



REPUBLIC OF KENYA



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**West Kenya Sugar Co. Ltd v Nyongesa (Employment and Labour Relations Appeal 21 of 2023) [2023] KEELRC 1603 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1603 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS APPEAL 21 OF 2023**

**JW KELI, J**

**JUNE 29, 2023**

**(FORMERLY BUNGOMA ELRC APPEAL NO. E025 OF  
2022)**

**BETWEEN**

**WEST KENYA SUGAR CO. LTD ..... APPELLANT**

**AND**

**JACOB BUSHURU NYONGESA ..... RESPONDENT**

*(Appeal against the Ruling and Order of Hon. Eric Malesi (SPM)  
delivered on the 6th September 2022 at Kakamega CMCC No. 234 OF  
2017 between Jacob Bushuru Nyongesa v West Kenya Sugar Co. Ltd)*

**JUDGMENT**

1. The Appellant being dissatisfied with the Ruling and order of Hon. Erick Malesi (SPM) delivered on the 6<sup>th</sup> September 2022 at Kakamega CMCC No. 234 OF 2017 between Jacob Bushuru Nyongesa v West Kenya Sugar Co. Ltd filed Memorandum of Appeal dated 15<sup>th</sup> September 2022 seeking the following orders:-
  - a. The Appeal herein be allowed and the ruling delivered on the 6<sup>th</sup> September 2022 be set aside in its entirety.
  - b. That the preliminary objection dated 30<sup>th</sup> January, 2020 be allowed with costs and the subordinate court case to wit: Kakamega CMCC No. 234 of 2017 Jacob Bushuru Nyongesa v West Kenya Sugar Co. Ltd be struck out with costs.
  - c. That this Honorable court be pleased make a declaration /holding that the sub-ordinate court lacks jurisdiction to hear and determine Kakamega CMCC No. 234 of 2017 *Jacob Bushuru Nyongesa v West Kenya Sugar Co. Ltd* pursuant to the provisions of section 16,23 and 53 of



the *Work Injury Benefits Act* and in line with the Court of Appeal decision in Civil Appeal No. 133/2011 *Hon Attorney General v Law Society of Kenya and Central Organization of Trade Union*(COTU) and Supreme Court Petition No. 4 of 2019 *Law Society of Kenya v The Attorney General and Central Organization of Trade Union*(K)

- d. Cost of this Appeal be awarded to the Appellant.
2. The Appeal was premised on the following grounds:-
- i. That the learned trial Magistrate erred in law and fact in making the aforementioned decision based on a complete misapprehension of the law.
  - ii. That the learned trial Magistrate erred in law and fact in failing to hold that the court did not have jurisdiction to handle claims relating to work related injuries as provided in the Work Injuries Benefits Act No. 13 of 2017 which governs claims/cases of that nature.
  - iii. That the learned trial Magistrate erred in law and fact in making a decision based on misapprehension of the law and Supreme Court decision to wit:- Supreme Court in Supreme Court Appeal No. 4 of 2019 *Law Society of Kenya v The Attorney General and Central Organization of Trade Union*(K).
  - iv. That the learned trial Magistrate erred in law and fact by failing in making the aforesaid decision without addressing himself to the law/statute from which jurisdiction to handle work injury claims is derived from.
  - v. That the learned trial Magistrate erred in law and fact in making an erroneous decision that had no backing in law.

#### **Written submissions on the appeal**

3. The court directed that the Appeal be canvassed by way of written submissions. The Appellants written submissions drawn by Dennis Onyimbo Onyikwa Advocate instructed by M/S Onyinkwa & Co Advocates were dated 17<sup>th</sup> May 2023 and received in court on the 19<sup>th</sup> May 2023. The Respondent's submissions drawn by Abok Odhiambo & Company Advocates were dated 8<sup>th</sup> May 2023 and received in court on the 15<sup>th</sup> May 2023.

