IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MAKHANDIA & OUKO, JJ.A)

CIVIL APPEAL NO. 133 OF 2011

HON. ATTORNEY GENERAL……..APPELLANT

VERSUS

LAW SOCIETY OF KENYA……..…….1ST RESPONDENT

CENTRAL ORGANIZATION OF TRADE UNIONS…....2ND RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Ojwang, J, as he then was), dated 4th March, 2009

in

H.C. Petition 185 of 2008)

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JUDGMENT OF THE COURT

To understand the dispute that has given rise to this appeal, it is apposite to briefly outline the process leading to the enactment of the Work Injuries Benefits Act of 2007, (the Act), constitutionality of some of whose provisions are at the heart of the impugned decision of the High Court.

Pursuant to Gazette Notice No. 3204 of 16th May 2001, the appellant appointed a 7 member Task Force to examine and review all labour laws and make recommendations for appropriate legislative intervention to replace or amend the existing laws. The Task Force was initially slated to submit its report to the appellant by 31st December 2001 but that did not happen. The report was submitted three years later in April 2004, by which time the membership of the committee had grown to 17 persons. Interestingly, the report was signed by only 11of the 17 members. This report would form the basis of the enactment in 2007 of the Act. The Act was operationalized on 2nd June 2008 by Gazette Notice No. 60 of 23rd May, 2008.

Following the aforesaid operationalization, the 1st respondent filed a petition on 14th April, 2008 pursuant to **section 84** of the former Constitution and **Rule 12** of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 contesting the constitutional validity of various provisions of the Act.

Specifically, it contended that some nine sections of the Act offended various provisions of the Constitution in the following manner;

a) section 7(1) which compels an employer to obtain and maintain an insurance policy from an insurer approved by the Minister of Labour and Human Resource Development, in respect of such liability as an employer may incur towards employees; and subsection 4 that makes it a criminal offence to fail to obtain and maintain such an insurance cover were said to be contrary to **section 80(1)** of the former Constitution as they deprived the respondents' members of the freedom to take out insurance policies for their employees with any licensed insurance company of their choice; that the obligation imposed on the 1st respondent, to commit additional funds for obtaining and maintaining the insurance policy constitutes a taking of the petitioner's property, contrary to **section 75(1)** of the former Constitution; and that the criminal offence created by the Act is not a legitimate exercise of the State's police power.

b) section 10(4) of the Act creates liability on the part of an employer "without fault" even where the employee is demonstrated to be at fault; that the section purports to deprive the 1st respondent of its constitutional right to raise the defence that the incident arose from the employee's criminal actions, negligence, or from unauthorized activity; that it violates the employer's entitlement to fair trial in accordance with **section 77(1)** of the former Constitution; and that it authorizes unlawful acquisition of property, contrary to **section 75(1)** of the former Constitution.

c) Section 16 of the Act prevents an employee from instituting a court action for recovery of damages in respect of injuries arising from an accident or disease. The 1st respondent understood this to mean that all court actions which were pending hearing and/or delivery of judgment at the time of the passage of the Act would be adjourned generally and decrees from judgments already delivered could not be executed. As a result, its members whose legal practices depend wholly or substantially on personal injury claims, would be adversely affected.

d) Section of the Act requires an employee to bring to the attention of an employer and the Director of any occupational accident. **Section 21(1)** which was impugned by the learned Judge does not exist and was not among the sections challenged in the petition.

e) section 23(1) of the Act confers upon the Director of Occupational Safety and Health Services (the Director) the power to make decisions on any claim. In the 1st respondent's view this section seeks to divest judicial powers from the courts and confer them exclusively in the Director in contravention of **section 60** of the former Constitution. In the event an employer fails to provide particulars to the Director he would be liable to a criminal charge. These, the respondent claimed, undermined **sections 60, 77(9)** and **77(10)** of the former Constitution because judicial power rests with the courts of law, the Director is not "independent and impartial" arbiter.

f) section 52(1) and **(3)** of the Act requires the Director upon receipt of an objection to give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to. The objector is entitled to lodge an appeal to the Industrial Court against the decision of the Director with no corresponding right to the affected person. It was submitted that this amounts to discriminatory treatment contrary to **section 82(1**) of the former Constitution, and finally.

g) Section 58(2) of the Act requires that claims instituted prior to the commencement of the Act were deemed to have been lodged under the Act. The 1st respondent maintained that this provision seeks to take away the right to legal process, in respect of matters covered by the new statute as it seeks to convert suits pending in Court into claims under the Act in contravention of **section 75(1)** of the former Constitution to the extent that it purports to take away property rights, without due process.

