REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Maraga (CJ & P), Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

PETITION NO. 4 OF 2019

–BETWEEN–

LAW SOCIETY OF KENYA ..... 1ST PETITIONER

–AND–

THE ATTORNEY GENERAL .....1ST RESPONDENT

CENTRAL ORGANISATIONOF TRADE UNIONS..2ND RESPONDENT

(Being an appeal from the entire Judgment and Order of the Court of Appeal sitting at Nairobi (Waki, Makhandia, Ouko, JJA) delivered on the 17th day of November 2017 allowing in part ***Civil Appeal No. 33 of 2011****)*

JUDGEMENT OF THE COURT

A. INTRODUCTION

[1] This Petition of appeal is dated 1st February 2019 and was filed on 4th February 2019. The Petitioners in this matter, the Law Society of Kenya (LSK), have appealed under Article 163(4)(a) of the Constitution, challenging the decision of the Court of Appeal (*Waki, Makhandia & Ouko JJA*) dated 17th November, 2017 in Civil Appeal No.133 of 2011. The Court of Appeal in its

Judgment, had reversed the order of the High Court that had declared Sections 4; 7(1) and (2); 10(4); 16; 21(1); 23(1); 25(1) and (3); 52(1) and (2) and 58(2) of the *Work Injuries Benefit Act 2007 (the Act)* null and void, as they contravened certain sections of the former Constitution.

B. BACKGROUND

[2] Pursuant to Gazette Notice No. 3204 of 16th May 2001, the Attorney General (AG) appointed a seven member Task Force to examine and review all labour laws and make recommendations for appropriate legislative intervention to replace or amend existing laws. The Task Force submitted a report that formed the basis of the enactment of the Work Injuries Benefits Act 2007 (WIBA*)* which came into force on 2nd June 2008 by Gazette Notice No. 60 of 23rd May, 2008.

a. The High Court

[3] After WIBA came into effect, LSK filed a petition on 14th April, 2008 pursuant to Section 84 of the former Constitution and Rule 12 of the Constitution of Kenya *(Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual)* High Court Practice and Procedure Rules, 2006 contesting the constitutional validity of various provisions of the said Act. They particularly argued that Sections 7(1), 10 (4), 16, 21, 52(1) and (3), and 58(2) of the Act were inconsistent with Sections 60, 75(1), 77(1), 77(9), 77(10), 80(1) and 82(1) of the former Constitution. They thus sought a declaration from the High Court that the said sections of WIBA were null and void to the extent of that inconsistency.

[4] The Attorney General the present 1st Respondent was the only respondent before the High Court, and elected not to address each averment made by the Law Society of Kenya directly in his response to the petition but argued policy

justification in defence of the alleged sections. The Central Organisation of Trade Unions (COTU) was however, later admitted as an interested party and while it agreed with the 1st Respondent's case, it responded directly to the allegations against the specified sections maintaining that they did comply with the former Constitution and that the Petition before the High Court should be dismissed.

[5] The learned Judge of the High Court J.B Ojwang J (*as he then was*) considered the evidence on record and submissions of the parties and in his Judgement declared, as being inconsistent with the provisions of the retired Constitution, **Sections 4; 7(1) and (2); 10(4); 16; 21(1); 23(1); 25(1) and (3); 52(1) and (2);** and **58(2)** of WIBA. The Respondent was further condemned to pay the costs of the Petition.

b. The Court of Appeal

[6] Aggrieved by the decision of the High Court, the Attorney General filed ***Civil Appeal No 133 of 2011*** arguing that the learned Judge erred in law in declaring the nine sections of WIBA inconsistent with the former Constitution.

[7] On 17th November, 2017, the Court of Appeal (*Waki, Makhandia, Ouko JJA*) allowed the appeal only to the extent that it set aside the High Court's orders declaring **Sections 4, 16, 21 (1), 23(1), 25 (1) and (3), 52 (1) &(2)** and **58(2) of the Act** to be inconsistent with the former Constitution. It however found that S**ection 7** of WIBA (in so far as it provided for the Minister's approval or exemption) and Section **10 (4)** thereof were inconsistent with both the former and the Constitution 2010.

[8] It was the Appellate Court's finding in that regard that the learned Judge of the High Court had intended to nullify Section 7(4) of the Act instead of Section 4. Thus, it agreed with the learned Judge that Section 7 contravened Section 80 of the retired Constitution and would limit the freedom of association. With

regard to the other impugned sections, the Court found as follows: *that there was nothing in Section 16 that offended the Constitution; that Section 23 did not contravene the Constitution since the powers of the Director of Occupational and Safety Services at the Ministry of Labour are donated by statute and the exercise of that power is circumscribed and not arbitrary; that Section 25(1) and (3) of WIBA is not in conflict with Section 82 of the former Constitution and did not discriminate against any party; that Sections 51 and 52 did not conflict with Section 82 of the former Constitution and that a party in whose favor a decision is made, may sometimes still be dissatisfied with the award and to challenge the Director's award at the High Court*.

The learned Judges of Appeal further observed that the latter provision has the effect of only granting the right to appeal to an objector and not to the party on the opposite side or an affected person wishing to vary the award. Accordingly, they were of the opinion that in its context, this was a pure drafting error and although it may convey the meaning the trial Judge had assigned to it-applying legislative intent, they could not think of any reason why, in an adversarial litigation, only one party would have a right of appeal. Hence, they found that the sub-section was not inconsistent with the former Constitution but was merely a drafting error that could easily be rectified by the National Assembly.