#### **Background to the appeal**

4. The Respondent filed a suit Kakamega CMCC CASE NO. 234 OF 2017 against the Respondent for injuries alleged to have been suffered at the workplace vide a Plaint dated 10<sup>th</sup> April 2017(as per the original plaint filed the filed copy in the record had no date) seeking the following reliefs:-
- a. General damages
  - b. Special damages of Kshs. 10,000/-.
  - c. Costs of this suit
  - d. Interest on (a) and (b) above at court rates
  - e. Any other of further relief that this honourable court may deem fit and just to grant. (pages 2&18 of the record are all pleadings by the plaintiff before the lower court )
5. The Respondent entered appearance and filed defence pleadings and documents (pages 19-34 was the defence case).



6. While the suit was pending the respondent/Appellant filed notice of preliminary objection dated 30<sup>th</sup> January 2020 pleading as follows:-

- i. That this honourable court has no jurisdiction to entertain, hear and/or determine the matter herein pursuant to the provisions of Section 16,23 (1) and 52 of the Work Injury Benefit Act.
- ii. That this suit having been filed in the year 2017 was filed during the subsistence of the Work Injury Benefit Act not the Workmen's Compensation Act and/or common law and therefore the operative law herein is the Work Injury Benefit Act which mandates that litigation related to work injuries should be handled in the first instance by the Director of Occupation Safety and Health Services and not this honourable court.

Note: The Defendant at the hearing of the preliminary objection rely on the decision made by the Supreme Court in Supreme Court Appeal No. 4 of 2019 Law Society of Kenya v Attorney General and Central Organisation of Trade Union (K)"(page 66).

7. The trial court delivered a ruling on the notice of preliminary objection by the respondent /appellant on the 6<sup>th</sup> September 2022. The ruling was short and read follows:- 'The defendant raised a preliminary objection to the effect this court lacks jurisdiction to hear the suit herein. The suit herein was commenced before the conclusion of the litigation surrounding the Work Injuries Benefits Act. The defendant went ahead and filed the defence in respect thereof. It is my opinion that the plaintiff has legitimate expectation to have his suit finalised under this forum. I therefore dismiss the preliminary objection with no order as to costs.'

## Determination

### Issues for determination.

8. The Appellant in their written submissions identified the following issues for determination:-
  - a. Whether the learned trial magistrate completely misapprehended the law(ground 1 to 5)
  - b. Whether the learned trial magistrate had jurisdiction to determine the matter (ground1 to 5)
  - c. Whether the respondent had legitimate expectation.
9. The Respondent in his written submissions identified the following as issues for determination in the appeal:-
  - a. Whether there are recent developments in the law regarding work injury claims filed before the Magistrates' court.
  - b. Whether the trial magistrate court has jurisdiction to hear and determine work injury claims in view of the recent developments in the law.
  - c. Whether the instant appeal is merited.
10. The Court having read the impugned ruling, the memorandum of appeal and the having considered the submissions by the parties is of the considered opinion that the issues for determination are as follows:-



- a. Whether the learnt trial court magistrate misapprehended the law in his ruling on issue of jurisdiction on WIBA matters
  - b. Whether there are recent developments in the law regarding work injury claims filed before the Magistrates' court.
  - c. Whether the learned trial magistrate has jurisdiction to determine the matter (ground 1 to 5)
11. The Court sitting on appeal from trial court is guided by the settled law that it must reconsider the evidence, re-evaluate the evidence itself and draw its own conclusions bearing in mind it has neither seen or heard the witnesses and should make allowance for that fact. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1948)EA123. In the instant appeal, the impugned ruling is on matters of law so the court will re-evaluate the law and authorities relied on by the parties in determining the appeal.

**Issue a. Whether the learnt trial court magistrate misapprehended the law in his ruling on issue of jurisdiction on WIBA matters**

12. The court in a similar appeal by the Appellant in Kakamega ERLC Appeal No 20. OF 2023 [\*West Kenya Sugar Co. Ltd v George Mukubwa\*](#) whose judgment as delivered earlier today on [\*WIBA\*](#) jurisdiction adopted its previous decision in similar appeals as follows:-
- ‘What was the position of the Court of Appeal and the Supreme Court regarding jurisdiction on work injury claims under [\*WIBA\*](#)?’
13. The Court of Appeal decision on jurisdiction under [\*WIBA\*](#) was in [\*Attorney General v Law Society of Kenya & Another\*](#) [2017] e KLR. The court addressed legitimate expectation of litigants already before court as at time of [\*WIBA\*](#) effective date as follows:-