For these reasons, the 1st respondent asked the High Court to declare that all the sections identified in the foregoing paragraphs to be inconsistent with the former Constitution, null and void.

The 2nd respondent applied by chamber summons on 30th April, 2008 to be admitted in the suit as an interested party on the basis that it had a public mandate to protect the interests of workers who may be affected by policy making and legislation. Consequently, the 2nd respondent persuaded the Court below that it had compelling case to make in respect of the Act. On the basis of this, the application for joinder was allowed.

The appellant on the other hand denied that the impugned sections of the Act are in violation of the Constitution and argued that they do not breach any of the individual rights enshrined in Chapter V of the former Constitution; that the laws in question are balanced and beneficial to both the employer and employees, in so far as they promote development that is consistent with the fundamental principles and rights at work; cultivate transparent and accountable governance in order to facilitate the expeditious and efficient resolution of labour disputes and minimize the risk of competition; foster accessibility of the labour laws to the social partners; promote freedom of association and the effective recognition of the right to collective bargaining; eliminate all forms of forced or compulsory labour; ensure the effective abolition of child labour; and ensure the elimination of discrimination in employment.

The learned Judge considered the evidence on record as well as submissions on behalf of the parties and observed as follows regarding the foregoing rebuttal;

"Whereas the petitioner has made specific challenges to the design of the Work Injury Benefits Act, 2007, the respondent, apart from challenging the competence and bona fides of the petitioner, has focused his case on the potential benefits of the new statute, of a general nature; and the interested party's position, too, has been founded on broad policy considerations……The burden of the submissions made by the Principal Litigation Counsel, Mr. Ombwayo, on behalf of the Attorney-General, is not so much a focused analysis and disproof of the constitutional arguments of the petitioner, but rather, a plea of the meritorious intentions, and about the substantial works which the State mounted, in the background to the drafting of the Work Injury Benefits Act, 2007."

On the substance of the petition the learned Judge came to this conclusion;

"On the basis of this assessment of the merits of the pleadings, the written and oral submissions, and the persuasive authorities noted, I find that the Work Injury Benefits Act, 2007 (Act No. 13 of 2007) failed to meet the professional standards of draftsmanship and scrutiny, and ended up in the statute book as an enactment that is inconsistent with certain provisions of the Constitution. The particular sections of the said Act which stand in contradiction to the Constitution are set out below, in the declaration which pronounces them to be null.

The petitioner asked that the entire statute be nullified, but the Court has no basis for so ordering, as the pleadings and the submissions were focused on particular provisions. Since, however, it is clear that the impugned statute has shortcomings of drafting, if it is to function as an integral law, then the Attorney-General, undoubtedly, will appreciate the need for a comprehensive drafting scrutiny and reformulation".

He proceeded to declare as inconsistent with the provisions of the Constitution **sections 4; 7(1) (2); 10(4); 16; 2(1); 23(1); 25(1) (3); 52(1)(2);** and **58(2)** of the Act. The appellant was condemned to pay the costs of the petition.

Aggrieved, the appellant has in this appeal challenged that decision arguing broadly that the learned Judge erred in law in declaring the nine sections of the Act inconsistent with the Constitution.

