**SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH**

**IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT**

**[2026] SC EDIN 10**

(1) PIC-PG10-18 (Ingan'ga);
(2) PIC-PG5-18 (Ochoi);
(3) PIC-PG6-18 (Omoke);
(4) PIC-PG7-18 (Muga);
(5) PIC-PG8-18 (Nyakondo);
(6) PIC-PG9-18 (Idinga); and
(7) PIC-PG11-18 (Chuma)

JUDGMENT OF SHERIFF CHRISTOPHER DICKSON

in the causes

(1) ELLY OKONG'O INGAN'GA; (2) JOICE MONGARE OCHOI;
(3) LUCA ONDUSO OMOKE; (4) VITALIS OTIENO MUGA;
(5) REBECCA OKENYURI NYAKONDO; (6) GETUNA MASELA IDINGA;
and (7) CHRISTOPHER OMWAMBA CHUMA

Pursuers

against

BROWNS PLANTATIONS KENYA LIMITED, formerly known as JAMES FINLAY (KENYA) LIMITED

Defender

**Pursuers: Sutherland, KC, Masters; Balfour & Manson LLP**
**Defender: Lord Davidson of Glen Clova, KC, McKenzie, KC, Boffey; Brodies LLP**

EDINBURGH, 16 January 2026

The sheriff, having resumed consideration of the preliminary proof, finds the following facts admitted or proved:

**Finds in fact**

1. Each of the seven pursuers lodged an individual initial writ in the All Scotland Sheriff Personal Injury Court on 8 May 2017. In each initial writ the pursuer: (i) contends

that: (a) whilst engaged in employment with the defender in Kenya, they sustained work related injuries when engaged in tea harvesting operations; and (b) their injuries were sustained as a result of the defender's negligence; and (ii) seeks payment of damages by the defender in Kenyan Shillings.

2. On 9 May 2017 the seven initial writs were served on the defender by sheriff officers.

3. On 22 October 2007 the Kenyan Work Injury Benefits Act, No. 13 of 2007 ("WIBA") was enacted. On 2 June 2008 WIBA came into force by virtue of Gazette Notice No. 60 of 23 May 2008.

4. Prior to the coming into force of WIBA, workers in Kenya could seek compensation in relation to a work injury under two main regimes. The first regime was a claim under the Workmen's Compensation Act Cap. 236 ("WCA"). The WCA provided a statutory framework for compensating workers who suffered injury in the course of their employment. It established a fixed compensation tariff based on the type and extent of injury suffered (a "WCA claim"). The second regime was by filing a claim in court seeking damages at common law for injuries sustained, during the course of their employment, by reason of their employer's negligence. In such a court claim liability would have to be proved on the basis of the common law and damages would be assessed at common law enabling the court to award general and special damages (a "court claim at common law"). Both regimes were available for workers to pursue. If a WCA claim was made the worker could still also file a court claim at common law. If a worker received compensation from a WCA claim and also received damages at common law, following a court claim at common law filing, the compensation from the WCA claim would be deducted from the damages awarded by the court in the court claim at common law to avoid double counting. A WCA

claim, if successful, generally provided a lower amount of compensation than damages awarded following a successful court claim at common law.

5. The common law in Kenya is applied pursuant to the provisions of section 3(1) of the Judicature Act (chapter 8 of the Laws of Kenya), which provides:

> "**3 Mode of exercise of jurisdiction**
>
> (1) The jurisdiction of the Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and of all subordinate courts shall be exercised in conformity with-
>
> (a) the Constitution;
> (b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule of this Act, modified in accordance with Part II of that Schedule;
> (c) subject thereto, and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in the courts of justice in England at that date;
>
> Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary."

6. The provisions of WIBA include:

> "**7. Employer to be insured**
>
> (1) Every employer shall obtain and maintain an insurance policy, with an insurer approved by the Cabinet Secretary in respect of any liability that the employer may incur under this Act to any of his employees.
>
> (2) The Cabinet Secretary may exempt from the provisions of subsection (1), an employer who provides and maintains in force a security which complies with the requirements of subsection (3), and any exemption under subsection (3) shall continue in force only so long as the security is maintained.
>
> […]"

"**10. Right to compensation**

(1) An employee who is involved in an accident resulting in the employee's disablement or death is subject to the provisions of this Act, and entitled to the benefits provided for under this Act.

(2) An employer is liable to pay compensation in accordance with the provisions of this Act to an employee injured while at work.

(3) An employee is not entitled to compensation if an accident, not resulting in serious disablement or death, is caused by the deliberate and wilful misconduct of the employee.

(4) For the purposes of this Act, an occupational accident or disease resulting in serious disablement or death of an employee is deemed to have arisen out of and in the course of employment if the accident was due to an act done by the employee for the purpose of, in the interests of or in connection with, the business of the employer despite the fact that the employee was, at the time of the accident acting—

(a) in contravention of any law or any instructions by or on behalf of his employer; or

(b) without any instructions from his employer.

[…]"

"**16. Substitution of compensation for other legal remedies**

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

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

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

"**22**. **Notice of injury or accident by employer to Director**

(1) Subject to the provisions of this section, an employer shall report an accident to the Director in the prescribed manner within seven days after having received notice of an accident or having learned that an employee has been injured in an accident.

(2) For the purposes of this section, an accident includes any injury reported by an employee, to his employer, if the employee when reporting the injury, alleges that it arose out of and in the course of his employment and irrespective of the fact that the employer is of the opinion that the alleged accident did not so arise out of and in the course of employment.

(3) An employer shall, at the request of an employee or the dependant of an employee, furnish the employee, or dependants with a copy of the notice of the accident furnished by the employer to the Director in respect of a claim for compensation by such employee or dependant.

(4) An employer who fails to comply with subsection (1) commits an offence.

(5) The provisions of this section do not prevent an employee from reporting an occupational accident or disease to the Director at any stage."

"**23. Inquiry by Director**

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

[…]"

"**25. Employee to submit to medical examination**

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

(2) If, in the opinion of any medical practitioner, an employee is not capable of travelling to be examined by the designated medical practitioner, the employee shall inform the party requiring the examination thereof or cause him to be so informed, and the designated medical practitioner shall then examine the employee at a time and place as agreed upon.

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

**26. Claim for compensation**

(1) A claim for compensation in accordance with this Act shall be lodged by or on behalf of the claimant in the prescribed manner within twelve months after the

date of the accident or, in the case of death, within twelve months after the date of death.

(2) If a claim for compensation is not lodged in accordance with subsection (1), the claim for compensation may not be considered under this Act, except where the accident concerned has been reported in accordance with section 21.

[…]"

"**52. Director's reply**

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

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

"**57. Repeal of Cap. 236**

The Workman's Compensation Act is repealed."

"**58. Savings**

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

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

7. WIBA introduced a single statutory administrative process for workers in Kenya seeking compensation in relation to work related injuries and diseases. WIBA established a non-fault compensation regime based on a fixed tariff scheme. The effect of section 16 of WIBA is to: (i) grant the Director of Occupational Safety and Health Services ("DOSH") exclusive jurisdiction at first instance to hear and determine claims arising from work related injuries and diseases; and (ii) prevent first instance court claims at common law. In terms of WIBA, an employee reports an accident which occurred during his employment to

his employer and the employer is then required to report the accident to the DOSH within 7 days of receiving notice of the accident or having learned that an employee had been injured in an accident. After receiving notice of an accident or having learned that an employee has been injured in an accident the DOSH is required to make such inquiries as necessary to decide the claim on the basis of the fixed tariffs. The DOSH is entitled to require the employee to submit to an examination by a medical practitioner.

8. If an employee is unhappy with a decision of the DOSH he could, within 60 days of such decision, object to the DOSH on a prescribed form and the DOSH would provide a written answer to the objection, varying or upholding his decision. If the employee is unhappy with the reply by the DOSH to his objection he could appeal to the Industrial Court (now the Employment and Labour Relations Court ("ELRC")).

9. In Kenya the Law Society of Kenya is entitled to lodge a petition to the High Court of Kenya contending that a provision or provisions in a statute are unconstitutional. In such a case, an appeal against the High Court's decision can be made to the Court of Appeal of Kenya. Further, in such a case an appeal against the Court of Appeal's decision can be made to the Supreme Court of Kenya (all references to courts are courts in Kenya unless otherwise stated).

10. The Supreme Court is the highest court or apex court in Kenya and its decisions are binding on all lower courts in Kenya. Decisions of the Court of Appeal are binding on lower courts. Decisions of the ELRC when sitting as an appellant court are binding on the Magistrates' court. The ELRC has the same status as the High Court.

11. On 14 April 2008 the Law Society of Kenya filed a petition at the High Court of Nairobi (all references are to this High Court unless otherwise stated) to declare certain provision of WIBA to be unconstitutional.

12. On 22 May 2008 the High Court (Judge Ojwang, J) made an interim ruling as follows:

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

13. On 4 March 2009 Judge Ojwang, J delivered the judgment of the High Court in *Law Society of Kenya* v *Attorney General & Another* (2009) eKLR where the High Court declared sections 4, 7(1) and (2), 10(4), 16, 21(1), 23(1), 25(1) and (3), 52(1) and (2) and 58(2) of WIBA to be unconstitutional. The sections of WIBA declared to be unconstitutional were declared null and devoid of status of law.

14. By Gazette Notice No. 9243 of 27 July 2011 the Chief Justice designated Magistrates' courts presided over by a Magistrate of the rank of Senior Resident Magistrate and above as Special Courts to hear and determine employment and labour relations cases within their respective areas of jurisdiction, which included work injury related matters.

15. Following the High Court judgment of 4 March 2009 workers could seek compensation for injuries sustained in a workplace accident by way of a court claim at common law in either the ELRC or the Magistrates' court presided over by a Magistrate of the rank of Senior Resident Magistrate and above. As section 22 of WIBA had not been declared null, a report of an accident could still be made to the DOSH, but the claim could not be progressed because section 23(1) of WIBA had been declared null and the DOSH, therefore, had no power to make such inquiries as were necessary to decide upon any claim.

16. The Attorney General of Kenya filed Civil Appeal No 133 of 2011 arguing that Judge Ojwang, J erred in the High Court in declaring the said sections of WIBA to be

unconstitutional. Between 4 March 2009 and 17 November 2017 there was not any interim order staying the decision of the High Court of 4 March 2009.

17. On 17 November 2017 the Court of Appeal issued its decision in relation to Civil Appeal No 133 of 2011 (the case is referred to as *Attorney General* v *Law Society of Kenya & Another* (2017) eKLR). The Court of Appeal reversed the decision of High Court of 4 March 2009 and found (with the exception of sections 7 and 10(4) of WIBA) that the sections of WIBA previously declared null were not unconstitutional. The judgement of the Court of Appeal including the following:

> "The last impugned provision of the Act was **Section 58(2)** whose effect is that claims arising from an accident or disease occurring before the commencement of the Act would be deemed to have been lodged under the Act.
>
> According to the learned Judge, existing claims pending before the courts of law at the commencement date of the Act which have not reached decree stage, the claimants would be non-suited. In which case they would be denied due process of law, which denial would amount, in some cases to a confiscation; that in those cases where a decree of the Court had been issued and conferred certain benefits upon the claimant this section has the effect of taking away the accrued property rights, which are protected under **section 75 (1)** of the former Constitution. As such and to the extent that **section 58 (1)** aforesaid purports to take that right away without compliance with the terms of the Constitution, it is inconsistent with the Constitution. We find, from the submissions of the respondents that at the commencement date of the Act there were before the courts, pending determination, several work- related accident claims brought under the repealed Workmen's Compensation Act (Cap. 236) or the common law.
>
> With respect, we agree that claimants in those pending case have legitimate expectations that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked. Indeed as a result of this concern, the learned Judge in a ruling on an interlocutory application directed that;
>
> > **'On the foregoing grounds, I will order that, pending the hearing and determination of the main cause, all pending litigation which had been commenced on the basis of either the Workmen's Compensation Act …. Or of the common law, or of a combination of both regimes of law, shall continue to be prosecuted and, in a proper case, finalized on the basis of the operative law prior to the entry into force of the Work Injury Benefits Act, 2007….'**

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

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

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

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

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

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

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

18. The Law Society of Kenya filed Petition No 4 of 2019 inviting the Supreme Court to reverse the said decision of the Court of Appeal. Between 17 November 2017 and 3 December 2019 there was not any interim order staying the decision of the Court of Appeal.

19. On 3 December 2019 the Supreme Court issued its decision in relation to Petition No 4 of 2019 (the case is referred to as *Law Society of Kenya* v *Attorney General & Another*,

Petition No 4 of 2019 (2019) eKLR). The Supreme Court upheld the decision of the Court of Appeal and found (with the exception of sections 7 and 10(4) of WIBA) that the sections of WIBA previously declared null by the High Court were not unconstitutional. The judgement of the Supreme Court included the following:

> "69. We have stated that section 16 cannot be read in isolation because if read with section 23 and 52 of the Act, the Act provides for legal redress to the Industrial Court (now the Employment and Labour Relations Court) and therefore judicial assistance can be sought by aggrieved parties from decisions of the Director and the court can make a determination with respect to all relevant matters arising from those decisions. It cannot, therefore, be the case that section 16 amounts to an ouster clause. It is in fact merely facilitative of what may eventually end up in court.
>
> 70. Flowing from the above analysis, it is apparent that in considering the nature and extent of the limitation placed under section 16 of the Act, it becomes clear that it does not permanently limit the right to access courts by an aggrieved party. It is only the initial point of call for decisions in workers' compensation. When read in whole with section 23 and 52 of the Act, therefore, a party is not left without access to justice nor do employees or employers have to result to self-help mechanisms. What the section does, is that it allows the use of alternative dispute resolution mechanisms to be invoked before one can approach a court.
>
> 71. We must in concluding on this issue also acknowledge, that this is a system that has been operational without complaint from employees through their union as divulged in court by the COTU for over a decade and we therefore find no reason to interfere with an already efficient system. It is our finding, therefore, that neither section 16, 23, nor 52(1) of WIBA can be said to be inconsistent with the former Constitution or the Constitution 2010.
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> […]
>
> 85. In agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of the *Act*, litigation relating to work-injuries had gone on and a number of the suits had progressed up to decree stage; some of which were still being heard; while others were still at the preliminary stage. All such matters were being dealt with under the then existing and completely different regimes of law. We thus agree with the Appellate Court that claimants in those pending cases have legitimate expectation that upon the passage of the *Act* their cases would be concluded under the judicial process which they had invoked. However, were it not for such legitimate expectation, *WIBA*, not being unconstitutional and an even more progressive statute, as we have shown above we opine that it is best that all matters are finalized under section 52 aforesaid.

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

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

88. In stating so, we presume that the property rights referred to include compensation for injuries or disease contracted in the work place. Even if so, all matters pending resolution under the previous legal regime were to be continued under *WIBA* and we have seen no evidence of denial of any right by that fact alone. Indeed, our courts and quasi-judicial tribunals have routinely applied the law in such a manner as to protect existing rights and therefore while we agree with the Appellate Court that a party has the legitimate expectation to have a dispute resolved under the invoked legal regime, we see nothing unconstitutional in *WIBA* being applied in a manner that is consistent with its provisions but taking into account the invoked legal regime."

20. Following the decision of the Court of Appeal and the decision of the Supreme Court there was uncertainty as regards what was to happen to cases filed in court after the commencement of WIBA but before the decision of the Supreme Court. There were three trends in relation to cases files during that period:

(1) Some judges took the view that they no longer had jurisdiction to hear cases in court and dismissed the court claim;

(2) Some judges took the view that the court cases could continue on the basis of legitimate expectation and dealt with cases under the common law; and

(3) Some judges refused to make any orders and returned the case to the registries to await directions.

21. To address the uncertainty that had ensued from the decisions of the Court of Appeal and the Supreme Court the Chief Justice, by Gazette Notice No. 5476, issued Practice Directions, dated 24 April 2023, relating to, amongst other things, pending court claims for compensation for work related injuries and diseases filed prior to the Supreme Court decision. The Practice Directions, dated 24 April 2023, included:

> "[…]
>
> IN EXERCISE of the powers conferred under Articles 159 (2) and 161 (2) (a) of the Constitution of Kenya, section 10 of the Judicature Act, and section 5 (1) and (2) (c) of the Judicial Services Act, the Chief Justice issues the following Practice Directions –
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> […]
>
> *Application*
>
> 3. The Practice Directions shall apply to the Employment and Labour Relations Court and Magistrates appointed and gazzetted by the Chief Justice pursuant to section 29(3) and (4) of the Employment and Labour Relations Act, 2011 to preside over cases involving employment and labour relations.
>
> […]
>
> *Judgment of the Supreme Court*
>
> 5. The Supreme Court *vide* a judgment rendered on 3rd December, 2019, determined that sections 16, 23 (1), 25 (1) and (3), 52 (1) and (2) as well as section 58 (2) of the Work Injury Benefits Act (WIBA) are consistent with the former Constitution and the Constitution 2010, specifically;
>
> (a) Section 16 as read with sections 23 and 52 of the WIBA does not limit access to courts but creates a statutory mechanism where any claim by an employee under the Act is subjected, initially, to a process of alternative dispute resolution mechanism starting with an investigation and award by the Director of Occupational Safety and Health Services and thereafter, under section 52 an appeal mechanism to the Employment and Labour Relations Court (formerly the Industrial Court).
>
> (b) Retrospective operation of statutes is not per se illegal or in contravention of the Constitution and section 58 (2) clearly expresses the intention that the Act shall apply retrospectively. Consequently, section 58 (2) of the Act does not take

away the right to legal process, or extinguish access to the courts or to take away property rights without due process.

(c) Be that as it may, claimants with pending cases have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process invoked.

(d) Also noting that many claims have not been finalized and due to passage of time, it has not been feasible to withdraw them and follow the alternative dispute resolution route. Further, considering the resolution passed by the Law Society of Kenya's meeting held on 21st March, 2023 urging that practice directions be issued for all pending claims be finalized in the respective courts.

*Consequently,*

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

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

*Claims* ***Filed after Commencement of WIBA but before the Supreme Court decision***

7. Taking into account that High Court vide its judgment dated 4th March, 2009 in Law Society of Kenya v. Attorney General & Another (2009) eKLR declared some of the provisions in WIBA including Sections 16, 23(1) and 52, which prescribe the procedure for lodging claims under the Act unconstitutional. Consequently, the said declaration of nullity created a legitimate expectation that claimants could directly lodge claims for compensation for work related injuries and diseases in court. As such, litigants cannot be penalized for relying on the declaration of nullity, as appreciated by the Supreme Court in Attorney-General and 2 Others v Ndii and 79 Others; Prof. Rosalind Dixon and 7 Others (Amicus Curiae) (Petition 12, 11 and 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) to lodge their claims in court. Therefore,

(a) All claims with respect to compensation for work related injuries and diseases ***filed after the commencement of WIBA and before the Supreme Court decision*** at the Employment and Labour Relations Courts or the Magistrates' Courts shall proceed until conclusion before the said courts.

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

*Claims* ***Filed after the Supreme Court Decision***

8. (a) All claims with respect to compensation for work related injuries and diseases shall commence before the Director of Occupational Safety and Health Services.

(b) All appeals emanating from the decision of the Director of Occupational Safety and Health Services shall lie before the Employment and Labour Relations Court.

(c) Such appeal shall be heard and determined through the appropriate appellant mechanism within the judicial hierarchy.

[…]

[***my emphasis***]"

22. Articles 159(2) and 161(2)(a) of the Constitution of Kenya 2010 provide:

"**Judicial authority.**

**159.** (1) […]

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

(a) justice shall be done to all, irrespective of status;
(b) justice shall not be delayed;
(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
(d) justice shall be administered without undue regard to procedural technicalities; and
(e) the purpose and principles of this Constitution shall be protected and promoted."

"**Judicial offices and officers.**

**161.** (1) […]

(2) There is established the office of-

(a) Chief Justice, who shall be the Head of the Judiciary;

[…]"

23. Section 10 of the Judicature Act 1967 provides:

> "**10. Rules**
>
> The Chief Justice may make rules of court for regulating the practice and procedure of the High Court and, subject to any other written law, that of subordinate courts, and the power to make rules under this section shall include the power to prescribe fees and scales of remuneration."

24. Paragraph 7 of the Practice Directions, dated 24 April 2023 (all references are to these Practice Directions unless the context appears otherwise) made clear that any claims filed in court with respect to compensation for work related injuries and diseases after the commencement of WIBA on 2 June 2008 and before the decision of the Supreme Court of 3 December 2019 at the ELRC or the Magistrates' courts shall proceed until conclusion before said courts. However, the Practice Directions did not specify what substantive law was to apply to those previously filed court claims.

25. Since the issue of the Practice Directions a number of work related injury cases that had been filed in court after the commencement of WIBA and before the decision of the Court of Appeal of 17 November 2017 and subsequently dismissed by the court on the basis of the court having no jurisdiction (with the dismissal being prior to the issue of the Practice Directions) have been reinstated as a court claims by the court that dismissed the court claim.

26. Dr Muli, Mr Nyairo and Prof Muigai have conducted research into cases decided after the issue of the Practice Directions. That research has found, in respect of work related injury cases filed in court after the decision of the High Court of 4 March 2009 and prior of the decision of the Court of Appeal of 17 November 2017 ("the relevant period"), that:

(i) the Kenyan courts were, after the issue of the Practice Directions, deciding those claims

on the basis of the common law; and (ii) there had not been any case identified where a court, after the issue of the Practice Directions, had decided a case filed by applying WIBA.

27. The Chief Justice of Kenya issues Practice Directions when acting in an administrative capacity, rather than a judicial capacity. Practice Directions issued by the Chief Justice: (i) have the force of law and are habitually observed by the Kenyan courts; (ii) cannot change the substantive law; (iii) are intended to guide the application of the existing law; and (iv) can be challenged by way of court application. The Practice Directions, dated 24 April 2023, have not been challenged and remain extant.

28. The case of *Zhongmei Engineering Group Ltd* v *Nyachiro* (*Appeal 2 of 2023*) [2023] KEELRC 1165 (KLR) is a decision of the ELRC sitting as an appeal court. In that the case a court claim was filed in the Magistrates' court, within the relevant period, on 21 February 2017, under common law seeking general and special damages. On 27 October 2021 the parties entered into a consent on liability at the ratio of 25/75 in favour of the plaintiff. The Principal Magistrate proceeded to a hearing on quantum of damages and in a judgment dated 15 December 2021 awarded the plaintiff 750,00 Kenyan Shillings in respect of general damages (after factoring in contributory negligence) and 4383 Kenyan Shillings in respect of special damages. *Zhongmei* appealed and contended, amongst other things, that: (i) the Principal Magistrate did not have jurisdiction to hear the claim as a result of the decisions of the Court of Appeal and the Supreme Court; and (ii) the Principal Magistrate erred in his assessment of quantum at common law, which was manifestly excessive in the circumstances. *Zhongmei* did not contend that it was incompetent for the Principal Magistrate to assess damages at common law. The ELRC issued its decision on 17 May 2023. The ELRC, in the refusing the appeal, held that: (i) the Magistrates' court had, as a result of the Practice Directions, jurisdiction to hear the claim; (ii) the Principal Magistrate had not

erred in his assessment of quantum at common law and made no criticism of the Principal Magistrate assessing quantum on the basis of the common law.

29. The case of *Chenje* v *Kibo & Allied Industries and another* (*Employment and Labour Relations Appeal 17 of 2023*) [2024] KEELRC 453 (KLR) is a decision of the ELRC sitting as an appeal court. In that the case a court claim was filed in the Magistrates' court, within the relevant period, on 8 August 2016, under common law seeking general and special damages. The first instance court issued its decision on 19 October 2022 (which was prior to the issue of the Practice Directions). The first instance court held, as a result of the decision of the Supreme Court, that it lacked jurisdiction and dismissed the claim. The plaintiff appealed to the ELRC and placed reliance on the Practice Directions. The ELRC issued its decision on 29 January 2024 and allowed the appeal. On the question of jurisdiction, the ELRC stated at paragraph 30:

> "30. The Court finds by doctrine of necessity the WIBA practice directions as gazetted by the Chief Justice pass muster in the eyes of the Court so as to promote access to justice to litigants who are caught up with WIBA cases filed in the Court in the period between Justice Ojwang's decision and the Court of Appeal 2017 and Supreme Court 2019 decisions. In the upshot the practice directions having expressly granted jurisdiction to the magistrates to handle WIBA matters filed in Court before the delivery of the Supreme Court decision of 3rd December 2019, then the appeal succeeds on the issue of jurisdiction."

The ELRC then addressed the question of liability and quantum and in returning the case to the Magistrates' court to determine the issues of liability and quantum stated:

> "33. The Court is persuaded by decision by Rika J in Saidi Mohammed v Diamond Industries Ltd (2018) eKLR to effect that this court only has appellant jurisdictions in work injury claims. Assessment of damages in work injury claims is the role of the Magistrates, the position prevailing before WIBA, and now permissible under the Chief Justice practice Directions(supra). This case falls under the practice Directions hence the jurisdiction to decide on liability and assessment of damages lies with the Magistrates Court."

30. The case of *Boniface Onyango* v *Jumbo North E.A.* MC.CC/1115/2016 is a first instance decision of Eldoret Magistrates' court. In that case the accident occurred on 22 June 2016 and a court claim appeared to be filed, within the relevant period, around 10 October 2016 (the plaint was dated 10 October 2016, but the case report does not specify the date the court claim was filed). The Magistrate issued a judgement on 27 June 2024. The Magistrate determined liability and quantum on the basis of the common law and awarded the plaintiff a total of 208,000 Kenyan Shillings in relation to both general and special damages.

31. The case of *Issac* v *Transafric Timber Limited* [2024] KEMC 63 (KLR) is a first instance decision of the Senior Principal Magistrate sitting in the Magistrates' court. In that case the accident occurred on 22 July 2017 and a court claim was filed, within the relevant period, on 25 September 2017. The Senior Principal Magistrate issued a judgment on 10 September 2024 determining both liability and quantum by applying the common law. The Senior Principal Magistrate found the defendant to be in breach of duty and awarded both general and special damages totalling 208,590 Kenyan Shillings.

**Finds in fact and law**

1. The action by each pursuer against the defender commenced in this court on 9 May 2017.

2. The present actions commenced in the All Scotland Sheriff Personal Injury Court during the relevant period. At the time of the commencement of the present actions jurisdiction to hear and determine claims arising from work injuries in Kenya was concurrent between the Kenya courts (either in the ELRC or the Magistrates' court presided over by a Magistrate of the rank of Senior Resident Magistrate and above) and the DOSH.

3. Whilst the decision of the Supreme Court of 3 December 2019 did recognise that in relation pending court claims filed prior to the commencement of WIBA, that claimants in those pending cases had a legitimate expectation that those cases would be concluded under the judicial process which they had invoked, meaning that those pending claims could continue in court with the law to be applied being the pre-WIBA legal regime, namely the common law and/or WCA (which was the applicable law at the time the claim was filed), the Supreme Court did not state that claimants in relation to claims filed in court during relevant period had such a legitimate expectation. Further, the Supreme Court stated that save for those pending cases filed prior to the commencement of WIBA, that all matters should be finalised under WIBA.

4. The Practice Directions have application to each action by the pursuer.

5. Following the decision of the Supreme Court of 3 December 2019 and after the subsequent issue of the Practice Directions, there is case law from both the Magistrates' courts and the ELRC, sitting as an appeal court, set out at findings in fact 28 to 31 above, that supports the current approach of the ELRC and the Magistrates' courts, in relation to claims filed at the ELRC or Magistrates' court with respect to compensation for work related injuries and diseases after the commencement of WIBA and before the decision of the Supreme Court, being that: (i) such claims should proceed to a conclusion before the court where the claim was filed; and (ii) the applicable law to be applied to determine those claims, in relation to both liability and quantum, is the common law.

6. However, the Supreme Court of Kenya would be likely to decide, in relation to claims filed at the ELRC or Magistrates' court with respect to compensation for work related injuries and diseases after the commencement of WIBA and before the decision of the Supreme Court, that: (i) such claims should proceed to a conclusion before the court where

the claim was filed; and (ii) that the applicable law to be applied to determine those claims is WIBA.

7. Had the present actions been filed in a Kenyan court during the relevant period, the Supreme Court of Kenya would be likely to decide that: (i) the actions should proceed to a conclusion before the court where the claims were filed; and (ii) that the applicable law to be applied to determine each action is WIBA.

**Finds in law**

1. The applicable law to be applied by this court in the present actions is the law of Kenya.

2. The applicable law of Kenya to be applied by this court in the present actions is WIBA.

**NOTE:**

**Introduction**

[1] The pursuers are or were employed by the defender. In these seven actions each pursuer seeks damages for injuries sustained while employed by the defender in tea harvesting operations in Kenya. Each pursuer contends that their injuries were sustained as a result of the defender's negligence (in PIC-PG10-18 (Ingan'ga) the pursuer also alleges a breach of statutory duty (other than the WCA)).

[2] There appears to be no dispute that: (i) each of the pursuers' actions commenced in this court on 9 May 2017; (ii) this court had jurisdiction by virtue of the defender being domiciled in Scotland (the first plea in law for the defender in each action is, however, essentially a plea of *forum non conveniens* - see paragraph 71 below); and (iii) the substantive

law to be applied in each case is the law of Kenya. There is, however, a dispute about what in fact the applicable law of Kenya was in relation to work related injury claims filed in the Kenyan courts during the relevant period (being between the 4 March 2009 (the date of the decision of the High Court) and 17 November 2017 (the date of the decision of the Court of Appeal)).

[3] By near identical interlocutors of 19 November 2024 the court appointed each action to a "preliminary proof on the matter of the applicable Kenyan law". In a note to those interlocutors the court noted it considered it had the power to restore each action to the adjustment roll following upon the court reaching a decision on the discrete question the preliminary proof was concerned with (namely the applicable Kenyan law). Case reference PIC-PG10-18 (Ingan'ga) was the lead action and it was agreed that the evidence heard in that action would be held to be evidence in the other six actions, namely: (i) PIC-PG5-18 Ochoi; (ii) PIC-PG6-18 Omoke; (iii) PIC-PG7-18 Muga; (iv) PIC-PG8-18 Nyakondo; (v) PIC-PG9-18 Idinga; and (vi) PIC-PG11-18 Chuma. As such, my decision on the discrete question will apply to all seven actions. I heard evidence in the preliminary proof, over 4 days, between 10 to 13 June 2025. There were, unfortunately, some difficulties in fixing a hearing on submissions and that hearing did not take place until 8 December 2025.

[4] The pursuer called the following two skilled witnesses on the law of Kenya to give evidence:

(1) Dr Elizabeth Muli, Senior Lecturer, University of Nairobi and Advocate of the High Court of Kenya; and

(2) Mr Alfred Nyairo, Managing Partner of Nyairo and Company Advocates and Advocate of the High Court of Kenya.

[5] The defender called the following skilled witness on the law of Kenya to give evidence:

(1) Professor Githu Muigai, Professor of Law at the University of Nairobi, Senior Partner at Mohammed Muigai LLP and Advocate of the High Court of Kenya.

**The evidence**

[6] Parties had entered into a joint minute of agreement regarding much of the legal background in these actions and there was no real dispute between the three witnesses as regards parts of legal background that were not subject to formal agreement. In the circumstances I did not consider it necessary to narrate all of the evidence that each of the three witnesses gave in relation to the legal background in these actions (the legal background is set out at findings in fact 3 to 26), but rather focus on the parts of their evidence where there was disagreement. The witnesses disagreed in relation to the discrete question set out in paragraph 3 above, with Prof Muigai taking a different professional view to that of Dr Muli and Mr Nyairo (Dr Muli and Mr Nyairo were of same view). Prof Muigai considered that the answer to the discrete question was that WIBA applied. Dr Muli and Mr Nyairo considered that the answer to the discrete question was that the common law applied.

***Dr Muli's evidence***

[7] Dr Muli is a Senior Lecturer at the University of Nairobi and an Advocate of the High Court of Kenya. Between 1995 and 1998 she worked as State Counsel at the Office of the Attorney General in Kenya where she was legal advisor to the relevant government minister in relation to international treaties and agreements. Since 1998 she had been an

academic and is currently the lead lecturer for labour law. She also teaches constitutional law. Between 2011 and 2015 she served on the Commission for the implementation of the Constitution of Kenya 2010 (all references will be to this Constitution unless otherwise stated). She reviewed past and new legislation and proposed amendments to align them with the Constitution. She was also involved in the development of legislation enacted to establish the ELRC.

[8] Dr Muli adopted her report of 3 September 2024 and her supplementary report of 31 May 2025. She spoke to the legal background already referred to. In terms of the hierarchy of the court, the Supreme Court was on top. Below that was the Court of Appeal. Below the Court of Appeal was the High Court and ELRC, which were on a par. When the ELRC was sitting as an appeal court, the appeal was heard by a single judge. Below the ELRC was the Magistrates' court.

[9] As a result of the High Court interim order of 22 May 2008 all pending litigation raised as a WCA claim or a court claim at common law continued to be dealt with under those legal regimes. The High Court made that order because the workers who had raised such claims had a legitimate expectation that their cases would continue to be dealt with under those regimes of law. The subsequent decision of the High Court of 4 March 2009 did not revive the WCA, but it meant that the DOSH had no power to handle work related injury cases. The decision of the High Court of 4 March 2009 meant that sections 4, 7(1) and (2), 10(4), 16, 21(1), 23(1), 25(1) and (3), 52(1) and (2) and 58(2) could not operate and were nullified. The decision of the High Court was not stayed, therefore the only way a worker could obtain compensation for a work related injury, after the decision of the High Court of 4 March 2009, was by making a court claim at common law. Following that decision the Chief Justice issued the Gazette Notice of 27 July 2011 where he designated

Magistrates' courts as being able to hear and determine employment and labour relations cases in relation to a number of specific areas, including work injury related matters. The effect of the decision of the High Court of 4 March 2009 taken with the said Gazette Notice meant that court claims at common law could be made and were made until the decision of the Court of Appeal of 17 November 2017.

[10] The decision of the Court of Appeal of 17 November 2017 upheld the constitutionality of sections 4, 16, 21(1), 23(1), 25(1) and (3), 52(1) and (2) and 58(2) of WIBA. The decision of the Supreme Court of 3 December 2019 upheld and confirmed the decision of the Court of Appeal. Therefore, the said sections of WIBA had been constitutional since WIBA came into force. As such all work injury claims occurring before (see section 58(2) of WIBA) or after the coming into force of WIBA, for which no suit was pending in court, was to be handled and determined under the provisions of WIBA. However, for pending court cases before WIBA came into force the Supreme Court agreed with the Court of Appeal that the doctrine of legitimate expectation applied and that those cases should continue to conclusion in accordance with the law and dispute resolution forum prevailing prior to WIBA. Therefore, the WCA or common law applied to those cases.

[11] Neither the decision of the Court of Appeal or the decision of the Supreme Court addressed what was to happen to cases filed in court between the decision of the High Court of 4 March 2009 and the decision of the Court of Appeal of 17 November 2017 (which has already been referred to as "the relevant period"). This led to confusion which was commented upon in the ELRC appeal case of *Omutiti* v *Orpower* at paragraph 21 to 23. Following the decisions of the Court of Appeal and the Supreme Court some courts took the view that, in respect of court claims filed during the relevant period, that the courts no longer had jurisdiction and that all cases required to be dealt with by the DOSH. Other

courts continued to deal with court claims filed during the relevant period and determined them as court claims at common law.

[12] The Practice Directions, dated 24 April 2023, were issued by the Chief Justice to address the confusion that had arisen in relation to court claims filed during the relevant period. The Practice Directions were issued under the lawful authority of the Constitution and other statutes and had the force of law. All courts required to follow the Practice Directions. The Practice Directions, dated 24 April 2023, did more than reiterate the existing law by giving procedural legitimacy to claims filed in court during the relevant period. The effect of paragraph 5(c) of the Practice Directions was, in respect of pending court cases before WIBA came into force, that those cases should continue to a conclusion under the judicial process invoked, namely the WCA or the common law. The effect of paragraph 7 of the Practice Directions was that cases filed in court during the relevant period and up to the decision of the Supreme Court could proceed under the legal regime that was applicable at the time of their filing based on the doctrine of legitimate expectation that the courts had jurisdiction. Therefore, a court claim at common law filed during the relevant period could continue as a court claim at common law. The Practice Directions did not, however, permit the raising of fresh court claims after the Supreme Court decision. After the decision of the Supreme Court all fresh claims had to be dealt with by the DOSH.

[13] The Practice Directions streamlined the handling of pending work injury cases by providing clear guidance on how these cases should proceed under the existing legal framework. They have provided consistency in promoting a uniform handling of work injury cases and facilitated access to justice for workers by ensuring that procedural ambiguities and jurisdictional disputes do not hinder access to justice for workers. If the

courts were not able to continue hearing the cases filed during the relevant period, the worker could face time bar issues given the 12 month time limit in WIBA.

[14] Dr Muli explained, under reference to a number of cases, including *West Kenya Sugar Co Ltd* v *Nyongesa* [2023] KEELRC 1603 (KLR) (29 June 2023), *Rok Industries Limited* v *Wambua* [2024] KEELRC 715 (LR) (14 March 2024); *Zhongmei Engineering Group Ltd* v *Nyachiro* [2023] KEELRC 1165 (KLR); *Chenje* v *Kibo & Allied Industries* [2024] KEELRC 453 (KLR), *Issac* v *Transafric Timber Limited* [2024] KEMC 63 (KLR), *Jumbo North (EA) Limited* v *Kiplimo* [2024] KEELRC 1677 (KLR) (28 June 2024); *Mugatsia* v *Protective Custody Services* [2024] KEELRC 41 (KLR) and *Boniface Onyango* v *Jumbo North E.A. Limited*, Eldoret Magistrates' court, case number MC.CC/1115/2016, that since the issuing of the Practice Directions: (i) the ELRC when sitting as an appeal court has consistently held that the court continues to have jurisdiction to determine court claims filed during the relevant period; (ii) that such court claims are being dealt with as court claims at common law; (iii) that her researches had not uncovered any court claim, filed during the relevant period, where a court had determined the case by applying WIBA; (iv) the cases of *Zhongmei Engineering Group Ltd* and *Boniface Onyango* were not outlier cases and in fact represented the current practice of the Kenyan courts; and (v) a number of cases that were filed in court during that relevant period that were subsequently dismissed following the decision of the Supreme Court were, following the issue of the Practice Directions, subsequently reinstated by the court (with *Mugatsia* being an example of such a case where the ELRC (sitting as an appeal court) placed reliance on the Practice Directions and allowed an appeal against a decision by the first instance court to strike out a claim filed in 2017 due to a lack of jurisdiction).

[15] Dr Muli, whilst accepting there was a difference in language used at paragraph 5(c) and 7 of the Practice Directions, rejected a suggestion that what paragraph 7 of the Practice

Directions meant was that claims filed after the commencement of WIBA and before the decision of the Supreme Court could proceed in the courts, but required to apply WIBA. She rejected a suggestion that paragraph 7 of the Practice Directions only dealt with forum. The language used in paragraph 5(c) of the Practice Directions mirrored the language used in the Court of Appeal and the Supreme Court. Whilst it was accepted that paragraph 7 of the Practice Directions did not mention the common law, neither did it mention WIBA. A claimed filed in court during the relevant period would be a court claim at common law because a number of provisions in WIBA were a nullity at that point. Dr Muli did not think that it was the Chief Justice's intention that a court claim at common law filed during the period set out in paragraph 7 of the Practice Directions would be converted into a court claim which applied WIBA. Rather, the Chief Justice's intention was that a court claim at common law filed during the period set out in paragraph 7 of the Practice Directions would continue at common law. In doing so the Chief Justice was not subverting the decision of the Supreme Court because paragraph 7 of the Practice Directions made clear that it was restricted to the time period set out in that paragraph. A court determining a court claim filed during that period could not determine a work related injury claim in accordance with WIBA. WIBA did not give the courts power to do so and there was no authority that supported such an approach. In terms of WIBA, only the DOSH could investigate and determine a claim according to the WIBA tariffs and the ELRC could only become involved at the appeal stage. When the state of confusion existed, namely post the decision of the Supreme Court and prior to the issue of the Practice Directions, the courts that had considered that WIBA applied did not themselves apply WIBA, but rather removed the cases from the court.

[16] In the ELRC case (sitting as an appeal court) of *Chenje* it was accepted, at paragraph 30, that the ELRC had used the phrases "WIBA practice directions", "WIBA cases filed in Court" and "WIBA matters". However, these phrases appeared to be just matters of expression and it was clear from paragraph 5 of the judgment that the plaintiff had filed a claim in the Magistrates' court for general damages at common law in 2016. Further, it was also clear that the ELRC held that: (i) the Magistrate had erred in his judgement of 19 October 2022 in holding that the Magistrates' court did not have jurisdiction; (ii) the Magistrates' court did have jurisdiction; and (iii) the case should be returned to the Magistrates' court for disposal in relation to the issues of liability and quantum. Therefore, the ELRC had clearly returned the case to the Magistrates' court to deal with liability and quantum at common law. The ELRC had not sent the case back to the Magistrates' court to deal with it under WIBA because that court had no power to do so and if the ELRC had taken such a course (which it had not), liability would not have been an issue because WIBA was a no-fault system.

[17] It was accepted what was said at paragraph 38 in the ELRC case (sitting as an appeal court) of *West Kenya Sugar Co Ltd* v *Libuyi* (paragraph 38 to 40 of that case is set out at paragraph 88 below). However, the decision of the ELRC was delivered on 17 November 2022, which was before the Practice Directions were issued. Further, the decision of ELRC makes clear that what the ELRC held was that the Magistrates' court had no jurisdiction to hear and determine work injury related claims filed after the commencement of WIBA and that such a claim therefore had to go to the DOSH.

[18] The ELRC case (sitting as an appeal court) of *West Kenya Sugar Co Ltd* v *Nyongesa* was determined after the Practice Directions were issued. Whilst it was accepted that the court

had again, at paragraph 31, used phrases "WIBA practice directions", "WIBA cases" and "WIBA matters", the court held at paragraph 32 that:

> "The answer on issue of jurisdiction then is that pursuant to the Chief Justice and President of the Supreme Court Practice Directions Vide Gazette Notice No. 5476 issued on the 28th April 2023 [*sic*] relating to pending Court claims regarding compensation for work related injuries and diseases instituted prior to the Supreme Court decision in Law Society of Kenya v Attorney General And Another, Petition No. 4 Of 2019; [2019] e KLR, the magistrates courts are now clothed with jurisdiction in work related injuries and disease claims pending in court before the delivery of the Supreme Court decision in Law Society of Kenya Vs. Attorney General And Another, Petition No. 4 Of 2019 on 3rd December 2019."

Dr Muli noted that the claim in *Nygonesa* was filed as a common claim in Magistrates' court and rejected a suggestion that the decision of ELRC meant that the Magistrates' court were now clothed with jurisdiction to determine the claim under WIBA.

[19] Dr Muli accepted that: (i) WIBA removed the need for lawyers and fees; (ii) the DOSH had a discretion in relation to the 12 month time bar; (iii) a judge could direct that a case went to DOSH; (iv) under WIBA the employee still required to satisfy the DOSH that they were: (a) an employee; (b) injured during their employment; and (c) within the 12 month time bar; and (v) that if an appeal to the ELRC under section 52(2) of WIBA was made against the decision of the DOSH, the ELRC would be able to consider, amongst other things, whether the DOSH had applied the WIBA tariffs correctly. Dr Muli did not consider that WIBA had replaced the common law. The common law applied to claims when WIBA did not apply.

[20] Dr Muli's opinion was that if a court claim at common law was filed in the Magistrates' court in Kenya in 2017, prior to the decision of the Court of Appeal, it would, following the issue of the Practice Directions, continue to be heard in the Magistrates' court and the Magistrate would determine liability and quantum on the basis of the common law.

*Mr Nyairo's evidence*

[21] Mr Nyairo has been an Advocate of the High Court of Kenya since 1984. He is currently the Managing Partner of Nyairo and Company Advocates. He has trained over 60 graduate pupils over the last 35 years and had over 40 years' experience in court litigation. He had experience of conducting cases in the Magistrates' court, the High court, the Court of Appeal and the Supreme Court. He had a number of areas of specialism, which included personal injury claims. It was normal in Kenya for an Advocate to have a number of areas of specialism. Whilst he had not listed constitutional law as an area of specialism, he regularly considered and applied the Constitution when it related to the areas that he specialised in. He had dealt with many work related injury cases and had acted for both employers and employees. Since 1985 he had dealt with claims by workers employed to work on tea estates.

[22] Mr Nyairo adopted his report of 11 April 2025. He spoke to the legal background already referred to. Prior to WIBA Mr Nyairo had dealt with both WCA claims and court claims at common law. A WCA claim was quicker to conclude, but a court claim at common law could result in award of damages that would be in region of five to ten times higher than a WCA claim. Under WIBA, accidents required to be reported to the DOSH who then required to make such inquiries as were necessary to decide any claim. The DOSH was an office within the executive. Advocates would not get involved with an accident reported to the DOSH. WIBA did not make any provision for the instruction of Advocates. There was no provision in WIBA that permitted court involvement at first instance. There was no provision in WIBA that gave the court the power to investigate a claim and apply the tariffs in WIBA. WIBA only permitted court involvement on appeal.

[23] The superior courts were the High Court, the Court of Appeal and the Supreme Court. The Supreme Court was the apex court in Kenya and its decisions were binding on all lower courts. A decision of the Court of Appeal was binding on lower courts. A decision made at a particular level of court holds until it is reversed.

[24] The interim ruling of the High Court of 22 May 2008 occurred before WIBA came into force and meant that court claims at common law could continue to be filed and that is what happened in practice. The decision of the High Court of 4 March 2009 nullified sections 4, 7(1) and (2), 10(4), 16, 21(1), 23(1), 25(1) and (3), 52(1) and (2) and 58(2) of WIBA. As section 22 of WIBA had not been declared null, reports of an accident could still be made to DOSH, but the claim could not be progressed because section 23(1) of WIBA had been declared null and the DOSH, therefore, had no power to make such inquiries as were necessary to decide upon any claim. During the relevant period reports were made to DOSH about accidents that had occurred during that period, but these could not be progressed. The decision of the High Court of 4 March 2009 did not declare section 57 null, therefore the WCA remained repealed. The decision of the High Court of 4 March 2009 was not stayed and was very clear. Following on from the decision of the High Court workers could still seek compensation for injuries sustained in a workplace accident by way of a court claim at common law.

[25] The decision of the Court of Appeal of 17 November 2017 resulted in uncertainty due to observations made in the judgment about legitimate expectations of those who had already filed work injury claims pre-WIBA to have those claims concluded under the legal regime they had invoked, even though the WCA had been repealed. Following on from the decision of the Court of Appeal, some courts held that cases filed in court during the relevant period could continue, while other courts took the view that as a result of section 16

of WIBA being restored, that they had no jurisdiction to hear cases filed during the relevant period and that those cases had to go to the DOSH. At that time Mr Nyairo took the later view.

[26] The decision of the Supreme Court of 3 December 2019 did not clear up the uncertainty. The decision of the Supreme Court upheld the Court of Appeal finding that parties who had filed work injury claims pre-WIBA had a legitimate expectation that such claims would be concluded under the legal regime they had invoked, which was the common law and/or the WCA. However, the decision of the Supreme Court did not give directions as regards what was to happen to court claims at common law filed between the decision of the High Court and the decision of the Supreme Court. Following upon the decision of Supreme Court there were three trends that emerged in respect of those cases.

(1) Some judges took the view that they no longer had jurisdiction to hear cases in court and dismissed the court claim;

(2) Some judges took the view that the court cases could continue on the basis of legitimate expectation and dealt with cases under the common law; and

(3) Some judges refused to make any orders and returned the case to the registries to await directions.

If court cases were dismissed, on the basis of lack of jurisdiction, the claimant potentially faced the challenge of being beyond the 12 month time bar in WIBA and WIBA did not have a provision for the extension of the 12 month period. Court claims in tort had a 3 year limitation period, which could be extended in certain circumstances.

[27] Practice Directions were issued by the Chief Justice under powers derived from the Constitution and other statutes and had the force of law. They were to ensure that the court system operated efficiently and to clear up any mishaps in the court system. Mr Nyairo

thought that Practice Directions dealing with an issue regarding the efficient operation of the court could help with connected constitutional issues. The Chief Justice is obliged to ensure access to justice. The Practice Directions, dated 24 April 2023, were promulgated by the Chief Justice to address the confusion that had arisen in relation to court claims filed from the commencement of WIBA and before the decision of the Supreme Court. Mr Nyairo did not consider that the Chief Justice would issue a Practice Direction that said a decision of the Supreme Court was wrong. The Practice Directions caused Mr Nyairo to change his view about the approach to cases in that period. The Practice Directions made clear that:

(1) Claims filed before WIBA came into force were to continue under the repealed WCA;

(2) Claims filed after the commencement of WIBA and before the decision of the Supreme Court were to be pursued until conclusion in the ELRC or Magistrates' court; and

(3) Claims after the decision of the Supreme Court were to be submitted to DOSH and appeals from a decision of the DOSH were to be filed in the ELRC.

[28] Mr Nyairo considered that the different language used between paragraph 5 and 7 of the Practice Directions was due to them dealing with different sets of persons. Paragraph 5 was dealing with persons who had filed claims before WIBA came in to force and paragraph 7 was dealing with persons who had filed claims during the period set out at point (2) above. Paragraph 6 of the Practice Directions was contentious because the Supreme Court referred to the judicial process invoked, which was mainly the common law and the WCA, but paragraph 6 only mentioned the WCA and did not mention the common law. Paragraph 7 of the Practice Directions stated that the decision of the High Court

created a legitimate expectation that claims could be lodged in court and made reference to the Supreme Court decision of *Ndii*, which considered the principle of legitimate expectation and held that if a person relied on a law to lodge a claim in court, they could not be penalised if that law was later nullified. Mr Nyairo considered that it would be a narrow approach to say that paragraph 7 of the Practice Directions was dealing with only with jurisdiction, rather than both jurisdiction and the law to be applied. Mr Nyairo's opinion was that such claims would continue to follow court procedure and that, in terms of paragraph 7 of the Practice Directions, that court claims at common law filed during the period set at point (2) above would continue as court claims at common law. The Practice Directions did not contradict the decision of the Supreme Court because its decision did not deal with cases in that time period.

[29] Mr Nyairo explained that since the issue of the Practice Directions there had been a settled and uniformed approach to work injury claims. The courts have in practice continued to deal with court claims at common law made during the period set out in point (2) above as court claims at common law. The courts have also revived cases filed during that period that were previously struck out for a want of jurisdiction. Indeed, Mr Nyairo had acted in cases for employers and had succeeded in having them struck out for a want of jurisdiction prior to the issue of the Practice Directions, but had, since the issue of the Practice Directions, consented, on behalf of the employer, to those cases being revived in court. Those cases had then proceeded as court claims at common law. Mr Nyairo had searched the case reports and had not been able to find any cases where a claim, which had been made during the period set out in point (2) above, had continued to be dealt with in court following the issue of the Practice Directions, but had applied WIBA to assess damages. Mr Nyairo noted that there will come a point when all the court claims at

common law filed during the period set out in point (2) above are dealt with and then all work injury claims will be dealt with in terms of WIBA.

[30] In the ELRC case (sitting as an appeal court) of *Chenje* it was clear from paragraph 5 of the judgment that the plaintiff had filed a claim in the Magistrates' court for general damages at common law in 2016. It was also clear that the ELRC held that: (i) the Magistrate had erred in his judgement of 19 October 2022 in holding that the Magistrates' court did not have jurisdiction; (ii) the Magistrates' court did have jurisdiction; and (iii) the case should be returned to the Magistrates' court for disposal in relation to the issues of liability and quantum. This case did not support the use of WIBA tariffs by the court.

[31] The case of *Boniface Onyango* was indicative of how courts are approaching court claims filed during the relevant period. In that case the claim was filed in 2016 as court claim at common law. The decision of the Magistrates' court was issued on 27 June 2024 and it was clear from judgment that fault and quantum were determined according to the common law.

[32] In the ELRC case (sitting as an appeal court) of *Rok Industries Limited* the claim was filed in April 2017 and the employer appealed against the decision in the Magistrates' court, which held that it had jurisdiction to determine the claim. The ELRC, in a judgment issued on 14 March 2024, held, after making reference to the Practice Directions, that the Magistrates' court did have jurisdiction to entertain the claim and dismissed the appeal.

[33] In the ELRC case (sitting as an appeal court) of *Zhongmei Engineering Group Ltd* a court claim at common law was filed on 21 February 2017. Parties entered into a consent on liability at the ratio of 25/75 in favour of the employee. The claim proceeded to a hearing on quantum of damages and in a judgment delivered on 15 December 2021 the Principal Magistrate awarded the employee common law damages. The employer lodged an appeal

contending, amongst other things, that the Magistrates' court had no jurisdiction and that the damages awarded were excessive. The ELRC, in a judgment issued on 17 May 2023, held, after making reference to the Practice Directions, that the Magistrates' court did have jurisdiction and that damages awarded at common law were not excessive.

[34] In the case of *Isaac* a court claim at common law was filed on 25 September 2017. The court claim also alleged breach of contract and breach of statutory duties. In a judgment of 10 September 2024 the Senior Principal Magistrate found that the defendants were liable by reason of negligence and/or breach of duty and awarded damages at common law.

[35] In the ELRC case (sitting as an appeal court) of *Jumbo North (EA) Limited* v *Kiplimo* a court claim was filed on 26 May 2017. The employer then made an application for a stay of the proceedings on the basis that the Magistrates' court had erred in determining that that court had jurisdiction to determine the claim. The ELRC, in a judgment issued on 28 June 2024, held, after making reference to the Practice Directions, that the Magistrates' court did have jurisdiction to entertain the claim and dismissed the application.

[36] In the ELRC case (sitting as an appeal court) of *West Kenya Sugar Co Ltd* v *Tangale* the claim was filed on 8 June 2017 and the employer appealed against the decision in the Magistrates' court, which held that it had jurisdiction to determine the claim. The ELRC, in a judgment issued on 23 March 2021, which was prior to the issue of the Practice Directions, applied the doctrine of legitimate expectation and held that the Magistrates' court did have jurisdiction to entertain the claim and dismissed the appeal.

[37] In the ELRC case (sitting as an appeal court) case of *Mugatsia* v *Protective Custody Services* the employee filed what appeared to be a court claim at common law on 9 May 2017. The Magistrates' court held that it had no jurisdiction to hear the claim. The employee appealed and the ELRC, in a judgment issued on 25 January 2024, noted that the employer

disputed the claim, which suggested that liability was disputed and held, after making reference to the Practice Directions, that the Magistrates' court did have jurisdiction and allowed the appeal. Whilst the ELRC had used the phrase "WIBA claims" at paragraph 21 of the judgment, that appeared to be the terminology used and ought not to be read that WIBA ought to be applied by the Magistrates' court.

[38] There was no provision in WIBA allowing a court to remit a case to the DOSH. In the ELRC case of *Mohammed* v *Freedom Airline Express Limited (Miscellaneous Application No E156 of 2021)* the court did not transfer the case to the DOSH but rather extended the time to report the accident to the DOSH. In ELRC case of *Kamande and Muigai* v *Ace Freight Limited* [2022] KEELRC 1275 (KLR) the court did refer a case to the DOSH, but there was not any provision in WIBA allowing a court to do so. Both the said cases had been decided prior to the issue of the Practice Directions.

[39] Mr Nyairo's opinion was that if a court claim at common law was filed in the Kenyan Courts in May 2017 it would: (i) if concluded prior to decision of the Court of Appeal, have been dealt as a court claim at common law; (ii) if not currently concluded, continue to be dealt with in the court as a court claim at common law.

***Professor Muigai's evidence***

[40] Prof Muigai is an academic who specialises in public law, public international law and constitutional law. He is also a Senior Partner at Mohammed Muigai LLP and an Advocate of the High Court of Kenya. He is an expert in the constitutional law of Kenya. His doctorate was in constitutional law. Between 2000 and 2005 he was a Commissioner of the Constitution of Kenya Review Commission. He was one of the draft persons of the 2010 Constitution. Between August 2011 and February 2018, he served as the Attorney

General of the Republic of Kenya. He has written extensively on the constitutional law of Kenya, including a recent book in 2022 entitled "Power, Politics and Law".

[41] Prof Muigai adopted his report of 14 April 2025 and his supplementary report of 2 May 2025. Prof Muigai again spoke to the legal background already referred to and explained the hierarchy of laws of Kenya under reference to section 3(1) of the Judicature Act (on which see finding in fact 5). The Constitution stood at the apex. There then followed written laws, then adopted laws, which was usually the law of England. The common law of England and the doctrines of equity were at the bottom of the food chain. The common law of England applied when it did not contradict any written law which was in force in Kenya. The High Court, Court of Appeal or Supreme Court could not revive a repealed statute. That was an important constitutional principle. In interpreting statutes, the Kenyan courts have adopted the common law tradition on statutory interpretation as an exercise aimed at fulfilling the intention of legislators. The marginal note to a section of WIBA was an aid to interpretation.

[42] It was important to recognise that the Supreme Court had a narrow and special jurisdiction. It can deal with appeals from the Court of Appeal in a case involving a question on the Constitution as of right. It can also deal with appeals from the Court of Appeal in any case which the Court of Appeal or Supreme Court has certified that a matter of general public importance is involved. Everybody was bound by the Supreme Court's interpretation of the law. The Supreme Court was infallible on the Constitution unless it reversed itself. Decisions of the ELRC (sitting as an appeal court) were binding on the Magistrates' court.

[43] The decision of the High Court of 4 March 2009 was unprecedented and amounted to judicial overreach. It resurrected a law that Parliament had killed. It was accepted that the

decision of the High Court nullified a number of provisions of WIBA, including section 16 and that the decision of the High Court was not stayed. That decision meant that cases could still be reported to the DOSH, but the DOSH had been stripped of his powers to investigate and therefore could not do much to progress a claim. The consequences of the decision of the High Court of 4 March 2009 were threefold:

(1) The exclusive original jurisdiction of the DOSH was deemed to be repealed. As such, claimants could pursuer their claims through the DOSH or the courts, as the jurisdiction was now to be concurrent;

(2) The definition of an employer and the implied duties of the employer provided by section 4 and 10(4) of WIBA (which were declared unconstitutional) had to be ascertained by reference to other statutes and regulations; and

(3) The operational provisions of WIBA relating to the quantification of compensation for injuries sustained at work continued to subsist irrespective of whether a claim was filed before the DOSH or the courts. Section 10(1) to (3), that provided for the statutory basis for claiming compensation and section 28 to 44 and the first schedule to the third schedule to WIBA, that governed the mechanism for computing compensation, remained undisturbed by the declaration of unconstitutionality by the High Court of sections 4, 7(1) and (2), 10(4), 16, 21(1), 23(1), 25(1) and (3), 52(1) and (2) and 58(2) of WIBA.

Prof Muigai accepted that during the relevant period: (i) the law was presumed to be as pronounced by the decision of the High Court; and (ii) workers were entitled to file and did file court claims at common law.

[44] The decision of both the Court of Appeal and Supreme Court held that WIBA (save for sections 7 and 10(4) of WIBA) had always been good law. That was the first stop and one could not jump over WIBA to the common law. The decision of the Supreme Court must be read alongside section 58(2) of WIBA. The part of Court of Appeal decision quoted at finding in fact 17 above was dealing with cases filed in court before the commencement of WIBA. In relation to those cases the reference to a legitimate expectation was only to do with forum and not the substantive law. The decision of the Supreme Court as regards legitimate expectation in relation to such cases was also in relation to forum only. Neither the Court of Appeal nor the Supreme Court said what law was to govern those cases that had been filed in court before the commencement of WIBA. It was accepted that neither the Court of Appeal nor Supreme Court gave guidance as regards what was to happen to court claims filed during the relevant period. It was also accepted that following on from the decision of the Supreme Court there was confusion as regards whether the courts had jurisdiction to hear cases filed during the relevant period and that a number of cases were decided in different directions.

[45] The Chief Justice was not acting in a judicial capacity when issuing a Practice Direction, rather he was acting in an administrative capacity. Practice Directions were not law, rather, they were directions. They are intended to make matters more efficient, more convenient and more responsive for court users. They are intended to guide the application of the existing law. Practice Directions are habitually observed when no controversy arises in relation to the subject matter of the Practice Direction.

[46] The Practice Directions, dated 27 July 2011 (see finding in fact 14), were written in the traditional lean style of a Practice Direction. By contrast the Practice Directions, dated 24 April 2023, were not in the normal tradition of a Practice Direction and it may have

created a bit of confusion. It would be a total error to suggest that the Practice Directions, dated 24 April 2023, were a source of law. It was never the intention of the Constitution that the Chief Justice, in the exercise of an administrative function, could create a new course of action or abolish existing courses of action. Practice Directions could not change the substantive law. Prof Muigai explained that it was possible to judicially review a Practice Direction.

[47] The Chief Justice issued the Practice Directions, dated 24 April 2023, in an attempt to resolve the confusion that had arisen. The Practice Directions contained argument and Prof Muigai had never seen a Practice Direction written in such a manner before. It was accepted, in terms of paragraph 7 of Practice Directions, that all claims for work related injuries and diseases filed after the commencement of WIBA and before the Supreme Court decision shall proceed to conclusion in court. That paragraph recognised a legitimate expectation on the appropriate forum to determine those court claims. Paragraph 7 of the Practice Directions did not say what substantive law was to be applied to those court claims and a claimant could not: (i) have a legitimate expectation that was contrary to the law; or (ii) expect what the law had taken away. The use of "work related injuries and diseases", in paragraph 7, was language that would be used in a Kenyan statute. Paragraph 7 of the Practice Directions could not override WIBA and therefore the applicable framework for quantification of the claim and the substantive law was WIBA. The Practice Directions served to set out the effect of the litigation before the Kenyan courts as follows:

(1) All claims relating to workplace related injuries filed prior to 2 June 2008 are to be determined under the legal framework set out in the WCA (repealed);

(2) All claims filed from 2 June 2008 to 4 March 2009 are to be determined exclusively and solely under the legal framework provided by WIBA;

(3) All claims filed from 5 March 2009 to 3 December 2019 when parts of WIBA had been declared unconstitutional were to be determined under the forum that the claimant had filed their claim (whether DOSH or the courts), the contractual provisions of the employment contracts between the respective employers and employees, the WIBA provisions on the computation of compensation and principles of common law on interpretation of employment contracts; and

(4) All claims filed from 4 December 2019 to date are to be resolved through the exclusive legal framework set out under WIBA. This meant the claims should be filed before the DOSH in accordance with WIBA.

Prof Muigai accepted that the Practice Directions, dated 24 April 2023, had not been challenged.

[48] In respect of the pursuer's claim filed in 2017 it was Prof Muigai's view that whilst the exclusive mechanism for the resolution of claims by the DOSH had temporarily been rendered unconstitutional, a claimant was at liberty to file a claim either before the DOSH or the courts, since they both enjoyed concurrent jurisdiction to hear WIBA claims, with the governing law to resolve the substance of the work injury claims still being WIBA. Prof Muigai drew support for his opinion from the following:

(1) First, upon coming into force of WIBA on 2 June 2008, the WCA was repealed by section 57 and 58(2) of WIBA. As such, unless the entirety of WIBA had been invalidated, any claim lodged after 2 June 2008 could not seek to rely on the WCA.

(2) Second, the High Court only declared specific provisions of WIBA unconstitutional while the remainder of WIBA remained the governing framework. Such a position was encapsulated by the ELRC (sitting as an appeal court) in *Heritage Insurance Company Limited* v *Joshua and another* [2021] KEELRC 1634 (KLR) in passage set out in paragraph 87 below (Prof Muigai accepted that this decision was made prior to the Practice Directions being issued). Among the sections declared unconstitutional was section 16 of WIBA, which had granted exclusive original jurisdiction to the DOSH. It was crucial to note that this declaration only affected where the claim could be lodged and not what law would govern the claim. The declaration of section 16 as being unconstitutional removed the exclusive jurisdiction of DOSH to hear claims arising from work injury. This therefore meant that prospective claimants were free to approach either DOSH or the courts, with WIBA being the governing framework on the quantum of damages.

(3) Thirdly, section 12 of the Employment and Labour Relations Court Act 2011 expressly provided that the ELRC shall have exclusive original and appellant jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution.

(4) Fourthly, section 29(3) and (4) of the 2011 Act provides that the Chief Justice could appoint Magistrates to hear and determine employment related disputes. Therefore, the Employment and Labour Relations Division within the Magistrates' court had jurisdiction to hear claims arising from work injury. This was affirmed in the case of *Abyssina Iron & Steel Limited* v *Ondara, Civil Appeal No 1 of 2014*.

[49] The contention that WIBA does not apply to court claims filed after the decision of the High Court of 4 March 2009 and before the decision of the Supreme Court was wrong on two grounds. First, it appeared to be presumed that the entirety of WIBA was declared unconstitutional by the High Court when instead only some provisions of WIBA were declared unconstitutional. The parts of WIBA that dealt with the framework for the quantification of loss under the first to third schedule of WIBA were not challenged. Secondly, it appeared that it had not been appreciated that the WCA was repealed and could not in any circumstances be relied upon. Once an Act had been repealed, even if the successor Act was found unconstitutional, the preceding Act was not deemed to be resuscitated. As such, the applicable law on the quantification of damages for work injury claims that arose or were filed post 2 June 2008, whether before the DOSH or the courts, is and was always WIBA. Section 58(2) of WIBA made this clear. The common law could not apply to such claims under the hierarchy of laws because a clear statutory scheme existed in the form of WIBA. Section 10 and 16 of WIBA categorically provides that the right to compensation for disablement or death of an employee arising from an accident was solely limited to the provisions of WIBA. As such, section 16 of WIBA excluded common law remedies for all claims arising after 2008.

[50] Prof Muigai accepted that he had not seen any cases where the courts had applied WIBA, but noted that that does means that such cases did not exist. If the courts were dealing court claims filed during the relevant period as court claims at common law, they were wrong to do so. The case of *Libuyi* supported Prof Muigai's approach and was the most persuasive authority on the applicable substantive and procedural law between 2008 and 2019 when the Supreme Court decision was issued. It was, however, accepted that that case was decided prior to the Practice Directions being issued. There was no difference to

the substantive law pre or post the issue of the Practice Directions. It was accepted that the case of *Nyongesa* was decided, after the Practice Directions were issued, by the same judge as decided the case of *Libuyi,* but in *Nyongesa* the judge reached a different decision and sent the case back to Magistrate to deal with the case. However, it was not open to the Chief Justice to dictate any other law other than WIBA. Prof Muigai considered that the decisions in the cases of *Boniface Onyango* and *Zhongmei Engineering Group Ltd* were outlier decisions. Prof Muigai's opinion was that the present actions would fall to be determined by the application of WIBA only.

[51] Whilst there was no express power in WIBA for a judge to remit a case to the DOSH, there may be an inherent power for a judge to do so. In the ELRC (sitting as an appeal court) case of *Bloomingdale Roses (K) Ltd* v *Nteere, Civil Appeal No 1 of 2018*, the judgment was issued 8 November 2018 and was therefore after the decision of the Court of Appeal and before the issue of the Practice Directions. In that case the judge referred the case to DOSH.

[52] Prof Muigai did not dispute Mr Nyairo's experience, as a practitioner, as regards what was happening in the lower courts with work injury related cases: (i) after the decision of the Court of Appeal and before the issue of the Practice Directions; and (ii) after the issue of the Practice Directions.

**Submissions**

[53] A 36 page written submission was lodged on behalf of the pursuer and a 17 page written submission was lodged on behalf of the defender. Both parties also made additional oral submissions. What follows is a summary of the submission made by the parties.

***Submissions for the pursuer***

[54] The court should find that the applicable Kenyan law that this court should apply, in respect of both liability and quantum, is the common law of Kenya and restore the case to the adjustment roll. It was important to note that the actions in the Inner House case of *Campbell* v *James Finlay (Kenya) Ltd* 2023 SLT 1364 were all raised after the Supreme Court decision. The present actions were quite distinct from those dealt with in the Inner House because they were all raised on 9 May 2017, within the relevant period. It was accepted that the task this court faced was to decide what the Supreme Court of Kenya would decide if the point were to come to it (see *Perry and Another* v *Lopag Trust Reg And Another No 2 (Cayman Islands)* [2023] UKPC 16 at paragraph 11).

[55] The evidence that should be the primary guide to the court is Mr Nyairo as supported by the evidence of Dr Muli. Mr Nyario rejected a suggestion that he was not a constitutional lawyer and made clear that: (i) the Constitution was at the heart of everything in daily lives in Kenya; and (ii) he dealt with the Constitution on a daily basis. Dr Muli had served on the Commission for the implementation of the Constitution and was also involved in the development of legislation that was enacted to establish the ELRC. The evidence of Mr Nyairo and Dr Muli should be preferred to that of Prof Muigai where there was disagreement between them and Prof Muigai conceded that Mr Nyairo would be better placed to comment on what was actually happening in the court system.

[56] The present actions were raised after the decision of the High Court of 4 March 2009 had removed important powers of the DOSH. It was not disputed that, as a result of the decision of the High Court, claimants could bring a claim in a Kenyan court for common law damages during the relevant period. The decision of Court of Appeal of 17 November 2017 resulted in a period of flux from 17 November 2017 until 24 April 2023, when the Practice

Directions were issued. During the flux period, cases were decided in different directions. It was accepted that the decision of the Supreme Court of 3 December 2019 upheld the decision of the Court of Appeal and finalised matters. Importantly, the Supreme Court recognised that claimants who had raised actions in courts prior to WIBA coming into force had a legitimate expectation that those cases would be decided in the court that they had chosen. However, the Supreme Court did not deal with what was to happen with cases filed in court during the relevant period. The Practice Directions clarified that issue and resolved the uncertainty that had arisen during the period of flux. The Practice Directions did not alter the substantive law and did not contradict the decision of Supreme Court. The Practice Directions in fact embraced the Supreme Court's analysis of the underlying principles of legitimate expectation. Mr Nyario made clear that the Practice Directions had the force of law. The Practice Directions had been written by the Chief Justice and had not been challenged. There was no evidence before the court that the Practice Directions had no effect at all and Prof Muigai did not say that they were irrelevant. The Practice Directions affected how the law of Kenya was being applied in Kenya. However, even without the Practice Directions, the principle of legitimate expectation still applied.

[57] The case law, following on from the issue of the Practice Directions, dated 24 April 2023, supported the position that cases raised during the relevant period were permitted to proceed in the Kenyan courts and that those courts awarded damages at common law. WIBA did not give the courts the power to award damages under the WIBA tariffs or to refer a case to the DOSH. In terms of WIBA, only an employer or a claimant could refer a case to the DOSH. The defender had not identified any case, decided after the issue of the Practice Directions, where a case proceeding in court had been dismissed for want of jurisdiction or referred to DOSH. Nor had the defender identified any case where a Kenyan

court had determined that it had jurisdiction but then applied WIBA. It was accepted that claims raised after the decision of the Supreme Court could only proceed through the WIBA scheme. That scheme was operated by the DOSH and he awarded damages based on the WIBA tariffs. Damages awarded under the WIBA tariffs were lower than damages at common law, but the "trade off" was that fault did not require to be proved. However, as the present actions were raised during the relevant period, the pursuers were entitled to file a court claim at common law or report the matter to the DOSH. In the present actions the pursuers had opted to file a court claim at common law and had a legitimate expectation that their cases would continue to proceed in court and be determined at common law. If they were not permitted to proceed with their court claim, a claim to the DOSH would be time-barred. If they were entitled to continue with the cases in court, but apply WIBA, they would be penalised by having their cases determined under an Act that awarded lesser damages than the common law.

[58] It was accepted that Prof Muigai was a highly regarded academic constitutional lawyer. Prof Muigai accepted that the present actions could continue in court but contended that the court should apply the WIBA tariffs when assessing damages. However, Prof Muigai had not referred to any case that supported his contention and had not appreciated the difference between cases decided in period of flux and cases decided after the Practice Directions were issued. Prof Muigai stated that the case of *Libuyi* was the most persuasive authority on the applicable substantive and procedural law between 2008 and 2019 when the Supreme Court decision was issued, but that case was decided prior to the issue of the Practice Directions and the judge in that case (Judge Keli) reached the opposite decision in the subsequent cases of *Nyongesa* and *Chenje,* with the decision in those cases being made after the Practice Directions were issued. Cases decided in the flux period

did not demonstrate how a court in Kenya would today approach a case filed in court in May 2017. Rather, the court should derive assistance from the cases decided after the Practice Directions were issued and all the Kenyan cases, decided after the issue of the Practice Directions, pointed to the courts applying the common law. The cases of *Zhongmei Engineering Group Ltd*, *Chenje*, *Boniface Onyango* and *Isaac* all clearly demonstrated that legitimate expectation existed in relation to the applicable law and not (as suggested by the defender) forum only.

[59] In the circumstances: (i) the pursuers were entitled to raise proceedings in this court; and (ii) following the issue of the Practice Directions the clear and settled practice in Kenya in respect of cases filed in court during the relevant period was that: (a) those cases were to continue to a conclusion before the court where the claim was filed; and (ii) the court would award common law damages where they have been legitimately sought. In all the circumstances this court should therefore find that applicable Kenyan law to all issues, including liability and quantum, is the common law of Kenya.

***Submissions for the defender***

[60] The defender contended that: (i) WIBA was the only substantive law applicable to pursuer's claims; (ii) the Practice Directions, dated 24 April 2023, applied only to cases filed in the ELRC and Magistrates' court in Kenya during the relevant period and did not apply to the pursuers' actions raised in this court; (iii) in any event, the Practice Directions did not affect the substantive law of Kenya applicable to claims for compensation for workplace injuries and affected only the forum in which certain existing cases may be progressed; (iv) the provisions of WIBA precluded any attempted determination of the pursuers' claims by this court and, in any event, this court was not in a position to properly determine the

pursuers' claims in accordance with WIBA; and (v) the present actions should be dismissed or, in the alternative, sisted pending determination of the pursuers' claims under WIBA in Kenya.

[61] Foreign law must be proved as matter of fact. The correct approach was set out in *MCC Proceeds Inc* v *Bishopsgate Investment Trust plc & Ors* [1999] CLC 417 at paragraph 23, *DNO Oman Ltd* v *Clouston* 2019 SLT 395 at paragraph 62, *Ted Jacob Engineering Group Inc* v *Morrison* 2019 SC 487 at paragraphs 15 to 17 and *Perry* at paragraphs 10 to 15. Paragraph 11 of *Perry* made clear that the task of the trial judge when there were disputed questions of foreign law was to determine what the highest relevant court in the foreign legal system would decide if the point were to come to it. In the present case the task for this court was to consider how the Supreme Court of Kenya would be likely to decide the point in this case if it were to come before it. That was of critical importance and was why the evidence about what was happening "on the ground" in lower courts in Kenya was peripheral. None of the decision of the ELRC or the Magistrates' court were determinative and there were a number of examples where a point had been consistently decided by the lower courts in a certain way for a considerable period of time, but that had subsequently turned out to be incorrect once a higher court had considered the matter.

[62] This court was concerned with constitutional law in Kenya and the only true constitutional law expert was Prof Muigai. His doctorate was on the subject of constitutional law, he was a former Attorney General of Kenya, he was one of the drafters of the Constitution and had authored a book on the Constitution. Dr Muli was an academic and her breadth of experience did not begin to match that of Prof Muigai. She was an academic who was a labour lawyer and not a constitutional lawyer. Whilst she generally gave her evidence in a straightforward manner, she would not accept what the Supreme

Court said at paragraph 71 of their decision of 3 December 2019 about WIBA operating without complaint of the employees of the COTU union for over a decade. She insisted that paragraph 5 and 7 of the Practice Directions, dated 24 April 2023, had the same meaning despite different wording being used. She also had relied on the case of *Chenje* but was unable to point to any passage in that case which supported her position. Mr Nyairo was clearly an experienced lawyer in private practice. He specialised in a number of areas of law and whilst he expressed familiarity with the Constitution, he did not claim to be a constitutional lawyer. His breadth of experience in relation to constitutional law did not match that of Prof Muigai. Whilst he gave his evidence in a straightforward manner, his evidence was heavily focused on what was happening "on the ground", which, for the reasons set out in paragraph 61 above, was not determinative. Given the expertise of Prof Muigai in constitutional law, his evidence should be preferred to the evidence of Dr Muli and Mr Nyairo wherever there was a material conflict between their evidence.

[63] The key area of contention between the parties was over the status and effect of the Practice Directions, dated 24 April 2023. Prof Muigai's evidence in that regard should be accepted. Prof Muigai was clear that Practice Directions were not law and not intended to be law. They were administrative directions which were intended to make the administration of justice more efficient, more convenient, more affordable and more responsive to the demands of users. Practice Directions had the force of law in the sense that they were habitually observed and were intended to guide the application of the existing law. The Practice Directions, dated 24 April 2023, did not take the form of traditional Practice Directions because they contain argument, justification and many other things. It would be a total error to treat those Practice Directions as a source of law. The

constitution never intended that the Chief Justice, in the exercise or his or her administrative functions, could create new causes of action or abolish existing causes of action.

[64] The Supreme Court exercised a very narrow and special jurisdiction as regards the Constitution. It was infallible on the Constitution, unless it reversed itself and every other court was bound by the Supreme Court's interpretation of the law. The decision of the Supreme Court of 3 December 2019 was that the relevant sections of WIBA were constitutional the day it was enacted. The Supreme Court took the view that all claims lodged after the commencement of WIBA should be resolved within the framework of WIBA. The only exception were claims being litigated prior to WIBA coming into force. In respect of such claims the Supreme Court held that the claimants in those pending cases had a legitimate expectation that upon the passage of WIBA, their cases would be concluded under the "judicial process which they had invoked". In respect of all other cases, the Supreme Court held that the relevant sections of WIBA, not being unconstitutional, they should be resolved under WIBA. Therefore, Kenyan law has always been WIBA since it came into force in 2008.

[65] The two issues that divided parties in the present cases were:

(1) Whether the Practice Directions, dated 24 April 2023, were of any application in the present actions?

(2) If the Practice Directions did apply in these actions, what was the proper meaning and effect of paragraph 7 of the Practice Directions?

[66] As regard the first issue, the Practice Directions had no application in the present actions. Paragraph 3 of the Practice Directions made clear that they applied only to cases filed within the relevant period in the ELRC or the Magistrates' court. That was not a mere technicality which could be overcome by treating this court as the Scottish equivalent of

the ELRC or the Magistrates' court. Under WIBA, the Kenyan courts had no original jurisdiction in respect of work injury claims (the ELRC has an appellant jurisdiction) and it was only by virtue of the Practice Directions that an exception was made and the exception was only for work injury cases filed in the relevant period at the ELRC or the Magistrates' court. There was therefore no Kenyan law basis for the exclusive jurisdiction of the DOSH, under section 16 of WIBA, not to apply in respect of the present actions. Further, the ELRC in the case of *Chenje* held that only the Magistrates' court had jurisdiction over work injury claims under the Practice Directions. There was, however, no basis upon which this court could purport to determine that it should be treated as being equivalent to the Magistrates' court, as opposed to the ELRC, for the purposes of the Practice Directions.

[67] As regards the second issue, paragraph 7 of the Practice Directions was, in any event, solely to do with forum and not about substantive law. Paragraph 85 of the decision of Supreme Court was clear that all claims filed since WIBA came into force should be finalised under section 58(2) (the reference in paragraph 85 to section 52 of WIBA being erroneous). The Supreme Court held that work injury claims filed pre-WIBA should be concluded under the "the judicial process which they had invoked". That language was reflected in paragraph 5 of the Practice Directions, which dealt with the treatment of pre-WIBA cases. Paragraph 7 of the Practice Directions sought to address a difficulty caused by the fact that from the date of the interim order of the High Court of 22 May 2008 until at least the decision of the Court of Appeal, parties had been allowed to bring work injury claims in courts and had done so. That led to the confusion described by Mr Nyairo and the Practice Directions sought to address that confusion. The difficulty was that the Supreme Court had held that WIBA was the governing law and therefore work injury claims required to go exclusively to the DOSH in the first instance. However, that meant that work injury claims,

which had been legitimately filed in court during the relevant period, were in the wrong place. The solution adopted by the Chief Justice in the Practice Directions was to allow claims filed in the ELRC or Magistrates' court, post WIBA and before the decision of the Supreme Court, to proceed to conclusion before said courts. In such cases the Practice Directions were the only reason that the ELRC or Magistrates' court had jurisdiction (see *Nyongesa* at paragraphs 31 to 33). However, those cases could be brought to a conclusion by the court referring them to the DOSH.

[68] Paragraph 7 of the Practice Directions only concerned forum and it was not about the substantive law. This was so for several reasons:

(1) The Chief Justice could not make a Practice Direction which overruled the substantive law, namely WIBA, or alter the law as determined by the Supreme Court;

(2) The Supreme Court had confirmed that the substantive law applicable to all work related injury claims, except those filed before WIBA came into force, was WIBA;

(3) The wording of paragraph 7, particularly when contrasted with the wording of paragraph 5 and 6 of the Practice Directions, goes no further than to allow work injury claims which were filed at the ELRC or at the Magistrates' court, during the relevant period, to proceed to a conclusion before said courts. The wording of paragraph 5(c) is that; "claimants with pending cases have legitimate expectation that upon the passage of the Act their cases would be *concluded under the judicial process invoked*"; whereas at paragraph 7 a different type of legitimate expectation is discussed: "the said declaration of nullity created a legitimate expectation that claimants could *directly lodge* claims for

compensation for work related injuries and diseases in court. As such, litigants cannot be penalized for relying on the declaration of nullity … *to lodge their claims in court*." [*the defender's emphasis*].

(4) The difficulty facing the pursuers was that the Practice Directions would be unnecessary, but for section 16 of WIBA being in play. However, if section 16 of WIBA was in play, the common law is excluded by its terms and all the other previously impugned sections of WIBA (save for sections 7 and 10(4)) were also in play.

[69] It followed, as a matter of Kenyan constitutional law, that the substantive law applicable to claims filed after the commencement of WIBA, is WIBA. If the matter came before the Supreme Court that is what they would decide and that is what the Supreme Court did decide in their decision of 3 December 2019. Therefore, the substantive law in relation to claims filed in court during the relevant period, which include the actions by the present pursuers, is WIBA. The Practice Directions cannot and do not change that. As the actions of the pursuers in the present actions have based their claims on the common law, their cases are irrelevant and ought to be dismissed.

[70] Further, this court is not in a good position to give the pursuers the redress to which they are entitled under Kenyan law. Their entitlement under Kenyan law is to have their claims dealt with according to the procedures and processes laid down in WIBA, not some attempted facsimile thereof which takes place in the context of a proof in this court. Comity demanded that this court did not seek to fashion an imperfect approximation in the alternative. The pursuers could never be better off by continuing to litigate in this court, rather than progressing their claims in Kenya in accordance with WIBA (because even if the pursuers claims were to be progressed before this court, it would be bound to apply

the provisions of WIBA in exactly the same way as they would be applied in Kenya). Accordingly, the pursuers have nothing to gain by being allowed to continue litigating in this court and there was much to be potentially lost in terms of expense. In all the circumstances the defender's first plea in law should sustained and the present actions should be dismissed.

**Analysis**

[71] It is important to point out *in liminie* that I have the upmost respect for: (i) the legal system of Kenya; and (ii) the opinions expressed by Dr Muli, Mr Nyario and Prof Muigai, who were all very experienced and skilled lawyers. I have explained, at paragraph 3 above, that the discrete question in this preliminary proof concerns what applicable law of Kenya is in relation to the pursuers' actions. That is the discrete question that I heard evidence about and it is that discrete question that I must and will determine. The defender submitted that I should also, amongst other things, sustain the defender's first plea in law, which was in the following terms in PIC-PG10-18 (Ingan'ga) (with very minor different wording in the other actions):

> "The pursuer's claim being governed by Kenyan law, the action ought to be dismissed, or alternatively sisted until such time as the pursuer has made his claim pursuant to the statutory procedure provided by the Kenyan Work Injury Benefits Act 2007 and such claim has been determined in accordance therewith."

However, the only evidence I heard was as set out above and I considered that the appropriate course of action was to determine the discrete question and fix a hearing to consider the expenses of the preliminary proof and further procedure.

[72] I considered that all three witnesses were impressive witnesses who each clearly had an in-depth knowledge of the law of Kenya. I considered that each of them was extremely

well qualified to give skilled evidence on the law of Kenya. The experience of each witness differed and was informed by their career to date. Dr Muli is academic and lead lecturer in labour law. She also had considerable experience in and currently taught constitutional law. Mr Nyairo was an extremely experienced court practitioner and explained that he regularly had to consider and apply the Constitution in respect of the areas of law he specialised in, which included work injury related cases. Prof Muigai was again extremely experienced and I considered that his experience demonstrated that he was an expert in the constitutional law of Kenya. I considered that each witness was: (i) doing their very best to assist the court; and (ii) a credible and reliable witness.

[73] All three witnesses were in agreement that, in terms of paragraph 7 of the Practice Directions, all claims with respect to compensation for work related injuries and diseases filed after the commencement of WIBA and before the Supreme Court at either the ELRC or the Magistrates' court, should proceed until conclusion before said courts. However, they professionally disagreed as regards the answer to the discrete question. In short, Dr Muli and Mr Nyario, on the one hand, were of the view that the answer to the discrete question was that the common law applied and Prof Muigai, on the other hand, was of the view that WIBA applied.

[74] In order to reach an answer to the discrete question I required to determine, as a matter of fact, what the applicable law in Kenya currently is in relation to court claims filed during the relevant period for compensation for work related injuries and diseases. In the recent Inner House case of *Ted Jacob Engineering Group Inc* Lord Drummond-Young, in delivering the opinion of the court, set out, at paragraphs 11 and 12, what I considered to be the correct approach to determining what the relevant foreign law is:

"[11] …Evidence of foreign law was dealt with more recently in *DNO Oman Ltd v Clouston* (para 62), where the Lord President, giving the opinion of the court, stated the law as follows:

> 'Foreign law must be proved as a matter of fact. This often means that parties will adduce experts in the foreign law to explain the relevant rules and principles. The task of ascertaining foreign law remains that of the court. It will seldom be a question of simply preferring one expert as more reliable than another as if he were an eyewitness speaking to events which he had observed. Especially when the foreign law is in codified form, the court will have to look at the written materials and decide for itself, if necessary with the assistance of experts, what the law has been proved to be (*Kolbin & Sons v Kinnear & Co*, …, LJC (Alness) at 737–8, Lord Ormidale at 748–9; Lord Anderson and 753). As it was put in *Parkasho v Singh, [1968] P 233* (Cairns J at 250, cited in *King v Brandywine Insurance Co, [2005] 2 All ER (Comm) 1]*, Waller LJ at para 66) 'the question of foreign law, although a question of fact, is a question of fact of a peculiar kind''. The same considerations as apply to a review of fact, and the advantages which a first instance judge has from having heard and seen the witnesses testify, do not apply with quite the same force. In this case, in any event, the commercial judge does not appear to have taken account of the testimony of the experts, other than to say erroneously that neither had departed from the content of his reports. The judge relied exclusively upon an analysis of the expert reports. The appellate court is at no disadvantage in carrying out the same exercise to see if the judge has correctly understood their import.'

[12] …The question is what the relevant foreign law is, and that is an issue that must ultimately be decided by the court, not the experts. In the words of Lord Justice-Clerk Alness in *Kolbin & Sons v Kinnear & Co* (p 737):

> 'I think the same view is that the Court must construe foreign written law with the assistance of the expert evidence adduced. The Court is not entitled to construe that law for itself without any assistance at all … With that assistance, however, I think the Court may look at the law itself, as part of the evidence, and reach a conclusion upon it. I do not apprehend that, merely because the expert evidence is conflicting … the Court must necessarily throw up its hands in despair, and refuse to attempt to solve the problem submitted to it'.

This recognises that the function of the experts is not to decide the foreign law but to assist the court in the exercise of its function of deciding the case before it. If there is no conflict between the experts, at least in the absence of a manifest absurdity, the court will normally follow the expert opinion. If the experts conflict, however, or if there is a point of dubiety or uncertainty in their evidence, the court must examine the experts' views and come to a conclusion as to what the foreign law is. That applies not merely to foreign law in the abstract, but also to the correct application of the principles of foreign law to the facts of the case under consideration."

[75] Lord Drummond-Young went on to note at paragraph 16 that:

> "[16] Case law will also frequently be an important aspect of foreign law, even in a codified system. The Scottish court is likely to depend on expert witnesses to make it aware of any relevant cases, and to provide a commentary on those cases and their potential implications for the problem under consideration. The task of the Scottish court is to determine how a foreign court would be likely to decide the issues of law that are relevant to the particular facts of the case before it. Scottish judges will be familiar with general principles of legal reasoning, and it can be assumed that these will apply to any legal system."

Given there are conflicting views from three skilled witnesses in the present actions, I required to examine their views and come to conclusion about what the applicable law in Kenya is.

[76] In the very recent Privy Council case of *Perry* Lord Hodge, when considering the correct approach to making findings in relation to foreign law, stated at paragraph 11:

> "11. First, the task of the trial judge when there are disputed questions of foreign law is to determine what the highest relevant court in the foreign legal system would decide if the point were to come to it: *Dexia Crediop SpA v Comune di Prato [2017] 1 CLC 969 ('Dexia')*, para 34; *Morgan Grenfell & Co Ltd v SACE Istituto per I Servizi Assicurativi del Commercio [2001] EWCA Civ 1932 ('Morgan Grenfell')*, para 50. It is not sufficient for a party to identify a judgment of a foreign court of first instance which may be on point and assert that the task of the appellate court is simply to analyse that judgment."

Therefore, whilst it is important to understand how the ELRC and Magistrates' court is currently approaching the discrete question, ultimately, I required to determine what the Supreme Court of Kenaya would be likely to decide if the discrete question came before it. Clearly, in that event, it would be open to the Supreme Court of Kenya to uphold or reject the current approach being taken by the lower Kenyan courts.

[77] I have set out the views of the skilled witnesses at some length above and have also set out, in some detail, the largely undisputed legal background to this case in findings in fact 3 to 26. In particular, there was no dispute that:

(1) WIBA came into force on 2 June 2008;

(2) The present actions by the pursuers against the defender all commenced in this court on 9 May 2017 and therefore fell within the relevant period;

(3) The decision of the High Court of 4 March 2009 declared sections 4, 7(1) and (2), 10(4), 16, 21(1), 23(1), 25(1) and (3), 52(1) and (2) and 58(2) of WIBA to be unconstitutional and therefore null and devoid of status of law;

(4) The remaining sections of WIBA, which were not declared unconstitutional, remained in force;

(5) Following the decision of High Court of 4 March 2009 workers could seek compensation for work related injuries and diseases: (i) in either the ELRC or the Magistrates' court presided over by a Magistrate of the rank of Senior Resident Magistrate and above; or (ii) with the DOSH as required by WIBA;

(6) Between 4 March 2009 and 17 November 2017 there was not any interim order staying the decision of the High Court;

(7) The decision of the Court of Appeal of 17 November 2017 reversed the High Court decision and found (with the exception of sections 7 and 10(4) of WIBA) that the sections of WIBA previously declared unconstitutional by the High Court, were not unconstitutional;

(8) The decision of Supreme Court of 3 December 2019 upheld the decision of the Court of Appeal and found (with the exception of sections 7 and 10(4) of WIBA) that the sections of WIBA previously declared unconstitutional by the High Court, were not unconstitutional;

(9) The decision of the Court of Appeal and the subsequent decision of the Supreme Court did not expressly deal with how claims filed in court during the relevant period ought to be dealt with going forward;

(10) Following the decision of the Court of Appeal and the subsequent decision of the Supreme Court there was uncertainty as regards how pending claims filed in court after the commencement of WIBA and before the decision of the Supreme Court ought to be dealt with;

(11) To address the uncertainty that had ensued following the decisions of the Court of Appeal and the Supreme Court, the Chief Justice issued the Practice Directions, dated 24 April 2023;

(12) That whilst Practice Directions can be challenged, the Practice Directions, dated 24 April 2023, have not been challenged and remain extant;

(13) The approach in Kenya to the interpretation of statues does not differ from the manner in which this court would approach a statute; that is to ascertain the intention of the legislature from the language used in the relevant provision, read in the context of the statute as a whole (see the Supreme Court of Kenya case of *Alcoholic Beverages Association of Kenya* v *Kenya Fil, Classifications Board & 2 others* (*Civil Appeal 232 of 2017)* [2022] KECA 1051 (KLR)); and

(14) The marginal note to each section of WIBA (which appears in finding in fact 6 as the heading of the section) is an aid to interpretation.

[78] There was also no dispute between the parties that the present actions differed from the group proceedings dealt with by the Inner House in case of *Campbell*. I was informed that in *Campbell* all the claims had been filed after the decision of Supreme Court, which clearly differed from the present actions, which were concerned with claims filed during

the relevant period. Further, in *Campbell* the Lord President (Carloway) explained, at paragraph 57, the reasons why the Inner House had not taken the Practice Directions into account (paragraph 8 of the Practice Directions now sets out that all claims with respect to compensation for work related injuries and disease filed after the decision of the Supreme Court shall commence before the DOSH).

[79] In order to answer the discrete question, I was of the view that it would be useful to consider the following issues in relation to court claims filed during the relevant period:

(1) The import of the decisions of the Court of Appeal of 17 November 2017 and the Supreme Court of 3 December 2019;

(2) The approach taken by the Kenyan courts to the decision of Supreme Court prior to the issue of the Practice Directions, dated 23 April 2023, in respect of claims filed during the relevant period;

(3) The approach taken by the Kenyan courts to the decision of Supreme Court after the issue of the Practice Directions, dated 23 April 2023, in respect of claims filed during the relevant period;

(4) Whether the Supreme Court of Kenya would be likely to follow the current approach taken by the Kenyan courts to the decision of Supreme Court after the issue of the Practice Directions, dated 23 April 2023, in respect of claims filed during the relevant period; and

(5) Whether the Practice Directions, dated 24 April 2023, were of any application in the present actions.

***Issue 1 - The import of the decisions of the Court of Appeal of 17 November 2017 and the Supreme Court of 3 December 2019.***

[80] The relevant parts of each decision are set out in findings in fact 17 (the Court of Appeal) and finding in fact 19 (the Supreme Court). Both the Court of Appeal and the Supreme Court considered that even though section 58(2) of WIBA had retrospective operation it was nevertheless not unconstitutional. Both the Court of Appeal and the Supreme Court then went on to consider the position regarding pending claims that had been filed in court prior to the commencement of WIBA. Prof Muigai considered that both the Court of Appeal and the Supreme Court were only dealing with forum in relation to these pending claims, which meant that those pending claims could continue in court, but the law to applied would be WIBA. Dr Muli and Mr Nyairo considered that the Court of Appeal and the Supreme Court were stating that the claimants in those pending cases had a legitimate expectation that upon the commencement of WIBA their cases would be concluded under the judicial process they had invoked, which meant that those pending claims could continue in court with the law to be applied being the common law and/or WCA.

[81] On this point, the Court of Appeal stated:

> "… We find, from the submissions of the respondents that at the commencement date of the Act there were before the courts, pending determination, several work-related accident claims brought under the repealed Workmen's Compensation Act (Cap. 236) or the common law.
> With respect, *we agree that claimants in those pending case have legitimate expectations that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked*. *Indeed* as a result of this concern, the learned Judge in a ruling on an interlocutory application directed that;
>
> > **'On the foregoing grounds, I will order that, pending the hearing and determination of the main cause, all pending litigation which had been commenced on the basis of either the Workmen's Compensation Act …. or of the common law, or of a combination of both regimes of law, shall continue to be prosecuted and, in a proper case, finalized on the basis of**

> **the operative law prior to the entry into force of the Work Injury Benefits Act, 2007….'**
> […]
> 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. [*my emphasis*]"

[82] It can be seen from the above passages that the Court of Appeal recognised that those pending cases were brought under the now repealed WCA or the common law. The Court of Appeal then stated that those cases should be concluded under the judicial process which they had invoked and in the next sentence, in respect of those pending cases, seemed to go on to endorse the interim ruling of the High Court of 22 May 2008, which made clear that all pending cases which had been commenced on the basis of either the WCA or the common law should continue to be prosecuted and finalised on the basis of the WCA or the common law. The Court of Appeal then went on to observe that section 58(2) of WIBA required further consideration to ensure a smooth transition to WIBA from the WCA. Whilst section 57 of WIBA had repealed the WCA (and that section had never been declared unconstitutional) and section 58(2) of WIBA had now been declared not to be unconstitutional and therefore gave no room for the application of the pre-existing legal regime, I considered that the import of the above passage was that the Court of Appeal were stating that claimants in those pending cases had a legitimate expectation that those cases would be concluded under the judicial process which they had invoked, meaning that those pending claims could continue in court with the law to be applied being the common law and/or the WCA (it appeared that a claimant could also seek damages on the basis of a breach of statutory duty other that the WCA).

[83] The Supreme Court appeared to agree with the Court of Appeal on this point and stated:

> "85. In agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of the *Act*, litigation relating to work-injuries had gone on and a number of the suits had progressed up to decree stage; some of which were still being heard; while others were still at the preliminary stage. *All such matters were being dealt with under the then existing and completely different regimes of law. We thus agree with the Appellate Court that claimants in those pending cases have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked.* However, were it not for such legitimate expectation, *WIBA*, not being unconstitutional and an even more progressive statute, as we have shown above we opine that it is best that all matters are finalized under section 52 aforesaid.
> 86. The above proposition would be the most prudent way for a judicial system to operate. Lord Atkin in *R v Electricity Commissioners* 119241 1 KB 171, 204-205, declared that prerogative writs would issue to 'anybody of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially'. Indeed procedural fairness, a common law duty, implies that one would act fairly in decision making by the exercise of statutory and judicial powers which may affect an individual's rights, interest and legitimate expectations.
> 87. We note again in addressing this issue that retrospective operation of statutes is not per se illegal or in contravention of the Constitution. Indeed, section 58(2) clearly expresses the intention that the *Act* shall apply retrospectively in terms of our decision in the *SK Macharia* case. Consequently, we do not agree with the Petitioner that the effect of section 58(2) of the *Act* is to take away the right to legal process, extinguish access to the courts and to take away property rights without due process.
> 88. In stating so, we presume that the property rights referred to include compensation for injuries or disease contracted in the work place. Even if so, all matters pending resolution under the previous legal regime were to be continued under *WIBA* and we have seen no evidence of denial of any right by that fact alone. Indeed, our courts and quasi-judicial tribunals have routinely applied the law in such a manner as to protect existing rights and therefore *while we agree with the Appellate Court that a party has the legitimate expectation to have a dispute resolved under the invoked legal regime,* we see nothing unconstitutional in *WIBA* being applied in a manner that is consistent with its provisions but taking into account the *invoked legal regime*. [*my emphasis*]"

[84] In paragraph 85 the Supreme Court stated that pending cases are being dealt with under completely "different regimes of law" and agreed with the Court of Appeal, using near identical wording to that of the Court of Appeal, that claimants in those pending cases

have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked. At paragraph 88 I considered that the Supreme Court went on to confirm that a claimant in those pending cases had a legitimate expectation to have a dispute resolved "under the invoked legal regime". Having considered paragraphs 85 to 88 of the decision of the Supreme Court and that fact that section 58(2) of WIBA had been found not to be unconstitutional, I could certainly understand the legal reasoning of Prof Muigai who considered that the Supreme Court were only stating that the pending cases prior to the commencement of WIBA could continue in the court where the claims were filed, but with WIBA being applied. However, after considering all the written materials before me (and, in particular, those identified in the next sentence) I ultimately considered that paragraph 85 to 88 above supported the Supreme Court agreeing with the Court of Appeal that claimants in those pending cases had a legitimate expectation that those cases would be concluded under the judicial process which they had invoked, meaning that those pending claims could continue in court with the law to be applied being the pre-WIBA legal regime, namely the common law and/or WCA. I drew support for that interpretation of paragraphs 85 to 88 from the following: (i) the decision of the Court of Appeal; (ii) the passages from the ELRC (sitting as an appeal court) cases of *Heritage Insurance Company Limited* (set out at paragraph 87 below) and *Libuyi* (set out at paragraph 88 below); and (iii) the view taken by the Chief Justice in Practice Directions, dated 24 April 2023, which made clear, at paragraph 5(c) and paragraph 6, that all claims with respect to compensation for work related injuries and diseases filed in courts before the commencement of WIBA shall proceed to conclusion under the WCA (although paragraph 6 of the Practice Directions did not mention the common law or breach of statutory duty other than the WCA).

***Issue 2 - The approach taken by the Kenyan courts to the decision of Supreme Court prior to the issue of the Practice Directions, dated 23 April 2023, in respect of claims filed during the relevant period.***

[85] Neither the Court of Appeal nor the Supreme Court expressly dealt with how claims filed in court during the relevant period ought to be dealt with. As I have already noted, it was not disputed that: (i) there was uncertainty about the approach to be taken to those claims following on from the decisions of the Court of Appeal and the Supreme Court; and (ii) the Chief Justice issued the Practice Directions to address that uncertainty. In the period between the decision of the Supreme Court and issue of the Practice Directions claims filed in court during the relevant were decided in different directions. I accepted Mr Nyairo's evidence that there were three trends, namely that: (i) some claims were dismissed for want of jurisdiction; (ii) some claims continued in the court on the basis of legitimate expectation; and (iii) some judges refused to make any orders and awaited further directions. The following three cases, which were all decided before the issue of the Practice Directions, fell into trends one and two.

[86] The first case is the ELRC (sitting as an appeal court) case of *Tangale*, which was decided on 23 March 2023 (this case falls into trend two). In *Tangale* the claimant's accident occurred on 20 October 2016 and the claim was filed in the Magistrates' court, within the relevant period, on 8 June 2017 alleging breach of statutory duty/negligence. The employer appealed against the decision in the Magistrates' court that that court had jurisdiction to determine the claim. The ELRC, in dismissing the appeal, stated:

> "10. The Work Injury Benefits Act came into operation on 2 June 2008.
> 11. The legal framework under the Act has been in turmoil and/or troubled waters in this country for several years. Some decisions in the interim have served to pour oil in the troubled waters.
> […]

21. While dismissing the appeal Petition, the Supreme Court gave some guidance. The decision/guidance has not calmed the waters.
[…]
24. The elephant in the room is, therefore, what is the status of legal proceedings instituted in the Courts after 2 June 2008.
[…]
46. In the Court's respectful view, bar any stay orders, all claims which were lodged with the Courts from 22 May 2008 to 3 December 2019 being claims underpinned by judge-made or judge declared law were validly within the jurisdiction of the Courts.
[…]
48. In light of this, in this Court's view, subscribing to the position taken by the Appellant that all claims lodged with the Courts after 2 June 2008 should not be entertained because of jurisdiction would be antithetical to the right to access justice since the litigants who moved the Court after 22 May 2008 did so on the assurance of judge declared law that they could present their disputes to the Courts.
49. The Court says so because the employees who moved the Court on the strength of judge declared law would be met with an insurmountable plea of limitation because section 26 of the Work Injury Benefits Act has prescribed time within which an accident should be reported to the Director of Occupational Safety and Health.
50. Sending these Claimants from the seat of justice under these circumstances would, therefore, be a source of great injustice for reasons beyond their control.
**Legitimate expectation**
51. The doctrine of legitimate expectation has its roots in administrative law. In this jurisdiction, it emerged with the establishment of a *permanent Constitution Court* in the 1990s. It is now well entrenched in the jurisprudence of the Country.
52. The Court of Appeal and the Supreme Court invoked the doctrine to give life and therefore render justice to the Claimants who had lodged their work-injury claims with the Courts prior to the coming into effect of the Work Injury Benefits Act.
53. In the view of this Court, these litigants who filed their disputes with the Courts from 22 May 2008 to 3 December 2019 on the firm belief that the judge declared law was the valid law in place then, are entitled to successfully assert legitimate expectation in having the claims heard to a conclusion before the Courts where they had been lodged."

In that case the ELRC applied the doctrine of legitimate expectation and held that the Magistrates' court did have jurisdiction to entertain the claim and dismissed the appeal. The ELRC did not, however, clearly state the legal regime that was to be applied by the Magistrates' court.

[87] The second case is the ELRC (sitting as an appeal court) case of *Heritage Insurance Company Limited*, which was decided on 4 June 2021 (this case falls into trend one). In *Heritage Insurance Company Limited* the claimant filed a claim in the Magistrates' court, within the relevant period, on 17 March 2015 seeking general and special damages. Heritage filed a preliminary objection in relation to the Magistrate's court lacking jurisdiction and relied on the decision of the Court of Appeal (the decision of the Supreme Court had not, at that time, been issued). The Chief Magistrate stayed the preliminary objection pending the decision of the Supreme Court. Heritage appealed to the ELRC who made a number of findings including:

> "… The Court therefore finds that decision by the Court of Appeal as upheld by the Supreme Court protected cases filed in Courts before WIBA came into operation and on account of the doctrine of legitimate expectation that the suits pending prior to coming into operation of the WIBA on 02.06.2008 would be handled in accordance with the law and dispute resolution forum prevailing prior to WIBA. Thus, the Court considers that cases filed in courts prior to commencement of WIBA will continue and be determined by courts with the competent jurisdiction such cases may have been filed before the commencement date, 02,06.2008. Further, the Court considers that for all work injury claims or disputes occurring before or after coming into operation of the WIBA on 02.06.2008 and for which no suit was pending in court as at the commencement date 02.06.2008, the same will be handled and determined in accordance with provisions of WIBA and in particular, that view being the better application of section 58(2) of WIBA which states thus, '**Any claim in respect of an accident or disease occurring before the commencement of this Act shall be deemed to have been lodged under this Act**.' Hence, the Court of Appeal in its judgment had stated thus, '**In its original form, section 58(2) though, in our view not inconsistent with the former or current Constitution requires further consideration to ensure smooth transition to the Act from Workmen's Compensation Act. Similarly, in terms of section 23 of the interpretation and General Provisions Act, it is clear that where a written law partially or wholly repeals another written law, unless a contrary intention appears, the repeal cannot revive anything not in force or existing before the repeal or affect the previous operation of repealed law in relation to interests, rights and or obligations enshrined under such law.'** As submitted for the appellant and quoting the Supreme Court decision, similarly the Supreme Court, on account of legitimate expectation, protected suits already filed on the commencement date of WIBA and for claims not filed as of the commencement date, they had to proceed under WIBA and which the Supreme Court found to be a more progressive law.

[…]

While making that finding the Court has considered that the High Court, Ojwang J, had on 04.03.2008 declared the impugned provisions of WIBA as unconstitutional and in reliance upon that declaration, some litigants had between that 04.03.2008 and 17.11.2017, when the Court of Appeal reversed that High Court decision, (in terms as already stated earlier in this judgment) filed suits in the Magistrates' Court such as the suit in issue in this appeal which was filed on 17.03.2015. *It may be arguable that by reason of retrospective application of decisions in civil suits affirming the position prior to the decision, the decision by Ojwang J applied as affirming the unconstitutionality of provisions of WIBA as had been impugned and until the date the Court of Appeal rendered its decision - and the legal regime prior to commencement of WIBA therefore applied to filing of suits in courts*. However, the Court considers that by reason of the appeal, the affirmed retrospective status on provisions of WIBA was as per the decision by the Court of Appeal as affirmed by the Supreme Court. On that account, the Court relies on the law of the case doctrine so that the decision of the Court of Appeal as affirmed by the Supreme Court became binding on, the Court of Appeal as well as all other Courts in the Republic and applied throughout thereafter, not to be departed from, except by the Supreme Court and only in exceptional circumstances as may be appropriate. The related principles of *stare decisis* and precedent applied accordingly as flowing from the decision of the Court of Appeal as affirmed by the Supreme Court as opposed to as flowing from the earlier decision of the High Court which had been set aside by the Court of Appeal as affirmed by the Supreme Court - and the prevailing judge-made law then became the decision as affirmed by the Supreme Court. The Court considers that the decision by the High Court was effectively varied, and, can no longer be relied upon by the 1st respondent to justify the suit he filed against the 2nd respondent and which High Court decision is no longer binding or applicable on the issue at hand.

In making that finding the Court further considers that if a statute declared unconstitutional is a nullity from the date of its commencement and retrospectively so after the declaration of the unconstitutionality, the compelling converse principle must be that a statute challenged on account of alleged unconstitutionality but found and declared constitutional must be good law and binding retrospectively from the date of its commencement."

In that case the ELRC: (i) acknowledged that it may be arguable that the legal regime prior to the commencement of WIBA applied to cases filed between the ruling of the High Court on 4 March 2009 (the above passages appear to incorrectly refer to the date of the ruling of the High Court to be 4 March 2008) and the decision of the Court of Appeal, but rejected that argument; (ii) upheld Heritage's preliminary objection; and (iii) struck out the claim.

[88] The third case is the ELRC (sitting as an appeal court) case of *Libuyi*, which was decided on 17 November 2022 (this case falls into trend one). Prof Muigai described the case of *Libuyi* as the most persuasive authority on the applicable substantive and procedural law in relation to cases filed between the commencement of WIBA and before the decision of the Supreme Court. In *Libuyi* the claimant filed a claim in the Magistrates' court, within the relevant period, in what appears to be November 2017 (the plaint was dated 6 November 2017) seeking general and special damages. West Kenya Sugar Co Ltd filed a preliminary objection in relation to the Magistrates' court lacking jurisdiction and relied on the decision of the Supreme Court. The Magistrate refused the preliminary objection and West Kenya Sugar Co Ltd appealed. In allowing the appeal Judge Keli in the ELRC, stated at paragraph 38 to 40:

> "38. Applying the foregoing decisions of the Court of Appeal and Supreme Court which are binding on this court, the court finds and determines that the law on work injury related claims is that all pending litigation filed prior to the entry into force of WIBA commenced on the basis of either the Workmen's Compensation Act or of the common law, or of a combination of both regimes of law are to be finalised on basis of the legitimate expectation that upon the passage of WIBA such cases would be concluded under the judicial process which had been invoked (para 85 of Supreme Court decision supra). Further all other litigation on work injury claims post entry into force of WIBA would proceed before the Director.
> 39. The Court then finds, respectfully, that the decision *West Kenya Sugar Co Ltd v Tito Lucheli Tangale* (2021) eKLR holding that all litigants who filed their disputes with the courts from 22nd May 2008 to 3rd December 2019 on the firm belief that the judge declared law was the valid law in place then and that they are entitled to successfully assert legitimate expectation in having the claims heard to conclusion before the courts where they had been lodged was not consistent with the holding Supreme Court decision as analysed above which decision is binding on this court. The court is not persuaded with the argument that the High Court declarations having not been stayed by the court or Court of Appeal would continue to be valid law post the pronouncement of the WIBA as constitutional and in view of the glaring guide on the legitimate expectation application scope under para 85 of the Supreme Court decision….It would also be moot to consider the argument on the validity of the WIBA in terms of judicial authority to assess damages by the Director as submitted by the appellant when the supreme court has already pronounced itself that WIBA is constitutional. It is further moot to consider the argument on retrospectivity of the superior courts decisions when the Supreme

> court in para 85 held that save for such legitimate expectation with respect to matters filed prior to its enactment, that it was best that all matters be finalized under section 52 of WIBA Act(emphasis given).
> 40. The Court is persuaded by its colleagues in Mombasa ELRC Civil Appeal No 21 of 2019 *Heritage Insurance Company Limited v David Fikiri Joshua and Another* (2021) eKLR where the court held that the WIBA having been declared constitutional by the two superior courts the High Court decision could no longer be relied on. A similar holding exists in Mombasa ELRC Civil Appeal No, 18 of 2020 *Perfect Sean Limited v Harrison Kahindi* Said. The decisions of the court are only persuasive whereas in terms of hierarchy the Court of Appeal precedent is superior and the Supreme Court decisions are binding."

In that case the ELRC: (i) held that Magistrates' court had no jurisdiction to hear and determine work injury claims filed upon the commencement of WIBA; and (ii) struck out the claim for want of jurisdiction.

***Issue 3 - The approach taken by the Kenyan Courts to the decision of Supreme Court after the issue of the Practice Directions, dated 23 April 2023, in respect of claims filed during the relevant period.***

[89] The Practice Directions, dated 24 April 2023, came into force on the date of issue (the relevant paragraphs of the Practice Directions are set out in finding in fact 21). Paragraph 7 of the Practice Directions deals with claims with respect to compensation for work related injuries and diseases filed in court after the commencement of WIBA but before the Supreme Court decision (claims filed during the relevant period fall within that period). Paragraph 7 is clear that such claims shall proceed until conclusion before the court that the claim was filed in (which could be the ELRC or the Magistrates' court). However, paragraph 7 does not expressly say whether these claims ought to be determined on the basis of the pre-WIBA legal regime or on the basis of WIBA. The defender, in support of their contention that WIBA applies, point to the differences in wording in paragraph 5 and 6 of the Practice Directions to that used in paragraph 7. Paragraph 6 makes clear that all claims with respect

to compensation for work related injuries and diseases filed in various courts before the commencement of WIBA shall proceed to conclusion under the WCA. Paragraph 7 could have specified the legal regime that the claims being dealt with in that paragraph should be concluded under, but it did not.

[90] I considered, given the provision of WIBA that had been declared unconstitutional by the High Court, that claims could be filed in court during the relevant period on the basis of the common law and breach of statutory duty (other than the WCA). Section 57 of WIBA repealed the WCA on 2 June 2008 and that section had not ever been declared unconstitutional. The WCA therefore ceased to have effect on 2 June 2008. In the present actions the pursuers do not rely on the WCA and it is not therefore necessary for me to comment on it further. It can be seen from a number of cases that claims were filed in court during the relevant period on the basis of the common law/breach of statutory duty other than the WCA. The cases filed in court during the relevant period included *Heritage Insurance Company Limited* (common law), *Tangale* (common law/breach of statutory duty), *Libuyi* (common law), *Zhongmei Engineering Group Ltd* (common law), *Chenje* (common law), *Boniface Onyango* (common law) and *Issac* (common law). In *Tangale* the accident occurred on 20 October 2016 and it therefore seemed that the breach of statutory duty would be in relation to an Act other than the WCA (given its repeal on 2 June 2008).

[91] I considered that the claimants in those cases I have referred to, at paragraph 90 above, were entitled, on the basis of the interim and full decision of the High Court, to invoke the legal regime that they did at the time the claims were filed during the relevant period, given the sections of WIBA that had been declared unconstitutional. Indeed, given that section 23(1) of WIBA had been declared unconstitutional, the filing of a court claim on

the basis of the common law/breach of statutory duty seemed to be only practical way that a claimant could progress a claim during the relevant period.

[92] Dr Muli, Mr Nyairo and Prof Muigai had all conducted research into cases decided after the issue of the Practice Directions. That research had found, in respect of work related injury cases filed in court during the relevant period, that: (i) the Kenyan courts were, after the issue of the Practice Directions, deciding those claims on the basis of the common law; and (ii) there had not been any case identified where a court, after the issue of the Practice Directions, had decided a case filed by applying WIBA.

[93] That research was supported by the following appellant decisions of the ELRC, which were decided after the issue of the Practice Directions, in relation to claims filed during the relevant period:

(1) In *Zhongmei Engineering Group Ltd* (see finding in fact 28) the ELRC, in a decision dated 17 May 2023, did not consider that the Principal Magistrate had erred in assessing damages at common law.

(2) In *Chenje* (see finding in fact 29) the ELRC, in a decision dated 29 January 2024, considered that the Magistrates' court had jurisdiction to decide on liability and the assessment of damages (with liability only being an issue if the claim was being determined at common law).

I considered that both the above cases were binding on the Magistrates' court and were both authority, at an appellant level, that following the issue of the Practice Directions, claims filed in court during the relevant period were to continue to be dealt with by the court of filing on the basis of the common law and breach of statutory duty other than the WCA.

[94] That research was also supported by first instance decisions in the cases of *Boniface Onyango* (see finding in fact 30) and *Issac* v *Transafric Timber Limited* (see finding in fact 31).

These decisions carried less weight than a decision of the ELRC sitting as an appeal court, but I nevertheless considered that the approach taken in both those cases was consistent with the earlier ELRC decisions of *Zhongmei Engineering Group Ltd* and *Chenje*.

[95] I was referred to other appellant decisions of the ELRC, which were issued after the issue of the Practice Directions and concerned claims filed during the relevant period. For the sake of completeness, I will briefly comment on them.

[96] In the case of *Nyongesa* (see paragraph 18 above) Nyongesa appeared to file a court claim in the Magistrates' court, within the relevant period, in April 2017 (the plaint was dated 10 April 2017), under common law seeking general and special damages. The first instance court refused to hold that the court did not have jurisdiction. *West Kenya Sugar Co Ltd* appealed to the ELRC on the question of jurisdiction (they did not contend that even if the Magistrates' court had jurisdiction, WIBA ought to apply). Judge Keli, sitting in the ELRC, in a decision dated 29 June 2023, took a different view from the view she reached in the cases of *Libuyi* (which was decided before the issue of the Practice Directions - see generally paragraph 88 above) and held, on the basis of the Practice Directions, that the Magistrates' court was clothed with jurisdiction and dismissed the appeal. Judge Keli did, at paragraph 30, make some observations that could be construed as indicating that the Magistrates' court ought to apply WIBA and also used, at paragraph 31, the phrases "WIBA practice directions", "WIBA cases" and "WIBA matters", however, she did not expressly state what legal regime ought to be applied by the Magistrates' court (and there appeared to be no need to do so because the applicable legal regime in the Magistrates' court was not an issue in the appeal). In the circumstances: (i) I did not consider that *Nyongesa* could be regarded as an authority for the proposition that the Magistrates' court ought to apply WIBA; (ii) given that the claim was raised under common law and the appeal regarding

jurisdiction had been dismissed, I considered that it would be likely that the Magistrates' court would, in line with the research and the ELRC cases referred to at paragraph 93 above, have continued to determine the claim in terms of the common law.

[97] The ELRC cases (sitting as an appeal court) of *Protective Custody Services* (decision of 25 January 2024 - see paragraph 37 above), *Rok Industries Limited* (decision of 14 March 2024- see paragraph 32 above) and *Kiplimo* (decision of 28 June 2024 - see paragraph 35 above) were concerned with jurisdiction of the Magistrates' court in relation to claims filed in court during the relevant period (as I have already noted, it is not disputed that the Magistrates' court would have jurisdiction in relation to a claim filed during the relevant period). The decisions in those cases did not expressly deal with the legal regime that would apply in the Magistrates' court but there was nothing stated in any of the decisions that contradicted the approach taken in *Zhongmei Engineering Group Ltd* and *Chenje*. Indeed in *Kiplimo* the ELRC noted Kiplimo's contention, at paragraph 5, that "having invoked the judicial process prevailing at the time of the filing of the suit, he has the right to have this matter concluded within the legal regime invoked" and in holding, at paragraph 18, that as Kiplimo had filed his claim on 26 May 2016 it should, on the basis of the Practice Directions, proceed to its conclusion before the trial court, said nothing to suggest that Kiplimo's contention regarding the legal regime invoked was incorrect. In a similar vein in *Protective Custody Services* the ELRC recorded *Mugatsia's* submission as including:

> "10. The Appellant [*Mugatsia*] also raised the issue of legitimate expectation and submitted that the legal regime that existed before WIBA and after its provisions were declared unconstitutional by the High Court in 2007 and up to 2017 when the Court of Appeal reversed the decision and that as such, the magistrates court and the Employment and Labour Relations court were deemed to have jurisdiction to adjudicate disputes of injuries at place of work both under the statute and common law. It was his submission that having filed the court action while relying on the declaration of invalidity by the High Court, he had a valid legitimate expectation in having the same concluded by the court."

The ELRC, in allowing the appeal, held that as *Mugatsia* had filed his claim on 9 May 2017 it should, on the basis of the Practice Directions, proceed to its conclusion before the trial court, and again said nothing to suggest that *Mugatsia's* submission, recorded at paragraph 10 of the decision, regarding the adjudication of the claim under statute and common law, was incorrect.

[98] None of the cases decided after the issue of the Practice Directions, which I was referred to, stated that WIBA was to be applied by the first instance court in relation to claims filed during the relevant period. Further, I noted that WIBA: (i) did not give the courts an express power assess a claim for compensation, with that being a matter for the DOSH; and (ii) only generally permitted the involvement of a court at an appeal stage (section 17 of WIBA does, however, permit a court claim for damages against a third party). Indeed, even in the cases of *Heritage Insurance Company Limited* and *Libuyi* the ELRC concluded that the court did not have jurisdiction and that those cases required to proceed before the DOSH.

[99] Having considered the research of the three witnesses and the cases decided after the issue of the Practice Directions that I was referred to, I considered that the current approach of the ELRC and Magistrates' court, in relation to claims filed at the ELRC or Magistrates' court with respect to compensation for work related injuries and diseases after the commencement of WIBA and before the decision of the Supreme Court, was that: (i) such claims should proceed to a conclusion before the court where the claim was filed; and (ii) the applicable law to be applied to determine those claims, in relation to both liability and quantum, is the common law. That is not, however, the end of the matter, for the reasons I have explained at paragraph 76 above.

***Issue 4 - Whether the Supreme Court of Kenya would be likely to follow the current approach taken by the Kenyan courts to the decision of Supreme Court after the issue of the Practice Directions, dated 23 April 2023, in respect of claims filed during the relevant period.***

[100] The conclusion I reached in relation to issue 3 was in line with the evidence of Dr Muli and Mr Nyairo and contrary to evidence of Prof Muigai. However, as I have already noted, I accepted that Prof Muigai was an expert in the constitutional law of Kenya and I considered that, as such, his opinion in the present actions commanded respect and required careful consideration. Prof Muigai considered that WIBA applied to cases filed in court during relevant period, but accepted, as a result of paragraph 7 of the Practice Directions, that those cases could proceed to conclusion before the court where they had been filed. Whilst I was not ultimately persuaded that the identification by the Court of Appeal and Supreme Court of a legitimate expectation as regards claims filed prior to the commencement of WIBA was restricted to forum only (on which see paragraphs 80 to 84 above), I considered Prof Muigai's analysis of the applicable law in relation to claims filed during the relevant period to be logical and persuasive for the following reasons.

[101] First, the decision of the Supreme Court made clear that the sections of WIBA declared unconstitutional by the High Court were in fact constitutional (save for sections 7 and 10(4), which are of no moment in the present actions). I considered that meant that sections 4, 16, 21 (section 21(1) did not exist), 23(1), 25(1) and (3), 52(1) and (2) and 58(2) had been good law since the commencement of WIBA. Section 16 of WIBA had therefore been good law since 2 June 2008 and currently remained in force. Section 16 of WIBA made clear that the only possible way that an employee or dependant of an employee could obtain

compensation in respect of an occupational accident or disease resulting in disablement or death was under the provision of WIBA.

[102] Second, section 3(1) of the Judicature Act (see finding in fact 5) made clear that courts had to apply the written laws of Kenya and that the common law applied in "so far as those written laws do not extend or apply". WIBA is a written law of Kenya and therefore the common law can only apply in so far as WIBA does not extend or apply. I considered that once section 16 of WIBA had been declared to be constitutional, the common law, therefore, had no application in relation to the claims covered by section 16, save, perhaps, on the basis of a legitimate expectation near identical to that identified by the Supreme Court for claims filed in court prior to the commencement of WIBA. Third, sections 10(1) to (3) of WIBA (see finding in fact 6) provided the statutory basis for claiming compensation and sections 28 to 44 and the first schedule to the third schedule to WIBA, that governed the mechanism for computing compensation, remained undisturbed by the declaration of unconstitutionality by the High Court of 4 March 2009. Therefore, even if a claim was filed in court during the relevant period and determined during that period, the matter of the quantification of the compensation to be paid to the employee ought to have been by the application of the WIBA tariffs.

[103] Fourth, whilst the cases of *Heritage Insurance Company Limited* and *Libuyi* would, as a result of and in light of, the Practice Directions, now be decided differently, I respectfully agreed with the analysis in those cases of the decisions of the Court of Appeal and the Supreme Court. Whilst the decision of the Supreme Court did recognise, in relation pending court claims filed prior to the commencement of WIBA, that claimants in those pending cases had a legitimate expectation that those cases would be concluded under the judicial process which they had invoked, meaning that those pending claims could continue in

court of filing with the law to be applied being the pre-WIBA legal regime, namely the common law and/or WCA (which was the applicable law at the time the claim was filed), the Supreme Court did not state that claimants in relation to claims filed in court during relevant period had such a legitimate expectation. Further, the Supreme Court stated that save for those pending cases filed prior to the commencement of WIBA, that all matters should be finalised under WIBA.

[104] Fifth, whilst the three witness did not entirely agree on the status of a Practice Direction, I did not, in the end, consider that there was much, if anything, between them. Both Dr Muli and Mr Nyairo considered that a Practice Direction had the force of law. Prof Muigai said they were not law, but rather directions. Prof Muigai explained that Practice Directions were issued by the Chief Justice in their administrative capacity and were: (i) habitually observed when no controversy arose in relation to the subject matter of the Practice Direction; (ii) intended to make matters more efficient, more convenient and more responsive for court users; and (iii) intended to guide the application of the existing law. Mr Nyairo's evidence regarding the purpose of a Practice Direction was along similar lines to Prof Muigai. Prof Muigai was very clear that a Practice Direction could not change the substantive law and neither Dr Muli nor Mr Nyairo suggested otherwise. Dr Muli considered that the Practice Direction, dated 24 April 2023, did more than reiterate the existing law by giving procedural legitimacy to claims filed in court during the relevant period and Prof Muigai accepted that those Practice Directions permitted such claims to be filed in court. I considered that it would have been surprising if a Practice Direction could have changed the substantive law. On the basis of the evidence before me, I accepted, amongst other things, that Practice Directions issued by the Chief Justice: (i) have the force of law and were habitually observed by the Kenyan courts; (ii) cannot change the

substantive law; (iii) are intended to guide the application of the existing law (see also finding in fact 27).

[105] I therefore considered that the Practice Directions, dated 24 April 2023, could not change the substantive law. As I have already noted, the decision of the Supreme Court was that WIBA applied to all matters other than the pending claims filed prior to the commencement of WIBA. Therefore, I considered that the only way in which a claim filed in court during the relevant period, on basis of the common law, could continue to be determined by the court on the basis of common law, after the decision of the Supreme Court, was by application of the doctrine of legitimate expectation. The pursuer contended that the Practice Directions were merely interpreting the decision of the Supreme Court and that paragraph 7 made clear that the doctrine of legitimate expectation could be applied in that way (namely that the common law would continue to apply). The pursuer also contended that, even if the Practice Directions had not been issued, the doctrine of legitimate expectation could be applied in that way on the basis of an interpretation of the decision of the Supreme Court. However, as I have already noted, the Supreme Court only recognised a legitimate expectation for pending claims filed prior to the commencement of WIBA and I did not consider that the Practice Directions could authorise the doctrine of legitimate expectation to be applied in manner beyond what had been decided by the Supreme Court. Prof Muigai briefly explained that a claimant could not have a legitimate expectation that was contrary to the law (he explained that a claimant could not expect what the law had taken away), however, I found that difficult to reconcile with the extent of the legitimate expectation that I considered that the Supreme Court had recognised regarding pending claims filed prior to the commencement of WIBA (Prof Muigai's view on the extent of that legitimate expectation is summarised at paragraph 80 above and, to be fair to Prof Muigai,

appears to be consistent with the brief explanation that he provided). In any event, I considered that if the Practice Directions were, on the basis of the doctrine of legitimate expectation, to be read as permitting claims filed during the relevant period to continue to be determined by the court on the basis of the common law, that would have been going beyond what was decided by the Supreme Court and would be innovating on the substantive law. Indeed, it would have meant that WIBA, which had been passed by Parliament and been declared constitutional by the Supreme Court (save for sections 7 and 10(4)), would have been overridden by the Practice Directions in respect of cases filed during the relevant period. I did not consider that the Practice Directions could do so and did not consider that they did so.

[106] Sixth, in any event, I considered that the wording of the Practice Directions supported Prof Muigai's view that paragraph 7 was restricted to forum only. I considered that paragraphs 5(a) to (c) of the Practice Directions summarised the decision of the Supreme Court. Paragraph 5(c) appeared to mirror the wording used in paragraph 85 of the decision of the Supreme Court and stated:

> "(c) Be that as it may, claimants with pending cases have legitimate expectation that upon the passage of the Act their cases would be *concluded under the judicial process invoked*." [*my emphasis*]

I have already explained that I considered that what the Supreme Court meant by those pending claims being concluded under the judicial process invoked was that those pending claims could continue in court with the law to be applied being the pre-WIBA legal regime, namely the common law and/or WCA. Paragraph 5(d) appeared to me to be referring to the difficulties identified in *Tangale* at paragraph 48 to 50 and I considered that paragraphs 5(a) to (d) were a preamble to paragraphs 6, 7 and 8. Paragraph 6 made clear the legal regime

that the claims filed before the commencement of WIBA were to be concluded under, but paragraph 7 did not. What paragraph 7 stated, after making reference to the decision of the High Court, was that:

> "… declaring some provision in WIBA including Sections 16, 23(1) and 52, which prescribe the procedure for lodging claims under the Act unconstitutional. Consequently, the said declaration of nullity created a legitimate expectation that claimants *could directly lodge claims* for compensation for work related injuries and diseases *in court*. As such, litigants cannot be penalized for relying on the declaration of nullity, as appreciated by the Supreme Court in Attorney-General and 2 Others v Ndii and 79 Others; Prof. Rosalind Dixon and 7 Others (Amicus Curiae) (Petition 12, 11 and 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) *to lodge their claims in court*." [*my emphasis*]

I considered that the difference in wording used in paragraphs 5(c) and 6 to that of paragraph 7 was of significance. I considered that that difference in wording (and, in particular, the words I have highlighted in italics above) pointed to paragraph 7 limiting the legitimate expectation identified in that paragraph to the lodging of claims in court during the relevant period and not in relation to a legitimate expectation that the court would, after the decision of the Supreme Court, continue to determine such claims at common law. Accordingly, I considered that Prof Muigai was correct in his view that paragraph 7 was limited only to forum.

[107] In all the circumstances, after carefully considering the opinions of each of the three experts in light of the written materials on the law of Kenaya placed before me, I have come to the conclusion that if the discrete question came before the Supreme Court of Kenya they would be likely to decide to support Prof Muigai's opinion and find that: (i) the applicable law in relation court claims lodged during the relevant period is in fact WIBA; and (ii) that paragraph 7 of the Practice Directions recognised a legitimate expectation that was limited to forum. I therefore considered the Supreme Court of Kenya would not be likely to follow the current approach taken by the Kenyan courts to the decision of Supreme Court after

the issue of the Practice Directions, dated 23 April 2023, in respect of claims filed during the relevant period. Rather, I considered that the Supreme Court of Kenya would be likely to decide, in relation to claims filed at the ELRC or Magistrates' court with respect to compensation for work related injuries and diseases after the commencement of WIBA and before the decision of the Supreme Court, that: (i) such claims should proceed to a conclusion before the court where the claim was filed; and (ii) that the applicable law to be applied to determine those claims is WIBA. Such an approach would: (i) avoid claimants encountering time-bar issues; and (ii) require the Kenyan courts to apply WIBA even though WIBA did not give them an express power to do so.

***Issue 5 - Whether the Practice Directions, dated 24 April 2023, were of any application in the present actions?***

[108] I have already explained that I accepted Prof Muigai's evidence that a Practice Direction: (i) could not change the substantive law; and (ii) were intended to guide the application of the existing law. I also accepted the evidence of Dr Muli and Mr Nyairo that a Practice Direction had the force of law. Paragraph 7 of the Practice Direction recognised that a legitimate expectation existed in relation to claims with respect to compensation for work related injuries and diseases after the commencement of WIBA and before the decision of the Supreme Court. I considered that that legitimate expectation was part of the law of Kenya and that the Practice Directions would be considered by Supreme Court of Kenya if the discrete question came before it. I therefore considered that the Practice Directions had application to present actions by forming part of the written materials that required to be considered in order to determine how the Supreme Court of Kenya would be likely decide the discrete question if it came before it.

**Decision and disposal**

[109] I have concluded that if the present actions were filed in the ELRC or Magistrates' court during the relevant period, the Supreme Court of Kenya would be likely to decide that: (i) the actions should proceed to a conclusion before court where the claim was filed; and (ii) that the applicable law to be applied to determine the actions is WIBA. In all the circumstances I consider that the answer to the discrete question in this preliminary proof is that the applicable law to be applied by this court in the present actions is WIBA. A hearing will now be fixed to determine: (i) the question of expenses of the preliminary proof; and (ii) further procedure.