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LLM THESIS

Revisiting Work Injury Benefits Framework for Kenya: A Case for Review of WIBA 2007

STUDENT NAME: CONSOLATA WANJIRU KIURA

REGISTRATION NUMBER: G62/75435/2014

SUPERVISOR: DR.AKUNGA MOMANYI

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DECLARATION

I, **Consolata Wanjiru Kiura,** do hereby declare that this is my original work and has not been submitted to any other University or Institution for any award. I hereby now submit the same for the award of Master of Laws Degree of University of Nairobi.

Signed…….

CONSOLATA WANJIRU KIURA

G62/75435/2014

This thesis has been submitted for examination for the award of Master of Laws Degree, for which the candidate was registered with my approval as the University of Nairobi Supervisor,

DR AKUNGA MOMANYI, PhD

Dated 02 November 2021

ABSTRACT

The Work Injury Benefits Act CAP 236 of the Laws of Kenya (WIBA), was one of the highlights of labour reforms in 2007 that was seeking to promote employees' rights to compensation for work related injuries. However, WIBA was received with a lot of disquietness by lawyers, who considered some of the provisions of the Act to be inconsistent with the Constitution of Kenya. In addition to these provisions being considered unconstitutional, the same were seen to lock out other stakeholders within the workmen compensation structure.

The contested provisions of WIBA were challenged before the High Court by the lawyers' professional body, the Law Society of Kenya (LSK) and the said court concurred with LSK in a judgment delivered in 2009, that indeed, sections 10(4), 16, 23(1), 25(1) and (3), 52(1) and (2) and 58(2, respectively, were unconstitutional.

The Attorney General (AG) challenged this decision before the Court of Appeal and the said court upheld WIBA as being constitutional. LSK, dissatisfied with this decision, appealed to the Supreme Court who finally put this matter to rest by upholding the Court of Appeal decision.

The Supreme Court in giving WIBA a clean bill of health, noted some drafting challenges in some provisions which if interpreted in their ordinary meaning, would be

ambiguous. It is in the ambiguity that the research is seeking to establish whether it is time to consider a review of WIBA.

Particularly, there has since been a lot of confusion on how the Director of Occupational Safety and Health Services, (DOSH)can determine the issue of liability when he only serves an administrative role and what processes have been put in place to allow for an employer to challenge an employee's injuries.

Secondly, whilst it is clear that the magistrates' courts lack jurisdiction to hear and determine work related injuries, there is no recourse before the Director when an employee's case has been dismissed at the magistrates' court.

It was therefore necessary to revisit the work injury benefits framework and seek answers to these challenges, by appreciating the dynamism of Kenya's workforce and the necessity to have all stakeholders on board, to end the impasse that still remains unaddressed, two years after the Supreme Court pronounced itself on WIBA.

An attempt has been made to identify and perhaps address all these pressing challenges by unpacking the work injury benefits framework in Kenya, in five chapters.

In Chapter One, the Introduction and Background of the research gives a general overview of how the era of industrialization played a big role in promoting workers' welfare especially when they were injured in the course of employment and the

enactment of legislation further progressing worker's rights. The Statement of the Problem uniquely identifies the gaps in WIBA and how they have greatly affected fair administration of work injury claims. The research objectives and research questions seek to address one goal, which is whether it is time to review WIBA considering the pressing gaps and challenges of the Act. Finally, the Literature Review shall discuss various authors who highlighted flaws of a 'no fault' workmen compensation system.

In Chapter Two, the research will highlight the historical background of workmen compensation in Kenya's context discussed in three phases' i.e colonial period, post-independence period and post Constitution of Kenya, 2010. This chapter shall also discuss the obligations of the stakeholders as envisaged under WIBA.

In Chapter Three, the research will reflect on the legal and policy framework of Kenya's workmen compensation in reference to the Workmen's Compensation (Accidents) Convention, 1925(No.17) and WIBA's adaptation to the Convention . This chapter will also look at two jurisdictions, i.e. U.S and U.K's workmen compensation models and the lessons that Kenya can learn from these two jurisdictions.

In Chapter Four, the research analyses the decision of the Supreme Court on WIBA and discussions on the practicability and interpretation of the decision will be the basis for making a case for review of WIBA.

Finally, Chapter Five is the climax, where the research will be proposing reforms under the Act by way of amendments, with an all-inclusive approach of all parties that are

involved in the workmen compensation process and not just an employer and employee as envisaged in the Act. This chapter will also look at policy reforms at the Ministry of Labour, and particularly, the Department of Occupational Health and Safety, in relation to the proposed legal reforms.

ACKNOWLEDGEMENT

First, I owe it to God for putting in me the motivation to tirelessly work on my research to its successful completion. I often lamented and for a long time was unsure whether I would ever complete my research work. God surely had a different plan for me and giving up was never an option. This year, my testimony is that the work that God began in me six years ago, is now truly finished. May his name be praised!

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What a blessing it is to have parents who still hold your hand even in adulthood! I thank my wonderful parents Steve and Mary Kiura for their warmth, support, intercession, guidance, encouragement, education and laying a foundation for my future. I am immensely blessed to have such supportive parents.

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my success. May God fulfill all your hearts' desires and may our bonds never be broken.

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Finally, I would like to thank my friends; Catherine Kanyuga, Perpetua Njeri and Stella Njeri, for their encouragement and prayers. You are friends that became my family.

DEDICATION

This thesis is dedicated to my parents who constantly reminded me that I can do anything if I put my mind and effort into it.

I also dedicate this thesis to my darling daughter, Zuri Kabura, who is the reason for everything that I do and because of her, I aspire to do better.

LIST OF CASES

1. *Law Society of Kenya v Attorney-General & Another [2009]eKLR*

2. *Attorney General v Law Society of Kenya & Another [2017]eKLR*

3. *Law Society of Kenya v. Attorney General & Another [2019]eKLR*

4. *West Kenya Sugar Co. Ltd vs Tito Lucheli Tangale [2021]eKLR*

LIST OF COVENANTS

1. Workmen's Compensation (Accidents) Convention, 1925 (NO.17)

LIST OF STATUTES

1. Black Lung Benefits Act [1972]
2. Employers Liability (Compulsory Insurance) Act, CAP 57 [1969]
3. Energy Employees Occupational Illness Compensation Program Act [2000]
4. Federal Employees' Compensation Act [1916]
5. Longshore and Harbor Workers' Compensation Act [1927]
6. Social Security Act, CAP 38 [1973]
7. Workmens Compensation Act, CAP 236[1949] Laws of Kenya (Repealed)
8. Work Injury Benefits Act, CAP 236 [2007] Laws of Kenya

LIST OF ABBREVIATIONS

AG Attorney General

AKI Association of Kenya Insurers

COTU-K Central Organization of Trade Unions-Kenya

DOSHS Director of Occupational Safety and Health Services

DWP Department for Work and Pensions

ECAB Employees' Compensation Appeals Board

EEOICPA Energy Employees Occupational Illness Compensation Program Act

ELRC Employment and Labour Relations Court

FECA Federal Employees' Compensation Act

FKE Federation of Kenya Employers

IIS Industrial Injuries Scheme

ILO International Labour Organization

IRA Insurance Regulatory Authority

LHWCA Longshore and Harbour Workers' Compensation Act

LSK Law Society of Kenya

OWCP Office of the Workers' Compensation Programs

U.K United Kingdom

U.S United States of America

WIBA Work Injury Benefits Act

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CHAPTER ONE

INTRODUCTION AND STATEMENT OF THE PROBLEM

1.1 Introduction and Background

In the aftermath of increased industrialization in the United States of America and Europe in the nineteenth century, more employees were falling victims of industrial related injuries and occupational disease. Employees and their families would unfortunately bear the costs of recovery, when they sustained injuries since they were seldom paid by their employers.[1]

With no workers compensation laws enacted at the time, an employer would take advantage of their injured worker by insisting that he or she had to prove in court that the injury was the fault of the employer, in order to be compensated.[2]

Most workers' would not attempt to file a case against their employer in order to keep their jobs. Those employees that filed against their employer could not get their fellow colleagues to testify on their behalf. If the injured worker was unable to prove that the employer was at fault, the employer could not be found liable.[3] The wounded worker's attempt to obtain compensation in court was further complicated by the fact that even a negligent employer might utilize one of three common law defenses to deny

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[1] Patrick L.Brockett and Yehuda Kahane Etti Baranoff.'Risk Management for Enterprises and Individuals,',Flat World Knowledge, May 1,2009,vol.10 at pg 1.Available at:Risk Management for Enterprises and Individuals - Table of Contents (saylordotorg.github.io)(Accessed:25 February 2021))

[2] ibid

[3] ibid

accountability for their employees' injuries. The fellow-servant rule, the theory of assumption of risk, and the doctrine of contributory negligence are examples of these defenses.[4].

An employee who was hurt by a workmate was not allowed to claim from the business there under fellow-servant rule.[5]

Under the assumption of risk doctrine, it was assumed that the worker was aware of, or should have been aware of, his workplace's hazardous conditions. This defence locked out compensation for the worker as it assumed that he or she recognized the risks of the job but opted to remain on the job[6].

Under contributory negligence, if an employer was negligent but the worker also contributed to his injury, the employer was relieved of responsibility for the injury.[7]

These defenses made compensation of injured workers unfeasible leading to the plight of workers' compensation, to be statutorily addressed.

Due to the challenges faced in court by injured workers in seeking recovery of damages, efforts were made universally to ensure there was a work injury benefits framework that guaranteed compensation of workers in spite of the party at fault.

[4] ibid
[5] ibid
[6] ibid
[7] ibid

The framework was implemented by way of legislation. The key principle that dominated the work injury legislation was compensation of the employee without having to prove fault.

The Work Injury Benefits Act (WIBA), which was passed in 2007, is the current workers' compensation legislation in Kenya. [8] The Act is a strict responsibility statute, which means that a worker can sue for damages even if they were at fault for the accident. [9]It also requires businesses to have insurance policies to cover any responsibility that may arise as a consequence of work-related accidents or diseases. [10] Finally, it provides for the personal representatives of an employee who passes away while on the job. [11]

To be eligible for compensation, an employee or their personal representative must first report the accident to their employer, who must then report the accident to the Director of Occupational Safety and Health Services (hereinafter referred to as the Director) within seven days of receiving notice.[12]

The employer then must complete a form known as the DOSH/WIBA 1 or LD104, which indicates the circumstances surrounding the injury or occupational disease.[13] A medical doctor must also complete this form, describing the type and degree of the

[8] Work Injury Benefits Act, Cap 236 Laws of Kenya
[9] WIBA, s 10(4)
[10] ibid,s 7(1)
[11] ibid, s 34(1)
[12] ibid, s 22(1)
[13] ibid,s 26(1)

employee's injuries or occupational sickness. [14]Following the employee's medical evaluation, the company should reward the employee. [15]

The various amounts of payment depend on the type and extent of the injury suffered as a result of the accident, or death of the employee and the nature of the occupational disease as set forth in the Schedules of the Act.

WIBA nonetheless has been met with skepticism and particularly by lawyers who were locked out of the compensation process at the Director's office. The Act only anticipates three parties in the compensation process to the exclusion of lawyers namely; Employer, Employee and Director. This was unlike the Workmen Compensation Act of 1949(Repealed), it expected that a worker may bring a civil suit in a court with jurisdiction in the district where the accident that gave rise to the claim happened to vindicate his claim.[16]

The attorneys, through their professional organization, the Law Society of Kenya (LSK), challenged the validity of certain aspects of WIBA in the High Court immediately after it was implemented. [17]The LSK argued that section 7(1) of WIBA was unconstitutional because it required employers to get and maintain insurance from an insurer authorised by the Minister of Labour. According to LSK, this was in violation of the Constitution since it allegedly violated section 80 (1) of the old Kenyan

[14] ibid, s 25(1)
[15] ibid, s26(4)
[16]Workmens Compensation Act (Repealed), s17(1)
[17] *Law Society of Kenya v Attorney-General & Another [2009] eKLR*

Constitution, which denied employers the ability to get insurance from any regulated insurance business.

LSK further claimed that Section 10(4) of WIBA was unconstitutional since it imposed "without fault" liability on the employer, which was seen as a breach of the right to a fair trial. Section 16 of WIBA on the other hand, barred the worker or any dependant of the worker to pursue legal remedies for work related injuries in court and this was viewed by LSK as a violation of access to justice.

The High Court agreed with LSK's position, forcing the Attorney-General to file an appeal with the Court of Appeal. [18]WIBA was maintained as a well-grounded Act under the Constitution by the Court of Appeal, which rejected most of the conclusions of the High Court. The Court of Appeal, in particular, did not find the provisions prohibiting court action in work injury cases to be unconstitutional, implying that the courts have lost jurisdiction in these matters, with the exception of appeals to the Employment and Labour Relations Court (ELRC) from the Director's decision.

Only section 7 of the WIBA, insofar as it allows for Ministerial permission or exemption, and section 10 (4) of the WIBA were found to be incompatible with the Constitution's requirements.