First, it was submitted that **section 7(1)** did not violate the rights of association and assembly; that it did not compel an employer to take out an insurance policy with a particular insurer but merely required the employer to take out a policy with one of the insurers approved by the Minister; that this was intended for the protection of the public from bogus insurers. The appellant relied on the Canadian Supreme Court decision of **R V. Big M Drug Mart Limited [1985] 1 S.C.R. 295** on the purpose and effect of determining constitutionality of a law and the mischief rule in the High Court case of **Republic V. Political Parties Tribunal and 2 Others,** Misc. Application No. 67 of 2015.

Secondly, the appellant contended that **section 10(4)** of the Act only enacts strict liability and cited the case of **Rylands V. Fletcher** (1861-73) All ER 1 as an instance; that the section does not amount to unlawful acquisition of private property. The appellant submitted that there was nothing unconstitutional with **section 16** since the right of access to courts may be limited by law. Counsel cited ***Halsbury's Laws of England,*** Volume 10, paragraph 319, which states that *'the subject's rights to access the courts may be taken away or restricted by statute.'* It further referred the court to ouster clauses that are permissible in law as was the case in the celebrated **Owners of Motor Vessel 'Lillian S' V Caltex Oil (Kenya)** KLR 1.

On the validity of **section 23(1)** of the Act, the appellant argued that in certain instances, like those in the present case, the courts may be divested of their authority through statutes.

On whether **section 53(2)** is contrary to the Constitution, the appellant insisted that there was nothing wrong with the provision which entitles an objector to lodge an appeal against the decision of the Director without a corresponding right since the law permits differential treatment. See **Kakuta Maimai Hamisi V Peris Tobiko and Others**, Civil Appeal No.154 of 2013.

The appellant further insisted that **section 58(2)** of the Act, which deems claims filed prior to the commencement of the Act to have been brought under the Act was in consonance with the law because a statute can operate retrospectively or retroactively. In particular, it was contended that the section did not deprive the respondents' members of the right to judicial process, rather, it merely provided another forum of dealing with insurance claims as was recognized by the Supreme Court in **Samwel Kamau Macharia and another V Kenya Commercial Bank Ltd and 2 Others,** S.C. Civil Application No. 2 of 2011.

The 1st respondent supported the conclusions reached by the learned Judge and was in agreement that since **section 7(1)** and **(2)** of the Act, confers upon the Minister an unbridled discretion to nominate the insurer the learned Judge properly found that it was in conflict with the constitutional right to freedom of association. It relied on the U.S Supreme Court case of **Kent V Dulles** 357 US 116 (1955) to reinforce this point. It was averred also that this amounts to taking the property of the employer. This was unacceptable and the statute would be voided for taking away property from an employer without due process as was held by the New York Court of Appeal in the case of **Earl Ives V South Buffalo Railway Company** 201 N.Y.271.

On **Section 10(4)** of the Act, the 1st respondent submitted that by virtue of this section, liability on the employer is presumed to have occurred regardless of the circumstances; notwithstanding that the employee was acting against the law. It also confers liability on the employer for injury caused through the employee's willful misconduct and eliminates any defence that the employer may have.

With regard to **sections 16** and **23** of the Act, the 1st respondent argued that the effect of these two sections is to extinguish the employee's right to file an action in law and purport to transfer judicial power to the Director.

On **section 52(1)** and **(2)** of the Act, the 1st respondent argued that it has the effect of having an objection by an aggrieved party heard without according the other person a similar opportunity to be heard contrary.

Finally, it was argued that **section 58(2)** of the Act seeks to convert suits pending in court to claims under the Act. It contended that many work injury cases had been lodged in the normal manner and were in various stages of the judicial process; that it would be an impossibility to transfer such suits to be claims under the Act since claimants would be non-suited and denied due process contrary to Article 50.

The 2nd Respondent did not file submissions but supported those of the appellant.

This is a first appeal and it is the duty of this Court imposed by law to evaluate afresh by way of a retrial the evidence recorded before the trial court in order for it to reach its own independent conclusion. See **Selle V Associated Motor Boat Co. Ltd** (1968) EA 123.

To determine whether there was justification to strike down parts of the Work Injuries Benefits Act, we must bear in mind the following principles.