“We find, from the submissions of the respondents that at the commencement date of the Act there were before the courts, pending determination, several work- related accident claims brought under the repealed Workmen’s Compensation Act (Cap. 236) or the common law. (emphasis given)

With respect, we agree that claimants in those pending case have legitimate expectations that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked.(emphasis given) Indeed as a result of this concern, the learned Judge in a ruling on an interlocutory application directed that;

“On the foregoing grounds, I will order that, pending the hearing and determination of the main cause, all pending litigation which had been commenced on the basis of either the Workmen’s Compensation Act .... or of the common law, or of a combination of both regimes of law, shall continue to be prosecuted and, in a proper case, finalized on the basis of the operative law prior to the entry into force of the [\*Work Injury Benefits Act, 2007\*](#)...”(emphasis given)

The legislative practice where a new judicial forum is created to replace an existing system is to finalize all proceedings pending in the previous system before that forum where they were commenced. (emphasis given)For instance upon the establishment of the Employment and Labour Relations Court, section 33 of the Employment and [\*Labour Relations Act\*](#) provided for what would happen to pending claims as follows;



“All proceedings pending before the Industrial Court shall continue to be heard and shall be determined by that court until the Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar of the Judiciary.”

In its original form Section 58 (2), though, in our view not inconsistent with the former or current Constitution requires further consideration to ensure smooth transition to the Act from Workmen’s Compensation Act.

Similarly in terms of Section 23 of the *Interpretation and General Provisions Act*, it is clear that where a written law partially or wholly repeals another written law, unless a contrary intention appears, the repeal cannot revive anything not in force or existing before the repeal or affect the previous operation of a repealed law in relation to interests, rights and or obligations enshrined under such law.” That a lengthy import of the parts of the judgment of court of appeal which the court found necessary for clarity and emphasis purpose.”

14. “The Law Society of Kenya aggrieved by the decision of the Court of Appeal appealed to the Supreme Court in *Law Society of Kenya v Attorney General & another* [2019] eKLR vide petition no. 4 of 2019, the decision relied on by the Appellant at the trial court. The Supreme Court addressed the issue of legitimate expectation by parties already before court in paragraph 85 as follows:-

a. “[85] In agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of the Act, litigation relating to work-injuries had gone on and a number of the suits had progressed up to decree stage; some of which were still being heard; while others were still at the preliminary stage. All such matters were being dealt with under the then existing and completely different regimes of law. We thus agree with the Appellate Court that claimants in those pending cases have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked. However, were it not for such legitimate expectation, WIBA, not being unconstitutional and an even more progressive statute, as we have shown above we opine that it is best that all matters are finalized under Section 52 aforesaid”(emphasis given)

15. The Court has shown emphasis under the decisions of the Court of Appeal and Supreme Court outlined above to the effect that the legitimate expectation alluded to by the Court of Appeal and upheld by the Supreme Court in *Law Society of Kenya v Attorney General & another* [2019] eKLR vide petition no. 4 of 2019, was with respect to pending litigation as stated by the Justice Ojwang sitting at the High Court while granting interim orders as follows:- “On the foregoing grounds, I will order that, pending the hearing and determination of the main cause, all pending litigation which had been commenced on the basis of either the Workmen’s Compensation Act .... or of the common law, or of a combination of both regimes of law, shall continue to be prosecuted and, in a proper case, finalized on the basis of the operative law prior to the entry into force of the *Work Injury Benefits Act*, 2007....”(emphasis given)

16. The Court of Appeal position on the legitimate expectation was in tandem with the High Court interlocutory order by Justice Ojwang (as he then was) above. The Court of Appeal position on the legitimate expectation was limited to pending cases at whatever stage filed under legal regime prior to enactment of WIBA. This Court of Appeal position was upheld by the Supreme Court *Law Society of Kenya v Attorney General & another* [2019] eKLR vide petition no. 4 of 2019 which held as follows:- “In agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of the Act, litigation relating to work-injuries had gone on and a number of the suits had progressed up to decree stage; some of which were still being heard; while others were still at the preliminary stage. All such matters were being dealt with under the then existing and completely different regimes of law. We



thus agree with the Appellate Court that claimants in those pending cases have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked. However, were it not for such legitimate expectation, WIBA, not being unconstitutional and an even more progressive statute, as we have shown above we opine that it is best that all matters are finalized under Section 52 aforesaid.”(para 85, emphasis provided ).