[9] Finally, pertaining to Section 58(2) of the Act, the Court of Appeal found that although the same is in harmony with the former and the Constitution 2010, it still requires further consideration, to ensure smooth transition to WIBA from the *Workmen's Compensation Act*.

c. *The Supreme Court*

[10] Aggrieved by the decision of the Court of Appeal, the Petitioner filed the appeal herein. Seeking the following reliefs:

(a) The entire Order of the Court of Appeal (Waki, Makhandia & Ouku JJA) dated 17th November, 2017 in Civil Appeal No. 133 of 2011 be set aside and be substituted with a judgment:

i. ***Affirming the finding of the High Court in its judgment dated 4th March, 2009 in High Court Petition no. 185 of 2008;***

ii. ***Declaring [that] Section 16 of the Act is unconstitutional in that it impedes the right of an employee to a fair trial therefore contravening Article 48 of the Constitution, Section 75 of the repealed Constitution which corresponds with Articles 40 and 50 of the Constitution, 2010.***

iii. ***Declaring Section 23(1) of the Act unconstitutional to the extent that it fails to confer equal rights of appeal to both the objector and the other party thereby contravening Sections 60 and 77(9), (10) of the repealed Constitution and Articles 50(1), 159(1), 163(2)(a) as well as and Articles 23(1) and 165(3)(b) of the Constitution, 2010.***

iv. ***Declaring that Section 25(1) and (3) of the Act is unconstitutional to the extent that it purports to discriminate against employees thus contravening Section 80 of the repealed Constitution which corresponds with Article 27 of the Constitution 2010.***

v. ***Declaring that Section 52(1) and (2) of the Act is unconstitutional to the extent that it fails to confer equal rights of appeal to both the Objector and the other party thus contravening Section 82 of the repealed Constitution which corresponds with Articles 27, 41(1) and 48 of the Constitution 2010.***

vi. Declaring that Section 58(2) of the Act is unconstitutional to the extent that it purports to promote the retrospective application of the Act thus contravening section 75 of the repealed Constitution which corresponds with Articles 40, 41(1), 48 and 50(1) of the Constitution 2010.

(b) Any other relief that the Court deems fit.

C. SUBMISSIONS

a. The Petitioner

[11] Counsel for the Petitioner submitted that its case meets the requisite jurisdictional threshold under Article 163(4)(a) of the Constitution as the question as to whether Sections 7(1) & (4), 10(4), 16, 21(1), 23(1), 25(1) & (3), 52(1) & (2) and 58(2) of WIBA were in accord with the former Constitution has been at the core of the proceedings since inception at the High Court and later at the Court of Appeal. Thus, it was submitted that the Petitioner has met the requisite legal standing.

[12] The Petitioner also contended that the Court of Appeal focused almost exclusively on the provisions of the former Constitution while interpreting the impugned sections of the Act without analysing the corresponding Articles of the Constitution 2010 thus violating Article 159(2) of the Constitution 2010 which provides that in exercising judicial authority, Courts and tribunals shall protect and promote the purposes and principles of the said Constitution.

[13] Counsel for the Petitioner further urged the point that the Appellate Court failed to consider Section 23(1) of the Act in terms of Articles 159(1) and 23(1) of the Constitution 2010 as read with Article 165(3)(b) of the same Constitution

which vests exclusive jurisdiction of interpreting the Bill of Rights on the High Court.

[14] Counsel also argued that the Court of Appeal failed to recognize that Section 52(1) & (2) of the Act is not only discriminatory but also inhibits a litigant's right to access justice as guaranteed under Article 48 of the Constitution 2010 as well as the right to fair labour practices contrary to Article 41(1) of the Constitution.

[15] Counsel cited two of this Court's decisions namely, ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR*** and ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR,*** in support of submission that the Court of Appeal ought to have adopted a purposive approach while interpreting the provisions of the new and progressive Constitution 2010 vis-à-vis the impugned sections of the Act.

[16] Further, learned Counsel submitted that the Appellate Court, in its Judgment, failed to take into account the sovereign will of the people to enact Article 41 of the Constitution as well as the provisions of Article 2(4) of the

Constitution 2010 on the supremacy of the Constitution. It was thus urged that this was an abuse of the sovereign power which belongs to the people and which is to be exercised only in accordance with Article 1 of the Constitution. Additionally, it was submitted that any law inconsistent with the Constitution is void to the extent of that inconsistency.

[17] It was the Petitioner's other submission that the effect of Section 16 of the Act is to extinguish an employee's right to file an action for the recovery of damages from an employer in respect of any occupational accident or disease resulting in the disablement or death of such an employee. It was thus contended that this infringed upon an employee's right to property under Article 40(1), (2)

of the Constitution 2010 and restricts the enjoyment of the rights of access to justice and fair hearing under Articles 48 and 50 of the Constitution 2010 thereof.

[18] Counsel furthermore urged that the effect of Section 23(1) of the Act is to confer judicial authority upon an individual, namely the Director of Occupational Safety and Health (the Director), thus violating Articles 50(1), 159(1), 162(2)(a) and 165 of the Constitution 2010. It was submitted in that context that the provision ousts the jurisdiction of the High Court to deal with constitutional questions and violations arising from such claims as conferred by Article 23(1) as read with Articles 165(3)(b) of the said Constitution. To buttress its case, the Petitioner relied on the decisions in, Civil Appeal 287 of 2016, ***Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others [2017] eKLR*** and ***Petition 120 of 2010, United States International University & Eric Rading (2012) eKLR***.

