



**Kathambi v Safaricom Limited (Cause 1986 of 2014)  
[2023] KEELRC 1772 (KLR) (25 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1772 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1986 OF 2014**

**J RIKA, J  
JULY 25, 2023**

**BETWEEN**

**EVA BESSY KATHAMBI ..... CLAIMANT**

**AND**

**SAFARICOM LIMITED ..... RESPONDENT**

**Duty of the employer to provide adequate, safe and proper devices for work.**

*The instant case involved an aggrieved former call center operator suing her former employer for vocal cord paralysis; a condition she claimed she acquired as a work place injury due to the negligence of the respondent of not providing her with safe working conditions and safe working hours. The ELC held that the duty to provide a safe system of work included the systems layout, the manner of use of the equipment, training and supervision. The respondent did not discharge the duty to provide a safe system of work. The respondent acted negligently, and did not provide the claimant with proper and safe call devices, and a safe system of work. The court granted the claimant Kshs. 2,500,000 in general damages for pain, suffering and loss of amenities; the court declined to issue the claimant with special damages and costs for future treatment as the claimant had not proved the same.*

Reported by John Ribia

**Labour Law** – work place injury – duty of the employer to provide their employees with safe system of work – what duties did employers have when providing their employees with a safe system of work - section 6(1)(2)

**Labour Law** – work place injury – duty of the employer to provide their employees with safe working environment and conditions – where a claimant alleged to get voice cord paralysis due to working in unsafe working conditions in the employer’s call center - where the employer claimed that the injuries were attributable to the employee’s negligence and abuse of work equipment - whether the claimants vocal cord paralysis was occasioned through the respondent’s negligence, by failure to provide a safe and proper working environment - whether the claimant’s vocal cord paralysis could be attributed to the claimant misusing the call center equipment by not facing the instructions on the safety manual - , section 6(1)(2).

**Labour Law** – work place injury – claim for damages – claim for special damages – claim for costs for future treatment - proof required in work place injury claims in order to be awarded with special damages and costs for



*future treatment – what did claimants in work place injury claims have to prove an award for general damages for pain, suffering, mental anguish and loss of amenities.*

### **Brief facts**

The claimant was employed by the respondent as a customer care representative at the age of 26 years. Her work entailed, but was not limited to, working at the respondent's call center. She constantly communicated to the respondent's customers, receiving and attending to their complaints. She constantly wore headsets, in discharge of her role. The claimant claimed that she served diligently, until she was diagnosed with functional dysphonia where she lost her voice. Subsequently, she was moved to the voiceless SMS section and shortly after which the claimant alleged that she was retired on medical grounds.

Aggrieved the claimant filed the instant claim where she claimed that her injury was occasioned by the respondent's negligence, carelessness, breach of statutory duty, and breach of contract. She was subjected to prolonged hours of receiving calls. She was not provided safe and proper devices for such work.

### **Issues**

- i. What were the duties employers had to their employees regarding the provision of a safe system of work?
- ii. Whether the claimants vocal cord paralysis was occasioned through the respondent's failure to provide a safe and proper working environment.
- iii. Whether the claimant's vocal cord paralysis could be attributed to the claimant misusing the call center equipment by not adhering to the instructions on the safety manual.
- iv. What did claimants in work place injury claims have to prove to be awarded with special damages and costs for future treatment?
- v. What proof did the claimants in work place injury require for an award for general damages for pain, suffering, mental anguish and loss of amenities?

