonable funeral expenses (section 34 (4) of WIBA) and thus ought to have been given credit in the final settlement for the advanced Kshs 120,000. The appeal is allowed. (Mbogo v Shah) The appellant filed proof of payment of the undisputed assessment (supplementary record dated 4th April 2025).
23. In conclusion the appeal is allowed. The decision of the Director dated 19th November 2024 is set aside and the objection dated 14th November 2024 allowed. The court having found proof of payment of the undisputed assessment holds that the matter is settled.



24. The court taking into account the fact that the employee is deceased, to temper mercy with justice makes no order as to costs against his estate. The appeal is dismissed with no order as to costs. The file is marked as closed. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF JULY 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Appellant: Ms. Mutesi

Respondent: Biyongo