17. The court finds that the Supreme Court held that WIBA not being unconstitutional, save for such legitimate expectation with respect to matters filed prior to its enactment, that it was best that all matters be finalised under WIBA Act(emphasis given).
18. Applying the foregoing decisions of the Court of Appeal and Supreme Court which are binding on this court the court finds and determines the law on work injury related claims is that all pending litigation filed prior to the entry into force of WIBA commenced on the basis of either the Workmen’s Compensation Act or of the common law, or of a combination of both regimes of law are to be finalised on basis of the legitimate expectation that upon the passage of WIBA such cases would be concluded under the judicial process which had been invoked (para 85 of Supreme Court decision supra). Further all other litigation on work injury claims post entry into force of WIBA would proceed before the Director WIBA as provided for under the WIBA.
19. The Court then finds, respectfully, that the decision West Kenya Sugar Co Ltd v Tito Lucheli Tangale (2021)eKLR holding that all litigants who filed their disputes with the courts from 22<sup>nd</sup> May 2008 to 3<sup>rd</sup> December 2019 on the firm belief that the judge declared law was the valid law in place then, are entitled to successfully assert legitimate expectation in having the claims heard to conclusion before the courts where they had been lodged was not consistent with the holding Supreme Court decision as analysed above which decision is binding on this court .
20. The Court is persuaded by its colleagues in Mombasa ELRC Civil appeal no 21 of 2019 Heritage Insurance Company Limited v David Fikiri Joshua and Another[2021]eKLR where the court held that the WIBA having been declared constitutional by the two superior courts the High Court decision could no longer be relied on. A similar holding exists in Mombasa ELRC Civil Appeal No, 18 of 2020 Perfect Sean Limited v Harrison Kabindi Said. The decisions of the court are only persuasive whereas in terms of hierarchy the Court of Appeal precedent is superior and the Supreme Court decisions are binding.
21. The Respondent submitted that the suit was filed in 2017 and as such substantive issues have arisen since the filing of the suit and which issues ought to be determined by the trial court and to buttress this submissions relied on the decision in Kiplagat Korir v Dennis Kipngeno Mutai[2006] e KLR where the court held that broader issues of substantial justice precluded the court from determining the case on technicalities without considering its merits and further relied on the provisions of the Constitution Article 159(2)(d). On this submission the court finds and determines that jurisdiction is not a procedural technicality. That without jurisdiction the court cannot exercise discretion or take any more steps consistent with the decision of Court of Appeal in decision of Nyarangi JA in Owners of the Motor Vessel Lilian “S”-VS- Caltex Oil ( Kenya ) ltd 1989 eKLR where the court of Appeal stated :-  

“Jurisdiction is everything without it, a court has power to make one more step. A court of law downs tools in respect of the matter before court the moment it holds the opinion that it is without jurisdiction”.
22. In view of the foregoing the binding decision of the Supreme Court in Law Society of Kenya v Attorney General & another [2019] eKLR vide petition no. 4 of 2019 on all work injury related claims post entry into force of WIBA lying with Director WIBA and only exception on legitimate expectation basis



being with respect to litigation pending before court prior to entry in force of WIBA Act that is 2<sup>nd</sup> June 2008, the instant suit having been filed in 2017 was before the wrong forum.