[19] The Petitioner also contends that the requirement under Section 25 (1) & (2) of the Act empowering the Director to appoint a medical practitioner to examine an employee so as to determine the requisite compensation, allowing the employee to have a medical practitioner of his choice present at the time of the examination, while denying the employer a corresponding privilege, is discriminatory contravening Article 27 of the Constitution. Citing ***John Harun Mwau v Independent Electoral and Boundaries Commission & Another [2013] eKLR***, it is their submission that discrimination is the act of subjecting a person to different treatment from the other on any ground including those outlined in Article 27 of the Constitution.

[20] It is their contention in that regard that Parliament disregarded the national values and principles of governance, among which is non-discrimination, while enacting Section 25(1)&(2) of the Act contrary to the provisions of Article 27 of the Constitution. They thus implore this Court to find

that the said section, in so far as it discriminates against an employer by denying him enjoyment of the privilege granted to the employee, is inconsistent with Article 27 of the Constitution and therefore unconstitutional. They cite the case of ***Josephat Musila Mutua & 9 others v Attorney General & 3 others [2018] eKLR*** in support of that submission.

[21] The Petitioner concluded its submissions by arguing that Section 52(1) & (2) of the Act has the effect of only granting the right of appeal to an objector and not to a party on the opposite side nor to an affected person wishing to vary an award made by the Director. This, it was contended, is therefore not only discriminatory and contrary to Article 27 of the Constitution but also violates a litigant's right to fair labour practices as guaranteed by Article 41(1) of the Constitution 2010.

[22] In addition, it was urged that the provision denies an affected party the right to access justice as guaranteed by Article 48 of the Constitution and that Section 52(1) & (2) is discriminatory as it creates an appellate locus for the "objector", in respect of the determinations of the Director but none for the affected party and as such cannot stand. To support this assertion, it relied on the decision in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others, S.C Petition No 4 of 2012, [2013] eKLR***.

b. 1st Respondent

[23] Regarding the compatibility of Section 16 of the Act with the Constitution 2010, Counsel representing the Attorney General argued that this is an ouster clause which is not unique and is permitted by law citing ***Halsbury's Laws of England, Volume 10 paragraph 319*** and ***Owners of Motor Vessel Lilian S v Caltex Oil (Kenya) eKLR***.

[24] As to whether Section 23(1) of the Act contravened the former as well as the Constitution 2010, the 1st Respondent submitted that courts do not have exclusive rights to deal with disputes. It was thus urged that the Constitution 2010 also allows that power to vest in a person or a tribunal as opposed to Courts alone. In support of that proposition, they cited ***Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others, S.C. Civil Application No. 2 of 2011 (S. K. Macharia Case)***. Further, it was submitted that nothing in the Act purports to oust the jurisdiction of the High Court and vests it in the Director and it was pointed out that Section 53 of the Act outlines that the grievances may be dealt with by the Director but that they do not include human rights violations which are the preserve of the Courts.

[25] As to the constitutionality or otherwise of Section 25 (1) & (2) of the Act, the 1st Respondent contends that in dealing with work injury claims, just like in ordinary litigation, there is need for the adjudicating body to be neutral, and the Director who does not act for either the employer is neutral and in any event, when claimants need to be medically examined, they can designate medical practitioners for that purpose.

[26] It was submitted that nonetheless there are safeguards in place for arbitrary use of this power, that employers may refer claimants to their own medical practitioners but must seek the approval of the Director before doing so, and that during such examination, an employee is at liberty to have a practitioner of his own choice present. Therefore, they submit that the said section is opportune in securing the interests of both the employer and employee, and advances the equality of both parties and does not discriminate against any of them.

[27] Counsel also submitted that the Petitioner had incorrectly interpreted Sections 52(1) and (2) of the Act, and failed to appreciate that both an employer and employee may simultaneously file a grievance and that it is usually the

dissatisfied party that appeals. It was thus contended that the Section's reference to the objector's entitlement to lodge an appeal is not to the exclusion of the other party.

[28] Finally, regarding Section 58(2) of Act, the 1st Respondent submitted that retrospective application of the Act does not make the said section inconsistent with the Constitution 2010 and cited the ***S. K. Macharia Case*** *in that regard.*

c. 2nd Respondent's

[29] It is the 2nd Respondent's case that there is nothing unconstitutional about Section 16 of the Act, and that the right of access to Court may be limited by law. To this end, they also rely on the ***Halsbury's Law of England, Volume 10, paragraph 319*** and ***Owners of Motor Vessel Lillian's' vs Caltex Oil (Kenya) KLR1.***

[30] As to Section 23 (1) of the Act, it is their submission that the said section is not unconstitutional as courts can be divested of their authority through statutes especially in matters that are administrative in nature. It was thus urged that such authority could be vested upon a person or a tribunal. In support they cite ***Halsubry's Laws of England, Volume 10 page 319*** *where it was stated that a tribunal with exclusive jurisdiction had been specified by a specific statute to deal with claims arising under a statute, the county court's jurisdiction to deal with these claims is ousted, for where an Act creates an obligation to, and enforces the performance of it, it cannot be enforced in any other manner.*

[31] Counsel further submitted that the Appellant's contention that Section 25 (1) and (2) of the Act purports to discriminate against an employee by providing that before such an employee can be compensated, he has to undergo a medical examination by a medical practitioner designated either by the Director or the

employee with the Director's approval thus taking away the employee's autonomy to have a medical practitioner of his choice is incorrectly interpreted. They argue instead that this Section gives both the Director and the employer equal rights to require an employee to submit himself/herself for examination by a medical practitioner and in doing so, the employee has the right to have at his own expense a doctor of his choice present at the examination.