[18] *Attorney General v Law Society of Kenya & another [2017] eKLR*

Dissatisfied with the Court of Appeal decision, LSK appealed against the decision, at the Supreme Court challenging the following provisions of WIBA[19]:

i. That Section 16 of the Act is unconstitutional in that it impedes the right of an employee to an impartial 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.

ii. That Section 23(1) of the Act is inconsistent with the provisions of the Constitution 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.

iii. That Section 25(1) and (3) of the Act is inconsistent with the provisions of the Constitution 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.

iv. That Section 52(1) and (2) of the Act is inconsistent with the provisions of the Constitution to the extent that it fails to vest 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.

[19] *Law Society of Kenya v Attorney General & another [2019] eKLR*

v. That Section 58(2) of the Act is inconsistent with the provisions of the Constitution 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.

On 3rd December 2019, the Supreme Court endorsed the Judgment of the Court of Appeal whose implication was that the provisions of WIBA did not offend the former and current Constitution.[20]

The Supreme Court's decision has implications that will not only reverberate in the legal profession but also in the insurance industry as far as the Employer's Liability policies commonly referred to as the Common Law policies are concerned.

Currently, even with the bold decision of the Supreme Court, magistrate courts are applying the decisions selectively with some dismissing work-related injury cases whilst others continue hearing and determining these cases under the principle of legitimate expectation.[21]

These implications have far reaching consequences as far as the capacity of the Director to give awards with the increasing demands due to economic growth, reduction in

[20] ibid
[21] ibid

premium debiting and collection under the Common law policies, the capacity of the Employment and Labour Relations Court to adjudicate Appeals from the decision of the Director amongst other consequences that shall be discussed at length in the subsequent chapters.

We shall also look at the possible solutions in unlocking the stalemate noting that the Supreme Court Judgment has caused more confusion than settling a lengthy debate on the need for full implementation of WIBA if at all, or its review, to cater for all the stakeholders.

The background and introduction section should be more giving some information that would enable the reader to understand the context rather than problematising the issue in your project.

1.2 Statement of the Problem

It is undeniable that WIBA is the most contested legislation compared to the other labour legislations in Kenya. Due to its strict liability nature, the tenets of fair trial and access to justice protected by the Constitution of Kenya are subverted. To put this into context, WIBA denies the employer the forum to address negligent employees who, out of their own fault, get injured even after being provided with a safe work environment and personal protective equipment. This enables a workforce that does not heed to work instructions and risks an increase in work injuries and compensation.[22]

[22] Supra, note 8

WIBA in denying legal recourse of an employee or their dependant, before a court of law for compensation in respect of work injuries, is perceived as denying an employee his rights to access justice.[23] The structured compensation nature of the Act also restricts the award that the Director can offer to the injured employee or their dependant. For example, for 100% permanent disability which includes permanent incapacity of the employee or death, the Director only awards 96months of the gross salary of the employee.[24] This barely compensates the employee or dependants who if they were before court would receive additional awards under diminished earning capacity and lost earnings for injured employees and awards under the Law Reform Act and Fatal Accidents Act, in case of dependants.

The other glaring challenge of WIBA is that the Director will experience an avalanche of work injury claims in light of the fact that the burden to deal with such cases solely falls on the Director.[25] With only 13 field stations countrywide, it would be impossible to achieve the purpose and efficiency to compensate injured employees as anticipated by the Act.[26]

The retrospective section of the Act has also been met with implementation and interpretation challenges which although finally settled by the Supreme Court, has led

[23] WIBA, s 16
[24] WIBA, s 30(1)
[25] WIBA, s 53(2)(e)
[26] Data base from the the Ministry of Labour and Social Protection, Directorate of Occupational Safety and Health Services(DOSHS) https://labour.go.ke/directorate-of-occupational-safety-and-health-services-doshs/(Accessed:25 February 2021)

to numerous dismissal of work injury cases filed after the enactment of the Act at the magistrates' courts and referral of those cases to the Director.[27] The dilemma that is presented is that most of such cases fall outside the time within which the Act directs employees to report the case to allow for compensation in addition to the Director having no capacity to handle most cases around the 47 counties of the country.[28]

The Insurance industry has also been dragged into uncertainties of the future of the Common Law Policies that are still operational as a result of work-related injury cases filed in court during the subsistence of the Workmen Compensation Act, (Repealed) and the now operational WIBA. The Insurance industry still awaits direction from the Chief Executive Officer of the Association of Kenya Insurers (AKI) on the fate of Common Law policies offered to consumers in this respect Employers, as envisaged in the Act.

It is important that solutions to these concerns be addressed as the failure to do so continues to hurl the relevant stakeholders in a state of uncertainty as regards their role and relevance in the implementation of WIBA. This research, however, sets out to find amicable and pragmatic solutions amongst stakeholders that may also lead to a review of WIBA.

[27] WIBA, s 58
[28] Supra, note 12

1.3 Research Objectives

The goal of this research is to propose inclusivity of all stakeholders in the Act to allow for efficiency in compensation, fairness, reasonable awards and access to justice to all the parties involved.

The specific objectives are as follows:

i. To examine whether WIBA addresses the rising numbers of work injuries
ii. To examine whether the introduction of quasi-judicial tribunals in the Act allows for fairness, access to justice, efficiency and reasonable compensation
iii. To propose recommendations for improvement of the existing work injury benefit framework

1.4 Research Questions

This study will seek to answer the following questions:

a. Is there a need to review WIBA and the process of handling WIBA cases to cater for the rising number of work injuries?
b. If so, is it not necessary that quasi-judicial tribunals be formed within sub counties to address the influx in the number of cases reported before the Director who only serves 13 field stations in the whole country?
c. Is there a need to improve the existing work injury benefit framework?

1.5 Hypothesis

The study will show that an exclusive 'no fault' workmen compensation system is arbitrary as it promotes the welfare of an employee more than it protects an employer.

The current work injury legal framework is no longer tenable as it is faced with many interpretation and implementation challenges, hence a possible review of the Act is inevitable.

The focus should shift to other relevant stakeholders to facilitate proper implementation of the Act in its reviewed state, as the end goal is to promote fairness across the board where both the employer and employee are able to articulate their claim to a fair and logical conclusion.

1.6 Justification and Significance of the study

This study will endeavour to review the legal framework underpinning WIBA in Kenya. It will further analyze the application of work-related injury laws and regulations in the UK and U.S with a focus on the Kenyan situation.

By focusing on these two jurisdictions, we may borrow a leaf as a country that will call to action all stakeholders under WIBA with an intention to promote fairness and justice across the board. At the end of the research, it will be inevitable to consider a review of WIBA having highlighted the challenges that the Act faces in its contemporaneous state.

1.7 Theoretical and Conceptual Framework

1.7.1 Theoretical Framework

The jurisprudence of workmen compensation laws before modern legislations on work injury, was based upon the principle of responsibility solely *ex delicto*. [29] This meant that employers were only liable for their own faults and those of their agents. The injured employee was therefore compensated only if he could prove his employer's negligence. This caused a lot of acrimony between Employer-Employee relationships as it was presumed by the Employer that an Employee assumed risks upon employment hence the question of compensation ought not to arise.

On the other hand, were the ever-growing numbers of destitute victims of work-related injuries who were not compensated having failed to prove negligence, consequently shifting the burden of relief to their families.

This created a necessity on the part of the courts and legislation to stretch the law to favour workmen regardless of the logical consequences resulting in a relaxation of the rules of proof just to give the victims the right to indemnity.

[29] P.Tecumseh Sherman, *The Jurisprudence of the Workmen's Compensation Laws*, 63 Penn Law, 823, 1915

In this regard, the operative theory that is the basis of this research is Legal Realism.[30] Legal Realism is a naturalistic approach to law. This means not following traditional legal principles but in effect test them.

The legal realism revolution began in 1881 by Oliver Wendell Holmes Junior when he published 'The Common Law'. The publication was an affront on the traditional view of the law.[31]

There are four philosophies that dominate this revolution:[32]

1. Power and economics in society
2. Persuasion and Characteristics of the individual judges
3. Society's welfare
4. Practical approach to a durable result

However, we shall concern ourselves with the school of thought of Society's welfare.

1.7.2 Society's Welfare

In this school of thought, the realists' facilitated changes in the law that propagated enactment of a law that protected the welfare of vulnerable workers vis-à-vis their Employer and work environments.[33]

In the same vein, modern workmen's compensation laws were derived from the prevailing social interests to protect the rights of vulnerable workers injured at work by allowing their right to indemnity.

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[30] Martin Luenendonk, 'Legal Realism',Cleverism,August 5, 2016 https://www.cleverism.com/lexicon/legal-realism-definition/

[31] ibid

[32] ibid

[33] ibid

The foundation of WIBA is pegged on the tenets of society welfare as there was a need to hold accountable employers who would have otherwise denied liability of injuries and occupational diseases contracted at work.

1.7.3 Conceptual Framework

When you make reference to work injury benefits, there are four basic eligible requirements that must be met:

i. You must be an employee
ii. The employer must take out a workers' compensation insurance
iii. The employee must have a work-related injury or illness
iv. The employee must meet the deadline for reporting the injury or illness

1.7.3.1 An employee[34]

It is only workers who have been identified in the wage roll that are considered to be eligible for compensation, when they have been injured at work or have contracted diseases in the course of employment. Independent contractors are therefore not considered employees strictly within the interpretation of a work injury benefits framework.

[34] WIBA,s 5

1.7.3.2 Workers' compensation insurance[35]

It is a requirement under the work injury benefits framework that an employer must take out insurance to cover their employees and compensate them when they have been injured at work or have contracted diseases in the course of employment. Compensation entails periodical payments equivalent to the employees' earnings during the time of incapacity for a temporary disablement[36] or is computed on the basis of ninety-six months earnings against the degree of disability of the employee in case of a permanent disablement.[37]

1.7.3.3 Work related injury or illness[38]

An injury or illness can be classified as work related if the work done is for the benefit of the employer. The employee's injury will still be considered to be work related even if he was acting contrary to any law or instructions by or on behalf of his employer or even without any directive from his employer, as long as the work was done for the benefit of the employer.

[35] Supra, note 8
[36] WIBA, s28(1)
[37] Supra, note 23
[38] Supra, note 8

1.7.3.4 Reporting the injury or illness[39]

Since the work injury benefits framework is supported by a worker's compensation insurance, timelines for reporting the injury or illness are very strict. The injury or illness must be reported in line with the requirements of the work injury benefits framework after which the insurance component responds by compensating the injured employee.

1.8 Research Methodology

This is a normative research study seeking to identify and analyze prevailing arguments about the work injury benefits framework in Kenya. The end result would be advancing recommendations in the legal and policy framework for work injuries.

This approach is advanced by way of qualitative research from desktop methods used to collect both primary and secondary sources of information that will be analyzed. The primary sources of information include: the Constitution, statutes, international legal instruments and decided cases. These primary sources of information are useful because of their binding and authoritative nature.

Secondary sources of information are also used, the main being library and documentary sources such as: books, journal articles, government records, internet sources and media reports.

[39] Supra, note 11

1.9 Literature Review

The modern work injury benefit framework was a concept borrowed from Prussia under Chancellor, Otto von Bismarck.[40]

Haller JS[41], in his Journal, observed that although the Chancellor was no great humanitarian, he was passionate about providing social protection to his workers and he was the force behind social insurance in Prussia.[42] The Employers' Liability Law of 1871 was his first attempt at social insurance, giving limited social security to workers in some industries, quarries, railways, and mines. [43] Bismarck later pushed for the passage of the Workers' Accident Insurance Act in 1884, which established the first modern workers' compensation system. [44]The major benefits of the system to workers was medical treatment and rehabilitation. [45]

The precedent of modern-day work injury framework established by the Prussian system was the creation of an "exclusive remedy" to workers' compensation. This meant that workers could no longer file for recovery of damages against their employer.[46]

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[40] Haller JS, Industrial accidents-worker compensation laws and the medical response. Western J of Med. 1988;148:341–348
[41] ibid
[42] Gregory P Guyton,'*A Brief History of Workers' Compensation*',Iowa Orthopaedic J,no.19,1999,106-110
[43] ibid
[44] ibid
[45] ibid
[46] ibid

Former Vice President and General Counsel of Greater New York Mutual Insurance Company, Peter M. Lencsis, is a New York City-based attorney, applauds the framework of workmen compensation laws as a substitute for tort remedies. He looks at compensation laws as a social tradeoff for employees to receive certain limited benefits regardless of fault. He however laments that since an employee cannot sue his employer for work related injuries, the employee does not recover full tort damages for pain and suffering.[47]

Ronald G. Ehrenberg observes that workmen compensation systems benefits are founded on the basis of no- fault. The no-fault aspect of it however, should allow employers the right to dispute claims on such grounds as the injury did not take place in the course of employment, or the extent of the injury is not as dire as the employee claims, or an injured employee is not returning to work as quickly as is possible.[48] The author must have observed that the no-fault liability aspect was subject to abuse by employees who would lie to receive compensation since negligence needed not to be proved in a workmen compensation framework.

