REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL PETITION NO. 196 OF 2018

IN THE MATTER OF: ARTICLES 1, 2 ,6, 10, 19, 20, 21, 22, 23, 24, 25,27,28, 40, 48,50, 52, 159, 160, 161, 162, 163, 164, 165, 169 (1), 169(2), 258,259 AND 260 OF THE CONSTITUTION OF KENYA 2010, THE 5TH SCHEDULE AND SECTION 7(1) OF SCHEDULE 6 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER: OF: THE VIOLAITON AND THREATENED VIOLATION OF ARTICLES 1, 2,6(3), 10,19,20,21,23,24,25, 27, 28, 40, 48, 50(1), 159, 160, 162, 165, 169(1), 169(2),258,259, 260 AND 261 OF THE CONSTITUTION OF KENYA, 2010, THE 5TH SCHEDULE AND SECTION 7(1) OF THE SCHEDULE 6 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE WORK INJURY BENEFITS ACT NO. 13 OF 2007, SECTION 10, 16, 23, 26, 28, 30, 33, 37, 51, 53 2(d), 53 2(e), 58(2) AND THE FIRST SCHEDULE

AND

IN THE MATTER OF: THE EMPLOYMENT ACT NO.11 OF 2007, SECTION 2 AND 87

AND

IN THE MATTER OF: THE LABOUR INSTITUTIONS ACT NO.12 OF 2007 SECTION 12 AND GAZETTE NOTICE NUMBER 9243 DATED 27THJULY, 2011 AND PRACTICE DIRECTIONS DATED 27TH JUNE, 2011 AS READ TOGETHER WITH SECTION 32(1) OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT NO.20 OF 2011

AND

IN THE MATTER OF: THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT NO. 20 OF 2011, SECTION1 (a) 4, 12, 22, 29,32(1) AND 35

AND

IN THE MATTER OF: THE MAGISTRATES COURT ACT NO. 26 OF 2015, SECTIONS 2, 3, 4, 7 AND 9 (b)

AND

IN THE MATTER OF: THE MAGISTRATES COURT JURISDICTION TO ADJUDICATE OVER AND DETERMINE INJURY AT PLACE OF WORK DISPUTES AND WHETHER THE DIRECTOR ESTABLISHED UNDER SECTION 53 OF THEIR WORK INJURY BENEFITS ACT NO. 13 OF 2007 AND THE LABOUR OFFICER ESTABLSIHED UNDER SECTION 2 AND 87 OF THE EMPLOYMENT ACT NO.11 OF 2007 CAN CONSTITUTIONALLY EXERCISE JUDICIAL POWER

BETWEEN

JUMA NYAMAWI NDUNGO..1ST PETITIONER

PETER LUNGWE SHALU...2ND PETITIONER

PATRICK KISALI ODANGA...3RD PETITIONER

JOHN OSORO OMAYO..4TH PETITIONER

SADIKI RAMADHAN MCHECHEMO...........................5TH PETITIONER

VERSUS

THE ATTORNEY GENERAL...RESPONDENT

AND

MOMBASA LAW SOCIETY...................................INTERESTED PARTY

JUDGMENT

The Petition

1. The Petition before the Court in the main, seeks to have a constitutional determination as to whether: -

(a) The Magistrates Court as by law established **post 2010 Constitution** can be divested of, that is deprived of jurisdiction to hear and determine matters of compensation to bodily harm arising from negligence and breach of duty at the work place, and a judicial award of damages.

(b) The Director or any other officer for that matter appointed by the executive under the **Work Injury Benefits Act No. 13 of 2007 (hereinafter referred to as "WIBA")** or any officer appointed by the executive under **Employment Act No. 11 of 2007** can constitutionally exercise judicial authority post the 2010 Constitution.

(c) The several sections of the WIBA subject of this petition are constitutional.

2. The Petitioners are Plaintiffs in various cases in the Magistrate's Court where they have lodged claims for injury at their respective places of work on 10th September, 2016, 28th August, 2015, 7th October, 2017, 31st October, 2016 and 8th August, 2015 respectively. While the cases were pending in Court, the Court of Appeal on 17th November, 2017 made a decision in **Attorney General vs. Law Society of Kenya & Another [2017] eKLR** where it held *inter alia*;-

"In the end we allow the appeal to the extent that we set aside the learned Judge orders declaring Section 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.

3. The Petitioners' case is that although the Court of Appeal in above matter had not made an interpretation based on the 2010 Constitution and neither had it decreed that the magistrate's court had no jurisdiction to deal with work injury claims based on the above provisions of **WIBA**, most magistrates have declined to proceed with the hearing of the work injury claims on the basis that the **Work Injury Benefits Act** divested them of the jurisdiction and this affected the hearing of Petitioners' cases and other cases countrywide where the courts downed their tools.

The History

4. The Petitioners aver that the messy situation they now find themselves in had its origin in the passages of the **Work Injury Benefits Act No. 13 of 2007** which commenced in 2007. After the passage of the Act the case of the **Law Society of Kenya vs. Attorney General [2009] eKLR** was lodged in the High Court as a Constitutional Petition challenging the constitutionality of various provisions viz a viz the repealed Kenyan Constitution. The same was heard on 4th March, 2009 and Justice Ojwang' (as he then was) declared Section 4, 7(1) (2), 10(4), 16(2) (1), 23(1), 25(1) (3), 52(1)(2) and 58(2) of the **WIBA** unconstitutional with respect to the former Constitution in force then. As a consequence, the subordinate courts continued handling work injury cases until the Court of Appeal by its decision of 17th November, 2017 referred to above overturned Justice Ojwang's Judgment aforesaid.

5. In the meantime, between the time when Justice Ojwang made his decision on 4th March, 2009 and 17th November, 2017 when the Court of Appeal decided the appeal, the 2010 Constitution was promulgated which fundamentally altered the structure of Kenya's jurisprudence, with profound impact on any legislation passed before it which was now required to be aligned to the new Constitution.

6. Being aggrieved by the alleged arbitrary stopping of their cases in the subordinate courts, the Petitioners have brought the current action alleging that the provisions of Sections 10, 16, 23, 26, 28, 30, 33, 37, 51, 53(2) (d), 53(2)(d), 58(2) and the first Schedule of the **WIBA** violate both the word and the spirit of provisions of Articles 1, 2, 6(3), 10, 19, 20, 21, 23, 24, 25, 27, 28, 40, 50(1), 159, 160, 162, 165, 169(1), 169(2), 258, 260, and 261 of the Fifth Schedule and Section 7(1) of Schedule 6 of the 2010 Constitution.

7. The Petitioners aver that net effect of the aforesaid decision is that the Magistrate's Court and in some instances the Employment and Labour Relations Court have: -

a) Refused to proceed with suits that are pending in court that involve injuries at place of work and have directed that the entity with jurisdiction to deal with such matters is the office of the director created under Section 53 of the WIBA pursuant to Sections 10 and 16 of the Said Act.

b) Stayed proceedings and stood over the matters generally

c) Given further mention dates to take direction

d) Dismissed matters filed in Court after the 17th November, 2017

e) Agreed to deal with matters filed before the close of day 17th November, 2017.

8. The Petitioners aver that the Constitution of Kenya 2010 at Article 159 provides that judicial authority is derived from the people and vests in and shall be exercised by the courts and tribunals established by or under the new Constitution. The Petitioners aver that the office of the Director created under Section 53 of the WIBA is neither a court nor a tribunal.

9. The Petitioners aver that in any event they lodged their claims pursuant to the subsisting law at the time, as the offending provisions of the WIBA had been declared unconstitutional between 2007 and November 2018 and that some claims predated the passage of the WIBA.

10. The Petitioners aver that under the legal regime that was in place before the WIBA and after its provisions were declared unconstitutional in 2007 upto 2017 when the Court of Appeal decision was made, the magistrate's court and the Employment and Labour Relations Court were deemed to have the jurisdiction to adjudicate over disputes of injuries at place of work both under the statute and common law. However, Section 58 of the WIBA now provides for retroactivity and states that any claim in respect of an accident or disease occurring before the commencement of the WIBA would be subject to the said Act. The Petitioners claim that

the net effect of that provision is to take away claims that have already accrued and been filed in court from the courts, meaning they have to be withdrawn and be filed afresh with the Director. Majority of the claims going back 11 years will then fail to the guillotine of one year Limitation provided under Section 26 of the WIBA. The Petitioners aver that in the intervening period between 2007 when the WIBA was passed and then stayed by the High Court, and subsequently major portion thereof declared unconstitutional, thousands of cases arising from injuries at place of work have been concluded by courts and new ones lodged, and the retroactivity application has the effect of undermining Article 159 of the Constitution of Kenya on substantive Justice and accrued property rights under Article 40 of the Constitution. Petitioners aver it is grossly unreasonable to expect that the thousands of cases before our courts arising from injuries at place of work be taken to the Director under WIBA by the court. Petitioners aver that the test of reasonability and substantive justice demand that what was done pursuant to the legal regime that subsisted at the time the claims were lodged in court be deemed as legal. Petitioners aver that the office of the Director as established under Section 53 of the WIBA has not been operationalized and no structure is created other than a provision under Section 53(3) that he shall be assisted by other officers as necessary without any qualification being provided nor the mode of the appointment of the Director of the Work Injury Benefits Act and such assistants. The Director of the Work Injury Benefits Act and those to assist him are on the face of it appointees of the executive arm of the government exercising executive authority and they are to double up as the authority to receive complaints, investigate them and ultimately adjudicate over them in breach of the Doctrine of separation of powers. There being no clear structure for establishment of the office of the Director under WIBA is a challenge to the litigants or claimants. The right of access to justice provided for under Article 48 of the Constitution is thus negated, unlike the magistrates courts that are everywhere in the corners of the Kenyan Republic. Petitioners aver that the provisions that declared that the cases of injury at the place of work be lodged with the Director of Work Injury Benefits Act are not in tandem with the right to fair hearing wherein every dispute is to be resolved by application of the law decided in a fair and public hearing before a court or if appropriate before another independent and impartial tribunal.

11. As to limitation, Petitioners state that Section 26 of WIBA provides that the limitation period of a cause of action is one (1) year from the date of accident unless a notice had been given to the Director under Section 21 of the Act. The impact of this is that the claims filed between 2007 and now are already over the limitation period and there was no Director to give notice to as the provisions had been stayed. This, Petitioners claim, amount to their property rights to the cause of action being taken away arbitrarily.

12. Another concern is that the WIBA at part **V** makes the earnings of an employee injured at the place of work an integral part of determining the compensation payable to the injured person. Petitioners aver and claim that the aforesaid negates the common law and general internationally accepted principle that similar injuries should attract more or less similar compensation for pain and suffering and the variation can only come in assessing the loss of earnings. Petitioners state that this further denigrates the right to be treated equally, fairly and equitably before the law, the right against discrimination and the right to human dignity. Petitioners refer to Articles 27 and 28 to support this claim.

13. Petitioners aver that pursuant to the provisions of the new Constitution at Article 261, the National Assembly in conformity with the 5th Schedule of the Constitution passed various legislations whose intent and purpose was to align the pre-existing laws with the provisions of the new constitution. Some of the legislation that were passed in fulfillment of that provision of the Constitution included *inter-a-lia* the following:

(i) **The Employment and Labour Relations Act, No. 20 of 2011**, as a successor to the **Industrial Court Act No. 2 of 2011**.