To begin with **section 30** of the former Constitution vested legislative power in the Parliament, consisting of the President and the National Assembly. Although Parliament in discharging its legislative function is not subject to the direction or control of any other person or authority, **section 123(8)** of the former Constitution made it clear that that alone could not be construed as precluding a court of law from exercising jurisdiction in relation to any question whether Parliament had exercised those functions in accordance with the Constitution or any other law.

Secondly, at the heart of this appeal lies the construction of the former Constitution *vis a' vis* the nine impugned sections to ascertain whether they are in conflict or inconsistent with the former Constitution. It is important, as we do so, to also test those sections against the Constitution of Kenya, 2010, which was promulgated after the decision of the High Court in this matter to ensure that those provisions do not also offend the current constitutional order. The cardinal rule in construing a statute or a provision of a statute is to interrogate the intention expressed in the statute itself by the drafters. That intention must be determined by reference to the precise words used in the statute, their factual context, and, their aim and purpose, bearing in mind that each case must be resolved by reference to its particular factors. In other words, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. In the oft-cited Canadian Supreme Court decision in the **R V Big M Drug Mart Ltd,** [1985] 1 S.C.R. 295 this principle was enunciated as follows;

"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."

See also **The County Government of Nyeri & Anor. V. Cecilia Wangechi Ndungu,** Civil Appeal No. 2

of 2015. Therefore, every statute passed by the Legislature enjoys a rebuttable presumption of constitutionality as the Court of Appeal of Tanzania in **Ndyanabo V. Attorney General** [2001] 2 EA 485, noted;

"In interpreting the Constitution the court would be guided by the general principles that … there was a rebuttable presumption that legislation was constitutional, and…the onus of rebutting the presumption rested on those who challenged the legislation's status save that, where those who supported a restriction on a fundamental right relied on claw back or exclusion clause, the onus was on them to justify the restriction."

Section 3 of the former Constitution is our starting point in the determination of the question whether the learned Judge erred in declaring the impugned provisions of the Act offensive to and inconsistent with the Constitution, null and void. It stipulated that;

"**This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void".**

What Chief Justice John Marshall observed in 1803 on the supremacy of the American Constitution in **Marbury V. Madison**, 5 U.S. (1 Cranch) 137 (1803), appear to have informed the enactment of the above section 3. Those words, which we reproduce below, apply to date in many jurisdictions, including ours. He said;

"The Constitution is the fundamental and paramount law of the nation, and that it cannot be altered by an ordinary act of the legislature. Therefore, an act of the Legislature repugnant to the Constitution is void…It would be an absurdity to require the courts to apply a law that is void. Rather, it is the inherent duty of the courts to interpret and apply the Constitution, and to determine whether there is a conflict between a statute and the Constitution: It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each. So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply....."

The purpose for which the Act was enacted is expressed in its short title as;

"An Act of Parliament to provide for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes."

Going by Parliamentary Hansard record of 22nd May, 2007, we have no doubt that the purpose of enacting this law was noble. The then Minister for Labour and Human Resource Development Dr. Kulundu explained that, because the existing workmen's compensation Act, Cap 236 was outdated, having been enacted in 1948; that even with numerous amendments it remained deficient in many ways; that in order to introduce a legal framework which would be compliant with the International Labour

Organization (ILO) standards with regard to compensation of employees injured at work or who contract work-related diseases, safety and health, it was imperative to introduce the new law.

It was however challenged on the ground that some of the things it provides for were offensive to the former Constitution. It is important that we set out seriatim each of those impugned provisions to contextualize the decision of the High Court and our final opinion in this appeal.

We note first that the learned Judge invalidate section 4 which is a definition section of the word "*employer*". The petition did not cite section 4 among those it challenged. The learned Judge did not say how it was inconsistent with the former Constitution. We believe the learned Judge intended to annul sub-section (4) of **section 7**. He found **section 7(1) (2)** and **(4)** to be in conflict with **sections 75 (1)** and 80(1) of the former Constitution.