Bernerd Fortin and Paul Lanoie, reviewed the workmen compensation system further by conducting a survey on the incentive effects of workers' compensation.[49] The two

[47] Peter M.Lencsis, '*Workers Compensation: A Reference and Guide*,'Praeger, June 25,1998,9
[48] Ronald G. Ehrenberg,(1985), Workers' Compensation, Wages and the Risk of Injury.National Bureau of Economic Research, Working Paper No.1538. Available at https://www.nber.org/system/files/working_papers/w1538/w1538.pdf(Accessed: 17 January 2021)
[49] Fortin B., Lanoie P. (2000) Incentive Effects of Workers' Compensation: A Survey. In: Dionne G. (eds) Handbook of Insurance. Huebner International Series on Risk, Insurance, and Economic Security, vol 22. Springer, Dordrecht. https://doi.org/10.1007/978-94-010-0642-2_13

authors' angle in the context of a workmen compensation framework was to look at the implications of the work injury framework in the market context.[50] The effects of the work injury framework affecting both the employer and employee affected the frequency, duration and nature of the claims reported through the incentive effects.[51] For starters, it was observed in the survey that workmen compensation insurance led to moral hazard problems as workers' incentive to exercise care diminished with increase in coverage.[52]

Furthermore, because workmen's compensation payments are funded in part by premiums tied to a company's safety record, there is an incentive to raise investment in health and safety capital as workmen's compensation insurance coverage increases. Changes in risk, or more accurately, changes in the frequency or duration of injuries, may emerge from these forces.[53]

Chris Parsons, in discussing the framework of compensation of work injury, notes that workmen compensation models differ.[54] He agreed with Lencsis that the models had two distinct properties. For starters, they offer no-fault compensation. Second, workers' compensation programs seldom, if ever, offer "complete" reimbursement for injuries. [55]The goal of a laborers compensation system, according to Parsons, is to only offer

[50] ibid,422
[51] ibid
[52] ibid
[53] ibid
[54] Chris Parsons,(2002),Liability Rules, Compensation Systems and Safety at Work in Europe.The Geneva Papers on Risk and Insurance, vol 27 No.3,358-382.Available at https://link.springer.com/content/pdf/10.1111/1468-0440.00179.pdf(Accessed:17 January 2021)
[55] ibid,362

appropriate remedy for monetary losses rather than non-monetary damages (such as pain and suffering). [56]Non-monetary damages are recognized in the Swiss and Swedish workers' compensation systems, while not being included in the workers' compensation framework. [57]

The two authors, Parsons and Lencsis, appear to advocate for compensation of non-pecuniary losses in the workmen compensation framework in other jurisdictions that have not adopted such models. This discussion on the various models of workmen compensation will be featured later on in the research.

Giampaolo, Keeton, Volker and Sitoe[58] in agreeing with Fortin and Lanoie, highlight how South Africa workmen compensation coverage increased the scope of moral hazards. They went ahead to discuss from an economic perspective, the increasing scope of moral hazards which translated to employers paying too much premiums to provide workers' compensation. The idea to reduce employers' costs was to eliminate the increasing scope and in doing so, encourage careful institutional design.

In looking at the literature by the aforementioned authors, one thing remains constant. The 'no fault' system appears to take precedence in almost all jurisdictions in

[56] ibid
[57] ibid
[58]Garzarelli, Giampaolo & Keeton,Lyndal & Schoer, Volker & Sitoe, Aldo.(2011).Workers' compensation, minimum wages and moral hazard scope:stylized considerations on a South African case.Occupational Health Southern Africa7.34

addressing compensation for work related injuries. My research departs from this thinking as this has caused more harm than good.

The discussions by these authors have pointed out the weaknesses of the 'no fault' system which has been the subject of abuse by employees who would even lie to receive compensation since negligence need not to be proved. The ripple effect would be an increase in moral hazards since workers' motivation to exercise care is diminished with increase in coverage.

It is important that a workmen compensation model that best suits the Kenyan jurisdiction be designed to manage the compensation framework that addresses the needs of all the stakeholders.

1.10 Scope, Limitations and Significance of the Study

The dilemma that the Act presents is whether its implementation is sustainable for a growing economy with an anticipated avalanche of work injury cases. As discussed earlier in the study, there are currently 13 field DOSH stations serving the densely populated areas in Kenya.[59] This means that employers and injured employees that are outside such stations must travel to the closest station to report their work-related incident. This presents a challenge to the study in that no data is recorded to give a clear picture of the extent of work injuries in a particular area. Without this information, there would be no justification to either create quasi-judicial tribunals for work related injuries or increase the number of DOSH stations in areas that have been overlooked.

[59]Supra, note 25

In addition, it would discourage the employer and employee to report the injuries due to the inconvenience of travelling to the nearest town that hosts the Director. Again, this hampers the discourse on the need to review WIBA as no accurate information is available to discredit its implementation.

Another limitation is that DOSH does not frequently update work injury data and surveys are not only conducted over a long period of time but also concentrated on a small sized sample of employees in a given industry as opposed to all work-related injuries in a given year. This risk conducting the research on outdated and inaccurate information that would otherwise defeat the purpose of the study.

It is also not clear how many cases have been dismissed at the magistrates' courts for lack of jurisdiction, and how the Director intends to allow the transition of these cases to DOSH even after the statutory limitation period to deal with such cases have elapsed as per the Act. There is unfortunately no research studies on this particular aspect neither is there direction on how the Director intends to deal with such cases.

Although DOSH lacks capacity to administer WIBA effectively, it does not require any resources to make it a mandatory requirement for employers within the jurisdiction of the 13 field stations and outstations, to file an annual report of work injury accidents and occupational diseases. This information would be used to determine the need for either additional DOSH stations or quasi-judicial tribunals within the country.

The annual report on work injury claims would also give a clear indication of which industry reports the most work injury claims and how to intensify training on occupational health and safety, to reduce the number of work injury claims.

1.11 Chapter Breakdown

This Thesis consists of well researched and in-depth content consisting of five chapters.

1.11.1 Chapter One

Gives an overview of the researched topic consisting of the introduction and background of the study, the Scope and Significance of the Study, Statement of the Problem, Research Objectives and Questions, Hypothesis, Justification and Significance of the study, Theoretical and Conceptual framework, Research Methodology, Literature Review and Scope, Limitation and Significance of the study.

1.11.2 Chapter Two

This chapter will discuss the historical aspect of workmen compensation and the introduction of a work injury benefits framework in Kenya. This chapter will also highlight the implication of the Work Injury Benefits Act in respect of the relevant stakeholders and provide the situational analysis of the workmen compensation regime.

1.11.3 Chapter Three

This chapter will highlight the policy framework of workmen compensation of the International Labour Organization vis a vis the adaptation of this framework in Kenya. This chapter will also discuss the workmen compensation models of two jurisdictions i.e UK and U.S. Employer responsibility and workers' compensation are combined in the United Kingdom. In the United Kingdom, employer responsibility is well

established, with compensation much exceeding that of the industrial injury system (the workers compensation component of the regime).[60]

Each state in the United States has its own workers' compensation legislation, with a state governing body in charge of supervising various public and private workers' compensation systems.[61]

1.11.4 Chapter Four

This chapter will analyze the decision of the Supreme Court of Kenya on WIBA confining the discussion to two aspects of the Act, namely; strict liability nature of the Act and the Director's role in ensuring access to justice for all stakeholders.

This chapter will also make a case for review of WIBA.

1.11.5 Chapter Five

This chapter will provide summary, conclusion and recommendations based on the whole study.

[60] Supra Note,34

[61] Aaron Larson, 'Workers' Compensation Laws and benefits by State,'Expert Law,April 11,2018

CHAPTER TWO

THE HISTORICAL BACKGROUND OF WORKMEN COMPENSATION IN KENYA

2.1 Introduction

The genesis of workmen compensation laws was as a result of a century agitation for reforms in the labour sector in Kenya. The discussion around labour laws can therefore not be wished away as workmen compensation was an ideology born out of the plight of Kenyan workers who suffered in the hands of colonialists.[62] The advancement of labour laws closely intertwined with the political, industrial and social development of the country. The agitation for reforms in the labour sector culminating in workmen compensation laws, happened in three stages: colonial period, post-independence period and post 2010constitutional dispensation period.[63]

In looking at these phases, the emergence of the Workmen Compensation Act(*repealed)* and that of WIBA will be comprehensively discussed. The implication of WIBA in respect of the relevant stakeholders will also be highlighted in this Chapter.

2.2 Colonial period

Kenya was declared part of the East African British Protectorate in 1895, and the campaign for change began then. By virtue of the 1897 Order in Council, all English laws became part of Kenyan law. The terms and conditions of employment in Kenya

[62] Kenya Human Rights Commission, '*Labour Rights Legal Framework in Kenya'*,(2019), p.2
[63] ibid

was supposed to be regulated by the Employment and Workmen's Act 1875 of England. The Act, on the other hand, was too advanced for the protectorate, according to the settlers who had begun settling in Kenya in 1902. Their reasoning was that labor in the protectorate was still in its infancy, necessitating the use of basic labor laws. The Master and Servant Ordinance of 1906 was enacted on this premise.[64] The purpose of the Ordinance was to provide a sufficient supply of low-cost labor to support the protectorate's new businesses. The Ordinance was thus created to defend the rights of British colonialists as masters by any means necessary, including harsh penalties, while providing minimal protection to employees of African heritage.[65] The Ordinance was the principal statute controlling the protectorate's labor market. The prescription of employee offenses, sanctions, and dispute resolution methods were among its main aspects. Employees were exposed to criminal consequences for carelessness or similar violations of contracts under the Ordinance, whilst employers were vulnerable to civil sanctions for breaches of contracts.[66]

The Ordinance remained in effect until 1925, when labor became a hot topic, causing the British government to revise labor regulations. Anti-slavery organizations and missionaries had begun to monitor the British territories at the time. Political activists, trade unions, and the International Labour Organization (ILO) all kept a careful eye on them. The International Confederation of Free Trade Unions began to apply pressure on the colonial authority to change its rules. The colonial authority, still favoring an

[64] Anderson M.D, '*Master and Servant Ordinance in Colonial Kenya*, 1895-1939,' The Journal of African History, Vol. 41, No. 3 (2000), p. 461 https://www.jstor.org/stable/183477
[65] ibid
[66] ibid,462

advantage for the European minority, placed high levies on Africans, forcing them to labor on settler farms.[67]

African laborers were driven to struggle for their rights due to their deplorable living conditions. Makhan Singh founded Kenya's first labor union, the Labour Trade Union of Kenya, in 1935 as a result of this.[68] In reaction, the colonial government passed the 1937 Trade Union Ordinance, which compelled trade unions and any other group claiming to carry out trade union activities to apply for registration or discontinue operations. Another discriminatory law was the requirement that union presidents be educated. This was done against a backdrop of widespread illiteracy among Africans. F.W. Carpenter, the acting labor commissioner at the time, announced that untrained laborers who lacked leadership and organization skills would not be allowed to form trade unions.[69] The growth of political groups hampered union development since they were seen as conduits for carrying out political activity.[70]

The 1944 ILO proclamation on the organization's objectives and purposes reaffirmed the essential nature of freedom of association for all people, regardless of race, color, or sex.[71] This aided the establishment and standing of trade unions such as the Federation of Kenya Employers and the Kenya Federation of Labour, which strengthened the demand for better working conditions for Africans. The labor department in Nairobi enacted the protective labor law for African employees as a

[67]Home R., '*Colonial Township Laws and Urban Governance in Kenya*' Journal of African Law, Vol. 56, No. 2 (2012), p.179 < https:// www.jstor.org/stable/pdf/41709959.pdf>
[68] Patel Z., '*Unquiet: The Life & Times of Makhan Singh*' Zand Graphics Limited (2006) pp. 58-59
[69] ibid,63
[70] ibid
[71] Supra, note 62, at p.3

result of the activity of these trade unions. This aided in the reduction of colonialists' inhumane treatment of Africans.[72]

The Kenyan governments, the Federation of Kenya Employers, and the Kenya Federation of Labour signed the Industrial Relations Charter in 1962. [73]Within the sphere of labor relations, the charter spelled forth the agreed-upon obligations of employer groups and unions. [74] This made it easier for trade unions to operate, which boosted the demand for enhanced worker welfare. [75]

2.3 Post Independence period

Various laws were passed in post-independence Kenya to regulate the labor market while preserving employees' welfare. Employment Act (Cap. 226), Regulation of Wages and Conditions of Employment Act (Cap. 229), Trade Unions Act (Cap. 233), Trade Disputes Act (Cap. 234), Workmen's Compensation Act (Cap. 236), and Factories Act (Cap. 237) are the legislation in question (Cap. 514). The provisions of these laws were modeled after those in place in England at the time. As a result, the rules had a colonial history that was incompatible with the post-independence Kenya labor market.[76]

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[72] Supra, note 64
[73] Supra, note 71
[74] ibid
[75] Chepkuto Paul et al., '*Labour Laws and Regulatory Practices in Kenya: An Analysis of the Trends and Dynamics*', International Journal of Research in Management Business Studies (April- June 2015) Vol. 2 Issue at p. 1
[76]International Labour Organization,'*National Labour Profile: Kenya*' (undated) https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158910/lang--en/index.htm

During the implementation of these legislation, a number of flaws were discovered. The power imbalance between employers and employees was one of the most apparent. Employer-friendly legislation were enacted to the disadvantage of employees. Furthermore, there were no provisions for regulating the informal sector, there was duplicity and overlapping in the existing legal framework, there was a contradiction in the jurisdiction of the Industrial Court, which was established in 1964, and the High Court, the Minister of Labour had excessive powers, and the laws lacked human rights-based approaches and were drafted in a complex and difficult-to-understand manner.[77]

The preceding, together with changes in the local work market, such as structural adjustments, economic liberalization, and technological innovation, necessitated a review of labor regulations.[78]

In May 2001, the Attorney General established a task team on labor reforms to study the labor law system and provide legislative suggestions. The government, the Federation of Kenya Employers (FKE), and the Central Organization of Trade Unions-Kenya were all represented (COTU-K). The task committee produced five pieces of proposed legislation that removed the previous labor laws. Employment Act, Labour Institutions Act, Labour Relations Act, Work Injury Benefits Act, and Occupational Safety and Health Act are among these pieces of law.[79] These bills

[77] ibid
[78] supra, note 69 at p.2
[79] supra, note 70

were given to the Attorney General in 2004, however they were a low priority for the government at the time.[80] It's worth mentioning that these legislations were passed just days before the 2007 national elections. COTU-threats to mobilize workers to vote against the ruling party if the legislation was not passed pushed the political elite to reorganize and adopt these measures. The legislations were rushed through by the few members of Parliament who were present at the time, with little inspection or discussion.[81]

2.4 The Post Constitution of Kenya 2010 period

Through its many provisions, Kenya's 2010 Constitution has strengthened the labor law system. The elevation of labor rights to constitutional status increased employees' respect, dignity, and protection. Article 25 on the right to a fair trial, Article 48 on access to justice, and Article 162(2)(a) on the formation of the Employment and Labour Relations Court, which has the standing of the High Court, are relevant provisions that will be explored in the following chapters in relation to WIBA.

