

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NYERI

PETITION NO E010 OF 2024

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 22(1) & (3), 23(1) & 3) 25(a), 27, 28,
29 (d) & (f), 35, 41, 47, 50(1), 165 AND 259 OF THE CONSTITUTION OF KENYA**

And

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLES 28, 29, 35, 41 AND 47 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTIONS 3, 4, 5, 10, 15, 21, 22, 23, 25, 26, 27, 28, 29 AND
30 OF THE WORK INJURY BENEFITS ACT**

AND

**IN THE MATTER OF SECTIONS 3, 4, AND 6 OF THE ACCESS TO INFORMATION
ACT**

AND

**IN THE MATTER OF SECTIONS 3 AND 4 OF THE FAIR ADMINISTRATIVE
ACTIONS ACT**

AND

**IN THE MATTER OF UNFAIR AND UNLAWFUL TERMINATION OF
EMPLOYMENT**

BETWEEN

PAUL KIBUE GACHUHI.....PETITIONER

AND

EAGLE CONCRETE & MACHINERIES LIMITED.....RESPONDENT

AND

DIRECTORATE OF OCCUPATIONAL SAFETY

JUDGMENT

1. By his Petition dated 20th June 2024, the Petitioner alleges violation of his constitutional rights and therefore pursues the following remedies:
 - a) A declaratory order that the Respondent's failure to fill and submit the Notice by an Employer of an Occupational Accident to an Employee to the Directorate of Occupational Safety and Health Services violated the Petitioner's right under Article 41 of the Constitution of Kenya;
 - b) A declaratory order that the Respondent's failure to fill and submit the Notice by an Employer of an Occupational Accident to an Employee despite being requested by the Petitioner violated the Petitioner's right under Article 35 of the Constitution of Kenya;
 - c) A declaratory order that the Respondent's failure to fill and submit the Notice by an Employer of an Occupational Accident to an Employee without any justifiable reason violated the Petitioner's right under Article 47 of the Constitution of Kenya;
 - d) A declaratory order that the actions of the Respondent contravened and/or violated the provisions of the Constitution under Articles 2, 3, 10, 19, 22(1) & (3), 23(1) & (3), 25(a), 27, 28, 29(d) and (f) and thus violated the rights and freedoms of the Petitioner under the Bill of Rights;
 - e) An order compelling the Respondent to fill the Notice by an Employer of an Occupational Accident to an Employee and forward

the same to the Directorate of Occupational Safety and Health Services within seven (7) days for purposes of computation of compensation payable to the Petitioner;

- f) In the alternative of (e) above, an order compelling the Interested Party to assess the compensation payable to the Petitioner upon presenting a copy of the original Notice by an Employer of an Occupational Accident to an Employee;
- g) An order for compensation against the Respondent for violating the Petitioner's constitutional rights and freedoms;
- h) An order for compensation in the sum of Kshs. 600,000 for the unfair and unlawful termination of the Petitioner's contract of employment;
- i) An order compelling the Respondent to pay the Petitioner one month's salary in lieu of termination notice;
- j) An order compelling the Respondent to refund the Petitioner Kshs. 133,198 being medical expenses incurred by the Petitioner arising from the injuries suffered at the work place on 28th February 2023;
- k) Costs plus interest.

2. The Petitioner states that he was employed by the Respondent on 7th February 2022, as a crusher mechanic earning a monthly salary of Kshs. 40,000, which was reviewed upwards to Kshs. 50,000 from February 2023.

3. The Petitioner avers that on 28th February 2023, he was tasked to repair the stone crusher and was working on the conveyor belt. He adds that there was an electrician working on a mortar who mistakenly switched on the electricity, whereupon the Petitioner's hand was pulled to the conveyor belt and crushed.
4. The Petitioner claims to have suffered segmental fracture of the left humerus with total brachial plexus, causing loss of his left upper limb with disability assessed at 50%.
5. The Petitioner pleads that he was rushed to Diocese of Embu Consolata Hospital, Kyeni where surgery was performed and he was given 90 days' sick leave, running from 7th March 2023 to 7th June 2023.
6. According to the Petitioner, he was called by the Respondent to resume work on 26th March 2023, before expiry of his sick leave. He claims to have worked the whole of April 2023 but was only paid Kshs. 16,000.
7. The Petitioner further avers that on 6th May 2023, he together with other employees of the Respondent, were ordered to leave employment. No reasons were given for the termination.
8. The Petitioner adds that on 29th May 2023, the Respondent called him to go back to work on the promise that he would be paid his salary arrears and hospital expenses. The Petitioner did not accede to the Respondent's offer.
9. The Petitioner claims to have been allowed a further 60 days' sick leave from 8th June 2023 to 8th August 2023.

10. The Petitioner accuses the Respondent of failure to report the accident and injury on 28th February 2023 to the Directorate of Occupational Safety and Health Services. He states that the Respondent's response to a demand letter issued by his Advocates was that no such accident had occurred and the Petitioner was no longer its employee.
11. The Petitioner also claims to have been constructively dismissed.
12. The Respondent's Response to the Petition is by way of a replying affidavit sworn by its then Human Resource Manager, Timothy Njeru Gutettah on 31st July 2024.
13. It is deponed that the Petition is without merit, frivolous and an abuse of the court process.
14. According to the Respondent, the Petitioner was its employee from October 2022 until April 2023, when he absconded duty.
15. Gutettah depones that on 29th February 2023, the Petitioner failed to report to work as required of him. Upon inquiry, the Petitioner is said to have informed Gutettah that he had been involved in an accident on 28th February 2023.
16. The Petitioner showed up at the work place on 7th March 2023, with visible injuries on his hand and a 90-day sick leave advisory from Valley View Medical Specialists.
17. The Respondent approved the 90-day sick leave to allow the Petitioner time to recuperate. The Petitioner is said to have requested to resume work in

the month of April; his request was granted and he was allocated a different work station with lighter duties.

18. According to the Respondent, the Petitioner worked until mid-April when he disappeared, refused to pick calls or offer any explanation regarding his whereabouts.

19. The Respondent denies ever terminating the Petitioner's employment.

20. The Respondent accuses the Petitioner of failing to provide the necessary documents to facilitate notification of the accident to the Interested Party. It is deposed that the Respondent could not refer the accident to the Director of Occupational Safety and Health Services, without the Petitioner's cooperation.

21. Gutettah challenges the jurisdiction of this Court to handle the matter because the Petitioner's monthly salary fell below the Kshs. 80,000 threshold set by Gazette Notice No 6024 dated 22nd June 2018. He asks that the Petition be struck out.

22. In response to the Respondent's replying affidavit, the Petitioner swore a further affidavit on 17th March 2025.

23. The Petitioner challenges the capacity of Timothy Njeru Gutettah to swear the replying affidavit on behalf of the Respondent.

24. The Petitioner deposes that his employment was terminated on 6th May 2023 due to an injury that had occurred at the workplace. He denies the allegation that he failed to report to work.

25. The Petitioner reiterates that he was granted 90 days' sick leave from 7th March 2023 to 7th June 2023 and a further 60 days from 8th June 2023. He adds that he was called by the Respondent on 29th May 2023, to return back to work on the promise that he would be paid his salary arrears.
26. The Petitioner states that he reported the accident and resultant injury to the Directorate of Occupational Safety and Health Services and the Commission on Administrative Justice.
27. The Respondent filed a supplementary affidavit sworn by its current Human Resource Manager, Patrick Gitonga Nyaga on 20th March 2025. Nyaga reiterates the contents of the replying affidavit sworn by Timothy Njeru Gutettah, asserting that the Petitioner himself absconded duty.
28. Nyaga further reiterates that the Petitioner did not supply the relevant information required to complete the necessary documentation, hence the delay in filing the notice by employer as required by law. He points out that a report was subsequently filed before the lapse of twelve (12) months.
29. Nyaga maintains that this Petition has been overtaken by events as the matter has been heard and determined before the Director, Occupational Safety and Health Services.
30. It is deponed that the Petitioner filed a claim with the Directorate of Occupational Safety and Health Services, being WIBA/NRB/5916/24, upon which he was awarded Kshs. 2,688,461.54. The Respondent claims to have lodged an appeal against the award and was awaiting directions.

31. Nyaga concludes that the reliefs sought by the Petitioner have been overtaken by events as the matter has been concluded and is pending appeal before the Director of Occupational Safety and Health Services.
32. The Petitioner swore a further supplementary affidavit on 21st May 2025, by which he challenges the supplementary affidavit sworn by Patrick Gitonga Nyaga on 20th March 2025, on the ground that it is not accompanied by a letter of authority to depone.
33. The Petitioner further faults Nyaga for purporting to depone to matters that are not within his knowledge, noting that he was not present when the Petitioner worked for the Respondent.
34. Regarding the allegation that he absconded duty, the Petitioner states that if this accusation were true, the Respondent would have summoned him or issued him with a termination notice.
35. The Petitioner counters the allegation that he did not supply the Respondent with the relevant information regarding the accident, adding that it is the Respondent that took him to Consolata Hospital, Kyeni after the accident.
36. The Petitioner further counters the averment that the Respondent had filed the relevant documentation on the accident, maintaining that the Respondent did not file any documents at the Directorate of Occupational Safety and Health Services.
37. The Petitioner disagrees that the Petition has been overtaken by events as alleged by the Respondent. He points out that the Petition does not seek

enforcement of the award under DOSH but rather, declarations that the Respondent has failed to comply with specific provisions of the Constitution.

38. At the time of writing this judgment, the Petitioner had filed a claim before the Director of Occupational Safety and Health Services which had been determined and an award issued in his favour. I must at this stage point out that the Work Injury Benefits Act is a self-executing statute, with clear time bound responsibilities and roles.

39. Further, where a duty bearer fails to fulfil their obligation, the Court can compel them to do so. In ***Boniface Orubia Wasika v Cadell Construction Co (De) LLC & Directorate of Occupational Safety and Health Services (Interested Party) [2023] KEELRC 3383 (KLR) Ongaya J*** affirmed that an employer who failed to report an occupational disease to the Director of Occupational Safety and Health Services could be compelled by the Court to do so.

40. The present case is however different as the Director of Occupational Safety and Health Services is now fully seized of the matter. At any rate, since an award has already been made in favour of the Petitioner, no further remedies are available to him.

41. Regarding the claim of unlawful termination of employment, the parties advanced sharply divergent positions regarding the circumstances surrounding the Petitioner's exit from the Respondent's employment. While the Petitioner claims to have been forced out of employment, the Respondent accuses him of failing to report to work.

42. These are matters of fact that cannot be determined by way of affidavits. Rather, *viva voce* hearing is required in order to test the veracity of the averments by the parties.

43. In my view, an ordinary claim would adequately address this part of the Petition. I will therefore withhold final determination on this issue in order to allow the parties an opportunity to ventilate it as an ordinary claim.

44. Each party will bear their own costs.

45. Orders accordingly.

DELIVERED VIRTUALLY THIS 17TH DAY DECEMBER 2025

LINNET NDOLO

JUDGE

Appearance:

Mr. Muriuki for the Petitioner

Ms. Migwi for the Respondent