Section 7(1) (2) and **(4)** provide that;

"7 (1) Every employer shall obtain and maintain an insurance policy, with an insurer approved by the Minister in respect of any liability that the employer may incur under this Act to any of his employees.

(2) The Minister may exempt from the provisions of subsection (1), an employer who provides and maintains in force a security which complies with the requirements of subsection (3), and any exemption under subsection (3) shall continue in force only so long as the security is maintained.

……..

(4) Any employer who contravenes the provisions of subsection (1) commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding three months, or to both".(Our emphasis)

Section 10(4) relates to right to compensation and states that;

"10(4). 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". (Our emphasis).

Regarding legal remedies in respect of occupational accident, the Act provides

at section 16 that;

"No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death

of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death". (Our emphasis).

Although the Director has many overarching functions under the Act, in **section 23(1)** he is required;

"23(1) After having received notice of an accident or having learned that an employee has been injured in an accident the Director shall make such inquiries as are necessary to decide upon any claim or liability in accordance with this Act." (Our emphasis).

Section 25(1) and (3) on medical examination provides that;

"25(1) An employee who claims compensation or to whom compensation has been paid or is payable, shall when required by the Director or the employer as the case may be, after reasonable notice, submit himself at the time and place mentioned in the notice to an examination by the medical practitioner designated by the Director or the employer with the approval of the Director.

…….

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

We reproduce finally **sections 52(1) (2)** and **58(2).**

> **52. (1) The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.**

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

……...

"58 (1) Any regulation or other instrument made or issued under the Workmen's Compensation Act and having effect before the commencement of this Act shall continue to have effect as if such regulation or other instrument were made or issued under this Act.

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

Section 7(1) (2) above makes it mandatory for an employer to take out an insurance policy; that 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 to make good any failure by the employer to discharge any liability which the employer may incur under the Act to any of its employees up to an amount approved by the Minister. Looked at from an economic point we 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. It is beneficial to both the employers and employees. 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 assure that their workplaces are safe. And when accidents happen the insurance makes it easy for the injured employees to get medical care and compensation. If a worker is killed in the course of work, the insurance provides death benefits for the worker's dependents. 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).

Despite our view that the idea of workers' compensation insurance is a progressive step, 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. It cannot micro-manage the implementation of the Act. The Legislature having enacted the enabling laws, the role of the Executive is limited to ensuring compliance with the law. Presently, 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 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 complaint regarding **section 10 (4)** of the Act was that it imposed liability on the employer regardless of who was to blame for the injury, disease or death; that even where the employee was acting against the law or negligently or through willful misconduct including self-injury, the employer would still be deemed liable for the injury or death. In that sense it was contended that it offends the principle of *ex turpi causa non oritur action*, that no action may be founded on illegal or immoral conduct.Further, it was argued that, in breach of the due process of the law, the section eliminates any form of defence the employer may have.

If an employee is injured through willful misconduct or against the direction of the employer or in the course of committing a criminal act, the employer cannot be held liable and should be free to raise the defence of illegality or contributory negligence. We reiterate the words of Lord Mansfield CJ in **Holman v Johnson** (1775) 1 Cowp 341 that:

"… No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own standing or otherwise, the cause of action appears to arise *ex turpi causa* ["from an immoral cause"], or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff…"

In the circumstances of this appeal, strict liability in the **Rylands V. Fletcher** (supra) sense has no application. We reiterate the oft-cited passage in **Kiema Mutuku V. Kenya Cargo Hauling Services Ltd.** (1991) 2KAR 258, that;

"….there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence…."

Although the learned Judge found the section to be inconsistent with **section 77** of the former Constitution, for our part we think that was erroneous as that section dealt only with fair hearing of persons charged with a criminal offence. We nonetheless find that that **section 10(4) (a)** and **(b)** cannot pass muster under Article 47 as it is arbitrary in its terms.