[32] The 2nd Respondent furthermore submitted that, if interpreted properly, Section 52 (1) & (2) of the Act does not discriminate against the objector and the employee and urge to the contrary that the section confers equal rights upon the two in case of an unfavourable decision by the Director.

[33] As for Section 58 of the Act, it is submitted that by Gazette Notice No. 60 of 27th May 2008 commencement was stated to be on 2nd June, 2007 which defect has since been noted and would be dealt with in due course.

[34] For the above reasons, the 2nd Respondent urges the court to dismiss the Petitioner's Appeal with costs.

D. ISSUES FOR DETERMINATION

[35] Arising from the Petition of Appeal, the responses thereto as well as the written and oral submissions, the following issues crystalize for determination:

(a) Whether Sections 16, 23(1), 25(1) and (3), 52(1) and (2) as well as Section 58(2) of WIBA are inconsistent with the former Constitution and/or the Constitution 2010.

(b) What are the appropriate orders to issue, including on costs?

E. ANALYSIS

(i) Unconstitutionality of statutory provisions

[36] Before determining the above issues, we consider it pertinent to restate the approach that every court should take when determining the question whether any statutory provision is unconstitutional or not. It is alleged in the Petition of Appeal that the cited provisions of WIBA should be struck off for being in violation of the former and present Constitutions. In addressing that issue, it must always be borne in mind that the Legislature's primary constitutional mandate is the making of laws. Those laws set the ultimate direction of all activities in a State and the actions of all persons. Thus, there exists principles that underline the determination of constitutional validity of a statute, or its provisions because it is the function of the Courts to test ordinary legislation against the governing yardstick: the Constitution.

[37] At the forefront of these principles is a general but rebuttable presumption that a statutory provision is consistent with the Constitution. The party that alleges inconsistency has the burden of proving such a contention. In construing whether statutory provisions offend the Constitution, courts must therefore subject the same to an objective inquiry as to whether they conform with the Constitution. That is why in ***Hamdarddawa Khana vs Union of India and Others*** 1960 AIR 554 it was stated thus;

"Another principle which has to borne in mind in examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment."

[38] In addition to the above, and to fully comprehend whether a statutory provision is unconstitutional or not, its true essence must also be considered. This gives rise to the second principle which is the determination of the purpose and effect of such a statutory provision. In other words, what is the provision directed or aimed at? Can the intention of the drafters be discerned with clarity? These were our sentiments expressed in **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others, Supreme Court Petition No. 26 of 2014 [2014] eKLR**, where we opined that a purposive interpretation should be given to statutes so as to reveal the intention of the Legislature and the Statute itself. We thus observed as follows:

> **"*In Pepper vs. Hart [1992] 3 WLR, Lord Griffiths observed that the "purposive approach to legislative interpretation" has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:***
>
> *"The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous, I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."*

[39] Therefore intention is construed by scrutinising the language used in the provision which inevitably discloses its purpose and effect. It is the task of a court to give a literal meaning to the words used and the language of the provision must be taken as conclusive unless there is an expressed legislative intention to the contrary.

These sentiments were also expressed by the Court of Appeal while analysing how to determine the intention of a statute, in **County Government of Nyeri & Anor. Vs. Cecilia Wangechi Ndungu [2015] eKLR** where the learned judges held thus:

> ***"Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors."***

[40] All the principles above were well expressed in The ***Queen v Big M. Drug mart Ltd,*** 1986 LRC (Const.) 332, where the Supreme Court of Canada noted:

> ***"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the***

operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity."

[41] On interpretation, specifically of a statute or even the Constitution itself, the Supreme Court of India in ***Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. {1987} 1 SCC 424 and others*** observed that: -

"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."

[42] In addition to the above we also note that our Court of Appeal, in ***Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others,*** Civil Appeal No 74 and 82 of 2012, observed that in determining whether a statute is consistent with the Constitution, a court must determine the *object and purpose* of the impugned Act and this can be discerned from the intention expressed in the Act itself.

[43] In searching for the purpose, therefore, it is also legitimate to seek to identify the mischief sought to be remedied. The historical background of the legislation is one of the factors to consider in that regard and this allows the provision (s) to be understood within the context of the grid of other related provisions and of the Constitution as a whole. In this light, it is necessary to reflect on WIBA; how it came into being and its purpose.

[44] WIBA defines itself as 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. In addition, a glimpse at the history of the Act would help us to further understand its purpose.

[45] In May 2001, a Taskforce to review all Labour Laws was appointed by the Attorney General vide Gazette Notice No. 3204. The tripartite Taskforce, comprised of members from the Government, the trade unions the Central Organisation (COTU) and the employers' organization; Kenya Federation of Kenya Employers (FKE). The terms of reference for the Taskforce were:

a) *To examine and review all the labour laws including the Employment Act (Cap.226); the Regulation of Wages and Conditions of Employment Act (Cap. 229); the Trade Unions Act (Cap. 233), the Trade Disputes Act (Cap. 234),* ***the Workmen's Compensation Act (Cap. 236),*** *the Factories Act (Cap. 514) and make recommendations for appropriate legislation to replace or amend any of the labour law statutes;*

b) *To make recommendations on proposals for reform or amendment of labour laws to ensure that they are consistent with the Conventions and Recommendations of the International Labour Organisation to which Kenya is a party; and*

c) *To make recommendations on such other matters related to or incidental to the foregoing*.