(ii) **Magistrate's Courts Act No. 26 of 2015**.

The **Employment & Labour Relations Court Act No. 20 of 2011** provided as here below under Section 12 (1):

12. Jurisdiction of the court

(1) the court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to in accordance with Article 162(2) of the constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including;-

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) disputes between an employer and a trade union;

(c) disputes between an employers' organization and a trade union's organization;

(d) disputes between trade unions;

(e) disputes between employer organizations;

(f) disputes between an employers' organization and a trade union;

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer's organization or a federation and a member thereof;

(i) disputes concerning the registration and election of trade union officials; and

(j) disputes relating to the registration and enforcement of collective agreements.

It further provided at Section 22:

22. Representation before the court

In any proceedings before the court or a subordinate Employment and Labour Relations Court, a party to the proceedings may act in person or be represented by an advocate, an office bearer or official of the party's trade union or employers' organization and, if the party is a juristic person, by a director or an employee especially authorized for that purpose.

The Act provides at Section 29:

29. Access to justice

(1) The court shall ensure reasonable, equitable and progressive access to the judicial services in all counties.

(2) For purposes of subsection (10, the Chief Justice may designate a judge in a county as a judge for the purposes of this Act.

(3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving employment and labour relations in respect of any area of the country.

(4) Subject to Article 169(2)(a) of the Constitution, the magistrates appointed under subsection (3) shall have jurisdiction and powers to handle;

(a) disputes relating to offences defined in any Act of Parliament dealing with employment and labour relations.

(b) any other dispute as may be designated in a Gazette notice by the Chief Justice on the advice of the Principal Judge.

14. Petitioners state that pursuant to the aforesaid provisions of the Law which the Court of Appeal declared Constitutional in the case of **Law Society of Kenya Nairobi Branch vs. Malindi Law Society & 6 Others Civil Appeal No. 287 of 2016** on 19th October 2017, the Chief Justice gazetted magistrates from the rank of Senior Resident Magistrates to handle work injury claims. The aforesaid provisions of Section 29 of the **Employment and Labour Relations Act** were passed in order to operationalize the constitutional provisions on access to justice. The said provisions of the said Section 29 of the said Act are consistent with the provisions of Section 17(2) of the WIBA and Section 87 of the Employment Act No. 11 of 2007 which envisage the court's jurisdiction. Petitioners state that the Employment and Labour Relations Act which was passed pursuant to Article 261 of the

Constitution provides at Section 35 that any other subsisting law relating to employment and labour relations would only be given effect subject to modification to conform with the Employment and Labour Relations Court Act. The Petitioners aver that its net effect was to do away with the authority of the Director to deal with personal injury claims at place of work under the WIBA and vest them in the courts.

15. Petitioners state that under the **Magistrate's Court Act 2015,** passed pursuant to Articles 23(2) and 169(1) (a) and (2) of the Constitution, the magistrates were *inter-a-lia* given the following jurisdiction by the Constitution: -

9. Claims in employment, labour relations claims; land and environment cases

A magistrate's court shall –

(a) in the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act (Cap. 12A) and subject to the pecuniary limits under Section 7(1), hear and determine claims relating to –

(i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(ii) compulsory acquisition of land;

(iii) land administration and management;

(iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(v) environment and land generally.

(b) in the exercise of the jurisdiction conferred upon it under Section 29 of the Industrial Court Act, 2011 (No. 20 of 2011) and subject to the pecuniary limits under Section 7(1), hear and determine claims relating to employment and labour relations.

16. The Employment Act No. 11 of 2007 which came into force after the WIBA provides at Section 87 as follows: -

87. Complaint and jurisdiction in cases of dispute between employers and employees

(1) Subject to the provisions of this Act whenever –

(a) an employer or employee neglects or refuses to fulfill a contract of service; or

(b) any question, difference or dispute arises as to the rights or liabilities of either party; or

(c) touching any misconduct, neglect or ill-treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.

(2) No court other than the Industrial court shall determine any complaint or suit referred to in subsection (1).

(3) This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute.

17. The Petitioners aver that these provisions give the Employment and Labour Relations Court and the labour officer jurisdiction to deal with disputes between employer and employees and it does not make it subject to WIBA.

<u>Matters complained of</u>

Arising from the above, Petitioners complain that:

- The provision of the WIBA that purport to vest judicial authority in the Director whose office is created under Section 53 of the WIBA, and who is neither a court nor a tribunal usurps judicial power from the judiciary contrary to Article 159 (1) of the constitution.
- The provisions of Section 10, 16 and 53 of the WIBA undermine a litigant's right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal.
- The provisions of Section 53 that give the "Director" who is an appointee of the Executive the right to receive complaints, investigate them and ultimately adjudicate over them and even receive appeals from dissatisfied parties is an affront to the Doctrine of Separation of powers that runs through the 2010 Constitution.
- The application of the WIBA on cases that have been pending in court before the Court of Appeal Judgment of November, 2017 that declared some of the provisions that had initially been declared unconstitutional goes against judicial wisdom that deems the legal regime that existed at a given time legitimacy in all actions done under it.
- The provision of the WIBA at part **V** which discriminates the right to compensation for pain and suffering on the basis of one's income are discriminatory, unequitable and undermine the human dignity of those with low income. The pain for the loss of a limb for everyone is the same and international good practices and principles provide that they should attract similar compensation regardless of class or background.
- There are accrued rights and expectations that have crystallized under the legal regime that existed before the Court of Appeal November 2017 Judgment, and this cannot be taken away without undermining the right to property.
- The magistrate's Courts are littered all over the Republic and have the relevant structures and manpower to handle the work injury claims. To purport to prefer that the work injury claims be lodged with the Director whose office has not been set up and lacks the relevant reach in the grassroots is an affront to the right of access to justice.
- To uplift the provisions of the statutes that existed before the passage of the new Constitution over the acts that were passed pursuant to Articles 261 and 262 of the Constitution, its fifth Schedule and Section 7(1) of the Sixth Schedule is to undermine those provisions of the Constitution and its spirit.
- The indicted provisions of the WIBA infringe on the constitutional provisions and undermine it and also infringe on the rights of the citizenry and or employees insured at their place of work.
- There is a confusion in judicial precedent between the statutes that existed prior to the new constitution and the ones that were passed pursuant to its provision to put it into effect.

<u>Constitutional provisions and freedoms infringed on</u>

Consequently, Petitioners state that their rights have been infringed on as follows:

- The provisions of Section 10, 16, 23, 26, 53 and 58 and the entire part IV and V and Section 53 of the WIBA to the extent that they place judicial authority in a body other than a court or a tribunal are *ultra vires* the word and spirit of Article 159 of the Constitution of Kenya 2010.
- The provisions of Section 10, 16, 23, 26 and 58 of the WIBA to the extent that they take away other accrued legal rights to compensation under the common law and statutes that precede the WIBA and provide for retroactivity are in violation of the right to property under Article 40 of the Constitution of Kenya.
- Article 48 of the Constitution of Kenya 2010 on the right of Access to justice is violated by restricting the parties' rights to pursue their claims in the magistrates' court and insisting that they ventilate their claim before a Director who is not in existence in practice and who lacks a structure that is devolved and does not have the kind of reach that the magistrate's Court have.
- Article 27 and 28 of the Constitution of Kenya 2010 that provide the right to equality, freedom from discrimination and the right to human dignity are violated by the provision of part V of the WIBA that make income a key consideration in making awards for pain and suffering negating internationally accepted principles and common law that similar injuries should attract similar awards.
- The provisions of Article 261 of the Constitution of Kenya 2010 and Schedule 6 Section 7 thereof are negated when the WIBA which preceded the passing of the new constitution is deemed to have greater force than the Magistrate's court Act No. 26 of 2015 and the Employment and Labour Relations Act No. 20 of 2011 which were passed to effectuate the 2010

Constitution.

Reliefs Sought

The Petitioners pray for the following orders:

(a) A declaration that Section 10, 16, 23, 26 and 53 and the entire part IV and V are ultra vires the constitution of Kenya and are null and void to the extent that they place judicial authority in an entity that not part of the judiciary.

(b) A declaration that Section 10, 16, 23, 26 and 53 and the entire part IV and V violate the doctrine of separation of powers.

(c) A declaration that the provisions of Section 10, 16, 23, 26 and 53 and the entire part IV and V violate the injured employee's right to a fair hearing as provided for under Article 50 of the Constitution of Kenya.

(d) That the provisions Section 10, 16, 23, 26 and 53 and 58 of the Work Injury Benefits Act No. 13 of 2007 violate the injured worker's right to property under Article 40 of the Constitution of Kenya.

(e) That the provisions of Section 10, 16, 23, 26 and 53 and the entire part IV and V of the Work Injury Benefits Act No. 13 of 2007 violate the right of access to justice and undermines the Doctrine of devolution.

(f) Part V of the Work Injury Benefits Act No. 13 of 2007 violates an injured employee right to equality, freedom from discrimination and the right to human dignity as provided under Article 27 and 28 of the Constitution of Kenya.

(g) A declaration that the provisions of the Employment and Labour Relations Act No. 20 of 2011 Section 12(a), 22, 29 and 35 and the Magistrate's Court Act Section 9(b) by dint of Article 261 (1) of the Constitution of Kenya 2010 and Section 7 of Schedule 6 of the Constitution of Kenya, override all provisions in the Work Injury Benefits Act No. 13 of 2007 that are in conflict with them.

(h) Costs.

The Response

18. The Attorney General, the Respondent herein, by way of response to the petition filed Grounds of Opposition on 14th January, 2019 raising the following grounds:

(a) That the legal dispute relating to the constitutionality of the Director of Work Injury henceforth established under the Provisions of Section 53 of the Work Injury Benefits Act No. 13 of 2007 was determined in **Civil Appeal No. 133 of 2011 Hon. Attorney General Versus Law Society of Kenya and Central Organization Of Trade Unions.**

(b) That this suit is an abuse of the court process since the aforesaid Judgment settled all the issues presently being raised in the current petition.

(c) The aforesaid action had been filed by the Law Society of Kenya (before devolution) and one of the issue for determination at 'No. (e) was Section 23(1) of the Act which 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 divert 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. This, the Respondent states clearly shows that the main issue in this petition was determined and the position of the Director declared constitutional.

(d) That this court should provide for the enhancement of the Office of the Director Work Injury Benefits as provided for in the Work Injury Benefits Act No. 13 of 2007 as a matter of urgency.

(e) That none of the Petitioners fundamental rights have been breached nor threatened with breach.

(f) That the drafts man issues/errors noted in the Work Injury Benefits Act No. 13 of 2007 can be dealt with through an amendment of the Act and not by a wholesome declaration of the same unconstitutional.

19. Further the Respondent filed a Replying Affidavit sworn on 24th January, 2018 by **Samuel Thuita**, Director of Work Injury Benefits and Occupational Safety and Health Service.

20. The Respondent's case is that the Work Injury Benefits Act came into force on 2nd June, 2008 and soon after, the Law Society of Kenya and others filed Petition No. 185 of 2008 in the High Court challenging some sections of the said Act to be unconstitutional. During the delivery of the Judgment of the said petition, Sections 4, 7, 10(4), 21(1), 23(1), 25(1) (3), 52(1) (2) and 58(2) were expunged. This information was communicated to the Office of the Attorney General and consequently Appeal No. 133 of 2011 was filed in the Court of Appeal. The Court of Appeal delivered Judgment in November, 2017 where 8 out of the 10 expunged Sections were re-instated. The Sections re-instated were 4, 21(1), 23(1), 25(1) (3), 52(1) (2) and 58(2). Section 7 and 10(4) were declared unconstitutional by the Court of Appeal.