2.5 Stakeholders Participation in the Implementation of WIBA

WIBA was created to ensure that employees were compensated for work-related injuries and illnesses suffered during their employment. The drafters of the Act anticipated three key stakeholders who without their participation would render the Act ineffective. These stakeholders are: employer, employee and the Director.

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[80] ibid

[81] Maema W., '*Current trends in Employment Dispute in Kenya: A disturbing Trajectory*' DLA Piper Africa (September 2016) at p.4 <http://www.ikm.co.ke/export/sites/ikm/news/articles/2016/downloads/IKM-Employment-update.pdf>

2.5.1 The Employer

The obligations of the employer in the implementation of WIBA is captured under part II of the Act. These are couched in mandatory terms so that all employers both in the informal and formal sector are compliant, to allow for compensation of the injured employee. The following are the obligations of the employer:

2.5.1.1 Employer to be insured

Under the Act, every employer is required to obtain and maintain insurance coverage for any obligation he or she may have to his or her employees.[82]However, this section was declared unconstitutional insofar as it provides for the Minister for Labour approval of an insurer.[83] The Minister for Labour, however, may exempt the employer from taking up insurance if the latter provides and maintains in force a security by a surety approved by the Minister.[84] Any employer who fails to insure against responsibility arising from work-related injuries commits an offence and is subject to a fine of not more than 100,000 shillings or to imprisonment for not more than three months, or both, and if convicted. [85]If the violation for which an employer has been convicted persists after the conviction, the employer is guilty of a new offense and liable to a fine of up to ten thousand shillings for each day the contravention continues. [86]

[82] Supra, note 9
[83] Supra, note 16
[84] WIBA,s7(2)
[85] ibid,s7(4)
[86] ibid,s7(5)

2.5.1.2 Registration of Employer

Every employer doing business in Kenya must register with the Director, provide the Director with the specified details of their business, and provide such details as the Director may demand within a time designated by the Director.[87] The aforementioned information must be provided individually for each company the employer conducts.[88] This is necessary so that the employer safeguards itself against liability for each entity it owns.

2.5.1.3 Employer to keep Records

An employer is required to retain a record of all of its workers' wages and other information, and to deliver the record upon demand by the Director.[89] The Director ensures that all employees are accounted for, for purposes of compensation under the Act. The record must be kept for at least six years following the last entry so that the Director may verify that the claims before it are not made by fictional individuals.[90]

2.5.1.4 Reporting of Accidents

After obtaining notification of an accident from an employee or learning that an employee has been wounded in an accident, an employer must report the accident to the Director within seven days. [91]In the compensation procedure, this is the first stage. The employer completes details of the accident, the occupation of the employee as well

[87] WIBA,s8(1)
[88] ibid,s8(2)
[89] WIBA,s9(1)
[90] ibid
[91] Supra, note 11

as the employee's earnings on Part I of the form referred to as DOSH/WIBA 1 or the LD104 form. Part II of the form is completed by the medical doctor who assessed the employee's injuries. The doctor evaluates the extent of temporary and permanent incapacity of the employee by awarding the number of days that the employee is likely to be absent from work and the degree or percentage of permanent incapacity that the employee has suffered as a result of the accident.[92]

2.5.2 The Employee

The employee has to fulfill some obligations to allow for compensation. These obligations are twofold. First, the employee must report the accident then he must submit to a medical examination which is the basis for calculation of the amount payable as compensation.

2.5.2.1 Reporting of Accidents

The employee must notify the employer about the accident in writing or verbally. In the event of a fatal accident, the employer is required to provide a copy of the notification to the Director within twenty-four hours after the incident. [93]While reporting the accident, the employee must also provide any further information or papers that the employer or Director may require. [94] The employee's claim shall then be submitted to the Director within seven days.[95] If in any event the claim for compensation is not lodged by the employee within one year after the date of the claim

[92] WIBA,First Schedule
[93] WIBA,s21
[94] ibid,s24(1)
[95] ibid,s24(2)

may not be considered under the Act if it is filed within twelve months of the date of death or if it is filed within twelve months of the date of death.[96]

2.5.2.2 The employee to submit to medical examination

Following the submission of the claim to the Director, the employee will be compelled to appear before the Director or his employer for an examination by a medical practitioner designated by the Director or employer. [97]The Director uses this as the foundation for calculating compensation for temporary whole or partial disability and permanent disability.

If the employee's injury is determined to be temporary total or partial disablement by a medical practitioner, the employee is entitled to a monthly payment equal to the employee's wages. [98]When an employee is getting full salary from his company, he is not entitled to a monthly payment. [99]If the employee was paid in full at the time of the temporary disability, the employee's monthly payment will be withheld so that he does not get more than he would have earned otherwise. [100]

If the employee is judged to have a permanent handicap after an evaluation, compensation will be computed on the basis of ninety-six months earnings minus the degree of disability.[101]

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[96] Supra,note 12
[97] ibid,s25(1)
[98] WIBA,s28(1)
[99] ibid,s28(4)
[100]ibid,s28(5)
[101]ibid,s30(1)

In the event that an employee dies as a consequence of an accident-related injury, compensation shall be provided to the employee's dependants in line with the requirements of the Act's Third Schedule. [102] Amounts may not be deducted from a dependent's compensation. [103]

2.5.3 The Director

The desire to address delayed compensation of employees and their dependants, is what brought about the office of the Director. After the employer and employee fulfill their mandate in the Act, the Director then becomes the umpire that oversees the compensation process as intended by the Act. The Director's mandate as a manager of the Act include:[104]

i. Registration of employers;
ii. Supervising the implementation of the Act;
iii. Ensuring that all employers insure their employees;
iv. Receiving reports of accidents and carrying out investigations into such accidents;
v. Ensuring that employees who are injured are compensated in accordance with the Act.

A claim for compensation is successfully lodged with the Director using DOSH/WIBA Form Part I and II. Part I is completed by the employer who gives full details of the

[102] ibid,s34(1)
[103] ibid,s34(2)
[104] WIBA,s53(2)

employee, their occupation, circumstances of the injuries and the gross salary. Part II of the form is completed by the medical examiner who assesses the nature and the extent of injuries of the employee. It is from the medical examiner's assessment that temporary total disablement and permanent disablement is determined. The Director then proceeds to calculate the award payable to the employee the basis of computation being the assessment by the medical examiner.

The award is noted on DOSH/WIBA Form 4, which is anticipated to be settled by the employer or insurance within ninety days of filing the claim. [105]The Director must then pay the money to the employee or dependants who made the claim within thirty days of receiving it. [106]An employer or insurer who fails to pay the compensation sought commits an offence and is punishable on conviction to a fine of not more than 500,000 shillings, or to imprisonment for not more than one year, or to both. [107]

2.5.3.1 Appealing against the Director's decision

In the event that either the employer or employee stands aggrieved by the Director's decision as far as compensation is concerned, either one of them has a right to lodge an objection with the Director within sixty days.[108] Regardless, the objection must be submitted in writing in the required form, with particulars providing a succinct account of the circumstances in which the objection is made, as well as the remedy or order that the objector seeks, or the matter that he wishes to be resolved.[109]

[105] ibid,s26(4)
[106]ibid,s26(5)
[107]ibid,s26(6)
[108] WIBA,s51(1)
[109] ibid,s51(2)

Within fourteen days of receiving an objection, the Director shall respond in writing to the objection, either varying or upholding his decision and providing reasons for the decision objected to and shall send a copy of the statement to any other person affected by the decision within the same period.[110]

If an objector is still dissatisfied by the Director's decision, he may file an appeal with the Industrial Court, now the Employment and Labour Relations Court (ELRC), within thirty days after the Director's reply.[111]

2.6 The Pressing Challenges and Gaps in WIBA

Despite the distinguished stakeholders of the Act working towards full implementation of the Act since 2007, its implementation is lacking in practice. For starters, the glaring gaps and challenges in the Act are so eminent that it did not gain momentum especially amongst employees who opted to file suit for recovery of damages in court, as a result of work-related injuries as they were guaranteed of awards higher than those assessed at the labour office. Although this aspect of the Act was settled by the Supreme Court,[112]there are many genuine cases that have been dismissed by the magistrates' courts whilst others have been held in abeyance awaiting further directions from the duty judges of the respective stations on how to proceed and others have been referred to the Director of Occupational Health and Safety out of time. To many employees who continue to suffer from the injuries sustained in the course of employment with no

[110] ibid,s52(1)
[111] ibid,s52(2)
[112] supra, note18

compensation facilitated under the Act and dismissals at the magistrates' courts, justice has been denied.

Secondly, lawyers who had studied closely the implementation of WIBA in practice saw glaring gaps as far as fair trial, access to justice and reasonable compensation of employees were concerned. Lawyers through their professional body LSK fought the Act's implementation from 2009 to 2019[113], when the Supreme Court put to an end ten years of gallant effort by the LSK to have certain provisions of the Act declared unconstitutional. Lawyers who play an important role in safeguarding the rights of all persons continue being locked out from the compensation process as the Act does not recognize their role in the process. Section 10 of the Act that gives character to WIBA as a strict liability legislation, denied lawyers the opportunity to defend the employer especially where the injuries suffered were as a result of fictitious or negligent claims by the employee. This section however has been declared unconstitutional by the Court of Appeal and upheld by the Supreme Court on appeal.[114] The effect of this would be that work related accidents can be challenged. However, since 2019, there has not been any direction on lawyers' involvement despite the section being declared unconstitutional.

In addition, section 16 of the Act does not allow an employee or his dependant to file suit for recovery of damages in respect of the work-related injuries. Consequently, no liability for compensation on the part of the employer would arise as a result of such an action except by way of the Act. This position by the Act denies justice to an

[113] supra, note 16 and18
[114] supra, note 17 and 18

employee or his dependants who may be aggrieved by an unreasonable award and can only address the same at the appeal stage before the ELRC. These awards only take into account the economic losses suffered by the employee as opposed to non-economic losses which include: pain and suffering, loss of consortium, loss of earning capacity *et al*. The awards at the Director of Occupational Health and Safety are certainly not representative of justice and fairness. On the other hand, the employer does not have to put up with court cases which are costly and time consuming and at times, faced with the challenge of availing witnesses, who may have transitioned from employment long before the hearing is commenced.

Thirdly, insurance companies and employers are not spared either. They have become victims of fictitious claims that could never pass the threshold for work related injuries but nonetheless have passed the threshold at the Director of Occupational Health and Safety pursuant to section 10(4) of the Act.[115] It would be an exercise in futility to challenge the Director's decision on this aspect, as the only requirement that needs to be proved is if the person being compensated is an employee.

Fourthly, compensation of these fictitious claims has resulted in an influx in cases at DOSH that has overwhelmed the already strained and underfunded stations, defeating the main mandate of the Director's office which was created to oversee the expeditious

[115] 'For the purposes of this Act, an occupational accident or disease resulting in serious disablement or death of an employee is deemed to have arisen out of and in the course of employment if the accident was due to an act done by the employee for the purpose of, in the interests of or in connection with, the business of the employer despite the fact that the employee was, at the time of the accident acting— (a) in contravention of any law or any instructions by or on behalf of his employer; or (b) without any instructions from his employer'

compensation of employees.[116] DOSH has 13 stations countrywide amongst an estimated working population of 18,142,700 both in the informal and formal sector as at December 2019.[117] These certainly cannot serve the injured population of workers who operate in the infrastructure and manufacturing industries that steadily grow with the economy. A solution therefore needs to be found to cater to the growing working population in terms of human resource and funding capacity of DOSH or in the alternative whilst increasing funding, appreciate transitioning of the office of the Director to suitable quasi-judicial tribunals within the sub counties.[118]

Appealing decisions from the Director is also not practical as the costs and time to do so by either the employer or the employee defeats the purpose of WIBA as a legislation that was enacted to facilitate expeditious compensation of employees and their dependants. Besides, since the ELRC shares equal status with the High Court, it would be expected that there would be a finding of both fact and law, in light of the court's discretionary powers. Such a decision will depart from the spirit and letter of the Act which for 14 years has sought to distinguish itself from a liability Act in addition to protecting the sanctity of structured compensation under the Act.

An influx in cases also meant a review of insurance rates of WIBA policies. The loss ratio of employers that had taken up WIBA policies became so high that some insurance companies not only considered increasing premiums for some employers but

[116] Ministry of Labour,(May,2012),*The National Occupational Safety and Health Policy*,at p.13

[117] CEIC,2019,*Kenya Employed Persons*,an ISI Emerging Markets Group Company.Available at https://www.ceicdata.com/en/indicator/kenya/employed-persons(Accessed: 14 March 2021)

[118] Supra,note 110

also booted out some as being 'high risk' businesses. With expensive insurance and a low penetration of just 2.37%[119] countrywide, convincing more employers, especially those in the informal sector, to take up insurance would be an uphill task.

2.7 Conclusion

The intention to enact a legislation that protected the welfare of the employee was noble and for a while the Act attempted to fulfill its purpose against a growing working population. However, as the working population grew, there was a need to evaluate the progress or lack thereof of WIBA as the existing legislation of workmen compensation. The Act certainly did not realize its full potential as the challenges and gaps therein hindered the Act's full implementation. These challenges and gaps can only be addressed by formulating a framework that responds best to all stakeholders including insurance companies and lawyers, whose participation has been overlooked since the enactment of the Act.

[119]Association of Kenya Insurers,2019,*Insurance Industry Annual Report*. Available at:https://www.akinsure.com/images/publications/AKI-Insurance-Industry-Annual-Report-2017---Final-Report-30.08.18.pdf.(Accessed: 14 March 2021)

CHAPTER THREE

LEGAL AND POLICY FRAMEWORK FOR WORKMEN COMPENSATION UNDER THE INTERNATIONAL LABOUR ORGANIZATION (ILO)

3.1 Introduction

The policy framework for workmen compensation at the International Labour Organization (ILO) was discussed during the General Conference convened at Geneva by the Governing Body of the ILO in its Seventh Session on 19th May 1925. On the 10th of June 1925, several ideas about workmen's compensation for accidents were accepted. These recommendations were enacted in the Workmen's Compensation (Accidents) Convention, 1925, an international treaty (No.17).[120]

Each ILO member that signed the Convention agreed to guarantee that workers who suffer personal damage as a result of an industrial accident, or their dependents, get paid on conditions that are at least equivalent to those set forth in the Convention.[121]

The compensation due to the wounded worker, or his relatives in the event of his death, was to be paid in installments, unless the competent authorities determined that it would be better spent in a single amount.[122]

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[120] www.ilo.org,'C017-Workmen's Compensation (Accidents) Convention, 1925(NO.17) https://www.ilo.org/global/lang--en/index.htm accessed on 28th July 2021
[121] Article 1, Workmen's Compensation (Accidents) Convention, 1925(NO.17)
[122] ibid,Article 5

In the event of incapacity, compensation had to be provided no later than the fifth day following the accident, regardless of whether the employer or the insurance company was responsible. [123]Additional compensation would be awarded if the damage resulted in incapacity to the point that the injured worker requires constant assistance from another person. [124]

The member states that ratified the Convention were to prescribe in their national laws and regulations the measures of supervision and methods of review that were necessary and in line with the Convention to prevent abuses and ensure that additional compensation was utilized for the intended purpose.[125]

In the event of insolvency of the employer or insurer, member states were to make legal provisions in their national laws that protected the workman's right to compensation in case of personal injury or to their dependents, in case of death.[126]

Kenya ratified the Workmen's Compensation (Accidents) Convention, 1925 (No.17) on 13thJanuary, 1964,[127] and the adaptation of the provisions of this Convention are evidently manifested in WIBA.

[123] ibid, Article 6
[124] ibid, Article 7
[125] ibid, Article 8
[126] ibid, Article 11
[127] Supra,note 114

In this chapter, it will be necessary to reflect on the provisions of WIBA vis a vis those in the Convention and contrast these provisions in our comparative analysis against the U.K and U.S as member states.

The contrast and comparative analysis will offer lessons to Kenya in unlocking the current deadlock in dealing with work injury claims with utmost fairness and justice.

3.2 The Adaptation of Workmen's Compensation (Accidents) Convention, 1925 (No.17) in WIBA

The provisions of the Convention that have dominantly featured in WIBA is on compensation of the injured worker and their dependants', in case of death.[128] The equivalent of these provisions under WIBA fall under sections 26,28,30 and 36, respectively.

Although the Convention has made a provision for member states to make exceptions in their national laws depending on the national circumstances of each member state, some provisions of the Convention strongly contrast with those in WIBA.

It will be necessary to highlight the provisions of the Convention that are replicated in WIBA whilst at the same time pointing out that which may appear to be impractical or different in Kenya's setting.

[128] Supra, note 115

3.2.1 Proper utilization of compensation money

The Convention provides for compensation to be paid to the injured worker or his dependants in the form of periodic payments if the injury results in permanent incapacity or death; provided, however, that it may be paid in a lump sum if the competent authority is satisfied that it will be properly utilized.[129]

Under WIBA, the Act has provided for control measures to be effected by the Director, to ensure that even in compensating the injured worker or his dependant, there is proper utilization of the payments by directing the following:

i. Compensation to be paid in installments or in any other manner that the Director deems appropriate to the employee or dependant of an employee;[130]
ii. Compensation should be invested or used to benefit the employee or the employee's dependents;[131]
iii. Compensation should be provided to the Public Trustee to be used for the benefit of a dead employee's dependents; [132]or
iv. Compensation be applied as specified in paragraphs (1), (2) and (3).[133]

[129] Supra, note 116
[130] WIBA, s36(1)(a)
[131] ibid,s36(1)(b)
[132] ibid, s36(1)(c)
[133] ibid, s36(1)(d)

3.2.2 Timelines for compensation

The Convention provides that compensation should be paid to the injured worker or the dependants within five days from the date of the accident.[134]

The provisions on the timelines for compensation under WIBA have taken into account possible delays in the reporting of the accident, treatment of the injured worker and assessment by the labour office.

The employer must give the Director notice of the accident within seven days of the date of the accident. [135]Following that, an employer must send the claim, medical report, or other document or information concerning the claim to the Director within seven days of receiving the claim, report, document, or information from the injured worker or dependent.[136]

The Director will have the claim assessed and an award under temporary total disablement and permanent disablement shall be preferred in favour of the injured worker and dependents'. The employer or insurer against whom a claim for compensation has been assessed is expected to settle the claim within ninety days from the date of the Director's award.[137]

[134] Supra note, 117
[135] Supra note,11
[136] Supra note, 89
[137] Supra note, 99

The employer or insurer will release the money to the Director who in turn should within thirty days of receipt of the money, pay to the injured worker or the dependants.[138]

It is evident from the foregoing that timelines for compensation in Kenya take into account obligations of the different stakeholders under WIBA, rendering it impractical to have compensation done within five days.

3.2.3 Future medical expenses

According to the Convention, a wounded worker has the right to have artificial limbs supplied and renewed by his or her employer or insurance. However, an award to the injured worker in a sum reflecting of the likely cost of the supply and renewal of such equipment, which is decided at the same time as the amount of compensation is resolved or updated, may be preferable.[139]

Although WIBA anticipates that an injured employee's disability may recur or the employee's health may deteriorate as a result of the accident causing the disability, the right to further medical aid terminates, if the employee is awarded compensation for permanent disability.[140]

The Act gives no room for future medical expenses which would have otherwise reduced the injured employee's disability. The one-off compensation is not sufficient

[138] Supra note, 100
[139] Article 10, Workmen's Compensation (Accidents) Convention, 1925(NO.17)
[140] WIBA,s 29(1)(c)

to cater for the injured employee's necessary medical needs as well as compensate him for pain and suffering.

3.2.4 Insolvency of the Employer or Insurer

The Convention had proposed that member states should pass national laws and regulations that made provisions for compensation of injured employees and in the case of the client's or insurer's insolvency, their dependents.[141]

WIBA does not anticipate that an employer or insurer can be declared insolvent hence incapable of compensating the injured employee or dependants. In such an event, Section 26(6)[142] of the Act cannot be operationalized as neither the employer nor insurer would be in a position to comply.

At this juncture, it would be necessary to study the workmen policy framework of two member states, that ratified the Convention, and how either or both can offer lessons that Kenya can adapt in its compensation model. The United Kingdom (UK) and the United States of America are the two member states (U.S). The United Kingdom has implemented a system that blends employer responsibility with workers' compensation. In the United Kingdom, employer responsibility is well established, with compensation much exceeding that of the industrial injury system (the workers compensation component of the regime). In the United States, on the other hand, each state has its

[141] Supra note, 120

[142] An employer or an insurer who fails to pay the compensation claimed under this subsection commits an offence and shall on conviction be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding one year or to both.

own set of workers' compensation rules, with a state governing body in charge of supervising various public and private workers' compensation systems.

3.3 Analysis of the United Kingdom and United States of America workmen compensation models

There are two primary approaches to compensating for occupational accidents. Client's Liability and Workers' Compensation are two of the approaches. These two approaches can be used separately or in tandem.

Workers' compensation schemes, as outlined in Chapter One, are designed to offer compensation without regard to blame. This implies that the wounded employee does not have to show that the employer was negligent or breached a legal obligation, and that his or her own responsibility is typically irrelevant, unless in the instance of deliberate misbehavior or self-inflicted injuries.[143]

Employer liability models, sometimes known as tort-based systems, differ significantly from worker's compensation models. If the wounded employee wants to get compensation under this type of compensation, he or she must prove legal culpability on the side of the employer. The employer is then responsible for paying compensation, albeit the risk may be passed to a liability insurance.[144]

[143] Supra note, 53
[144] ibid

Compensation for workplace injuries is given in the United Kingdom in part through an employers' liability system and in part through a workers' compensation plan.

In the U.S however, compensation for industrial injuries is provided through an exclusive worker's compensation scheme. This compensation model takes away the employee's rights to sue in tort and compensation is only limited to the worker's defined benefits such as medical aid, rehabilitation, lost earnings and funeral expenses and benefits for surviving dependants, in fatal cases.

From the analysis of these two member states, it will be possible to point out the wins and misses under WIBA and what would work best for Kenya.

3.3.1 United Kingdom (UK)

The worker's compensation component in the UK is realized through the Industrial Injuries Scheme (IIS). This is the state-funded workers' compensation system, which is part of the overall social security system. The Department for Work and Pensions is in charge of this program (DWP).[145]

Claims are filed with the DWP, and an officer assesses the claim without a hearing based on all of the information on paper, including advice from physicians who have received specific training in disability analysis.[146]

[145] Social Security Act 1973, s 94
[146] Richard Lewis,(2012). Employers' Liability and Workers' compensation: England and Wales at p.168

If the injured worker objects to the DWP's compensation award, he or she has the right to appeal the judgment to a First-tier Tribunal. This tribunal is made up of a legally trained judge and up to two other experts with financial, medical, or disability knowledge.[147]

If the injured employee is still unhappy with the First-tier Tribunal's decision on appeal, a further appeal may then lie to the Upper Tribunal. If leave is sought and obtained for a subsequent appeal, then the Court of Appeal may sit and determine against the decision of the Upper Tribunal.[148]

It is noteworthy that these tribunals are very different from the traditional courts as the services offered are free. The tribunals also offer a speedy and more informal system of justice, contrary to traditional courts. Lawyers in these tribunals are also much less common and their involvement only extends to legal aid for the injured employees. The process of appeal typically takes from three to eight months, and the hearing usually lasts less than an hour.[149]

An injured employee or their dependants, in the event of a fatal claim, may seek further compensation in addition to the benefits obtained from the IIS, by suing the employer in tort.[150] The employer is therefore required by law to insure against liability of employees injured in the course of their employment.[151]

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[147] ibid
[148] ibid
[149] ibid, at p.169
[150] ibid, at p.173
[151] Employers Liability (Compulsory Insurance) Act 1969 and the relevant regulations (SI 1998 No 2573)

The elements of liability that the employee or his dependants must prove in court for the employer to be held liable include[152]:

1. Vicarious Liability
2. Breach of Common Law duty
3. Breach of Statutory duty

Compensation in employers' liability cases are assessed in court the same way as any other type of personal injury and assessment is for both pecuniary and non-pecuniary losses resulting from injury or death.[153] This is in contrast with the worker's compensation component in respect of the same claim, where the injured employee or dependants only get benefits hence do not suffer pecuniary loss.

After compensation is awarded by court, the insurers who have insured the employer against liability of injured employees, will process the court award as routine insurance payments up to the employer's insurance policy limit.[154]

The insurer may also decide which elements of damages awarded by the court they are willing to accept and which they may contest on appeal.[155]

The downside of contesting damages is that the time taken to conclude the case is much longer than through IIS, which time averages between three and five years. The costs

[152] Supra note, 146 at p.175
[153] ibid,at p.184
[154] ibid, at p.195
[155] ibid, at p.188

involved are also excessive, as the insurer will incur legal costs on both sides i.e both claimant's and insurer's advocates costs[156].

The UK's model of compensation is applauded and frowned upon in equal measure. This is because both systems add to the complexity of the compensation structure in view of overlapping compensation by the IIS and the court, thereby inviting criticism that a wasteful system involving duplicate payments presently exists.[157]

3.3.2 United States of America (U.S)

The compensation model in the United States is based on an exclusive workers' compensation system. There are two parts to the workers' compensation system: Workers' compensation systems in the United States and in the state.[158]

The central tenet under both systems is that of no-fault. Therefore, employers participating in the systems have the notable benefit of not being sued by their injured employees.

The difference in operation of both systems however is that the Federal workers' compensation model is only restricted to civilian federal employees including employees from federal agencies, whilst the State workers' compensation model caters

[156] International Underwriting Association of London (fn 23) para 7.21.
[157] Supra note,146 at p.201
[158] Congressional Research Service,*Workers' Compensation:Overview and Issues,*CRS Report(February,2020),at p.5
https://crsreports.congress.gov (Accessed 21 August 2021)

to the rest of the civilian employees not employed by the federal government.[159] The State workers' compensation system therefore offers worker's compensation benefits for employees working for either public or private companies.

Although each system is administered differently, the common goal is to compensate injured employees expeditiously. It is therefore necessary to discuss the American structure of compensation and how it compares to the U.K model and what lessons, if any, they have to offer vis a vis the Kenyan system of compensation.

3.3.2.1 Federal Workers' Compensation System

Four comprehensive workers' compensation schemes are administered by the federal government. Two of the schemes offer limited benefits to people with certain medical problems who work in specific industries. [160]Legislation enacted under the following Acts makes the programs active. [161]

1. Federal Employees' Compensation Act
2. Longshore and Harbor Workers' Compensation Act
3. Black Lung Benefit
4. Energy Employees Occupational Illness Compensation Program Act

Workers' compensation for all federal civilian employees in the executive, legislative, and judicial branches of government is based on the Federal Employees' Compensation

[159] Erwin Mc cane & Daly, 'Federal v State Workers' Compensation,'EMD Law https://www.emdlaw.com/news/federal-versus-state-workers-compensation/Accessed on:22 August 2021)
[160] Supra note,158, at p.6
[161] ibid

Act (FECA). [162]The Office of Workers' Compensation Programs is in charge of this program, which is governed by the Department of Labor (OWCP). Compensation is provided from the federal government's general revenue to wounded employees and their dependents in the case of death. [163]

Employees' compensation for marine workers is based on the Longshore and Harbor Workers' Compensation Act (LHWCA). [164]Employers are obliged under the LHWCA to get workers' compensation insurance from carriers certified by the Department of Labor, or self-insure with Department of Labour permission, and pay benefits in accordance with the LHWCA legislation and regulations. [165]

Workers' compensation for coal miners who have developed black lung disease as a result of working in coal mines is based on the Black Lung Benefits program. [166]Claims are reimbursed by either the relevant coal companies' insurance or the Federal Black Lung Disability Trust Fund, which is funded by an excise charge on domestically produced coal.[167]

The Energy Employees Occupational Illness Compensation Program Act (EEOICPA) provides the legal foundation for workers' compensation for those who work on the creation, research, and testing of nuclear weapons. [168]The Department of Labour is in

[162] ibid
[163] Supra note, 153
[164] Supra note,158 at p.7
[165] ibid
[166] ibid
[167] ibid
[168] Supra note,158 at p.8

charge of processing claims, and payments are paid out of the federal government's general revenue.

If the injured employee or the dependants of a deceased employee are unhappy with the Office of Workers' Compensation Programs' decision, they have the right to appeal to the Employees' Compensation Appeals Board (ECAB), whose mission is to hear and decide appeals from the Office of Workers' Compensation Programs' determinations in claims of federal employees arising under the Federal Employees' Compensation Act (FECA)).[169]

3.3.2.2 State Workers' Compensation System

Under this system, every state has its own workers' compensation laws that vary somewhat from state to state. As a result, the national government has largely relinquished control over state workers' compensation programs.

It is noteworthy however, that all the states except for Texas, have passed legislation enacting a compulsory workers' compensation system.[170] The implication of this is that it is mandatory for employers in these states, to insure against liability for injuries or death caused in the course of employment.

The employers have four insurance arrangement options, depending on the state they are operating from. They include:[171]

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[169] U.S Department of Labor, 'Employees' Compensation Appeals Board'(August,2021) https://www.dol.gov/agencies/ecab/about/background(Accessed 29 August 2021)
[170] Supra note,154
[171] Supra note,158 at p.9

1. Insurance through an exclusive state fund,

2. Insurance through a competitive state fund,

3. Private insurance,

4. Self-insurance

For instance, the state of Ohio does not allow its employers to take out workmen compensation insurance from private insurance companies. The only workers' compensation insurance available in Ohio is from the state fund.[172]

In California, state funds operate in free markets, enabling companies to choose between commercial insurers and state funds for workers compensation insurance.[173]

There are no public funds in Florida, and workers' compensation is only available through private insurance.[174]

With the exception of North Dakota and Wyoming, all states enable firms with adequate means to self-insure for workers' compensation. The employer does not acquire insurance from a governmental fund or a commercial insurer under this arrangement, but instead has enough assets in reserve to pay any needed benefits. Self-

[172] Christopher F. McLaren, Marjorie L. Baldwin, and Leslie I. Boden, Workers' Compensation Benefits, Costs, and Coverage-2016 Data, National Academy of Social Insurance, October 2018, pp. 22-23, https://www.nasi.org/research/2018/report-workers%E2%80%99-compensation-benefits-costs-coverage- %E2%80%93-2016.
[173] ibid
[174] ibid

insured employers must be licensed by the state and may be required to post bonds to ensure that future payments are paid even if the employer is unable to pay or falls insolvent.[175]

The state workers' compensation system is administered by commissions or boards of the individual states, whose responsibility it is to ensure compliance with the workers' compensation state laws, investigate and decide disputed cases, and collect data on injury claims.[176]

In the event that an injured employee or dependants of a deceased employee are dissatisfied with the compensation award, they have the right to appeal. This process and the timelines vary by state by virtue of the different workers' compensation laws, but often involves a hearing before an administrative judge, preferred through the Department of Labour or State workers' compensation board.[177]

An appeal against the decision of the administrative judge lies before the Appellate Division of the State workers' compensation board whose mandate is to review the petition for reconsideration of the decision by the administrative judge and the

[175] Supra note, 158 at p.10
[176] Insurance Information Institute,May 2021,*Spotlight on:Workers Compensation* https://www.iii.org/article/spotlight-on-workers-compensation(Accessed 28 August 2021)
[177] Lauren Loeb, *Appellate*, State Board of Workers Compensation,Georgia https://sbwc.georgia.gov/divisions-offices(Accessed 29 August 2021)

regulation of the adjudication process by adopting rules of practice and procedure of the appeal.[178]

Workers' compensation is the only remedy available to American employees and their families for losses linked to covered injuries, illnesses, and fatalities, as shown in the preceding examination of the US compensation model. As a result, employees and their families are barred from suing their employers for any expenditures, including those not covered by workers' compensation or those connected to pain and suffering, or to seek punitive damages for covered injuries, illnesses, or deaths.

3.4 Lessons from the U.K and U.S workmen compensation models

The drafters of WIBA have to contend with the fact that their attempts to emulate international best practice compensation models brought forth more criticism than a sense of relief and justice to injured employees.

The ultimate goal for both the U.K and U.S workmen compensation models, was to ensure expeditious settlement of work injuries, death and occupational diseases through a ‘no fault’ system. This is with the exception of the U. K’s Employers Liability (Compulsory Insurance) Act 1969 which allows the employee to seek additional compensation over and above the ‘no fault’ system of compensation in a civil court. In Kenya, the ‘no fault’ system is provided under section 10(4) of WIBA but the same has since been found to be unconstitutional by the Supreme Court, in view of the

[178] ibid

adversarial nature of our legal system. The ‘no fault’ system of compensation, although a noble concept, was in favour of employees and left out aggrieved employers who would be forced to pay compensation even when the employee was to blame for their injuries. This caused a ripple effect of fictitious claims and high premiums on the part of the employer. The ‘no fault’ system therefore perpetuated injustice for the employer, the insurance companies and lawyers who were locked out of the system, perhaps the reason why the U.K enacted the Employers Liability (Compulsory Insurance) Act 1969.

The concept of insuring against liability for injuries or death of employees caused in the course of employment is the dominant requirement in all workmen compensation models. As discussed, both the U.K and U.S have enacted legislations that have made it a compulsory requirement for employers to insure against liability for injuries or death of their employees as a result of work-related injuries or occupational diseases.

Kenya has also made it a mandatory requirement under section 7 of WIBA. The goal is to not only ensure compensation of the injured employee, but also, protect the employer against debts and winding up of the company as a result of substantial compensation to the employees and their dependants.

Apart from workmen insurance, both the U.K and U.S have established workmen compensation programs through their governments and respective states, in the case of the U.S. These programs are largely funded from the general revenue of their

governments. This would be a noble idea for Kenya but in so far as increasing the budget for the office of the Director of Occupational Safety and Health Services and not necessarily having a parallel workmen compensation program through state funding and private insurance, respectively.

The Department for Work and Pension (DWP) in the U.K and the Office of the Workers' Compensation Programs (OWCP) as well as State Commissions and Boards for workmen compensation in the U.S, offer a striking similarity of roles as that of the Director of Occupational Safety and Health Services, in Kenya. Perhaps the thing that stands between the similarities in roles is that the Director has no capacity in terms of resources and geographical presence that would ensure efficient and smooth operations of the office. The timelines in roles such as investigation of work incidents upto the point of compensation have not been stipulated by WIBA bringing to question whether compensation is done expeditiously.

Both the U.K and U.S compensation models have appreciated the role of quasi-judicial tribunals as well as administrative judges in determining work injury cases. Their involvement is at the appeal stage, by the aggrieved employee and the general practice rules and costs that would have otherwise been a prominent feature in a civil court, is not a feature in these two jurisdictions save for court involvement in respect of the Employer's liability component of the workmen compensation model of the U.K.

The Kenyan situation is such that since section 10(4) of WIBA has since been found to be unconstitutional, the Director's administrative role in the Act should change to a quasi-judicial role. The current role of the office of the Director pursuant to a favourable amendment under WIBA should consider taking up the role in the form of a quasi-judicial tribunal but with original jurisdiction to hear and determine work injury accidents involving both the employer and employee in compliance with section 10 (4) of WIBA.

3.5 Conclusion

Although the U.K's enactment and implementation of the Employers Liability (Compulsory Insurance) Act 1969 appears to erode the principle by which workmen compensation models are founded, the same continues to exist harmoniously with the Industrial Injuries Scheme, as the other component of the U.K workmen compensation model of 'no fault'.

That said, U.K must have realized that an exclusive 'no fault' system would perpetuate injustice on the part of the employer and the repercussions would reverberate to the other players along the workmen compensation chain.

Kenya's intention of a workmen's compensation model under WIBA closely mirrors that of the U.K under the Employers Liability (Compulsory Insurance) Act 1969, in respect of determining the question of liability between the employer and employee. However, the point of departure is that civil courts lack jurisdiction to hear and

determine work injury claims under section 16 of WIBA unlike in the U.K. The mandate to determine work injury matters in Kenya lies with the Director of Occupational Health and Safety Services but the office is yet to demonstrate its ability to adjudicate on liability now that WIBA is no longer a 'no fault' Act.

It is therefore time for WIBA to embrace the role of a quasi-judicial tribunal to deal with the question of liability between the employer and employee whilst at the same time complying with section 16 of the Act. This will fast track compensation and reduce claim costs which would otherwise be higher when addressed in courts. Ultimately, fairness and justice for all the stakeholders involved in the workmen compensation chain shall be realized.

CHAPTER FOUR

ANALYSIS OF THE DECISION OF THE SUPREME COURT ON WIBA

4.1 Introduction

The Supreme Court decision on WIBA was a culmination of years of court battles between the Law Society of Kenya (LSK), the Attorney General (AG) and the Central Organization of Trade Unions (COTU), challenging the constitutionality of some provisions under WIBA.

LSK, was the Petitioner in the very first petition filed on 14th April 2008 before the High Court, challenging the constitutionality of WIBA under sections 7(1) and (2), 10(4), 16, 23(1), 52 (1) and (2) and 58(2), respectively.[179]LSK contested the validity of these provisions against the background of contravention of fundamental rights and freedoms under the repealed Constitution.

It was the Court's finding that Section 7(1) and (2) contravened Section 80 of the repealed Constitution and would limit the freedom of association.[180]

Section 10(4) was challenged on the grounds that it denied the employer's constitutional right to a fair trial under section 77(1) of the repealed constitution and perpetuated the employee's unlawful acquisition of property rights in violation of

[179] Supra, note 16
[180] ibid

section 75(1) of the repealed constitution by making an employer liable even when an employee was proven to be at fault.[181]

Section 16 prohibits an employee from bringing a lawsuit in court to obtain damages for injury and occupational diseases arising in the course of employment, was found to have contravened section 77(1) of the repealed constitution by denying the employee the right to a fair hearing.[182]

The court faulted section 23 (1) which granted unlimited powers to the Director to decide any claim or liability in relation to work injuries in contravention of section 60 of the repealed constitution. The court noted that the issue of liability was litigious in nature and therefore a judicial question to be decided through the courts.[183]

The court agreed with the Petitioner, that Section 52(1) and (2) amounted to discriminatory treatment and contravened section 82(1) of the repealed constitution as the objector was the only party allowed to file an appeal at the Employment and Labour relations court against the decision of the Director denying the other affected party, a corresponding right.[184]

[181] ibid
[182] ibid
[183] ibid
[184] ibid

Section 58(2) of the Act was found to be in contravention of section 75(1) of the repealed constitution on the basis of threatened property rights which were protected under the repealed constitution. The court observed that it would be scientifically impractical to convert cases that were filed either under common law or the Workmen Compensation Act (repealed) and reconcile them with an administrative system resting with the Director under WIBA. This was held to be tantamount to confiscation of property rights accrued through the due process of law.[185]

The AG, disgruntled by the Judgment of the High Court of 4th March 2009, by the then justice, J.B. Ojwang (Rtd), moved to appeal the decision at the Court of Appeal.[186] The Court of Appeal granted the appeal on November 17, 2017, overturning the High Court's rulings deeming Sections 7(1) and (2), 16, 23(1), 52(1) and (2), and 58(2) of WIBA to be incompatible with the abolished Constitution. It did, however, hold that Section 7 of the former Constitution, as well as Section 10 (4) of the current Constitution, were incompatible with both the repealed and current Constitutions.[187]

The Court had this to say as far as finding Section 7 to be inconsistent with the Constitution:[188] *"...Section 7 makes it mandatory for an employer to take out an insurance policy but the policy provider must be one approved by the Minister, unless the employer provides and maintains a security consisting of an undertaking by a surety approved by the Minister... Looking at it from an economic point of view, we*

[185] ibid
[186] Supra, note 17
[187] ibid
[188] ibid at p.9

think it is innovative and a good idea for the employer to take out insurance policy in respect of any liability that the employer may incur to employees for work-related injuries and diseases. Such a policy is intended to cushion the employer against loss that an employer may incur in the event of a liability that might threaten the risk of insolvency or bankruptcy. These can be avoided by making annual premium payments for coverage and have a predictable cost for handling the risk. It also protects the employer from potential compensation lawsuits and obligations, which might take years to resolve.

Further it ensures that employers are legally obligated to take reasonable care to ensure that their workplaces are safe and when accidents happen the insurance makes it easy for the injured employees to get medical care and compensation. All these find their place today in Articles 43(1) (e) (the right to social security and Article 46 (1) (c) and (d) (the right to the protection of health, safety and economic interests; right to compensation for loss or injury arising from defects in goods and services) ...

We do not, however, think that in a free-market economy the Government can dictate to employers from which insurer they must take the policy. We think there are sufficient regulatory measures under section 3 of the Insurance Act which establishes the Insurance Regulatory Authority (IRA) with the mandate of licensing, regulating, supervising and general administration of insurance companies' affairs. Of significance to us is the fact that, like the learned Judge, we are satisfied that the requirement that the insurer be approved by the Minister went against section 80 of the former Constitution, for such a requirement would limit the right to freedom of

association. The provision would also be in contravention of Article 36 of the current Constitution on freedom of association…"

The Court of Appeal also looked at section 10(4) of the Act, concluding that putting strict liability on the employer regardless of who was to blame for an employee's illness, sickness, or death was arbitrary and did not pass constitutional scrutiny under Article 47. In this scenario, if an employee is wounded or killed while engaged in intentional misbehavior or acting against his employer's orders, the employer should not be held accountable and should be entitled to claim illegality or contributory negligence as a defense.[189]

LSK, dissatisfied with the Court of Appeal's decision, appealed to the Supreme Court this time hoping to have those provisions that were set aside as being constitutional be found to be inconsistent with the provisions of the Constitution.[190] The Supreme Court analyzed each of the sections and discussed at length why they upheld the Court of Appeal's decision consequently finding WIBA consistent with the provisions of the Constitution giving the Act a clean bill of health.

Whilst we analyze the reasons for the Supreme Court to give WIBA a clean bill of health, two aspects of this decision may render the Act ineffective, and it may not hold

[189] ibid at p.10
[190] Supra, note 18

out for too long in its current form. We shall in brief discuss these reasons and bring to the fore why reviewing WIBA is imminent.

4.2 No action for recovery of damages in work related injuries and disease[191]

The Supreme Court noted that the purpose of section 16 of the WIBA was not to limit access to the courts, but to provide a legislative framework through which any claim by an employee under the Act would be subjected to review, initially, to a process of dispute resolution through the Director and thereafter, through an appeal mechanism to the Employment and Labour relations court (ELRC).[192]This section therefore cannot be read in isolation without reading section 23(1)[193] and section 52(1) [194]and (2)[195] of the Act. Besides, the intention of the Act was to compensate injured workers or their dependants without having to seek recourse under common law.

Whilst this was the vision for WIBA, most employees especially those in remote areas may not be in a position to access labour offices for compensation, as they have to travel long distances to the towns where they are situated. This is unlike civil courts which have been largely devolved within the 47 counties of the country with about 116

[191] Supra, note 22
[192] Supra, note 18 at page 10
[193] 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
[194]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
[195] An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such decision.

court stations currently. The number of civil courts outnumber that of labour offices which stand at 13. It is statistically impossible for injured employees throughout the country to be served by 13 labour office stations. It was understandably easier for employees to file suit for compensation in the civil courts, as opposed to claiming for compensation through the labour office hence why they overlooked this section.

Unfortunately, some courts are still allowing the filing of work injury matters in their registries.

Other courts have gone ahead to set down for hearing cases filed from 22nd May 2008 to 3rd December 2019 in the guise of the doctrine of legitimate expectation, despite the Supreme Court decision, that civil courts lack jurisdiction to hear and determine work related injury cases. This action has been perpetuated by a recent court decision by Justice Radido, who in pronouncing his judgment admittedly cautioned that his directive would throw tinder into already troubled oily waters.[196]

Perhaps the only way to cure this passionate debate is to encourage a more inclusive and efficient workmen compensation system throughout the country to deal with work injury matters as these cases found their way in court due to an inefficient workmen compensation system.

4.3 Inquiry by the Director[197]

The Supreme Court in upholding section 23(1) of WIBA as being consistent with the Constitution, analyzed the role of the Director as that of performing a quasi-judicial

[196] *West Kenya Sugar Co. Ltd vs Tito Lucheli Tangale (2021) eKLR*
[197] Supra, note 188

function which by dint of Article 165(b)[198] of the Constitution, is subject to the overriding authority of the High Court. The contention by LSK was that WIBA purported to arrogate judicial functions to the Director who is not a judicial officer and thus could not decide matters of judicial questions such as liability as envisaged by the Act.

Whilst noting the arguments by LSK, the Supreme Court in addressing the intentions of the Act observed that the office of the Director was administrative and focused on procedural justice rather than substantive justice which is the reserve for courts.

The administrative mechanism set out by the Act was meant to potentially address the problem of backlog of cases, enhance access to justice, encourage expeditious disposal of dispute, and lower the costs of accessing justice.[199]

However, the Director's role to make inquiries and investigate claims and liability is yet to be felt, as the question of liability is never determined by dint of section 10(4) of the Act even though the Supreme court found the latter to be inconsistent with Article 47 of the Constitution. The trend at the labour office is that once the prescribed forms for compensation have been completed, the Director will only assess the compensation award.

The process at the labour office is conclusive, and the employer does not have the platform to contest liability at the preliminary stage of reporting the accident.

[198] The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function

[199] Supra, note 18 at p.11

Currently, there is no full implementation of this section as it would have been expected that there would be proper record keeping of data information from the inquiries and investigations by the Director, of the number of accidents annually and what administrative action would be taken within a particular industry to avoid further occurrence of similar incidents. There is simply no added benefit if both the employer and employee are locked out of implementation of this section. The vision for WIBA is not realized by dint of inaction by the Director in the terms of section 23(1) of the Act.

4.4 Appeals[200]

The Supreme Court in upholding section 52(1) and (2) of WIBA as being consistent with the Constitution, observed that it was not the intention of Parliament to limit the right of reply to an objection as Kenya's dispute resolution mechanism is adversarial in nature. The court therefore ruled that it was a case of unrefined drafting and directed the AG to have the section amended accordingly.[201] The amendment is yet to be effected two years after the Supreme Court's judgment.

Without the amendment, the aggrieved party would not even be able to file their objection, as the Act specifically requires the same to be in the prescribed form. The sections in their current form is a gross violation of the aggrieved party's right to a fair hearing and access to justice. The reality is that the Director shall never receive an objection and without an objection, there shall not be any appeal before the

[200] Supra, note 189
[201] Supra, note 194

Employment and Labour relations court. It therefore means that both the employer and employee stand disenfranchised as far as their right to a fair hearing and access to justice.

4.5 Retrospective Application of WIBA[202]

The Supreme Court in upholding section 58(2)[203] of WIBA as being consistent with the Constitution, analyzed at length the principle of legitimate expectation to allow for a smooth transition of work injury claims from their previous legal regimes to WIBA.[204] The interpretation of legitimate expectation in the context of the Supreme Court judgment has been mutilated by both the magistrate courts and the Employment and Labour relations court for which work related injury cases have been filed after the enactment of WIBA in 2007. Some magistrates' courts and Employment and Labour relations court have gone ahead to give awards even when the Supreme Court decision had defined the extent to which these courts could consider the principle of legitimate expectation.

The Supreme Court confined its interpretation to work related injury cases filed in court before the enactment of WIBA, under the Workmen Compensation Act (repealed) regime or Common Law or both regimes.[205] The court had this to say[206]:

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[202] WIBA, s 58(2)
[203] 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
[204] Supra, note 18 at page 14
[205] ibid
[206] ibid

"*...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 58(2) aforesaid…"*

From the Supreme Court's interpretation of legitimate expectation, it is evident that the court wished to protect the vision for WIBA and its full implementation. The court even cautioned that the section required further consideration to ensure smooth transition to the Act from Workmen's Compensation Act.[207]

The transition may not be fully realized if the courts continue to misinterpret the principle of legitimate expectation by preferring the meaning that all work related injury cases in court filed before the Supreme court judgment ought to be heard and determined in the regimes they had been filed, in this case, common law.[208] Since such

[207] ibid
[208] Supra, note 191

cases have been illegitimately filed, it was incumbent upon the courts before which these cases have been filed, to refer them to the Director for compensation. The consideration to ensure smooth transition would have been a further amendment to the section allowing for only cases that were reported to the Director within the period prescribed, to lodge a claim for compensation in the terms of section 26(2) of WIBA.

It therefore follows that work injury related cases filed before the magistrate courts and appealed against before the Employment and Labour relations court without following due process as per WIBA, should be dismissed for lack of jurisdiction. However, this can only be possible if the terms for transfer of work-related injury cases are incorporated into the Act forcing the courts to comply and deter confusion that is attributable to the interpretation of the principle of legitimate expectation.

4.6 Strict Liability Compensation[209]

The Supreme Court in finding section 10(4) of WIBA unconstitutional and inconsistent with the Constitution, abandoned the 'no fault' system of compensation which has been the hallmark of most workmen compensation systems save for the UK workmen compensation system. Although the decision of the Supreme Court is sound and grounded on fair hearing and due process of law under an adversarial legal system, the deeming provision is the doctrine in which the whole statute is founded.

[209] Supra note, 8

Therefore, to find section 10(4) inconsistent with the Constitution is to find the entire Act unconstitutional, as the said section is non-severable from the Act.[210]

To paint an even clearer picture, since the employer has a right to defend himself against allegations of negligence by an employee, the Director would now be forced to critically assess the employee's contribution to his injuries or death, and all together subject the contribution to the assessed award. This shall take away the administrative role of the Director who would give conclusive awards without determining the issue of liability. The role of the Director shall then appear as that of a judicial officer with discretion to determine liability. This takes away the intention of WIBA as a benefits statute.

Currently, the Director carries out his mandate as though section 10(4) is still operational and does not allow the employer to put forth his defence. The Director's actions culminating in compensation of an employee are null and void by virtue of the unconstitutionality of section 10(4) and can be challenged in the High Court.