[46] The major points of concern addressed by the Taskforce relevant to this matter were: The merging and redrafting of the different relevant Acts in order to produce a user-friendly and comprehensive labour legislation for the benefit of the people; the introduction of an Industrial Court of Appeal to overcome the contradicting jurisdiction between the High Court and the Industrial Court; the setting up of an administration system to promote involvement and democratic participation of the social partners (role of the Labour Advisory Board, possible

involvement of civil society concerned in specific fields, etc.); review of possible limitations of excessive powers and influence by the Minister for Labour in industrial relations and the creation of an efficient labour administration system capable of effectively enforcing the laws.

[47] The taskforce proposed five new statutes, one being the ***Work Injury Benefits Act (WIBA).*** This Act was to provide for compensation to employees for injuries suffered and occupational diseases contracted in the course of employment. Until the enactment of the WIBA, the *Workmen's Compensation Act Cap 236* (repealed) was the only Act of Parliament enacted to provide for compensation for injuries suffered by a worker in the course of his/her employment.

[48] ***The Work Injury Benefits Act (WIBA)*** also sought to provide for insurance of employees and related matters. It further incorporated the 1998 International Labour Organisation Declaration on Fundamental Principles and Right at Work ensuring basic human values vital to our social and economic development.

[49] The International *Labour Organisation's Policy document, Occupation, safety and health profiles in Kenya (October 1, 2004*), also lent insight as to what WIBA was meant to achieve. A snippet is reproduced below:

"Agencies responsible for administration

- *The Ministry of Labour and Human Resource Development is responsible for the administration of the workmen compensation services through Labour department.*
- *However, with the recent review of the core Labour Laws, workmen's compensation Act will be referred as Work Injury Benefit Act (WIBA) and will be administered by the Director of*

Directorate of Occupational Health and Safety Services (DOHSS) in the same Ministry.

- *With this new arrangement the reporting of work injuries and accidents will be well captured in the most relevant department already charged with the responsibility of prevention of occupational accidents and diseases.*
- *The data collected will enable the officers concerned to institute investigation and hence hasten remedial measures to avoid further occurrence of the same." (emphasis added)*

[50] While the repealed *Workmen's Compensation Act (Cap 236)* only provided for compensation to workmen for injuries suffered in the course of their employment, WIBA provides for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes. WIBA also goes further and makes it compulsory for every employer to provide an insurance cover for all their employees against bodily injury, disease or death sustained and arising out of and in the course of their employment.

[51] It is therefore evident that WIBA's purpose is a noble one. It is meant to offer protection to employees should they get injured or contract disease in the course of their duties. In addition, its reach is far wider than its predecessor; the *Workmen's Compensation Act Cap 236.*

[52] It is against this background that we now consider whether the Petitioner has a valid case on the alleged unconstitutional statutory provisions of WIBA. For clarity, we shall determine the alleged unconstitutionality related provisions as delineated here below.

(a) Whether Sections 16, 23(1) and 52 (1) & (2) of the Work Injuries Benefits Act are inconsistent with the Constitution?

[53] The Petitioner contends that Section 16 and 23(1) of WIBA curtail rights conferred by Sections 60 and 77 (9) & (10) of the former Constitution, as read with Articles 40(1) and (2), 50(1), 159(1), 162(2) (a), 165, 41 (1), and 48, of the Constitution 2010. It was also argued that section 52 (1) and (2) of WIBA are discriminatory and contrary to Articles 27, 41 and 48 of the Constitution 2010.

For avoidance of doubt, Section 60 of the former Constitution created the High Court with unlimited original jurisdiction in civil and criminal matters, similar to the provision of Article 165 of the Constitution 2010; Section 77(9) and 10 of the same Constitution provided for the right to a fair hearing in public, which is similar to Article 50 of the Constitution 2010.

[54] In the above context, Section 16 of WIBA states:

> ***"No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death."***

[55] Section 23 of the same Act then provides:

> ***"23.(1) After having received notice of an accident or having learned that an employee has been injured in an accident, the Director shall make such inquiries as are necessary to decide upon any claim or liability in accordance with this Act.***
>
> ***(2) An inquiry made under subsection (1) may be conducted concurrently with any other investigation.***

(3) An employer or employee shall, at the request of the Director, furnish such further particulars regarding the accident as the Director may require.

(4) A person who fails to comply with the provisions of subsection (3) commits an offence."

[56] Sections 52 (1) and (2) of WIBA further provides:

"52.(1) 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.

(2) An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such decision."

[57] The bone of contention by the Petitioner with regard to Section 16 is that it extinguishes an employee's right to file an action for damages in respect of any occupational accident or disease resulting in the disablement or death of such employee as against his employer. It is thus contended that the provision infringes on an employee's right to property under Article 40(1) and (2) of the Constitution 2010 and restricts the enjoyment of the rights to access to justice and fair hearing under Articles 48 and 50 of the said Constitution. The Attorney General on the other hand argued that the section is not unconstitutional and is merely an *ouster clause* which is permissible under the law.

[58] It is also the Petitioner's contention that the effect of Section 23(1) of the Act is to confer judicial authority upon an individual, namely the Director of Occupational Safety and Health, thus violating Articles 50(1), 159(1), 162(2)(a) and 165 of the Constitution 2010 and thereby ousting the jurisdiction of the High

Court to deal with constitutional questions and violations arising from such claims.

[59] Further, the Petitioner argues that in coming to its determination, the Court of Appeal focused almost exclusively on the provisions of the former Constitution without analysing the extent to which the impugned sections contravened that Constitution vis-à-vis the corresponding Articles of the Constitution 2010 thus violating Article 159(2) of the latter Constitution which provides that in exercising judicial authority, all Courts and tribunals shall protect and promote, the purposes and principles of that Constitution. While not at the centre of the controversy before us, the question as to whether the Constitution 2010 should be applied retrospectively and to situations arising during the operation of the former Constitution was raised in submissions and we deem it necessary to address the same.

[60] In the above regard, this Court has already pronounced itself on the place of the Constitution 2010 when in the ***S.K Macharia case*** we rendered ourselves as follows:

> ***"[62.] At the onset, it is important to note that a Constitution is not necessarily subject to the same principles against retrospectivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not***

contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately acquired before the commencement of the Constitution."

As regards statues that were in operation before 2010, Section 7 of the Schedule 6 of the Constitution 2010 provides as follows: -

> "7. ***(1). All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.***
>
> (2) ***If, with respect to any particular matter –***
>
> **(a)** ***a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and***
>
> ***(b)*** ***a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer.***
>
> ***The provisions of this Constitution prevail to the extent of the conflict."***

While therefore all legislation prior to 2010 were not necessarily rendered unconstitutional, they ought in their application and interpretation to be

brought into conformity with the Constitution 2010. The impugned Sections of WIBA must be addressed in that context.

[61] **F**urthermore, this Court should consider the Constitution 2010's provisions to help deduce whether or not the impugned provisions, when read alongside the purpose of WIBA would assist in bringing clarity and justice to the issues in contest. In doing so, a plain reading of Section 16 of the Act would reveal that its intention is not to limit access to courts but to create a statutory mechanism where any claim by an employee under the Act is subjected, initially, to a process of dispute resolution starting with an investigation and award by the Director aforesaid and thereafter, under Section 52 an appeal mechanism to the then Industrial Court. As we previously stated in **Petition No. 33 of 2018, Sammy Ndungu Waity Vs I.E.B.C. and 3 others [2019]eKLR;**

> ***"Where the Constitution or any other law establishes an organ, with a clear mandate for the resolution of a given genre of disputes, no other body can lawfully usurp such power, nor can it append such organ from the pedestal of execution of its mandate. To hold otherwise, would be to render the constitutional provision inoperable, a territory into which no judicial tribunal, however daring, would dare to fly."***

[62] We reiterate the above holding and in the present context therefore we further find that Section 16 cannot be read in isolation so as to create the impression that it curtails the right to immediately access the courts, because by looking at the intention of Section 16, the purpose it fulfils is apparent. That purpose is revealed in Section 23 which calls for initial resolution of dispute via the Director and this can be deemed as an ***alternative dispute resolution*** mechanism. But what if one is still aggrieved by the decision of the Director? The answer to that question lies in Section 52 of the Act which allows aggrieved parties to seek redress in a court process. In the circumstances, access to justice cannot be said to have been denied.

[63] Having so held, it is evident that by granting the Director authority to make inquiries that are necessary to decide upon any claim or liability in accordance with WIBA, the jurisdiction of the High Court to deal with constitutional questions and violations that may arise from such claims under Article 165 of the Constitution 2010 is not ousted at all. Similarly, the appellate mechanism to the Industrial Court, in the circumstances, cannot be legitimately questioned.

[64] The Director's inquiries are also essentially preliminary investigations. Such mechanisms, set out by statute must be left to run their full course before a court intervenes. Not only does this simplify procedures to ensure that courts focus on substantive rather than procedural justice, but also potentially addresses the problem of backlog of cases, enhances access to justice, encourages expeditious disposal of disputes, and lowers the costs of accessing justice.

[65] There is also the added benefit that inquiries by the Director inevitably means that work injuries and accidents are well captured and understood by his office. He can for example take measures or instruct his officers to hasten remedial administrative measures to avoid further occurrence of similar incidents.

[66] In addition, the Director is in essence performing a *quasi-judicial functions* under Section 23 and by dint of Article 165 (6) *"The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function."* His actions and decisions, even without review or appeal, are therefore still subject to the over-riding authority of the High Court.

[67] With regard to Section 52, we note that both the High Court and the Appellate Court determined that it was not the intention of the Legislature to limit appeals from a decision of the Director to the Industrial Court but was a

case of *unrefined drafting*. We are in agreement with this finding and that such inelegance should be left to the Attorney General and for him to take appropriate action.

[68] The next issue to address is whether Section 16 is an *ouster clause*. In ***Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others***, S.C Petitions 13A of 2013 as consolidated with Petition 14 of 2013 and Petition 15 of 2013 [2014] eKLR, this court observed:

> ***"[115]... Ouster clauses are provisions in the Constitution or a statute that take away, or purport to take away the jurisdiction of a competent Court of law. They deny the litigant any judicial assistance in the relevant matter, and at the same time deny the Courts the scope for making any arbitral contribution with respect to the relevant matter. In short, ouster clauses curtail the jurisdiction of the Court, as the relevant matter is rendered non-justiciable before the Courts.***
>
> **. . . .**
>
> ***[117] Ouster clauses can be categorized as constitutional or statutory. Where they are statutory ouster clauses, the statute may confer exclusive jurisdiction on the relevant body to determine the relevant matter. In such a case, the relevant body must act under the statute, and not outside it."***

[69] We have stated that Section 16 cannot be read in isolation because if read with Section 23 and 52 of the Act, the Act provides for legal redress to the Industrial Court (now the Employment and Labour Relations Court) and therefore judicial assistance can be sought by aggrieved parties from decisions of the Director and the court can make a determination with

respect to all relevant matters arising from those decisions. It cannot, therefore, be the case that section 16 amounts to an *ouster clause*. It is in fact merely facilitative of what may eventually end up in Court**.**

[70] Flowing from the above analysis, it is apparent that in considering the nature and extent of the limitation placed under Section 16 of the Act, it becomes clear that it does not permanently limit the right to access courts by an aggrieved party. It is only the initial point of call for decisions in workers' compensation. When read in whole with Section 23 and 52 of the Act, therefore, a party is not left without access to justice nor do employees or employers have to result to self-help mechanisms. What the section does, is that it allows the use of alternative dispute resolution mechanisms to be invoked before one can approach a court.