The learned Judge invalidated **section 16** of the Act without specifying with which provision of the Constitution it was inconsistent. He merely opined that it offends the employer's guaranteed rights to due process of the law. The section is to the effect that no employee or his dependents can institute a court action against the employer to claim damages in respect of work-related accident or disease resulting in the disablement or death of such employee. The recourse provided for such an employee or his dependant is to notify the Director, who under **section 23(1)** of the Act shall upon receipt of the notice of the accident;

"(1)…… 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."

Section 16 as read with **section 23(1)** confer powers of adjudication of any claim for compensation arising from injury or death in the workplace upon the Director and expressly bars institution of court proceedings by the aggrieved employee.

However by section **51(1**) any person aggrieved by a decision of the Director may lodge an objection with the Director himself against his own decision. The Director is required to give a written answer, either varying or upholding his decision and giving reasons for the decision. Upon receipt of the answer the "*objector*" may appeal to the Industrial Court (now Employment and Labour Relations Court) against the decision.

The learned Judge found that the provisions offended the former Constitution for two reasons. That, by vesting in the Director alone unlimited powers of making inquiries and determining the question of liability and quantum of award of compensation, the section denies the employer the right to a fair hearing as the employer is "deemed" liable without being heard; that given the litigious nature of such claims, the only way to resolve them is through the court. Secondly he argued that **section 52(2)** is discriminatory as it creates an appellate locus for the "objector", in respect of the determinations of the Director but none for the affected party. In the learned Judge's opinion;

"……the said sections of the Work Injury Benefits Act, i.e. ss. 10 (4), 16, 23 (1) and 52 (1) lack professional draftsmanship, and, as they stand, offend against the employer's guaranteed rights to due process of the law."

We, on the other hand, do not find anything offensive of the Constitution or discriminatory in the provisions of **sections 16, 23** and **52(2).** Section 16 restricts claims for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of an employee to the procedure laid down under the Act. The Director, as we observed earlier has enormous adjudication powers from the point a report is filed, award of compensation through to a review of the decision.

It is now well settled on the authority of the Supreme Court in the decision of **Samuel Kamau Macharia & Another V. Kenya Commercial Bank Limited & 2 others,** S.C. Civil Application No. 2 of 2011, and in a long line of others, that a court's jurisdiction flows from either the Constitution or legislation or both; that it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law; and that jurisdiction goes to the very heart of the dispute and that it is equally accepted that;

"…….where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed".

See also **Speaker of the National Assembly V. James Njenga Karume,** Civil Application No. Nai. 92 of 1992. The jurisdiction donated to the Director is therefore not unique. In our view, it is lawful. The quarrel with **section 23,** according to the learned Judge is that it grants to the Director an unlimited judicial powers in "*making inquiries"* in relation to a work-related accident, and in making awards; that after receiving the complaint he alone is required to proceed to determine the question, and to resolve the claim on liability; that since personal injury and death in the workplace is, by nature so litigious, such a claim ought to go through a judicial process. For the same reasons we have given above in respect of **section 16,** we do not find anything in this section that is inconsistent with the Constitution. The powers of the Director are donated by statute and are legitimate. The exercise of that power is circumscribed and it is not arbitrary. For example the objective of the inquiry and investigation by Director is to verify the report in order to decide upon any claim or liability. The Director retains power to review his decision in the event a party is thereby aggrieved. There is even an appellate avenue to the Employment and Labour Relations Court.

Although the learned Judge invalidated **section 25** of the Act, the memorandum of appeal does not specifically state in what way the learned Judge erred. Likewise the parties in their submissions before us did not address this provision. The learned Judge himself did not give any reason for his action or the extent to which the section is inconsistent with the Constitution.

However in exercise of the powers of this Court, as a first appellate court we shall nonetheless consider the question whether **section 25(1)** and **(3)** conflict with the former Constitution. It states that:

"25(1) An employee who claims compensation or to whom compensation has been paid or is payable, shall when required by the Director or the employer as the case may be, after reasonable notice, submit himself at the time and place mentioned in the notice to an examination by the medical practitioner designated by the Director or the employer with the approval of the Director.