21. The Respondent states that Section 23(1) of the Work Injury Benefits Act gives the Director the mandate of receiving notice of accidents, investigating and making formal decisions on disputed matters regarding Work Injury Benefits Compensation.

22. Under Section 51, any person aggrieved by a decision of the Director has a right to lodge an objection with the Director within 60 days.

23. Under Section 52(1), the Director is required to give a written answer to the objection varying or upholding his decision and giving reasons for the decision objected. This should be done within 14 days. Under Section 2(2), any objector who is not contented with the Director's reply has a right to appeal to the Employment and Labour Relations Court.

24. Section 53(1) of the Work Injury Benefits Act provides for the establishment of the Office of the Director of Work Injury Benefits and defines his functions. Section 2 of the Act defines Director to mean the Director of Occupational Safety and Health Services who is substantially appointed under Section 23 of the Occupational Safety and health Act, 2007. It is very clear under Section 52(2) that any person who is aggrieved by the Director's response after an objection of his decision has the right to appeal to the Employment and Labour Relations Court. The Director does not take away the jurisdiction of the Employment and Labour Relations Court rather the court provides a re-course for any person aggrieved by the Director's response to an objection.

25. The Respondent avers that since the provisions of Sections 23(1) and 53(1) regarding the mandate and appointment of the Director of Work Injury Benefits were upheld by the Court of Appeal in the Judgment in Civil Application No. 133 of 2011, they cannot be challenged in this Court.

Interim Proceedings

26. The matter first came to Court under certificate of urgency on 19th July, 2018 and was certified urgent for service to be heard inter partes on 24th July, 2018. On that day the Mombasa Law Society successfully applied to be joined to the petition as Interested Party.

27. On 24th July, 2018 the matter came for hearing inter partes. **Mr. MacMillan Jengo, Miss Pauline Osino** and **Miss Diana Munyingi** learned Counsel appeared for the Petitioners. **Mr. Wachira Nguyo** learned Counsel, appeared for the Attorney General while **Mr. Njoroge Mwangi** learned Counsel, appeared for the Interested Party.

28. Mr. Nguyo, learned counsel for the AG, on 24th July, 2018 submitted that he had considered the application and the petition, and he would not be opposing the application for conservatory orders prayed for in the application provided that the petition is heard and determined on priority basis. Pursuant to that submission from the Attorney General's representative, and given that the Attorney General is the only Respondent in the petition, the Court entered the following orders by consent:

1. The application dated 16th July, 2018 is allowed as prayed in the following terms:

That this honourable court be and is hereby pleased to issue a conservatory order in the form of a stay order staying the operation of the provisions of Section 16, 23, 53 (c) and 53 (d) of the Work Injury Benefits Act No. 13 of 2007 and to give an interim relief allowing all cases by any litigants in the magistrate's courts of the Republic of Kenya arising from injuries at place of work to proceed for hearing, mention and or any action in furtherance of their hearing and determination and or conclusion and enforcement of the Judgment delivered in the said cases pending the hearing and determination of the constitutional petition herein.

2. The parties to file their submissions to the petition. The Petitioners to do so within 14 days after responses are filed. All other persons to do so within 21 days of service by the Petitioners.

2a. The Respondent to file response within 14 days.

2. **The petition will be heard on 17th October, 2018.**

Submissions

29. Parties filed extensive submissions which were highlighted orally in Court.

Petitioners' and Interested Party's Submissions

30. The submissions by the Petitioner and those of the Interested Party addressed the same issues. Their submission is that in interpreting the Constitution, the Court should be guided by:

i) **Article 10 (1) (a) and (2)** which provides as follows:-

"(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

ii) Civil Appeal No. 287 of 2016-Nairobi Law Society of Kenya Nairobi Branch vs. Malindi Law Society & 6 Others [2017] eKLR, where the Court of Appeal also cited with approval the case of;

*"**Kigula and others vs. Attorney-General (2005) AHRLR 197 (UgCC 2005)**. In that case the court expressed the view that the Constitution is a living document, having a soul and a conscience of its own, and that courts must endeavor to avoid crippling it by construing it technically or in a narrow spirit but construe it with the lofty purposes for which its makers framed it. Okello, JA of the constitutional court of Uganda articulated the principles of constitutional interpretation in that case as follows: That the widest construction possible, in its context, should be given according to the ordinary meaning of the words used; that the entire constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other; that all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument; that a constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms are to be given a*

generous and purposive interpretation to realize the full benefit of the right guaranteed; and that in determining constitutionality both purpose and effect are relevant."

31. **Mr. Njoroge Mwangi** learned Counsel for the Mombasa Law Society, (the Interested Party herein) submitted that being a society contemplated under **Section 24 of the Law Society of Kenya Act No. 21 of 2014,** the Interested Party is aggrieved by the fact that owing to the lack of Constitutional determination as to the Constitutionality of the **Work Injury Benefits Act, No. 13 of 2007 (WIBA)** vis-a-vis the Constitution of Kenya, 2010 legal practice has been put into a limbo and a huge backlog of cases are piling up in court and outside court in that:-

a) Most Magistrate Courts are not proceeding with cases arising from negligence and breach of duty at the work place and;

b) All other causes of action that have arisen are also not being filed and thousands of such cases are pending.

32. The above position obtains when membership of the Interested Party believes that the Magistrates Courts are seized of jurisdiction and this is the legal advice that the Interested Party has communicated to their clients.

33. Mr. Mwangi submitted that to date, the provisions of **WIBA** have not been subjected to the constitutionality test in that there has never been any litigation about the constitutionality of **WIBA** against the spirit of the Constitution of Kenya, 2010 in that: -

a) Professor J. B. Ojwang, J, as he was then, in **High Court Petition No. 185 of 2008** filed on **14th April, 2008** stayed operation of various Sections of **WIBA** on **22nd May, 2008** and on 04th March, 2009 declared **Sections 4,7 (1) (2),10 (4), 16,21 (1), 23 (1), 25 (1) (3), 52 (1) (2) and 58(2) of WIBA null and devoid of the status of law** vis-à-vis the <u>former Constitution of Kenya.</u>

b) Aggrieved by the decision of the learned Judge, J. B. Ojwang, the Respondent in that Petition appealed to the Court of Appeal in **Civil Appeal No. 133 of 2011** and the Court of Appeal rendered its decision on 17th November, 2017 and declared **Sections 4, 16,21 (1), 23 (1), 25 (1) (3), 52 (1) (2) and 58(2) of WIBA** constitutional, viewed as against the retired Constitution. For clarity, counsel submitted to the Court a copy of the decision of the Court of Appeal with the reference to the former Constitution marked in yellow. For brevity, the relevant holding in that decision is reproduced hereto verbatim: -

"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 <u>the former Constitution</u>. 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 <u>the former and current Constitution</u>."

34. Counsel submitted that it should be noted that the constitutional petition filed against **WIBA** was pleaded as per the then existing Constitution. The parties in that Petition were only limited to what was pleaded and none of the parties referred in those pleadings to the 2010 Constitution, as the same had not been promulgated. *Counsel* refuted submissions by Mr. Nguyo that the Court of Appeal in **Civil Appeal No. 133 of 2011** subjected the provisions of **WIBA** to the 2010 Constitution. Counsel opined that any mention of the Constitution of Kenya, 2010 in the appellate decision was mainly orbiter as the High Court could not have been invited to subject **WIBA** to the yet to be born Constitution and that no valid appeal would arise from what was not canvassed in the High Court. For authority on pleadings, Counsel cited: -

(a) Civil Appeal No. 219 of 2013-Nairobi <u>Independent Electoral and Boundaries Commission & Another=vs=Stephen Mutinda Mule & 3 Others [2014] eKLR</u> where the Court of Appeal held that: -

"…that <u>parties are bound by their pleadings</u> <u>which in turn limits the issues upon which a trial court may pronounce.</u> The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her."

(b) <u>Adetoun Oladeji (Nig) Ltd vs. Nigeria Breweries PLC S.C. 91/2002</u> where the Nigerian Supreme Court held that: -

"….it is now <u>a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded</u>."

35. **Mr. McMillan Jengo**, learned Counsel for the Petitioners, submitting on the same issue, adopted Mr. Mwangi's submissions that the stalling litigation on the allegation that **WIBA** is constitutional vis-a vis the 2010 Constitution is a legal ruse, a misnomer and a legal miscalculation.

36. Mr. Jengo submitted that in Kenya's Constitutional jurisprudence, the issue of the constitutionality of a statute or statutory provision must in the first instance commence in the High Court. This was so held by the **Supreme Court** in ***Petition No. 5 OF 2013 - Raila Odinga vs. Iebc & 5 Others (Raila case)*** *as cited in* **Petition No. 471 of 2017 - Ekuru Aukot vs. Independent Electoral & Boundaries Commission & 3 Others [2017] eKLR** where the High Court cited with approval the decision of the Supreme Court which stated that: -

"…the Supreme Court has no original jurisdiction to interpret the constitution save as stated in Article 163 (3) and (6) and added that the petitioner ought to have approached the High Court under article 165 (3) (d)."

37. Mr. Jengo submitted that **WIBA** was only subjected to the test of constitutionality in **High Court Petition No. 185 Of 2008** which was only limited to the retired constitution. **WIBA** has never been subjected to the constitutionality test against the constitution of Kenya, 2010 other than by these proceedings. The reference to the 2010 Constitution in **Civil Appeal No. 133 Of 2011** was only but orbiter and this decision cannot in law be said to have subjected **WIBA** to the constitutional test.

38. Mr. Jengo submitted that in 2010, Kenyans exercising their sovereign power adopted and enacted **the Constitution of Kenya 2010** in which the sovereign power was vested in the people under **Article 1**. The said power was delegated to the judiciary and independent tribunals in **Articles 1 (3) (c)** and the Defence of the Constitution was granted to every person with an obligation to respect, uphold and defend **the Constitution in Article 3 (1).** Exercising their sovereign power, the people of Kenya enacted **Article 159 (1) of the Constitution of Kenya, 2010** which provide as follows: -

"Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution."

39. Counsel submitted that there is nothing in the former and retired Constitution that was akin to Article 159 (1). Whereas the former and retired constitution merely created the judicature under Chapter IV, the current Constitution is emphatic on where the judicial authority vests and by whom the said judicial authority is exercisable. Counsel submitted that a plain reading of **Chapter 10 of the 2010 Constitution** shows that the spirit and tenor of the Constitution is to jealously guard and protect the judicial authority from being exercised by any other person or body other than Courts and Tribunals established under the current Constitution. Viewed constitutionally, even parliament cannot donate judicial power to a non-judicial entity by legislation.

40. In line with above Mr. Jengo submitted that Work Injury cases, as known for ages, are disputes in the realm of Common Law and are usually based in tort and in breach of duty. In their very nature, the cases involve determination of pure points of law amongst them being:-

i) Determination of liability that may involve contribution and or indemnity and;

ii) Award of damages guided by pure points of law drawing from precedence and experience.

iii) The conduct of these kinds of cases in determining liability, contribution and or indemnity and thereafter quantum require adduction of evidence under oath.

iv) This process of handling these type of cases is at the heart and soul of judicial responsibility and this has been found so in various cases amongst them being **Civil Appeal No. 141 Of 2016 - Justus Mutiga & 2 Others vs. Law Society of Kenya & Another [2018] eKLR** where the Court of Appeal cited with approval the following cases: -

Telkom Kenya Limited vs. John Ochanda (Suing On His Own Behalf and On Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR where the Court of Appeal held that: -

"…<u>judicial function of assessment of damages is one the courts have long jealously guarded</u> for it <u>takes judicial wisdom, experience and consideration</u> to arrive at an <u>appropriate measure of damages</u>."

Kenya Revenue Authority vs. Menginya Salim Murgani [2010] eKLR where the Court of Appeal held that: -

"Both the award and level or quantum of damages is in our view judicial functions which the superior court cannot rightfully delegate… a judgment must be complete and conclusive when pronounced and therefore it cannot be left to the Deputy Registrar to perfect it. Assessment of damages is not a ministerial act as envisaged by Order 48 (currently Order 49) of the Civil Procedure Rules and a direction to 'assess' or 'calculate' damages would be contrary to the requirements of Order 20 (currently 21) of the Civil Procedure Rules because it would be incomplete without assessment and would patently be a nullity."

41. Counsel submitted that the **first Constitutional issue** and or question arising from the Petition that rends itself for resolution is this:

"Are the officers contemplated in WIBA clothed with Constitutional mandate to exercise judicial authority under Articles 159 (1) as read with Articles 1 (1) (2) and (3) (c), 160 and 161 of the Constitution of Kenya, 2010" In other words can the Director of Work Injury Benefits (DOWIB) or the Director of Occupational Safety and Health Services (DOSH) created under WIBA exercise judicial authority""

42. Counsel submitted that the answer would be a deafening no for the following reasons: -

(a) WIBA, under **Section 2** defines **"Director"** as **"Director of Occupational Safety and Health Services"** and though the Act uses the word **"Director"** in a few sections, **Section 53** of **WIBA** introduces another Director with statutory functions. For clarity, the Section provides as follows:-

"(1) There shall be a <u>Director of Work Injury Benefits</u> who shall be responsible for the <u>management of this Act.</u>

(2) The Director of Work Injury Benefits shall perform the following functions"

(a) register employers;

(b) supervise the implementation of this Act;

(c) ensure that all employers insure their employees;

(d) receive reports of accidents and <u>carry out investigations</u> into such accidents; and

(e) ensure that employees who are injured are *<u>compensated</u> in accordance with the provisions of this Act*"

43. Counsel submitted that it follows that the **WIBA** does not distinguish the **"Director of Occupational Safety and Health Services"** who has no statutory functions from the "**Director of Work Injury Benefits**" who has statutory functions and which Director is responsible for management of the Act. Consequently, **WIBA** is an Act managed by a Director; that is **Director of Work Injury Benefits.** Counsel submitted that this means that **WIBA** is anchored in the executive arm of the government. Counsel referred to **Sections 13, 14, 15, 16, 17, 18, 23, 26, 27, 28, 30, 33, 37, 40, 51, 53 (d) and (e), 56 (1) and 58 (2)** of **WIBA** which donate powers to the Minister of the Government, a member of the executive to make regulations for the purpose of giving better effect to the provisions of **WIBA.** The term Minister is defined in **Section 2** of **WIBA** to mean the Minister for the time being responsible for Labour matters. Counsel submitted that the three implementers of **WIBA**, that is the **Director of Occupational Safety and Health Services**, and or **Director of Work Injury Benefits** and the **Minister of Government responsible for Labour matters** are employees of the executive branch of the government or put differently, neither the Directors contemplated in **WIBA** nor the Minister of Government are judicial officers employed by the Judicial Service Commission created under **Part 4 of the Constitution of Kenya 2010 that is in Articles 171, 172 and 173.** Further, counsel submitted that a reading of **WIBA** discloses that it does not in all its sections create a Tribunal as contemplated by **Article 1 (3) (c)** as read with **Article 159 (1) of the Constitution.** This means that none of the officers contemplated in **WIBA** can exercise judicial authority. The Act vests judicial functions to the Director and to the Minister, examples being **Sections 13, 16, 23, 26, 3 (b), 30 (4), 36 (a), 37, 51, 52** and **55** amongst others. Contrary to **Articles 1(3) (c), 159 (1), 160 (1), 161 (1) and 162 of the Constitution of Kenya, 2010.** Counsel submitted that to the extent that **WIBA c**onfers judicial functions to members of the executive and to the extent that the members of

the executive are required to perform judicial functions, then the entire Act is **unconstitutional.**

44. Mr. Mwangi added that Kenya's legal system and jurisprudence embodies the common law, principle of tort, breach of duty, negligence and so on. These are all legal issues whose determination call for adduction of evidence under oath to determine fault, that is liability and any contribution arising therefrom. Inevitably, an issue of third party proceedings and indemnity may arise. These are all judicial functions. In determining compensation for injury arising from the Work Place, the issues to be determined are all judicial. This includes an award of damages which is still a judicial function. See **Kiema Mutuku vs. Kenya Cargo Hauling Services Limited [1991] 2KAR 258** where the Court of Appeal held as follows: -

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

45. The above position was judiciously addressed earlier in **Holman vs. Johnson (1775) 1 Cowp 341** where Lord Mansfield CJ held 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…"

46. Mr. Mwangi submitted that **WIBA** cannot lawfully create strict liability and all cases arising from negligence, breach of duty and other torts must be judiciously tried by the Courts for determination of liability; after which the Courts shall again hear evidence and or submissions to make an award on quantum. As such, **Section 10 (4)** of **WIBA** is unconstitutional, contrary to public policy and Kenya's legal system and is null and void.

47. **Ms. Pauline Osino**, learned Counsel for the Petitioners addressed the court on what Counsel said was the **second Constitutional issue** that renders itself for determination as follows: -

"Does WIBA as a whole, base its compensation regime on a no fault system and structured compensation" If Yes, is it NOT unconstitutional for being inimical to Articles 27, 41 (1), 48 and 50""

Counsel referred to **Section 30** of **WIBA** provides as follows: -

"(1) Compensation for permanent disablement shall be calculated on the basis of ninety six months earnings subject to the minimum and maximum amounts determined by the Minister, after consultation with the Board, and set out in the Third Schedule.

(2) If an employee has sustained an injury specified in the first column of the First Schedule, the employee shall for the purposes of this Act, be deemed to be permanently disabled to the degree set out in the second column of the First Schedule.

(3) If an employee sustains an injury not specified in the First Schedule which leads to permanent disablement, the employee shall be paid such percentage of disablement in respect thereof as in the opinion of a medical doctor will not lead to a result contrary to the guidelines of the First Schedule…"

48. Counsel submitted that a reading of **Section 30** together with **the First Schedule** introduces in the Act structured compensation. Ms. Osino submitted that the architecture of structured compensation was declared unconstitutional by the **High Court in Petition No. 148 Of 2014** where Onguto J, on **5th April, 2016** held as follows: -

"With regard to the constitutionality of the Schedule to the Amendment Act, the argument must certainly be different. The Schedule does not appear to be for general guidance even for the insurer and courts. It is not about strict liability. It is a case of the court being left to determine liability and then the insurer determining what amount to pay for each injury suffered and payable under the Kshs. 3,000,000/= limit through the Schedule. The amount payable is actually capped and this may lead to a defeat of the intention of the statute altogether. The purpose of the statute, being the Principal Act in general must not be ignored. The purpose as can be gleaned from history was to ensure that the security of a person as to his physical and

bodily integrity is not compromised. The State sought to ameliorate the quandary of victims rendered helpless by motor vehicle accidents and who ordinarily ended up not being compensated by careless or negligent drivers who were impecunious. It ought to be appreciated that under the Constitution, the State ensures that the dignity and security of a person as guaranteed under Articles 28 and 29 are protected both through criminal sanctions as well as through other measures. Such measures may be taken to include the compulsory third party insurance schemes and covers. Where again the State through statute seeks to limit the level of compensation, then it would be right to conclude that the right to bodily integrity is under threat of being taken away. The Schedule actually seeks to limit the amount payable under the insurance cover by the insurer. On the other hand, in so far as the amendments to the Principal Act seek to cap and tie the payment of compensation in specific injuries, I find that it violates the right to bodily integrity or security of person."

49. The High Court proceeded and disposed of the Petition by declaring **Section 6** of the **Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013** unconstitutional null and void. The same issue was subjected to an Appeal being **CIVIL APPEAL NO. 141 OF 2016** where the Court of Appeal agreed with the High Court and stated as follows: -

"We therefore agree with the learned Judge that Sections 3(a) of the Insurance (Motor Vehicle Third Party Risks(Amendment) Act, 2013 is <u>null and void</u> and so is Section 6 which sought to introduce the impugned schedule."

50. Ms. Osino submitted that consequently, **Section 30** and the **three schedules** under the Act are unconstitutional. It would also be segregative and discriminatory and contrary to **Article 27** and **41(1)** for applying different structured compensation to injuries at work places and not injuries in other places.

51. **Ms. Diana Munyingi**, learned Counsel for the Petitioners, submitted on what she referred to as **the third Constitutional issue** as: -

"Are the provisions of WIBA <u>discriminatory</u>" If Yes, is WIBA <u>unconstitutional</u>"

52. Ms. Munyingi submitted that **WIBA** is also very discriminatory, oppressive and segregative in its design in that it negates, and subjugates the bodily injury of a Kenyan Workman just because they are workmen without any justifiable cause. For example, Kenyan workman who sustains injuries at work has a mere one year to lodge a claim failing which limitation ensues as provided for in Section 26 and 27 of WIBA; yet for the next Kenyan who is not a workman, the limitation is 3 years as provided for in Section 4 (2) of the Limitation of Actions Act. Again, a Kenyan workman who is injured in his employer's car shall be condemned under one (1) year limitation and structured compensation under Section 30 of the Act (WIBA) and the schedules thereunder, yet if the next Kenyan was injured in a matatu he or she would have a limitation of a 3 years and his compensation would be pegged on his age and circumstances of his life.

53. Ms. Munyingi submitted that WIBA discriminates against working Kenyans, oppresses them and trudges on their rights merely because they are workers. As such WIBA in sections 26, 27 and 30 contravenes Article 27 and 41(1) of the Constitution of Kenya 2010 and as such it is unconstitutional. For authority on discrimination, Counsel cited **Barclays Bank Of Kenya Ltd & Another Vs. Gladys Muthoni & 20 Others [2018] eKLR** where the Court of Appeal held as follows: -

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

54. Ms. Munyingi submitted further that even assuming **WIBA** is constitutional, its implementation after being subjected to **High Court Petition No. 185 OF 2008** which resulted into **Civil Appeal No. 133 of 2011** would still give birth to unconstitutional effects for want of a workable transition. This is so because according to Counsel the Act is unsound for want of proper transition.

55. Ms. Munyingi further referred to **Section 23(3) (b) and (c)** of the **Interpretation and General Provisions Act** which stipulates that: -

"23. Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not…

(b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed;…"

56. Counsel submitted that during the pendency of **High Court Petition No. 185 Of 2008** and by the interim orders issued by the Learned Ojwang, J, Work Injury cases were filed and they proceeded full throttle till about June, 2018 when the Magistrates Court started alleging that they may not have jurisdiction. At this point in time, cases in Court were at various stages. Counsel submitted that if the cases pending in court were to be adopted by the Director, then all the said cases would be time barred as the provisions of **Section 26** and **27** of **WIBA** would shut out the cases. This, counsel submitted, would violate **Articles 28, 40** and **48** of the **Constitution of Kenya, 2010** and such a move would be absurd, illogical, irrational and anomalous and adverse to the public interest, economic and social wellness of the citizenry.