23. The court finds that in the recent past it has taken a consistent considered position that the magistrate courts lack jurisdiction over Work injury related claims filed post WIBA effective date. The decisions of the court include:- *West Kenya Sugar Co Ltd v Shirandula* (Employment and Labour Relations Appeal E005 of 2021) [2022] KEELRC 13284 (KLR) (24 November 2022) (Judgment), *West Kenya Sugar Co. Ltd v Libuyi* (Appeal E013 of 2021) [2022] KEELRC 13244 (KLR) (17 November 2022) (Judgment) *West Kenya Sugar Co. Ltd v Sakasa* (Employment and Labour Relations Appeal E006 of 2021) [2022] KEELRC 13187 (KLR) (10 November 2022) (Judgment) where the court held that the magistrate court had no jurisdiction to hear and determine work injury related claims filed post entry into force of *WIBA*. Indeed the appellant further cited my decision in Bungoma ELRC appeal no. e004 of 2021 between *West Kenya Sugar Co. Ltd v Edward Alpheu Ambesta* wherein the court found that the work injury suit before the lower court was in the wrongly filed and proceeded to strike out the suit for want of jurisdiction. The court upholds its said decisions to apply in the instant appeal.”

The court upholds its foregoing legal position/jurisprudence on the issue of *WIBA*.

#### **Issue b. Recent developments in the law regarding work injury claims filed before the Magistrates' court.**

24. The respondent submits that the Chief Justice and the President of the Supreme Court of Kenya vide Gazette Notice No. 5476 issued on the 28<sup>th</sup> April 2023 published practice directions related to pending court cases regarding claims for compensation for work related injuries and diseases instituted prior to the Supreme Court decision in the much contested case of *Law Society of Kenya v Attorney General and another*, Petition No. 4 of 2019(2019)e KLR. The respondent submits that the practice directions reiterated principles in ELRC Kisumu Appeal No. 4 of 2019 *West Kenya Sugar Co Ltd v Tito Lucheli Tangale* [2021]eKLR and placed reliance on the case.

#### **The response**

25. The appellant submits that the practice directions by the Chief Justice cannot override the WIBA statute to act in retrospect. That the WIBA statute was still operational and had not been amended or repealed by the said order. That the practice notice had no legal basis/standing as it was not based on a court decision or amendment of WIBA. That the proper channel was to move the Parliament to amend the Act, that there cannot be legitimate expectation against clear provisions of the statute. The appellant urged the court to disregard the Chief Justice directive in determining the appeal.

#### **Decision**

26. The court issued hearing directions on the 27<sup>th</sup> March 2023 before the issuance of the practice directions in Kenya Gazette No. 5476 issued on the 28<sup>th</sup> April 2023. The directions were issued by the Chief Justice and the President of the Supreme Court of Kenya under the legal framework of the *Constitution* of Kenya, the *Judicature Act*, the *Judicial Service Act*, the *Employment and Labour Relations Court Act* and the *Work Injury Benefits Act*. The practice directions state as follows:-

‘practice Directions Relating To Pending Court Claims Regarding Compensation For Work Related Injuries and Diseases Instituted Prior to The Supreme Court Decision In *Law Society Of Kenya v Attorney General And Another*, Petition No. 4 of 2019; (2019) EKLR



In Exercise of the powers conferred under Articles 159(2) and 161(2)(a) of the Constitution of Kenya, section 10 of the Judicature Act, and Section 5(1) and 2(c) of the Judicial Service Act, the Chief Justice issues the following Practice Directions—

Citation 1. The Practice Directions may be cited as “Practice Directions relating to pending court claims for compensation for work related injuries and diseases instituted prior to the Supreme Court decision in Law Society of Kenya v. Attorney General & Another, Petition No. 4 of 2019; [2019] eKLR” (hereinafter referred to as the Supreme Court decision) Commencement

2. These Practice Directions shall come into force upon the date of issue.

Application 3. The Practice Directions shall apply to the Employment and Labour Relations Court and Magistrates appointed and gazzetted by the Chief Justice pursuant to section 29(3) and (4) of the Employment and Labour Relations Act, 2011 to preside over cases involving employment and labour relations.

Objectives 4. The Objectives of the Practice Directions are to—

- (a) consolidate and standardize practice and procedure in the Employment and Labour Relations Court and the Magistrates Courts in relation to claims for compensation for work related injuries and diseases instituted prior to the Supreme Court decision dated 3rd December, 2019, which are pending in courts;
- (b) enhance access to justice;
- (c) facilitate timely and efficient disposal of cases that were filed prior to the Supreme Court decision; and
- (d) ensure uniformity in court experience.

Judgment of the Supreme Court 5.

The Supreme Court vide a judgment rendered on 3rd December, 2019, determined that sections 16, 23(1), 25(1) and (3), 52(1) and (2) as well as section 58(2) of the Work Injury Benefits Act (WIBA) are consistent with the former Constitution and the Constitution 2010, specifically;

- (a) Section 16 as read with sections 23 and 52 of the WIBA does not limit access to courts but creates a statutory mechanism where any claim by an employee under the Act is subjected, initially, to a process of alternative dispute resolution mechanism starting with an investigation and award by the Director of Occupational Safety and Health Services and thereafter, under section 52 an appeal mechanism to the Employment and Labour Relations Court (formerly the Industrial Court).
- (b) Retrospective operation of statutes is not per se illegal or in contravention of the Constitution and section 58(2) clearly expresses the intention that the Act shall apply retrospectively. Consequently, section 58(2) of the Act does not take away the right to legal process, or extinguish access to the courts or to take away property rights without due process.
- (c) Be that as it may, claimants with pending cases have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process invoked (d) Also noting that many claims have not been finalized and due to passage of time, it has not been feasible to withdraw them and follow the alternative dispute resolution route. Further, considering the resolution passed by the Law Society of Kenya’s meeting held on 21st March,



2023 urging that practice directions be issued for all pending claims be finalized in the respective courts.

Consequently, 6. (a) All claims with respect to compensation for work related injuries and diseases filed in various courts before the commencement of WIBA shall proceed to conclusion under the Workmen’s Compensation Act, Cap 236 (repealed).

(b) All judgments and rulings relating to work related injuries claims pending before the Employment and Labour Relations Court and the Magistrates Court shall be delivered by the same court.

Claims Filed after Commencement of WIBA but before the Supreme Court decision 7. Taking into account that High Court vide its judgment dated 4th March, 2009 in *Law Society of Kenya v Attorney General & Another* [2009] eKLR declared some of the provisions in WIBA including Sections 16, 23(1) and 52, which prescribe the procedure for lodging claims under the Act unconstitutional. Consequently, the said declaration of nullity created a legitimate expectation that claimants could directly lodge claims for compensation for work related injuries and diseases in court. As such, litigants cannot be penalized for relying on the declaration of nullity, as appreciated by the Supreme Court in *Attorney-General and 2 Others v Ndi and 79 Others; Prof. Rosalind Dixon and 7 Others (Amicus Curiae)* (Petition 12, 11 and 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) to lodge their claims in court. Therefore, (a) All claims with respect to compensation for work related injuries and diseases filed after the commencement of *WIBA* and before the Supreme Court decision at the Employment and Labour Relations Courts or the Magistrates’ Courts shall proceed until conclusion before the said courts. (b) All pending judgments and rulings relating to compensation for work related injuries and diseases before the Employment and Labour Relations Court and the Magistrates’ Courts shall be delivered by the same court.c

Claims Filed after the Supreme Court Decision 8. (a) All claims with respect to compensation for work related injuries and diseases shall commence before the Director of Occupational Safety and Health Services. (b) All appeals emanating from the decision of the Director of Occupational Safety and Health Services shall lie before the Employment and Labour Relations Court. (c) Such appeal shall be heard and determined through the appropriate appellate mechanism within the judicial hierarchy.

Sanctions for Non-Compliance 9. Non-compliance with these Directions shall result in such penalty as the Courts may order.

Miscellaneous 10. The Chief Justice may amend these Practice Directions from time to time.

Dated the 24th April, 2023. Martha K. Koome, Chief Justice and President of the Supreme Court.”