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

The concern raised in the petition was in relation to subsection (3), to the effect that before an employee can be paid compensation he has to undergo medical examination; that during such examination he would be entitled to have a medical practitioner of his choice present but at his own expense. Because under subsection (1) the employee is required to be examined by the medical practitioner designated by the Director or the employer with the approval of the Director, we hold that the section provides equality of arms for the employee by giving him the option to also have a medical practitioner of his choice present during examination. The subsection does not, in the result discriminate any party. It was in error therefore to strike it off for being in conflict with **section 82** of the former Constitution.

Sections 51 and **52** provide for an appellate system. By the former, any person aggrieved by a decision of the Director may lodge an objection with the Director against such decision. The Director after considering the objection must give a written answer to the objection. In the answer he can vary or uphold his decision. In either case he must give reasons for his decision. It is subsection (2) which allows the "*objector*" to appeal the decision of the Director to the Industrial Court.

The learned Judge found that the section was in conflict with section 82 of the former Constitution as, in

his view, it was discriminatory, giving the "*objector*" alone the right of appeal while no such right is extended to the party on the other side of the dispute. In the context of **section 51**, an objector is the party who challenges the Director's initial decision on liability and award of compensation. **Section 52** makes a presumption that it is the same "*objector*" who may still be aggrieved by the answer of the Director for him to seek the intervention of Employment and Labour Relations Court. It is our considered opinion that a party in whose favour the decision is made may sometimes still be dissatisfied with the award and may wish to challenge the Director's answer. However, this provision has the effect of only granting the right to appeal to an objector and not to the party on the opposite side or an affected person wishing to vary the award.

The learned Judge himself observed that the drafting of the Act was not elegant. We ourselves think that, in its context this is a pure drafting error and although it may convey the meaning the learned Judge assigned to it, applying legislative intent we cannot think of any reason why in an adversarial litigation only one party would have a right of appeal. We, however, do not think the subsection is thereby inconsistent with the former Constitution. It is an error that can easily be amended by Parliament.

The last impugned provision of the Act was **Section 58(2)** whose effect is that claims arising from an accident or disease occurring before the commencement of the Act would be deemed to have been lodged under the Act.

According to the learned Judge, existing claims pending before the courts of law at the commencement date of the Act which have not reached decree stage, the claimants would be non-suited. In which case they would be denied due process of law, which denial would amount, in some cases to a confiscation; that in those cases where a decree of the Court had been issued and conferred certain benefits upon the claimant this section has the effect of taking away the accrued property rights, which are protected under **section 75 (1)** of the former Constitution. As such and to the extent that **section 58 (1)** aforesaid purports to take that right away without compliance with the terms of the Constitution, it is inconsistent with the Constitution. We find, from the submissions of the respondents that at the commencement date of the Act there were before the courts, pending determination, several work- related accident claims brought under the repealed Workmen's Compensation Act (Cap. 236) or the common law.

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

"On the foregoing grounds, I will order that, pending the hearing and determination of the main cause, all pending litigation which had been commenced on the basis of either the Workmen's Compensation Act …. or of the common law, or of a combination of both regimes of law, shall continue to be prosecuted and, in a proper case, finalized on the basis of the operative law prior to the entry into force of the Work Injury Benefits Act, 2007…."

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

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

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

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

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

Similarly in terms of section 23 of the Interpretation and General Provisions Act, it is clear that where a written law partially or wholly repeals another written law, unless a contrary intention appears, the repeal cannot revive anything not in force or existing before the repeal or affect the previous operation of a repealed law in relation to interests, rights and or obligations enshrined under such law.

In the end, we allow the appeal to the extent that we set aside the learned Judge's orders declaring **sections 4, 16, 21 (1), 23(1), 25 (1) (3), 52 (1) (2)** and **58(2)** to be inconsistent with the former Constitution. The result is that only **sections 7** (in so far as it provides for the Minister's approval or exemption) and **10 (4)** are inconsistent with the former and current Constitution.

There will be no orders as to costs.

Dated and delivered at Nairobi this 17th Day of November, 2017.

P.N. WAKI

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JUDGE OF APPEAL

ASIKE–MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR