



**Quale Holdings Limited t/a Guyana Guest House v Mombasa County  
Director of Occupational Safety and Health Officer & 2 others (Petition  
E010 of 2024) [2024] KEELRC 13508 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13508 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
PETITION E010 OF 2024  
M MBARŪ, J  
DECEMBER 18, 2024**

**BETWEEN**

**QUALE HOLDINGS LIMITED T/A GUYANA GUEST HOUSE ..... PETITIONER**

**AND**

**MOMBASA COUNTY DIRECTOR OF OCCUPATIONAL SAFETY AND  
HEALTH OFFICER ..... 1<sup>ST</sup> RESPONDENT**

**MILLICENT AKINYI ODHIAMBO ..... 2<sup>ND</sup> RESPONDENT**

**SHARON ANYANGO ODHIAMBO ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The petitioner is a limited liability company under the Guyana Guest House business enterprise. The first respondent is the Mombasa County Director of Occupational Safety and Health. The second and third respondents are adults.
2. The petitioner's case is that on 1 June 2018, the petitioner and Joel Odhiambo Amoke (Deceased) entered into a contract for plastering and painting services on its premises. He was engaged as an independent contractor. He was provided with all required materials except for paint, which was supplied by the petitioner.
3. On 8 May 2018, the deceased was involved in an accident and received treatment in a hospital and succumbed to injuries and died. There are different accounts of the cause of the accident, as evidenced by statements by the 2nd and 3rd respondent whose matter is pending in court.
4. The 2nd and 3rd respondents filed Mombasa SRMCC No.2078 of 2019 Millicent Akinyi Odhiambo & Sharon Anyango Odhiambo (suing as Administrators of the Estate of Joel Odhiambo Amoke (Deceased) v Quale Holdings Limited t/a Guyana Guest House).



5. While the suit was pending, the first respondent served the petitioner with two letters dated 3 March and 5 May 2021, both served on 20 May 2021. The letters demanded payment of a compensation claim for the deceased in the sum of Ksh.1, 926,144, and the other was an alleged follow-up.
6. By letter dated 20 May 2021, the petitioner objected to the demands because the deceased was an independent contractor at the time of the accident, and the 1st respondent had not given the petitioner a fair hearing before deciding to award the compensation to the deceased.
7. The 2nd and 3rd respondents in an attempt to obtain judgment filed Mombasa ELRC Cause No.68 of 2021 Millicent Akinyi Odhiambo & Sharon Anyango Odhiambo (suing as Administrators of the Estate of Joel Odhiambo Amoke (Deceased) v Quale Holdings Limited t/a/ Guyana Guest House) which matters bears the same description as in Mombasa SPMCC No. 2078 of 2019 which is still pending in court.
8. Among the documents filed in ELRC Cause No.68 of 2021 is a letter dated 3 September 2019 from the Deputy County Commissioner, Nyando Sub-County and a Form DOSH/WIBA 4 Reference No.WIBA/MBA/9781/19 dated 8 February 2019 with the award of ksh.1,926,144. The petitioner saw this document for the first time in these proceedings under ELRC Cause No.68 of 2021, and a perusal thereof shows that the petitioner was required to sign three copies if in agreement with the 1st respondent's award.
9. The respondents should have been served this letter to the petitioner. The petitioner was not in agreement with the respondents regarding the award by the first respondent. The respondents did not follow the WIBA process, and the first respondent condemned the petitioner without a hearing, on which basis the second and third respondents have claimed ELRC Cause 68 of 2021.
10. The disregard for due process and the petitioner's rights has denied justice and fair administrative action under Article 47, the right to property under Article 40, and is inconstant to the principles and values under Article 10 of *the Constitution*.
11. The petitioner is seeking orders that;
  1. It is declared that the petitioner's rights to a fair hearing and due process were violated by the 1st respondent's unilateral assessment and the subsequent demands for compensation.
  2. It is declared that the 1st respondent's assessment of compensation, detailed in DOSH/WIBA 4 Reference No.WIBA/MBA/9781/19 is null and void because it failed to involve the petitioner in the assessment process.
  3. There be an order quashing the decision of the 1st respondent, which requires the petitioner to compensate the Estate of Joel Odhiambo Amoke (deceased) in the amount of Ksh.1,926,144;
  4. There be a permanent injunction restraining the 2nd and 3rd respondents from enforcing the said award of Ksh.1, 926,144 as assessed by the 1st respondent without due process and proper involvement of the petitioner.
  5. An order to stay any proceedings in EMRC Cause 68 of 2021 until the issues raised in this petition are fully resolved has been issued.
  6. The costs of the petition be awarded to the petitioner herein.
  7. The petitioner be granted any other relief that his court may deem fit to grant.



12. The petition is supported by the Affidavit of Lydia Kaguna Japhet, the Managing Director, and on the basis that the petitioner is an enterprise known as Guyana Guest House. On 1 June 2018, they contracted the deceased to plaster and paint the premises as an independent contractor. On 8 May 2018, the deceased was involved in an accident where the 2nd and 3rd respondents filed Mombasa SPMCC No.2078 of 2019 under the provisions of WIBA, but while the matter was pending, they filed ELRC Cause No.68 of 2021 and where they rely on DOSH/WIBA 4 Reference No.WIBA/MBA/9781/19 claiming Ksh.1, 926,144 assessed by the 1st respondent. The petitioner was not given notice or a right to a hearing before the demand for payment was issued. The 1st respondent demonstrated abuse of power and undermined the principles of justice and fair hearing, and the petition should be allowed at a cost.
13. While the death certificate dated 1 November 2018 indicates that the death occurred on 18 September 2018, it does not disclose the cause of death or the manner of death. The treatment notes relate to 8 September 2018, which is 4 months after the accident; hence, they need to establish whether the deceased demise was a result of the accident.
14. The demand dated 5 November 2019 from the 2nd and 3rd respondents states that the deceased suffered injuries on 18 September 2018, thereby contradicting other information given by the respondents. The respondents did not involve the petitioner to ensure a fair and just outcome. Unless the petition is allowed, the petitioner's rights to a fair hearing and fair administrative action will be violated.
15. The 1st respondent filed the Replying Affidavit of Bernard Simiyu, the County Occupational Safety and Health Officer, Mombasa, and aver that his office was notified of the accident through DOSH 1 by Lydia Kaguna Japhet on behalf of the employer as required under Section 22 of WIBA on 7 February 2019. Although it was a late report, the accident notification DOSH 1 was received for processing. DOSH 1 is from the employer of an occupational accident/death of an employee, which, in this case, was signed by Lydia Kaguna Japhet on behalf of the employer. DOSH 1 indicated that the deceased had been employed in the maintenance department where he had worked for the past 3 months before the accident.
16. For purposes of assessing compensation, Lydia Kaguna Japhet, for the employer and the widow of the deceased, held several meetings with the Labour Office. The employer was involved at all stages of the assessment. A demand was raised for payment of Ksh.1, 926,144 on 8 February 2019, and the petitioner collected it from the office on 11 February 2019 through Lydia Kaguna Japhet.
17. There were no objections to the assessment and award of Ksh. 1, 926,144, as required under Section 51 of the WIBA. The first respondent also wrote to the County Commissioner, Nyando Sub-County, requesting the office to fill out a Certificate of Dependency to determine the deceased's rightful dependents. The Certificate identified the second and third respondents, Edward Otieno Odhiambo, the son, and Lilian Atieno Odhiambo, the daughter.
18. On 11 October 2019, the first respondent wrote to the petitioner on how to pay the dependants through DOSH Form 5B, but there was no response or payments made within 90 days as required under Section 26(4) of WIBA. As a follow-up, the first respondent wrote to the petitioner's letter dated 3 March 2021 to settle the award in 21 days, but there was no response. A further notice was issued on 5 May 2021, but there was no response.
19. Simiyu averred that, having filed DOSH 1, the petition herein is an abuse of the court process, and all attempts now made to stall payment are perpetuating such abuse. Accordingly, the petition should be dismissed.



20. In reply, the second respondent filed a Replying Affidavit averring that she is the wife of the deceased, Joel Odhiambo, and the third respondent is the daughter. They are both administrators of his Estate.
21. The petitioner contracted the deceased on 1 June 2018. He had been working as a painter since 2006 earning Ksh.3, 000 per day at the time of his death. There was no written agreement between the deceased and the petitioner, but on 8 September 2018, while at work as a painter for the petitioner, the deceased stepped on a cracked pavement and fell from the building to the ground. He was severely injured on the head, and he was rushed to Jocham Hospital for treatment and later referred to Coast General Hospital, but he succumbed to the injuries on 18 September 2018. The petitioner gave Ksh.15 000 and indicated they would pay the bill out of insurance, which was not done.
22. The 2nd respondent also said she reported the incident to the 1st respondent, who assessed compensation. Parties held several meetings at the Labour Office, and Ms Lydia Kaguna Japhet, the petitioner's managing director, attended. The allegations that the petitioner was unaware of the 1st respondent assessment are incorrect. The DOSH assessment for payment of Ksh.1 926,144 was personally served upon the managing Director, but there was yet to be a response. A letter dated 3 March 2021 and 5 May 2021 served as reminders of the assessed compensation, but there was no payment; hence, we decided to file Mombasa SPMCC No.2078 of 2018.
23. Before the matter could be heard, the respondent was informed by her advocates that the Supreme Court Petition No.4 of 2019 Law Society of Kenya v Attorney General & Another and that courts had no jurisdiction to handle claims under WIBA. The advocates further informed her that the Chief Justice published Notice No.5476 directing that matters filed before the Supreme Court judgment should be heard to conclusion and has since received Mombasa SPMCC 2078 of 2019.
24. The 2nd respondent also said that through advice from her advocates, she filed ELRC Cause 68 of 2021 seeking orders to pay the assessed compensation by the 1st respondent. The petitioner was made aware of the assessment and filed a Notice of Preliminary Objections dated 14 March 2022, which was dismissed on 16 November 2022. The petitioner was aware of DOSH meetings, and letters are now denied as not being served. DOSH/WIBA 4 Reference No.WIBA/MBA/9781/19 was part of the letter dated 11 October 2019, and due process was followed. We were aware of events leading to the fatal accident of the deceased while at work at the premises.
25. The claims that there was no access to justice is without merit, and the petition should be dismissed to allow the hearing of ELRC Cause 68 of 2021 on the merits.
26. Parties attended and agreed to file written submissions.
27. The petitioner submitted that they only became aware of DOSH Form 4 when the 2nd and 3rd respondents served them with ELRC Cause 68 of 2021. Being condemned to pay the award of Ksh. 1,926,144 is unfair and contrary to fair administrative action, as addressed in the case of Judicial Service Commission v Mbalu Mutava & another Civil Appeal No.52 of 2014. Article 47 of *the Constitution* is transformative and lays out the foundations for controlling the powers of state organs and entrenches the right to fair administrative action.
28. The 1st respondent's actions contravened the petitioner's right by failing to serve notices dated 8 February 2019 and the documents noted under DOSH/FORM 4 Reference No. WIBA/MSA/9781/19. The petitioner was condemned to pay the award without being allowed a hearing, contrary to Article 50 of *the Constitution*.
29. The petitioner was excluded from the assessment and removed from the proceedings, which led to a compensation award. The petitioner only learned of the outcome in ELRC Cause 68 of 2021. In the



case of *Inganga Alfred Arunga v University of Nairobi* [2017] eKLR, the court held that natural justice includes the requirement for notice before an adverse action is taken. In this case, the respondent acted without the petitioner's knowledge, and the orders sought should be allowed.

### **Determination**

30. At the heart of the petition is the award of compensation to the deceased, Joel Odhiambo Amoke, through the 2nd and 3rd respondents from the Administrators of his Estate. The award of compensation arose from a fatal injury.
31. Under the WIBA, the primary purpose is to compensate employees for work-related injuries and diseases contracted during their employment. This is affirmed by the Supreme Court in the case of *Law Society of Kenya v Attorney General & COTU Petition 4 of 2019*;  

...WIBA provides compensation to employees for work-related injuries and diseases contracted in the course of their employment and for connected purposes. WIBA also makes it compulsory for every employer to provide insurance coverage for all employees against bodily injury, disease or death sustained and arising out of and during their employment.
32. Once on the shop floor, if there is a work-related injury, the statutory mechanism to employ is the WIBA.
33. The petitioner reported a work injury to the first respondent in a letter dated 7 February 2019, as required under Section 22 of WIBA.
34. The petitioner does not challenge this letter and notice.
35. The DOSH 1 from the petitioner indicated that the deceased, Joel Odhiambo Amoke, was working in maintenance when he fell, and the type of injury noted was fatal. The petitioner further revealed that at the time of his demise, the deceased was earning ksh.15, 000 per month.
36. DOSH 1 is signed by Lydia Kaguna Japhet, the petitioner's managing Director. The details of her signature are similar to those of her supporting Affidavit to the petition dated 12 July 2024.
37. Upon notice dated 7 February 2019, the 1st respondent had a legal duty to address the injury and assess it based on its type. This was recorded as fatal. The monthly wage was noted as ksh. 15,000.
38. The petitioner's averments that it did not know about the matter until letters dated 3 March 2021 and 5 May 2021 are not correct. Following its report to the first respondent, the next cause of action under DOSH 1 was for the first respondent to assess it.
39. The case made is that the petitioner only learnt of the assessment by the 1st respondent when the two letters dated 3 March 2021 and 5 May 2021 were served on 20 May 2021.