57. Counsel submitted that more worrisome is that several sections of **WIBA** among them **Sections 50** and **54** created offences in a manner that amounts to criminalizing contractual relations. The offences created under **WIBA** are meant to be investigated, prosecuted and adjudicated by the executive after which the executive would assess the guilt and fine. To the extent that the function of determining guilt and imposition of fine and or imprisonment are judicial, all the sections of **WIBA** imposing ascertainment of guilt, criminality and fines and or imprisonment are unconstitutional. Examples of such Sections are **Section 50, 54 and 55.** Prior to **WIBA**, there was in existence **the Employment Act No. 11 of 2007** assented to on **22nd October, 2007** and the **Repealed Workmen Compensation Act**, then **Chapter 236, Laws of Kenya** which was repealed on **02nd June, 2008.** These two Acts vested the freedom of choice on the Workman to either provide compensation under **Workmen Compensation Act** or through the Courts of Law. This is found in **Section 3 and 17 of the Repealed Act.**

58. Counsel submitted that when **WIBA** was enacted and replaced the **Workmen Compensation Act**. However, it never eliminated the right of a worker to elect either to seek compensation through the Act or to access the Courts or use both as provided for in **Sections 12, 33 (1), 17 (1) (a) and (b)** as read with **Sections 87 of Employment Act No. 11 of 2007.** Further, WIBA must comply with the provisions of **Article 262,** together with **Section 7 of the 6th Schedule of the Constitution** and **Section 35 of the Employment and Labour Relations Act No. 11 of 200.**

59. Ms. Munyingi submitted that the Acts that were enacted in the spirit of the **Constitution of Kenya, 2010** and the decisions flowing from the Courts invited to interpret the law relating to the **2010 Constitution** have all found in favour of the subordinate courts having jurisdiction to hear work injury cases which are disputes in the realm of common law, that is tort and breach of duty.

60. Counsel submitted that from the foregoing it is clear that firstly, on the exercise of judicial authority, Sections 10 (4), 13, 14, 15, 16, 17, 18, 23, 26, 27, 28, 30 (4), 33, 36 (a), 37, 40, 51, 52,53 (d) (e), 55, 56 (1) and 58 (2) of WIBA are unconstitutional contrary to Articles 1 (3) (c), 47, 48, 50 (1), 159 (1), 160 (1), 161 (1), 162, 171, 172 and 173 of the Constitution of Kenya, 2010. Secondly, on the issue of the structured compensation, Sections 30, 34, 35, 36, the first, second and the third schedule, of WIBA are unconstitutional contrary to Articles 27, 28, 29 (c) (d) (f), 20 (4) (a) and 41 (1) of the Constitution of Kenya, 2010. Thirdly, on the issue of discrimination, Section 10 (4) and (5), 26, 27 and 30 of WIBA are unconstitutional contrary to Articles 27, 28, 41 (1) and 48 of the Constitution of Kenya, 2010. Lastly, the lack of proper and clear transition in WIBA, makes it unconstitutional contrary to Article 25 and 29 (d) of the Constitution of Kenya, 2010.

61. Counsel submitted that with several sections of **WIBA** being unconstitutional with regard to the **Constitution of Kenya, 2010,** the very backbone of **WIBA** is constitutionally faulty and the **whole Act** should be declared **unconstitutional.**

Respondent's Submissions

62. **Mr. Nguyo Wachira,** learned counsel for the Respondent, in opposition to the petition submitted that the main issues in this petition revolve on the constitutionality of the office of the Director of Work Injury established under the Provisions of Section 53 of the Work Injury Benefits Act No. 13 of 2007. However, counsel submitted that this issue was settled in the in **Civil Appeal No. 133 of 2011 Hon. Attorney General vs. Law Society of Kenya and Central Organization of Trade Unions.** Counsel submitted that in light of the Constitution of Kenya 2010, some Acts of Parliament would require to be streamlined to the new constitution.

This, counsel submitted, should be done through draftsmanship's and amendments rather than declaring whole Acts unconstitutional. Otherwise, counsel submitted that all the issues raised herein were settled in the Judgment in the said **Civil Appeal No. 133 of 2011.** Counsel revisited those issues as follows:

c) Section 16 of the WIBA 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.

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.

63. Mr. Nguyo submitted that when the above is read contemporaneously with the prayers in the petition herein it confirms that the new suit is *res judicata* that is; all issues herein have been determined.

64. Mr. Nguyo submitted that in view of the similarity in the two cases the Court should dismiss this petition as being *res judicata*. Counsel submitted that the plea of *res judicata* applies not only to points upon which the Court was actually required by the parties to form an opinion and pronounce Judgment on, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time. The plea of *re judicata* is provided for in section 7 of the Civil Procedure Act (CPA) which reads:

"No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or in which such issue has been subsequently raised, and has been heard and finally decided by such court."

65. Counsel cited **Nai Civil Appeal No. 530 of 2014 Nathaniel Ngure Kihiu vs. Housing Finance** at paragraph 15 where Justice Richard Kuloba (as he then was) set out the Definition and essentials of res judicata as a thing or a matter adjudged; a thing judicially acted upon or decided; a thing or a matter settled by Judgment. He further observes that, in that expression is found the rule that a final Judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. To be applicable, the rule requires identity in thing sued for as well as identity of cause of action, of persons and parties for or against whom claim is made. The sum and substance of the whole rule is that a matter once judicially decided is finally decided.

66. Mr. Nguyo urged the Court to find that the issues set out in this suit were determined and this matter should be marked as having been settled earlier and be dismissed with costs.

<u>The Determination</u>

67. From the submissions the issues which emerge for determination are as follows:

(i) Whether this court has the jurisdiction to try this matter.

(ii) Whether the petition is res judicata;

(iii) Whether WIBA is unconstitutional;

(i) **<u>Whether this court has the Jurisdiction to entertain this matter</u>**

68. The issue of jurisdiction is central to this petition and is raised at two levels – the general level, and within the confines of the Employment and Labour Relations Court. At the general level, it was submitted for the Petitioners with the approval of this court that the High Court under the provisions of Article 165 (3) (b) and (d) of the constitution has the jurisdiction to determine the question of whether constitutional rights have been violated or are threatened with violation, and any question respecting the interpretation of the Constitution which includes whether or not laws are consistent with the Constitution, whether any acts done are consistent with the Constitution, Constitutional powers of state organs and conflict of laws between the national and county laws. The petition herein raises allegations of the inconsistency of the statute with the constitution, violation of constitutional rights, constitutionality of acts of state officers and constitutional powers of state organs. This Court has the requisite jurisdiction at the first instance to entertain this petition. This jurisdiction is founded in **A.O.O & 6 Others vs. Attorney General & Another [2017] eKLR** where it was held:

"Article 165 (3) (d) (i) & (ii) of the Constitution vests power to the High Court to hear any question respecting the interpretation of the Constitution including the determination of the question whether or not any law is inconsistent with or in contravention of the constitution and also the question whether anything said to be done under the authority of the constitution or of any law is inconsistent with, or in contravention of, the constitution. An unconstitutional statute is not law; and more important judicial function includes the power to determine and apply the law, and this necessarily includes the power to determine the legality of statutes.The judiciary has a special role in our system with respect to constitutional interpretation. Courts <u>are bound by the Constitution and must interpret it when a dispute so requires.[11]"</u>

69. This position is fortified by the *locus standi* of Petitioners who as litigants in the subordinate courts and whose cases cannot proceed due to the provisions of an alleged offending statute, have direct *locus standi* to file the petition. Article 22 (1) and (2) and 258 of the Constitution reiterates this right hence it is the finding hereof that Petitioners are properly before this Court. They are aggrieved by the decision taken by the magistrates to decline jurisdiction in their matters.

70. At the second level is whether the petition before the court and the issues raised therein are the domain of the **Employment and Labour Relations Court** pursuant to the Employment and Labour Relations Court Act No. 2 of 2011. This issue is important because while no party raised it as a point of concern, there have been disquiet whether the High Court has the jurisdiction to declare an Employment and Labour Statute unconstitutional. This court is persuaded that it has the unmitigated jurisdiction under Article 165(3) (d) (i) & (ii) aforesaid to entertain and determine this petition. Further, this court is persuaded that the fact that the statute in question is an Employment and Labour Statute does not lessen the weight of the jurisdiction and authority granted to this court under the said Article 165. It is the finding of this Court that it has the jurisdiction to entertain this petition and to make appropriate pronouncements on the prayers sought in the petition.

(ii) <u>Whether the Petition is Res Judicata</u>

71. The principle of *res judicata* is provided for under Section 7 of the Civil Procedure Act which provides as follows: -

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

72. In **Mercy Munee Kingoo & Another vs. Safaricom Limited & Another [2016] eKLR** the Court of Appeal expounded on section 7 of the Civil Procedure Act in the following words: -

"... section 7 aforesaid raise four pre-requisites to be met for a matter to be deemed res judicata. These were defined in the case of Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR to mean that there has to be:

1. A previous suit in which the same matter was in issue

2. The parties are the same or litigating under the same title

3. A competent court heard the matter in issue and determined

4. The issue has been raised once again in a fresh suit."

73. In the Court of Appeal case of **John Florence Maritime Services Limited & Another vs. Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR,** the court made the following finding at pages 7: '***On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata. However, we must hasten to add that it should only be*** <u>invoked in constitutional litigation in the clearest of the cases.</u> ***It must be sparingly invoked and the reasons are obvious as rights keep on*** <u>evolving, mutating, and assuming multifaceted dimensions.</u>

74. Mr. Nguyo, learned counsel for the Respondent submitted that the matters the subject matter of this petition are res judicata having been decided and finalized in the decision by the Court of Appeal on 17th November, 2017 in Civil Appeal No. 133 of 2011 (supra). This submission was refuted by the learned counsel for Petitioners who provided a robust background of Petition No. 185 of 2008 filed in the High Court and which led to the said Civil Appeal. Mr. Mwangi learned Counsel for the Interested Party submitted that Petition No. 185 of 2008 was filed in the High Court on 14th April, 2008 and issues raised therein had nothing to do with the new constitution promulgated in 2010.

75. This Court has looked at the pleadings herein and confirms that the constitutional petition filed against **WIBA** was pleaded as per the then existing Constitution. The parties in that Petition were only limited to what was pleaded and none of the parties referred in those pleadings to the 2010, Constitution as the same had not been promulgated. The High Court could not have been invited to subject **WIBA** to the yet to be born Constitution, and in my opinion no valid appeal would arise from what was not canvassed in the High Court. This is so because it is now trite that parties are bound by their pleadings. In **Civil Appeal No. 219 Of 2013 - Nairobi Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR t**he Court of Appeal held: -

"…that <u>parties are bound by their pleadings</u> <u>which in turn limits the issues upon which a trial court may pronounce.</u> The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her."

In Adetoun Oladeji (Nig) Ltd vs. Nigeria Breweries PLC S.C. 91/2002 the Nigerian Supreme Court held that: -

"….it is now <u>a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded</u>."

76. In our Constitutional jurisprudence, the issue of the constitutionality of a statute must in the first instance commence in the High Court. This was so held by the **Supreme Court** in ***Petition No. 5 of 2013- Raila Odinga vs. IEBC & 5 OTHERS (Raila case)*** *as cited in* **Petition No. 471 of 2017 - Ekuru Aukot vs. Independent Electoral & Boundaries Commission & 3 Others [2017] eKLR** where the High Court cited with approval the decision of the Supreme Court which stated that: -

"…the Supreme Court has no original jurisdiction to interpret the constitution save as stated in Article 163 (3) and (6) and added that the petitioner ought to have approached the High Court under article 165 (3) (d)."

77. It is the finding hereof that **WIBA** was only subjected to the test of constitutionality in **High Court Petition No. 185 of 2008** which was only limited to the retired constitution. **WIBA** has never been subjected to the constitutionality test against the constitution of Kenya, 2010 other than by these proceedings. Therefore, the reference to the 2010 Constitution in **Civil Appeal No. 133 of 2011** was only but orbiter and this decision cannot in law be said to have subjected **WIBA** to the constitutional test.

78. In applying the above provisions and authorities in the decision in **Civil Appeal Number, 133 Of 2011, Hon Attorney General vs. The Law Society of Kenya and The Central Organisation of Trade Union,** the Articles of the Constitution mentioned in the said decision are as follows:

1. Articles 43(1) ((e) and 46(1) (d) in relation to section 7(1) and (2) of WIBA that deals with the right to take out insurance cover for employees

2. Article 36 on Minister's approval of the insurance cover

3. Article 47-section 10(4)(a) and (b) declared unconstitutional

4. Article 50 that deals with fair hearing with respect to section 58(2)

79. It is the finding of this Court that the current petition does not rely on the above articles except article 50 of the Constitution. However, section 58(2) has not been tested with respect to article 50 as read together with the other articles submitted upon by the petitioner touching on access to justice, judicial authority, the doctrine of separation of powers among others as provided for in the new Constitution.

80. The foregoing paragraphs show clearly that the issues placed in Petition No. 185 of 2008 are not the same issues which form part of this petition. In any event the said issues were to be determined in the light of the old constitution. Even if the same issues were to crop up in this petition, they shall not be rendered *res judicata* because they have to be determined within the framework of the current constitution.

81. The other aspect of res judicata is the allegation by the Respondent that the issues raised in the petition were settled by the Judgment of the court of Appeal in Civil Appeal No. 133 of 2011 (supra). To set the record straight on the outset, this Court must uphold the constitutional hierarchy of the court system in this country, and will not discuss the decision of the Court of Appeal in this Judgment. This Court will merely make cursory observation of what may have transpired in the Court of Appeal in the Civil Appeal No. 133 of 2011 (supra).

82. It is not in doubt that the Petition 185 of 2008 was filed in 2008 before the promulgation of the new constitution in 2010. And as I have stated above, the pleadings in the petition did not change when the Civil Appeal No. 133 of 2011 was filed. So it is reasonable to assume that at all relevant times the Court of Appeal was concerned only with the pleadings contained in Petition No. 185 of 2008, and that their decision was based on those pleadings. For avoidance of doubt, the Court of Appeal rendered itself as follows:

"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."

83. In reversing the majority of the orders of the High Court, the Court of Appeal made it abundantly clear that their decision was based on the former constitution. To emphasis this fact, the court went ahead to state that:

"…the result is that only Section 7…and 10(4) are inconsistent with the former and current constitution."

84. From the above, one gets the feeling that even though the Court of Appeal made their decision on the old constitution, they had an opportunity to consider those provisions also as against the new constitution. In fact the learned justices of the Court of Appeal expressly acknowledged this fact. At page 6 of the Judgment, they stated as follows:

“Secondly, at the heart of this appeal lies the construction of the former constitution vis-à-vis the nine impugned sections to ascertain whether they are in conflict or inconsistent with the former constitution. <u>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.”</u>

85. The position taken by this Court is that the issues raised in Civil Appeal No. 133 of 2011 were all based on the former constitution. The constitution 2010 was never an issue before the Court of Appeal. It is my position here that the comments made by the learned Justices of the Court of Appeal both in the body of their Judgment and as an order referring to the Constitution of Kenya 2010 were made *per in-curium, obiter dictum*, and were not intended to form the *ration daitre* of the learned Judges decision. That being the finding of this Court it is therefore not true that the issues raised here are res judicata on account of the aforesaid Judgment of the Court of Appeal in Civil Appeal No. 133 of 2011.

86. This position was considered by the Supreme court in the case of **Mable Muruli vs. Wycliffe Ambetsa Oparanya & 3 Others [2016] eKLR where the court stated as follows: -**

“For the special role of precedent in the certainty and predictability of the law as it plays out in daily transactions, any departure is to be guided by rules well recognized. It is a general rule that the Court is not bound to follow its previous decision where such decision <u>was an obiter dictum(side-remark), or was given per in curium (through inattention to vital, applicable instruments or authority).</u> <u>A statement obiter dictum is one made on an issue that did not strictly and ordinarily, call for a decision: and so it was not vital to the outcome set out in the final decision of the case</u>. And a decision per in curium is mistaken, as it is not founded on the valid and governing pillars of law.

“Comparative judicial experience shows that the decision of a superior Court is not to be perceived as having been arrived at per in curium, merely because it is thought to be contrary to some broad principle, or to be out of step with some broad trend in the judicial process; <u>the test of per in curium is a strict one – the relevant decision having not taken into account some specific applicable instrument, rule or authority</u>.’-the underline is mine

87. Of greater significance, however, is the fact that the petition herein is a constitutional petition raised, fashioned and constructed in a much broader sense, and whose prayers go beyond the cited sections in Petition No. 185 of 2008. The current petition appears to me to be very deliberate, more focused and aimed at completely invalidating the WIBA, if it were to succeed, and so it cannot fall prey to the *res judicata* principle.

88. Further, the issues of the provisions of the **Magistrate’s Court Act 2015** and the **Employment and Labour Relations Act No. 20 of 2011** and the Provisions of Article 260 of the Constitution of Kenya have never been adjudicated upon viz a viz WIBA. The provisions of Article 1 (3) (c) and 159 of the Constitution of Kenya on judicial authority are more comprehensive and firm on who can exercise judicial power this is unlike Section 60 of the former Constitution.

89. Lastly, this being a constitutional petition, it is acceptable that the nature and character, or even the manner of implementation of fundamental rights constantly change, with the result that the strict applicability of the doctrine of res judicata must be frowned upon for the obvious reason that to do otherwise will restrict the pursuit of rights thought to be violated by potential Respondents. As I have observed earlier, the current petition is deliberately constructed to effectively tackle the constitutionality of the WIBA and it would be injustice to terminate the Petitioners’ march to what they perceive to be justice at the altar of *res judicata*, when the premises of res judicata are not firmly grounded. It is the finding of this court that the petition herein is not *res judicata*.

(iii) **<u>Whether the Work Injury Benefits Act No. 13 of 2007 (WIBA) is unconstitutional as against the Constitution of Kenya 2010</u>**

90. To answer the third issue above this Court will have to address several other related sub-issues raised by the Petitioner. These include:

(a) Whether WIBA has been subjected to the constitutional scrutiny under the Constitution of Kenya 2010;

(b) Whether WIBA base its compensational regime on a no fault system and structured compensation and if yes, whether this is unconstitutional for being inimical to Articles 27, 41(1), 48 and 50;

(c) Whether the provisions of WIBA are discriminatory and hence unconstitutional;

(d) Whether the WIBA provisions offend the constitutional doctrine of separation of powers and hence unconstitutional;

(e) Does the doctrine of 'Implied Repeal' apply: The Magistrates' Courts Act No. 26 of 2015, The Employment and Labour Relations Act No. 20 of 2011 vis-à-vis WIBA and Articles 169 (1) (a) and (2) of the Constitution;

(f) Whether Sections 10, 16, 223, 26, 53 and 58 and the entire Part IV and V of WIBA are *ultra vires* the Constitution of Kenya and are null and void to the extent that they place judicial authority in an entity not part of the Judiciary;

(g) Whether the entire WIBA is unconstitutional;

(h) Whether Petitioners' fundamental rights have been breached, violated and or threatened;

(i) Whether orders should issue;

(j) Who pays costs"

91. I will consider all these sub issues simultaneously and not in any particular order. The starting point in my view, and as was ably submitted by Mr. Mwangi, learned counsel for the Interested Party, is Article 10(1) (a) (b) and 2 which guides this Court in the interpretation of the constitution.

Article 10 (1) (a) and 2 provides as follows:

(i) **Article 10 (1) (a) and (2)**: -

"(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

ii) Precedents as discerned in: -

CIVIL APPEAL NO. 287 OF 2016-NAIROBI

LAW SOCIETY OF KENYA NAIROBI BRANCH=VS=

MALINDI LAW SOCIETY & 6 OTHERS [2017] eKLR, where the Court of Appeal also cited with approval the case of;

*"**Kigula and others vs. Attorney-General (2005) AHRLR 197 (UgCC 2005)**. In that case the court expressed the view that the*

Constitution is a living document, having a soul and a conscience of its own, and that courts must endeavor to avoid crippling it by construing it technically or in a narrow spirit but construe it with the lofty purposes for which its makers framed it. Okello, JA of the constitutional court of Uganda articulated the principles of constitutional interpretation in that case as follows: That the widest construction possible, in its context, should be given according to the ordinary meaning of the words used; that the entire constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other; that all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument; that a constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms are to be given a generous and purposive interpretation to realize the full benefit of the right guaranteed; and that in determining constitutionality both purpose and effect are relevant."

92. It has been submitted by the learned counsel for the Attorney General Mr. Nguyo that the issues raised in this petition are res judicata because they were determined in Civil Appeal No. 133 of 2011. This Court is not persuaded by that submissions for the reasons that the Civil Appeal aforesaid did not delve into the constitutionality of the WIBA vis-à-vis the Constitution of Kenya 2010. The Court of appeal expressed itself clearly on that matter, and I have already found that the learned Judges comments were *obiter dictum* and made *per incurium*. The Court could not have envisaged Article 10(1) (a) and (2) of the Constitution of Kenya 2010, and the judicial authority cited above (being of 2017 respectively) for them to have applied their mind to national values and principles governing interpretation of the constitution. Further, given that the parties were bound by their pleadings it cannot have been envisaged that the pleadings framed in 2008 before the promulgation of the Constitution of Kenya 2010 would suffice to sustain a petition under the 2010 constitution.

93. As I have already stated, the issue of the constitutionality of a statute or statutory must in the first instance commence in the High Court. See This ***Raila Odinga Vs. IEBC [2013] (supra).***

"…the Supreme Court has no original jurisdiction to interpret the constitution save as stated in Article 163 (3) and (6) and added that the petitioner ought to have approached the High Court under article 165 (3) (d)."

94. It is clear that **WIBA** was only subjected to the test of constitutionality in **High Court Petition No. 185 of 2008** which was limited to the old constitution. **WIBA** has never been subjected to the constitutionality test against the constitution of Kenya, 2010 other than by these proceedings.

95. From the foregoing it is the finding of this Court that the provisions of the WIBA complained of in this petition have not been tested under the Constitution of Kenya 2010, and that this court is now endowed with the jurisdiction and competence to test those WIBA provisions against the Constitution of Kenya 2010.

Judicial Authority as per Article 159 of the Constitution

96. The **Black's Law Dictionary at page 976, Tenth Edition** defines judicial power as: -

"Judicial power (16c) 1. The authority vested in courts and judges to hear and decide cases and to make binding Judgments on them; the power to construe and apply the law when controversies arise over what has been done or not done under it. Under federal law, this power is vested in the U.S. Supreme Court and in whatever inferior courts Congress establishes. The other two great powers of government are the legislative power and the executive power.

It goes further to state of judicial power as:

"2. A power conferred on a public officer involving the exercise of judgment and discretion in deciding questions of right in specific cases affecting personal and proprietary interests. In this sense, the phrase is contrasted with ministerial power."

97. This is the power that is provided for under Articles 1 (3) (c) and 159 of the 2010 Constitution. Article 159(1) of the 2010 Constitution provides *inter-a-lia:*

"159(1) judicial authority is derived from the people and vests in and shall be exercised by the courts and tribunals established by or under this Constitution."

In the case of **A.O.O. & 6 Others vs. Attorney General & Another [2017] eKLR** the court dealing with judicial power stated as here below: -

"I find it appropriate to borrow the words of Lord Diplock in the above cited case when he said at pp. 225-6:-[33]

"…what Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders."

The court went further to hold:

"Article 159 (1) on Judicial authority provides that: -

159. (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

Judicial authority, is the term given to the power given to a judge that allows him to hear a case and to decide in favour of one party.[34] <u>It is the constitutional authority vested in courts and judges to hear and decide justifiable cases and to interpret and enforce or void, statutes when disputes arise over their scope or constitutionality."</u>

It then concluded:

"[50] The Executive has no role in performance of judicial process …. The Constitution prohibits all forms of interference with Courts or judicial officers from any person or authority. Judicial power is derived only from the people and is exercised by only the courts established under the Constitution.…... The Constitution provides for the separation of powers between the Executive, the Legislature and the Judiciary. Thus any law which has the effect of tying the hands of the judiciary in executing its function to administer justice is inconsistent with the Constitution….

The principle is also enshrined in all democratic Constitutions. It involves two tenets; (a) judicial power must exist as a power separate from and independent of, executive and legislative power and; (b) judicial power must repose in the judiciary as a separate organ of government, composed of persons different from and independent of those who compose the executive and legislature. As the United States Supreme Court observed in O' Donoghue v. United States[51] if it be important to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows as a logical corollary, equally important, that each department should be kept completely independent of the others - independent not in the sense that they shall not co-operate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other department. A democratic Society calls for a strong and independent judiciary and a commitment by the State to the rule of Law."

98. In **Justus Mutiga & 2 Others vs. Law Society of Kenya & Another [2018] eKLR,** *the Court of Appeal stated thus*:

"As rightly stated by the 1st Respondent, judicial authority is solely and exclusively vested upon the courts. Articles 159 and 160 the Constitution demand as much by providing:

Article 159(1): 'Judicial authority is derived from the people and <u>vests in, and shall be exercised by, the courts and tribunals</u> established by or under this Constitution.'

Article 160 (1): ' In exercise of judicial authority, the judiciary as constituted by Article 161, shall be <u>subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority</u>.' (emphasis supplied)

99. It is clear from the above decisions that judicial authority can only be exercised by courts and independent tribunals under the 2010 Constitution. No other entity, not even the so called "Director" as envisaged under the WIBA has such powers. Section 53 (1) of the Work Injury Benefits Act creates the office of the Director of Work Injury Benefits. Section 53(2) (d) and (e) then give him

the power to receive reports on accidents and **carry out investigations** into such accidents and ensure injured employees are compensated. In an adversarial system like ours, investigation is not a judicial function, and neither is it the duty of court to ensure all employees who suffer at the work place are compensated. **Section 16 of the WIBA** then provides that any compensation for work injury is to be as provided in WIBA which then brings into focus the functions of the director under Section 53(2) (e) which means that he is to adjudicate over injury cases and make assessment of damages. In my opinion these are purely judicial functions as the Court of Appeal recognized in **Justus Mutiga & 2 Others vs. Law Society of Kenya & Another [2018] eKLR** where it was held:

"31. This Court has on several occasions pronounced that computation of monies awarded to parties as damages is a judicial function which cannot even be performed by the Registrar of the court. In Telkom Kenya Limited vs John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) in Civil Appeal No. 60 of 2013, the Court was categorical that: -

"Judicial function of assessment of damages is one the courts have long jealously guarded for it takes judicial wisdom, experience and consideration to arrive at an appropriate measure of damages."

Earlier on in the case of Kenya Revenue Authority vs Menginya SalimMurgani [2010] eKLR, while addressing a similar issue, this Court expressed itself as follows: -

"Both the award and level or quantum of damages is in our view judicial functions which the superior court cannot rightfully delegate… a judgment must be complete and conclusive when pronounced and therefore it cannot be left to the Deputy Registrar to perfect it. Assessment of damages is not a ministerial act as envisaged by Order 48 (currently Order 49) of the Civil Procedure Rules and a direction to 'assess' or 'calculate' damages would be contrary to the requirements of Order 20 (currently 21) of the Civil Procedure Rules because it would be incomplete without assessment and would patently be a nullity."

100. It is the finding hereof that the provisions of **Section 16 and 53 (2) (d) and 53 (2) (e) of the WIBA** being a usurpation of judicial power by the executive means that not only are these provisions inconsistent with the constitution but also that the provisions of Section 10, 23, 26, 28, 30, 33, 37, 51, 53 (2) (d), 53 (2) (e), 58 (2) and the First Schedule to the Act to the extent that they promote the impugned **Section 53(2) (d) and 53(2)(e) of the WIBA** are also unconstitutional to that extent as the director therein is neither an independent tribunal nor a court, hence cannot exercise judicial powers.

101. Further, the **Employment & Labour Relations Court Act No. 20 of 2011** provides under Section 12 (1) as follows: -

12. Jurisdiction of the court

(1) the court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to in accordance with Article 162(2) of the constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including;-

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) ………..;

The Act ultimately provides at Section 29: -

29. Access to justice

(1) The court shall ensure reasonable, equitable and progressive access to the judicial services in all counties.

(2) For purposes of subsection (10, the Chief Justice may designate a judge in a county as a judge for the purposes of this Act.

(3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving employment and labour relations in respect of any area of the country.

(4) Subject to Article 169(2)(a) of the Constitution, the magistrates appointed under subsection (3) shall have jurisdiction and powers to handle;

(a) disputes relating to offences defined in any Act of Parliament dealing with employment and labour relations.

(b) any other dispute as may be designated in a Gazette notice by the Chief Justice on the advice of the Principal Judge.

102. Pursuant to Section 29(3) above, various gazette notices have issued granting jurisdiction to the magistrate's courts to hear and determine employment disputes, which jurisdiction the magistrates are now refusing to exercise by downing their tools in work injury related disputes. This is clearly inconsistent. In my view even if the magistrates were to decline the jurisdiction under WIBA, they are still seized of jurisdiction to hear and determine work injury related disputes under the Employment and Labour Relations Court Act No. 20 of 2011.

Separation of powers

103. The Constitution of Kenya 2010 creates three arms of government, namely the Executive, the Judiciary and the Legislature. Each has distinct though interconnected functions. The judiciary is charged with the task of *inter alia* interpreting and applying the law and solving disputes between parties via application of the law. It's a fundamental principle/doctrine in any civilized democracy. Each arm performs its task independently and enjoys safeguards against encroachment on its space by another. The provisions of Article 53(2)(d) and 16 of the **WIBA** violate this principle.

In **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others C. A. No. 290 of 2012** Judges stated as follows:

"(49) It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Court's dicta in the petition the subject of this appeal that:

"[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the Respondents also concede, the Courts have an interpretive role - including the last word in determining the constitutionality of all governmental actions..."

In **A.O.O.& 6 Others vs. Attorney General & Another (2017) eKLR** the court held:

"The Constitution requires effective separation of powers between the courts and the other branches of the government. Separation of powers is necessary to ensure a balance of power. A more fundamental reason for the separation of the power of judging is the liberty of the citizen. Nor is there liberty if the powers of judging are not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizen would be arbitrary, for the judge would be legislator. If it were joined to executive power, the judge could have the force of an oppressor.[37]

The constitution being the supreme law of the land separates the powers of the legislature, the executive and the judiciary. Judicial power is reserved to the judiciary. The imposition of a punishment in a criminal matter which includes the assessment of its severity is an integral part of the administration of justice and is therefore the exercise of judicial, not executive, power."

104. From the foregoing paragraphs, it is the finding of this Court that to the extent that the provisions of the **WIBA** and in particular, Section 16 and 53(2)(d) seek to transfer judicial power to the executive, or to an entity that is neither a tribunal nor a

court, they violate the constitutional principle of separation of powers, and are therefore unconstitutional.

The provisions of Article 169(1) (a) and 2 of the Constitution viz a viz the Doctrine of "Implied Repeal" and the Magistrate's Courts Act No. 26 of 2015, The Employment and Labour Relations Act No. 20 of 2011 viz a viz the Work Injury Benefits Act No. 13 of 2007.

Rule 7 (1) of part 2 of the 6th Schedule to the Constitution 2010 entitled **"Existing Laws"** provides that: -

"All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptions, qualification and exceptions necessary to bring it into conformity with this constitution."

105. It follows that the provisions of **WIBA** must meet the threshold prescribed by the Constitution and if they don't then they are inapplicable. To facilitate that constitutional imperative, the legislature under Article 261 and the 5th Schedule of the Constitution passed the twin Acts of the **Employment and Labour Relations Act No. 20 of 2011** and the **Magistrates Court Act 2015**. The **Magistrate's Court Act** was passed to give effect to Articles 23(2) and 169(1) (a) of the Constitution to confer jurisdiction function and powers on magistrates. ***Section 9 of the Act*** provides:

"A magistrate's court shall

(a) ……….

(b) In exercise of jurisdiction conferred upon it under Section 29 of the industrial court Act 2011 (No. 20 of 2011) and subject to the pecuniary limits under Section 7 (1) hear and determine claims relating to employment and labour relations."

Section 29 of the **Employment and Labour Relations Act No. 20 of 2011** passed pursuant to the provisions of Articles 48 of the Constitution of Kenya provides:

"29 Access to justice

(1) ………

(2) ……..

(3) ……The Chief Justice may by notice in the Gazette appoint a certain magistrate to preside over cases pertaining employment and labour relations in respect of any area of the country.

(4) Subject to Article 169 (2) of the Constitution the magistrates appointed under Section 3 shall have jurisdiction and powers to handle; -

(a) Disputes relating to offences defined in any Act if any parliament dealing with employment and labour relations.

(b) Any other dispute as may be designated in a Gazette Notice by Chief Justice on advice of Principal Judge.

106. Section 35 of this Act provides that its provisions would take precedence over any other law that subsisted before them on the issues set out in Section 29. This subsequent Act which gives the magistrate's court jurisdiction in employment and labour relations dispute must under the provisions of Rule 7 of part 2 of the Sixth Schedule of the Constitution of Kenya prevail over the provisions of the **WIBA** that seem to deny magistrates court's jurisdiction. This is fortified by the doctrine or principle of "Implied Repeal" on construction of statutes, which deems a subsequent statute to have repealed the previous statute where their provisions are in conflict. The issue was addressed in ***A.O.O.& 6 Others vs. Attorney General & Another [2017] eKLR*** where the court held:

"The application of the concept of "Implied Repeal"

The children's Act[53] came into effect on 1st March, 2002. The Penal Code's[54] commencement date was 1st August, 1930. According to principles of construction if the provisions of a later Act are so inconsistent with or repugnant to those of an earlier Act that the two cannot stand together, the earlier Act stands impliedly repealed by the latter Act. It is immaterial whether both Acts are Penal Acts or both refer to Civil Rights. The former must be taken to be repealed by implication.[55] This principle was properly adopted in Martin Wanderi & 19 others vs. Engineers Registration Board of Kenya & 5 Others,[56] where the Court, rendered itself as follows:-

"This is because of the canons of interpretation with regard to the timing of legislation, and the doctrine of implied repeal, which is to the effect that where provisions of one Act of Parliament are inconsistent or repugnant to the provisions of an earlier Act, the later Act abrogates the inconsistency in the earlier one…."

107. The same position was restated in **United States vs. Borden Co[57]** where the court rendered itself as follows:

"…There must be 'a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only, pro tanto, to the extent of the repugnancy'…"

In Steve Thoburn vs. Sunderland City Council*[58]* the court stated that:

"[I]f they [the two statutes] are inconsistent to that extent [viz. so that they cannot stand together], then the earlier Act is impliedly repealed by the later in accordance with the maxim Leges posterior espriores contrarias abrogant' …Authority to the effect that the doctrine of implied repeal may operate in this limited fashion is to be found in Goodwin v Phillips,[59] in the High Court of Australia, in which Griffith CJ stated at 7:"… if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act."

108. The upshot is that the provisions of the 2010 Constitution, **Magistrates Court Act No. 26 of 2015** and the **Employment and Labour Relations Act No. 20 of 2011** supersede any provisions found in the **WIBA** when there is a conflict. It's a principle of law that it's imperative to interpret a law very liberally to sustain a right than to deny it.

109. The issue of the Constitution and the **Magistrate's Court Act** was considered by the court of Appeal in ***Nairobi Branch vs. Malindi Law Society C. A. No. 287 of 2016*** where its constitutionality in granting magistrates' courts power to determine employment and labour relations disputes or cases was decided and it was held that the provisions of the **Magistrate's Court Act No. 26 of 2015** were within the Constitution.

The Court stated:

"We are unable to construe that Article as limiting the power of Parliament to confer jurisdiction, on the courts already established by the Constitution under Article 169(1)(a), (b) and (c). Article 169(2) provides that Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause 169(1). A distinction should thus be drawn between the power given to Parliament under the Constitution to establish courts, which in this case is restricted, and the power to confer jurisdiction on courts. It is acknowledged in the preamble to the Magistrates" Courts Act, that it is an Act of Parliament to give effect to Article 169(1)(a) of the Constitution "to confer jurisdiction, functions and powers on the magistrates' courts". We do not consider that in doing so, Parliament in any way exceeded its mandate or acted *ultra vires*."

The Court went on as follows:

"65. In our view, conferring jurisdiction on magistrates" courts to hear and determine does not diminish the specialization of the specialized courts considering that appeals from the magistrates" courts over those matters lie with the specialized courts. As urged by Mr. Kanjama, under the doctrine of judicial precedent, the decisions of the specialized courts would bind the magistrates" courts and the specialized courts would therefore undoubtedly imprint the "specialized jurisprudence" on the magistrate's courts."

Further it held:

“67. Devolution, access to services and access to justice, among others, are critical pillars of our constitutional architecture. Article 6(3) of the Constitution demands reasonable access to services. Article 48 demands that the state “shall ensure access to justice for all persons.” Access to justice has many facets. One facet is the geographical location of the courts and proximity of the courts to the people intended to be served by the courts. There are undoubtedly more magistrates" courts in Kenya than there are specialized courts or even High Court stations for that matter. The close proximity of magistrates" courts to the people ensures efficiency and access to justice at reasonable cost. It would be illogical and unreasonable to prohibit magistrates" courts from determining land and employment disputes, when it is undeniable that their reach to the citizenry is much wider than that of the specialized courts. Public interest, in our view, would be better served by increasing the number of courts with the capability of resolving such disputes.”

It then concluded:

68. …Had the framers of the Constitution intended to restrict the power of Parliament to enact legislation conferring jurisdiction on magistrates" courts with respect to disputes relating to employment and labour relations and the environment and the use and occupation of, and title to land, it would have done so in express terms in the same way that the High Court is expressly barred, under Article 165(5), from exercising jurisdiction in respect of matters “falling within the jurisdiction of the courts contemplated in Article 162(2).”

69. The choice of language in Article 165(5) is also instructive. Article 165(5) provides:

“(5) The High Court shall not have jurisdiction in respect of matters—

(a) <u>reserved for the exclusive jurisdiction</u> of the Supreme Court under this Constitution; or

(b) <u>falling within the jurisdiction</u> of the courts contemplated in Article 162 (2).”

70. … It is a pointer, in our view, that it was never intended that disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land would be “reserved for the exclusive jurisdiction” of the specialized courts under Article 162(2). It is also noteworthy that <u>In Re The Matter of the Interim Independent Electoral Commission [2011] eKLR</u>, the Supreme Court of Kenya in construing Article 165(3) of the Constitution that confers jurisdiction on the High Court to hear any question respecting the interpretation of the Constitution noted that although the High Court was entrusted, under that Article, with the mandate to interpret the Constitution, that

“empowerment by itself, however, does not confer upon the High Court an exclusive jurisdiction.”

110. It is the finding of this Court that the legislature, in granting the Magistrates’ Court the jurisdiction to deal with labour and employment issues as set out in **Nairobi Branch vs. Malindi Law Society C. A. No. 287 of 2016**, was acting within its mandate under the constitution. The upshot is that the **Magistrate’s Court Act** and the **Employment and Labour Relations Act** have conferred upon magistrates the jurisdiction to try and to determine labour related disputes.

<u>Breach of the Petitioners’ rights and or threats thereto</u>

111. As a consequence of the issues highlighted above, the following rights of the Petitioners have been violated or are threatened with violation.

(i) Article 40 of the Constitution on the rights to property. The Petitioners have causes of action which have accrued and which have been lodged in Court. Causes of action have been recognized as property rights due to the compensation expected.

(ii) Article 48 of the Constitution on access to justice. The magistrate’s courts are distributed everywhere within the Republic of Kenya and the provisions of Section 29 of the Employment and Labour Relations Court Act No. 20 of 2011 are passed specifically to promote the rights under Article 48 of the Constitution. The Court of Appeal in the ***<u>Nairobi Branch Vs Malindi Law Society & 5 Others C. A. No. 287 of 2016</u>*** (supra) emphasized the need of magistrate’s courts having jurisdiction in Employment and Labour Relations disputes in promoting the provisions of Article 48 of the Constitution. The current standoff compromises the Petitioners’ rights under Article 48 of the Constitution.

(iii) Right to a fair trial under Articles 25(c) and 50(1) of the Constitution which requires disputes to be resolved by application of the law in a fair and public hearing before a court or if appropriate another independent and impartial tribunal. The office of the Director of Work Injury Benefits created under Section 53 (1) of the Work Injury Benefits Act is not such a body. To insist that cases be tried before the said director violates and/or threatens Petitioners' rights.

(iv) Article 159 (2) (b) on the Petitioners' right to have their cases heard and determined without delays. Delays have been occasioned by the unnecessary confusion on the applicable legal regime.

(v) Article 159 (2) (a) on the right for Petitioners cases to be heard and determined without discrimination to their status. It is costly and expensive for the litigants to travel and look for the director whose offices are not known.

Whether the WIBA can be Amended

112. The learned Judges of the Court of Appeal expressed the following view in **Civil Appeal Number 133 Of 2011, Hon. Attorney General Vs. The Law Society of Kenya and The Central Organisation of Trade Union**: -

"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."

113. From above one can posit that an amendment would suffice as suggested by Mr. Nguyo for the Attorney General. In my view however, an amendment cannot cure the defects which are fundamental and touching on the jurisdiction of the magistrates' courts in exercising of their powers as granted by the 2010 Constitution. However, this Court shall restrict itself to the determination as to the constitutionality of sections specifically mentioned in the petition because these are the sections that this Court considered in this petition.

Disposition

114. It is the finding of this Court that the Constitutional provisions cited in the petition under Articles 1, 2 ,6, 10, 19, 20, 21, 22, 23, 24, 25,27,28, 40, 48,50, 52, 159, 160, 161, 162, 163, 164, 165, 169 (1), 169(2), 258,259 and 260 of the Constitution of Kenya 2010, **the 5th Schedule and Section 7(1) of Schedule 6** of the Constitution of Kenya were not tested in **Civil Appeal Number 133 of 2011, Hon Attorney General vs. The Law Society of Kenya and The Central Organisation of Trade Union** with respect to the WIBA provisions that have been cited in the petition as Sections 4, 16, 21 (1), 23(1), 25 (1) (3), 52 (1) (2) and 58(2).

115. It is the finding of this Court that the Petitioners have proved the petition on a balance of probability, and this Court is satisfied that the Petitioners are entitled to the orders and declarations they have prayed for in the petition. The petition is allowed and orders are issued as follows:

(a) A declaration that Sections 10, 16, 23, 26 and 53 (2) (d) and 2 (e) and the entire part IV and V are *ultra vires* the Constitution of Kenya 2010 and are null and void to the extent that they place judicial authority in an entity that is not part of the judiciary.

(b) A declaration that Section 10, 16, 23, 26 and 53 (2) (d) and 2 (e) and the entire part IV and V of WIBA violate the doctrine of separation of powers, and are therefore unconstitutional.

(c) A declaration that the provisions of Section 10, 16, 23, 26 and 53 (2) (d) and 2 (e) and the entire part IV and V violate the injured employee's right to a fair hearing as provided for under Article 50 of the Constitution of Kenya.

(d) That the provisions of Section 10, 16, 23, 26 and 53 (2) (d) and 2 (e) and 58 of the **Work Injury Benefits Act No. 13 of 2007** violate the injured worker's right to property under Article 40 of the Constitution of Kenya.

(e) That the provisions of Section 10, 16, 23, 26 and 53 (2) (d) and 2 (e) and the entire part IV and V of the **Work Injury Benefits Act No. 13 of 2007** violate the right of access to justice and undermines the Doctrine of devolution.

(f) Part V of the **Work Injury Benefits Act No. 13 of 2007** violates an injured employee right to equality, freedom from discrimination and the right to human dignity as provided under Article 27 and 28 of the Constitution of Kenya.

(g) A declaration that the provisions of the **Employment and Labour Relations Act No. 20 of 2011** Section 12(a), 22, 29 and 35 and the Magistrate's Court Act Section 9(b) by dint of Article 261 (1) of the Constitution of Kenya 2010 and Section 7 of Schedule 6 of the Constitution of Kenya, override all provisions in the **Work Injury Benefits Act No. 13 of 2007** that are in conflict with them.

(h) Costs of this petition shall be for the Petitioners and the Interested Party and shall be paid by the Respondent.

Dated, Signed and Delivered in Mombasa this 10th day of June, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. MacMillan Jengo

Ms. Pauline Osino

Ms. Diana Munyingi for Petitioners

Mr. Njoroge Mwangi for Interested Party

Mr. Mkok holding brief for Mr. Nguyo for the Respondent

Mr. Kaunda Court Assistant