[71] We must in concluding on this issue also acknowledge, that this is a system that has been operational without complaint from employees through their union as divulged in court by the COTU for over a decade and we therefore find no reason to interfere with an already efficient system. It is our finding, therefore, that neither Section 16, 23, nor 52(1) of WIBA can be said to be inconsistent with the former Constitution or the Constitution 2010.

(b) Whether Section 21 (1) of WIBA is inconsistent with the Constitution?

[72] It is the Petitioner's case that Section 21(1) which was impugned by the learned trial Judge does not exist and was not among the sections challenged in the Petition before the High Court. We shall spend little time on this issue.

[73] A thorough perusal of WIBA establishes that indeed, Section 21(1) does not exist. Section 21 of the Act only provides:

"***21. Notice of accident by employee to employer***

Written or verbal notice of any accident provided for in section 22 which occurs during employment shall be given by or on behalf of the employee concerned to the employer and a copy of the written notice or a notice of the verbal notice shall be sent to the Director within twenty-four hours of its occurrence in the case of a fatal accident."

[74] This section was never in contest at the High Court and we therefore, agree with the Petitioner that the learned Judge of the High Court erroneously reproduced a non-existent Section 21(1) of the Act when he stated thus at paragraph 6 of his judgment:

"6. Section 21 (1) and (3) of the Work Injury Benefits Act, 2007

Section 21 (1) of the Act thus provides:

"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.

And sub-section (3) aforesaid stipulates:

"An employee shall be entitled as his own expense, to have a medical practitioner of his choice present at an examination by a designated medical practitioner."

[75] The above is not what Section 21 of the Act provides and having found that Section 21 (1) of WIBA is non-existent, we are in agreement with the Appellate Court's decision that the learned trial Judge erred in law by declaring it inconsistent with the former Constitution. The issue is moot in any event and requires no orders by this Court.

(c) Whether Section 25 (1) & (3) of WIBA is inconsistent with the Constitution?

[76] Flowing from our finding above, we note that what the learned trial Judge pointed out as being Section 21 (1) and (3) of WIBA are actually the provisions of Section 25 (1) and (3) of the WIBA. Section 25 provides:

"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.

.....

3) An employee shall be entitled at his own expense, to have a medical practitioner of his choice present at an examination by a designated medical practitioner."

[77] The Petitioner contends that Section 25(1) and (3) of the Act is inconsistent with the Constitution to the extent that it purports to discriminate against employees thus contravening Section 80 of the former Constitution

which corresponds with Article 27 of the Constitution 2010. The Respondents refute this contention by urging that all parties; the Director, the employer and employee have equal rights under the Act and therefore the Section is consistent with both Constitutions.

[78] We note in the above context that Section 80 of the former Constitution provided for the protection of freedom of the assembly and association and cannot be the basis of any submission in the present Appeal noting the issues in contest. We thus make the logical inference that the Petitioner meant that Section 25(1) and (3) of the Act is inconsistent with the former Constitution as it contravened Section 82 of the said Constitution which prohibited discrimination. In addition, this is the Section that corresponds with Article 27 of the Constitution 2010.

[79] According to Black's Law Dictionary, 8th ed. (Bryan A. Garner, ed.) (St. Paul, MN: West Group, 2004), page 500, discrimination is "***the effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion or handicap.***"

Further, in **Willis vs The United Kingdom (2002) 34 EHRR 547** the European Court of Human Rights defined discrimination as:

*"....a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society". (*See **Andrews vs Law Society of British Columbia [1989] I SCR 143, as per McIntyre J.)**

In our own jurisdiction, the Court of Appeal in **Barclays Bank of Kenya LTD & Another vs Gladys Muthoni & 20 Others [2018] eKLR** held as follows;

> **"……Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions… whereby persons of one such description are subjected to … restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description…. Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex … a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."**

[80] Discrimination therefore entails the unjust or prejudicial treatment of different categories of people in the same circumstances and in the present matter, the Petitioner contends that the impugned Section 25(1) and (3) discriminate against employers and in some instances, employees. We disagree and instead agree with the Court of Appeal that there is no prejudicial treatment in the manner medical examinations are conducted. We say so because, firstly, while the Director can designate a medical practitioner to examine an employee, we agree with the 1st Respondent's submissions that the Director is a neutral adjudicating party who neither acts for the employer nor an employee in doing so. Secondly, and as a safeguard against the Director's arbitrary use of this power, the employer can, with the approval of the Director, refer the employee to its own medical practitioners. Last but not least, an employee, at his/her own expense is at liberty to have a medical practitioner of his/her choice present at the time of the examination.

[81] The effect of Section 25 of the Act therefore, is to ensure that the medical examination and ensuing report is objective, fair, accurate and sound. This section consequently secures the interests of both employees and employers, advances equality and does not accord differential treatment to any party. Thus, it cannot be said to contravene either the former Constitution or the Constitution 2010.

(d) Whether Section 58 (2) of WIBA is inconsistent with the Constitution?