### **What did the petitioner do upon notice on 20 May 2021?**

40. By this time, proceedings under Mombasa CMCC No.2098 of 2019 were ongoing. The petitioner was the respondent in this case. They knew of the accident at their premises, where the deceased fell while on duty.
41. The 2nd respondent in the Replying Affidavit to the petition dated 30 August 2024 aver that upon refusal by the petitioner to make payment of Ksh.1,926,144 as assessed by the 1st respondent, together with the 3rd respondent, they filed Mombasa CMCC No.2098 of 2019. However, before the matter could be concluded, her advocates advised that the court had no jurisdiction. Following Supreme



- Court Petition No.4 of 2019, the advocates informed them that the court had jurisdiction. Through Legal Notice No.5476, Chief Justice Directions were issued relating to pending cases before the Supreme Court judgment. These cases should be heard where they had been filed.
42. Indeed, the second respondent appreciates, under paragraph 7(p) of her Replying Affidavit, that the effect of Supreme Court Petition No. 4 of 2019 was to allow her to revive her cause under Mombasa CMCC No.2078 of 2019.
  43. However, the 2nd and 3rd respondents filed ELRC Cause 68 of 2021, and under such a suit, proceedings under Mombasa CMCC 2078 of 2019 stayed.
  44. The plaintiff under Mombasa CMCC 2078 of 2019 is that on 8 May 2018, the deceased, while in the course of his employment with the petitioner, fell from the rooftop top, occasioning fatal injuries. The 2nd and 3rd respondents are seeking special damages, general damages under the Fatal Accidents and Law Reform Act and costs.
  45. While the suit was pending, the 2nd and 3rd respondents filed ELRC Cause 68 of 2021 on the facts that on 8 May 2018, while the deceased was at work with the petitioner, he fell from the rooftop and suffered fatal injuries. The matter was reported to the 1st respondent, who assessed Ksh.1, 926,144, and despite notice, the petitioner has refused to pay.
  46. The respondents claim payment for the assessed award of Ksh.1, 926,144. However, the matter is a replica of the suit filed before the lower court save for the final orders sought.
  47. On 14 March 2022, the petitioner filed a Notice of Preliminary Objections arguing that the court lacked jurisdiction to hear and determine a work injury claim unless the basis was Section 52 of WIBA. The Mombasa CMCC No.28 [2078] of 2019 is pending determination, and the suit should be struck out.
  48. In a ruling delivered on 27 October 2022, the court held it had jurisdiction to hear the claim regarding enforcing the Director's award (the 1st respondent herein). Still, it could not determine any liability issues between the employer and the employee, which should have been raised with the Director. The objections were dismissed with costs.
  49. Parties reverted to the position subsisting when ELRC Cause 68 for 2021 was filed.
  50. The 2nd and 3rd respondents must address Mombasa CMCC 2098 of 2019 with finality.
  51. Aware of the judgment in Supreme Court Petition No.4 of 2019, the 2nd and 3rd respondents filed ELRC Cause 68 of 2021.
  52. For this petition, whereas the petitioner is aware of DOSH 1 dated 7 February 2019, where the work-related injury was reported to the 1st respondent, the court cannot ignore the various suits initiated by the 2nd and 3rd respondents in this regard. The DOSH 1 by the petitioner is lawful and legitimate, but the motions commenced by the 2nd and 3rd respondents herein are addressed on the merits first. Unless this is done, there will be a proliferation of suits, each taking parties in a different direction without a conclusion and resulting in varying orders by other judges.
  53. To forestall such abuse of court processes, the petition is allowed to the extent that the assessment by the 1st respondent detailed in DOSH/WIBA 4 Reference No.WIBA/MBA/9781/19 requiring the petitioner to pay Ksh.1, 926,144 is hereby placed in abeyance to allow the 2nd and 3rd respondents to address pending suits touching on similar matters in Mombasa CMCC 2098 of 2019 and ELRC Cause 68 of 2021 are heard on the merits.



54. For costs, the petitioner filed a Notice of Preliminary Objections dated 14 March 2022 under ELRC Cause 68 of 2021 and a ruling delivered on 27 October 2022. Upon dismissing the objections, the petitioner opted to file this petition to address matters which ordinarily should have been addressed under the substantive suit in ELRC Cause 68 of 2021. Filing this petition does not raise any questions of statutory interpretations or any matter that requires the court to interpret constitutional provisions that cannot be addressed under WIBA as outlined above as held in the case of *KKB v SCM & 5 others* [2022] KEHC 289 (KLR). This is what the court has defined as constitutional avoidance. It encompasses three main principles, which are standing, ripeness and mootness, as outlined in the case of *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* the principle of avoidance means that a Court will not determine a constitutional issue when a matter may correctly be decided on another basis.
55. The invocation of the constitutional petition route in this case was unnecessary. The matters addressed by the petitioner could have been addressed under ELRC Cause 68 of 2021 or a Memorandum of Claim. In this regard, there are no orders on costs.
56. Accordingly, the petition is allowed to the extent that the 1st respondent award detailed in DOSH/WIBA 4 Reference No.WIBA/MBA/9781/19, requiring the petitioner to pay Ksh.1, 926,144, is hereby placed in abeyance pending the hearing and determination of Mombasa CMCC 2098 of 2019 and ELRC Cause 68 of 2021 on merits. No orders on costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 18TH DAY OF DECEMBER 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