The only recourse at this stage is to cause an amendment to the said section by clearly stipulating that WIBA is no longer a 'no fault' statute to compel the Director to carry out his mandate as per the Act. This of course will trigger subsequent amendments to allow for inclusivity of all stakeholders.

[210] Supra note, 16 at p.11

4.7 The Implication of the Supreme Court Decision

The Honourable Judges of the Supreme Court, in unanimously upholding WIBA to be constitutional, would not have anticipated the confusion that followed their decision, in relation to work injury cases filed in the magistrates courts' after the enactment of WIBA in 2007.

For starters, it was not clear how work injury cases before the magistrates' courts would be dealt with considering the Supreme's court determination that pursuant to section 16 of WIBA, they lacked jurisdiction to hear and determine work injury cases. The Supreme Court in accentuating their position on the jurisdiction question, further referenced section 58(2) of the Act giving the magistrates' courts the go ahead to determine work injury cases that were filed before enactment of WIBA in 2007.

Most courts decided to seek their own interpretation of section 58(2) and have since rendered judgments in work injury cases as well as continue to hear work injury cases despite the Supreme Court judgment. A judgment rendered in favour of the employee would need to be settled by the employer through their insurance company. This has increased the number of work injury cases being settled by insurance companies post Supreme Court decision, thus increasing the claims loss ratio of the employer. This eventually will translate to higher premiums assessment of the employer to cushion the insurance company from making losses.

The employer's recourse through their insurance company in this case, would be to appeal against the judgments of the magistrates' courts. Taking a stand against the

magistrates' courts judgments as well as moving the courts by way of preliminary objection on jurisdiction of the courts to hear and determine work injury cases, would be the first step in highlighting the illegality of these magistrates' courts' decisions. This can however be successful if the insurance industry through Association of Kenya Insurers (AKI) speaks in one voice as well as seeks an audience with the Supreme Court for the clear interpretation of its decision. That way, the magistrates' courts' will be forced to comply with the apex court's final directive on the matter to have such cases before them dismissed.

Whilst it is frowned upon that some magistrates' courts are unlawfully delivering judgments in work injury cases when they have no business doing so, the drawbacks of the Supreme Court's decision in respect of lack of jurisdiction of magistrates' courts in work injury cases, can also not be ignored. Unfortunately, there are employees who had filed their work injury cases after the enactment of WIBA and their cases have since been dismissed by the courts, pursuant to the Supreme Court's decision that such matters ought to have been administered by the Director. These employees have been locked out from accessing compensation before the Director for being time barred. This is because the period within which an employee should claim for compensation under WIBA, is twelve months after the date of the accident, pursuant to section 26(1) of the Act.

The way forward would be, instead of the magistrates' courts perpetuating an illegality by hearing and determining work injury cases and in order to protect the interests of

employees who have been denied access to justice by the dismissals, it may be worth the consideration to pass an amendment under section 26 (1) and 58(2) of WIBA, allowing for the transition of such cases to the Director.

Secondly, now that WIBA was held to be a 'no fault' Act, it is unclear how the Director will adjudicate on liability, yet his role is largely administrative. It is inevitable that an amendment should be passed under section 23(1) and 53(2) of WIBA clearly stipulating the mode of assessment whilst taking into account the Director's role to adjudicate on liability between the parties, as well as the procedure and form in which an employer may challenge liability. Currently, the forms and procedure under WIBA only address the employee. An all-encompassing quasi-judicial tribunal that includes stakeholders, would be better placed to adjudicate on liability and decide on assessment of quantum having taken liability into account.

Thirdly, work injury claims reported after the decisions of both the Court of Appeal and Supreme Court are not being filed at the magistrates' courts. Those that have been filed after the fact, are being dismissed pursuant to section 16 and 58(2) of WIBA. The net effect of this is that the Director will experience an influx of work injury cases which he lacks the capacity to efficiently and expeditiously address. However, in order for the Director to achieve his implementation role in terms of section 53(2) of the Act, the conversations around the Act must now shift to capacity building.

Capacity building should include:

i. A total review of the labour process by allowing the Director to work with employers' representative (FKE), Occupational Health and Safety representatives', medical practitioners' and lawyers as a way of balancing the interests of both the employer and employee in the process.
ii. Enhancement of budgetary allocation for the Director by the Ministry of Labour, to fund the activities of the labour process
iii. Training of all the above-mentioned stakeholders in compliance with WIBA
iv. Increasing labour stations within the 47 counties of the country
v. Increasing occupational health and safety officers around the 47 counties of the country to enable prompt investigation of injuries
vi. Introduction of a data management system for all work-related injuries, diseases and death.
vii. Reviewing the subsidiary legislation of the Act in line with any preferred amendments
viii. Review of the compensation schedules to allow for rehabilitation of injured employees

4.8 Conclusion

It is evident from the analysis, that even though the Supreme Court gave WIBA a clean bill of health, the judgment has left a lot of unanswered legal questions.

The court admittedly acknowledged some inelegance in drafting of WIBA but nonetheless steered clear of giving ordinary meaning to the contested sections. The intention of the drafters of WIBA, instead, is what took center stage in the judgment,

ignoring the possibility that the Act may not be implemented in its original state, by finding section 10(4) unconstitutional and inconsistent with the provisions of the Constitution.

There needs to be further consideration in amending WIBA to review the current trend of compensation not only to be compliant with the findings of the Supreme Court, but also, allow for stakeholder involvement to end the impasse.

CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Summary

The vision for WIBA was a noble one and undeniably, a progressive statute in line with best international practices on workmen compensation.

However noble the intentions of the drafters of WIBA were, the study has revealed gaps in its implementation that should be addressed, by causing a review of the Act.

The Research objective and questions have highlighted both the legal and economic needs that ought to be addressed, to make WIBA a functional statute that will survive even in the coming years.

The workmen compensation system for Kenya should be unique to its workforce and not just an adoption of compensation systems and practices from different countries.

Whilst the UK workmen compensation system may closely mirror that of Kenya, there is need to appreciate that since civil courts in Kenya lack jurisdiction to adjudicate work related injury cases, then the next best thing for the country is to consider a quasi-judicial tribunal within the 47 counties of the country, to allow for implementation of the Supreme court directive, finding section 10(4) of WIBA unconstitutional.

This will pave the way for further review of the Act to allow for inclusion of all the stakeholders, efficiency, fairness, access to justice for all concerned parties and reasonable compensation.

5.2 Conclusion

There has been a lot of resistance in the implementation of WIBA from the time of enactment. The resistance must have been because the stakeholders felt that there was a lot to be desired in the Act that needed to be addressed. It has taken a Petition by LSK and subsequent appeals upto the Supreme court, to put to rest years of litigation.

Although the legal questions on the unconstitutionality of the Act have been addressed, there is a need to critically view the Act vis-à-vis our country's evolving economy.

The elephant in the room still remains and it can only be addressed by causing a review of WIBA. The successful review of the Act is however pegged on effective coordination of all the stakeholders and capacity building.

5.3 Recommendations

In line with the country's growing economy and an influx in work related injuries and diseases, the following are the recommendations that should be considered, whilst considering a review of WIBA:

5.3.1 Quasi-judicial tribunals for work related injuries and diseases

Since there are only 13 labour stations serving all employees in the country, there is a need to increase the number of stations to serve employees in all the 47 counties. Perhaps, the Ministry of Labour in collaboration with the County governments may put in place official labour stations in the sub-counties to address work related injury claims

in the respective sub-counties. This will solve the challenges of employers and injured employees having to travel to labour stations far away and incur costs to report accidents unnecessarily.

The labour stations will be the official sitting of the work injury tribunals with the Minister for the time being in charge of Labour, as the appointing authority. The composition of the tribunal should have at least 5 members with the Director of the sub-county serving as the Chairman, a representative of Federation of Kenya Employers (FKE), a representative of the Occupational Safety and Health Services, Medical practitioner and a lawyer. The tribunal could serve for a non-renewable term of three years.

The tribunal will be addressing issues of both liability and compensation, and each member shall uniquely contribute to the determination of assessment of both liability and compensation.

The Director and representative from the occupational safety and health services would be tasked with providing findings into the investigation of a claim and propose risk measures which they would thereafter follow up with the respective employer. The representative of FKE would stand in the gap of employers by noting the risk measures discussed in the tribunal and advising their members accordingly. This will promote collaborative trainings of their members with the department of occupational safety and health services.

The medical practitioner would assess injuries correctly and provide the degree of disability which would form a basis for calculation of compensation.

The lawyer would be best placed to analyze the findings of the investigation vis a vis the evidence adduced by both the employer and employee having been assisted by their legal representatives, to articulate their claim. The lawyer would therefore assist the tribunal come to a determination on liability.

Compensation would therefore be assessed on the basis of liability and assessment of injuries in line with proposed amendments on structured compensation that would allow for soft tissue and skeletal injuries as well as rehabilitation of the injured employee.

The decision of the tribunal may be appealed against by the aggrieved party, before the Employment and Labour relations court. The regulations on the prescribed procedure, forms and fees and specialized qualifications of the tribunal and their remuneration, shall be passed by the Minister for the time being in charge of Labour.

In comparison to an ordinary court, the tribunal would be better endowed in expertise and skill as the professionals would deliberate on every claim and arrive at a fair determination as opposed to an ordinary court which is clothed with discretionary powers hence may risk erroneous representation and interpretation of the facts presented to it.

Also, due to the informal processes at the tribunal, the timelines that would be taken to conclude a claim would be far much less than an ordinary court. Timelines must therefore be set and adhered to.

In addition, since the tribunal would be informal, the costs of the process would be restricted to minimal prescription fees paid by the employer and in the event either party would consider taking up legal representation, the Advocates fees would be borne by each party. This would certainly not be a costly process like that of an ordinary court which includes: filing fees, court adjournment fees, costs to parties in the event of an adjournment, and costs to the successful party in addition to Advocates fees.

5.3.2 Enhancement of Budgetary allocation by the Ministry of Labour

Since there is a growing need to address the influx of work-related injuries and diseases, more finances are required for funding the activities of the tribunal and facilitating the role of the Director in as far as ensuring compliance and enforcement of the Act.

An increase in the budget will also ensure that more safety officers are hired to investigate accident and occupational diseases claims and report the findings to the tribunal. The Director should follow up on any risk assessment measures proposed by the safety officer against an employer, so that future occurrence of similar incidents can be avoided. The safety officers will also be able to train all stakeholders on occupational health and safety to manage the influx of work-related injuries.

5.3.3 Introduction of a Data Management System for work related injuries

There is no updated data on work injury related claims by the Ministry of Labour through the Director. It is dire that a data management system is created and updated upon reporting of accidents to the Director. The database will help in the analysis of

the number of accidents reported annually and highlight the industry from which the accidents and diseases are rampant, for better administrative measures by the employer. The information would also help with budgetary planning and funding of the activities of the Director and tribunal in areas that have an influx in work related injuries and diseases. The data should also capture when compensation of the employee or dependant is effected by the insurer of the employer as per the orders of the tribunal.

5.3.4 Enforcement powers of the Director

Although criminal sanctions may be levied on a non-compliant employer, WIBA has not provided for the procedure of enforcing compensation of a non-compliant employer. Perhaps, there ought to be collaboration with the Insurance Regulatory Authority (IRA) where the Director can lodge a complaint with the regulator and disciplinary action can be taken against the defaulting insurance company in the form of hefty fines or withdrawal of operation licenses.

5.3.5 Timelines for investigations and compensation

WIBA does not provide a timeline for inquiries of work-related injuries and diseases by the Director. This may result in delay of compensation even where there is temporary disability. The timelines for investigations should be at least one month where the safety officer makes the necessary inquiries into the circumstances of the accident, full particulars of the injured employee and in the event of death, the full particulars of the dependants. The investigation report should be made available during the assessment for compensation at the tribunal and any risk assessment measures

proposed, be taken up by the Director as part of his role to enforce the operations of the Act.

The Act is also silent on the timelines within which a claim for liability and compensation ought to be determined. It only states that the employer should compensate the injured employee or dependants within ninety days from the date of the award. The timelines for compensation from the time of reporting the accident to that of assessment, should be within three months.

5.3.6 Review of the Subsidiary Legislation and Compensation schedule

Subsidiary legislation under WIBA is outdated and needs to be aligned with the provisions of WIBA. The Subsidiary Legislation makes reference to civil courts participating in work related injury cases contrary to section 16 of WIBA.

The compensation schedule also needs a review by taking into account that not all work-related injuries result in disability and those that do, require rehabilitation. Therefore, the degree of disability for soft tissue injuries and skeletal injuries should be specifically provided for. The Act only limits the degree of disability to loss of limbs, sight and hearing. Rehabilitation of injured employees ought to be considered to reduce the employee's disablement, so that they could go back to work. Most employees who have permanent disability are retired on medical grounds taking away their right to livelihood. Rehabilitation should be assessed at the same time as compensation and follow up by the employer should be done. Insurance companies may charge additional premiums to include rehabilitation as an extension to the work injury benefit policies.

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