[82] The Petitioner contends that Section 58(2) of WIBA is inconsistent with the former and the Constitution 2010 to the extent that it purports to promote the retrospective application of WIBA and is thus contrary to Section 75 of the former Constitution which corresponds with Articles 40, 41(1), 48 and 50(1) of the Constitution. The Respondents in opposition urge that the mere fact that a statute has retrospective application does not render it inconsistent with the Constitution. We have partly addressed retrospectivity of the Constitution and Statutes above.

[83] In the present context however, we note that Section 58 (2) of WIBA provides:

> "***58. Savings***
>
> ***(2) Any claim in respect of an accident or disease occurring before the commencement of this Act shall be deemed to have been lodged under this Act."***

[84] It is urged that this provision is unconstitutional for being retrospective. This Court, in addition to what we have already found above, examined whether retrospective statutory provisions in all instances contravene the Constitution in the ***S.K Macharia case*** where we stated as follows:

"[61] As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospectivity is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsbury's Laws of England, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it:(i) is in the nature of a bill of attainder;(ii) impairs the obligation under contracts;(iii) divests vested rights; or (iv) is constitutionally forbidden"

In addressing this issue, the Court of Appeal in the present matter stated thus:

"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. 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 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...."

The Legislative practice where a new judicial forum is created to replace an existing system is meant to ensure finalization of all proceedings pending in the previous system before the forum where they were commenced. 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."*

Section 30(2) of the Environment and Land Court Act, 2011 has similar provision but adds that;

"The Chief Justice may, after the Court is established, refer part-heard cases, where appropriate, to the Court."

> **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."**

[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.

[86] The above proposition would be the most prudent way for a judicial system to operate. Lord Atkin **in *R v Electricity Commissioners 119241 1 KB 171, 204-205***, declared that prerogative writs would issue to *"anybody of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially"*. Indeed procedural fairness, a common law duty, implies that one would act fairly in decision making by the exercise of statutory and judicial powers which may affect an individual's rights, interest and legitimate expectations.

[87] We note again in addressing this issue that retrospective operation of statutes is not *per se* illegal or in contravention of the Constitution. Indeed, Section 58(2) clearly expresses the intention that the Act shall apply retrospectively in terms of our decision in the **S.K. Macharia case.** Consequently, we do not agree with the Petitioner that the effect of Section 58 (2) of the Act is to take away the right to legal process, extinguish access to the courts and to take away property rights without due process.

[88] In stating so, we presume that the property rights referred to include compensation for injuries or disease contracted in the work place. Even if so, all

matters pending resolution under the previous legal regime were to be continued under WIBA and we have seen no evidence of denial of any right by that fact alone. Indeed, our courts and *quasi-judicial* tribunals have routinely applied the law in such a manner as to protect existing rights and therefore while we agree with the Appellate Court that a party has the legitimate expectation to have a dispute resolved under the invoked legal regime, we see nothing unconstitutional in WIBA being applied in a manner that is consistent with its provisions but taking into account the invoked legal regime.

(e) Appropriate Reliefs including on Costs

[89] Noting our findings above, it is obvious that we see no merit in this Appeal and we are satisfied that the Court of Appeal properly applied its collective mind to the issues of unconstitutionality raised. No other remedy save dismissal of the Petition is available to the parties.

[90] As for costs, we note that the Petitioner is a collectivity of advocates and whose statutory mandate includes ensuring the fair administration of justice. It may well be said however that its members filed the original petition to protect its members who practice law in our courts and may not have audience before the Director. That matter is neither here or there and while costs follow the event, we see no reason to burden the Petitioner with costs as to the present dispute relates to a wide pool of citizens called employees and employers. Public interest would thus preclude an order of costs against the Petitioner

F. CONCLUSION

[91] The present Appeal was straight-forward and we have settled the questions placed before us for determination. However, before we conclude we must take note of a matter that was brought to our attention at the hearing of this Appeal. While this matter was before us awaiting determination, *E.K. Ogola J*, on 10th

June 2019, in the High Court of Kenya at Mombasa, rendered a decision in the case of ***Juma Nyamawi Ndungo & 5 others v Attorney General; Mombasa Law Society (Interested Party),*** Constitutional Petition No. 196 of 2018 [2019] eKLR. Broadly, some of the issues for determination in that matter included whether the WIBA was unconstitutional in light of the Constitution 2010.

[91] We are greatly dismayed that the learned Judge *did not take judicial notice* of the pendency of this Appeal although he was aware of it. As a matter of fact, he stated so in his judgment that an appeal had been preferred to us against the decision of the Court of Appeal to the apex court on matters whose determination may well have been binding on him. The learned judge ought to have *held his horses* and acknowledge the *hierarchy of the courts* and await for this court to pronounce itself before rendering himself, if at all. As we perceive it, his judgment has created unnecessary confusion in the application of WIBA and cannot be allowed to stand as it may [may or is]? also be contrary to this Judgement. The findings and Orders expressed in that judgment must therefore be read in the context of the decision of the Court of Appeal and our finding and Orders in this appeal. That is all there is to say on that matter.

G. FINAL ORDERS

[93] Consequently, upon our findings above, the final orders are that;

(i) Petition of Appeal No 4 of 2019 dated 1st February 2019 is hereby dismissed.

(ii) For the avoidance of doubt the determination in Civil Appeal No. 133 of 2011 (Waki, Makhandia, Ouko JJ.A) is hereby upheld.

(iii) Each party shall bear their costs of the Appeal.

[94] Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 3rd day of December 2019.

.....	.....
D.K. MARAGA	**M.K. IBRAHIM**
CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
S.C. WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

.....

I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true

copy of the original

REGISTRAR
SUPREME COURT OF KENYA