27. The court appreciates that the Chief Justice has authority to issue practice directions under Section 27 of the *Employment and Labour Relations Act* which reads:- “27. Rules and Regulations (1) The Chief Justice, make rules for regulating the practice and procedure of the Court. (2) Without prejudice to the generality of subsection (1), such rules may provide for— (a) regulating the sittings of the Court and the selection of Judges for any purpose; (b) prescribing forms and fees in respect of proceedings in the Court and regulating the costs of and incidental to any such proceedings; (c) prescribing the



time within which any requirement of the rules is to be complied with; (ca) delegating judicial, quasi-judicial and non-judicial duties to the Registrar; and (d) any other matter required under this Act or any other written law.” The court finds that practice directions became necessary as this court took different positions on the interpretation of legitimate expectation of parties with cases before the magistrate courts before the pronouncement of the court of Appeal and the Supreme Court on WIBA jurisdiction.

28. The practice directions address the fate of cases filed and pending in court post WIBA and before the Supreme court decision delivered on 3<sup>rd</sup> December 2019. The court further observes there was a resolution passed by the Law Society of Kenya’s meeting held on 21st March, 2023 as stated in the directions, urging that practice directions be issued for all pending claims be finalized in the respective courts. The court finds that the foregoing Practice Directions would have given life to the cases like the instant one which the court would, save for the directions have struck out. the Constitution of Kenya in Article 159(1-2) provides for exercise of judicial authority as follows:-

“ 159. Judicial authority (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution. (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles— ‘(a) justice shall be done to all, irrespective of status; ‘

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and (e) the purpose and principles of this Constitution shall be protected and promoted.”

29. The court is required to promote access to justice under Article 48 of the Constitution which reads:- “The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”

30. The court in exercise of its judicial power in the matter then finds the question would be whether the appellant would suffer any prejudice pursuant to the Practice Directions. Article 159 (2)(d) provides that justice shall be administered without undue regard to procedural technicalities and that means the court should focus on substantive justice. There is no tangible prejudice to be suffered by the appellant in the instant case. The magistrates have same capacity as the Director if not better due to experience to handle work injury claims which involves assessment of damages a routine duty of the lower courts.

31. The court finds by doctrine of necessity the WIBA practice directions as gazetted by the Chief Justice pass muster in the eyes of the court so as to promote access to justice to litigants who are caught up with WIBA cases filed in court in the period between Justice Ojwang decision and the Supreme Court decision. In the upshot the practice directions having expressly granted jurisdiction to the magistrates to handle WIBA matters filed in court before the delivery of the Supreme Court decision of 3<sup>rd</sup> December 2019 , then the appeal fails.

### **Whether the learned trial magistrate has jurisdiction to determine the matter (ground 1 to 5)**

32. The answer on issue of jurisdiction then is that pursuant to the Chief Justice and President of the Supreme Court Practice Directions Vide Gazette Notice No. 5476 issued on the 28<sup>th</sup> April 2023 relating to pending Court claims regarding compensation for work related injuries and diseases instituted prior to the Supreme Court decision in Law Society of Kenya v Attorney General And



Another, Petition No. 4 Of 2019; [2019] e KLR, the magistrates courts are now clothed with jurisdiction in work related injuries and disease claims pending in court before the delivery of the Supreme Court decision in Law Society of Kenya Vs. Attorney General And Another, Petition No. 4 Of 2019 on 3<sup>rd</sup> December 2019.

### **Conclusion**

33. In the upshot the appeal dated 15<sup>th</sup> September 2022 is hereby dismissed for the foregoing reason of the Chief Justice practice directions on WIBA matters filed before the delivery of the Supreme Court decision vide Gazette Notice No.5476 issued on the 28<sup>th</sup> April 2023 to be heard and determined by the magistrates.
34. The court to temper justice with mercy in view of the recent development of the practice directions issued while the appeal was pending, orders each party to bear own costs in the appeal.
35. It is so ordered.

**DATED, SIGNED & DELIVERED IN OPEN COURT AT KAKAMEGA THIS 29<sup>TH</sup> JUNE 2023.**

**JEMIMAH KELL,  
JUDGE.**

#### **In The Presence Of:**

Court Assistant : Lucy Wesonga

For Appellant : Tuwei

For Respondent:- Absent