### **Held**

1. The claimant was medically examined prior to employment and was given a clean bill of health. Her ear nose and throat (ENT) system was sound. Her duty at the call center, involved constant communication with the respondent's subscribers, attending to their complaints over the phone, and seeking solutions. She constantly used headphones, supplied by the respondent.
2. There was strong and irrefutable medical evidence, to show that the claimant suffered functional dysphonia (vocal cord paralysis). Medical evidence affirmed that the injury or illness of the claimant's vocal cord, was related to her occupation. She did not have the voice problem when she was examined on recruitment in 2008, and given a clean bill of health to start working at the respondent's call centre. The report from Aga Khan Hospital, dated July 19, 2010, stated that the claimant should be assigned duty to a section where she was not required to use her voice. The doctor testified that the claimant's condition was heavily associated with her occupation.
3. The claimant suffered injury or illness to her throat, specifically to her vocal cords, and the injury or illness was occupational. It was a condition attributed to her occupation, based on a series of medical reports. The claimant's response during cross examination in not being able to determine whether she experienced voice problems in March or June 2010 could be excused. The claimant was giving evidence 12 years after the event. The medical reports spoke for themselves.
4. The claimant had worked for 2 years before her voice was lost. She was provided with Nortel System which managed calls. There were headsets which were shared. There was no call intrusion from the call managers. The system was changed to digital, enabling call managers to intrude. 3 or 4 call managers would intrude. The customer care representatives were forced to shout to be heard by the customers.
5. The respondent did not adduce evidence relevant to the period the claimant worked, discounting her evidence that she was not availed a safe and proper system of work. Her evidence was that the



- change from analogue system to digital system, resulted in voice intrusion by call managers. She and her colleagues were compelled to shout, to communicate with the respondent's customers. She suffered vocal cord paralysis, while some of her colleagues were alleged to have suffered acoustic shock.
6. An employer had a duty to take reasonable care, so as to carry on operations, in a manner that did not subject an employee to unnecessary risk. That included the duty to avail to an employee, adequate equipment, and a safe system of work. Section 6 (1) of the , 2007, required every occupier/employer, to ensure the safety, health and welfare at work, of all persons working, or present, in their workplace. Section 6(2), restated the duty of an employer to provide an employee systems and procedures of work, that were safe and without risks to health. An employer's duty included warning an employee against unusual dangers, and making the workplace as safe as the exercise of reasonable skill and care, would permit.
  7. An employer was under duty to provide an employee adequate material and safe system of work. In order for the duty of care to arise, harm must be reasonably foreseeable, as a result of the respondent's conduct; parties must be in a relationship of proximity; and it must be fair, just and reasonable to impose liability.
  8. The respondent did not show that it provided the claimant with any form of training on changeover from analogue to digital system. The explanation that it was at the discretion of the claimant to control the voice decibels, does not seem to the court, to have been the attitude of an employer, who was fully aware of its duty of care. The respondent filed user's guide, on devices which it was not able to show, were the devices in use, at the time the claimant was stricken. It was acknowledged that shift management system captured in the documents filed by the respondent, was not in use at the time the claimant worked.
  9. The claimant's vocal cord paralysis coincided with the changeover from analogue to digital system. The claimant told the court that a number of her colleagues sustained ENT injuries or illnesses mostly of their ears. They suffered acoustic shock. It could reasonably be inferred that the devices supplied to the claimant, which allowed 3 to 4 call managers to intrude on her system, compelling her to constantly raise her voice to be heard, were not fit for purpose; the respondent offered no evidence to counter that of the claimant, on the safety of the devices; it was not even ascertained by the respondent that the devices purported to had been in use, were procured and purchased by the respondent; and manufacturer details and quality standards , were not presented before the court.
  10. The respondent did not lead technical evidence on the call devices in use, at the time the claimant suffered dysphonia. The respondent could not give satisfactory evidence about the devices in use, their safety and the safety of the respondent's call infrastructure. The respondent could only supply details of procurement and purchase. There was no evidence led by the respondent, from its occupational safety and health office. The respondent did not even call its call centre attendants, who were said, to have certified the equipment as safe and proper to use. Its occupational safety and health office was created after the claimant left employment.
  11. The respondent did not supply the claimant with proper and safe call devices. The duty to provide a safe system of work included the systems layout, the manner of use of the equipment, training and supervision. The respondent did not discharge the duty to provide a safe system of work. The safety instructions relating to the plantronics documents presented by the respondent were not shown to have been related to the device the claimant was using, and were not shown to have been handed to the claimant.
  12. The respondent relied on the safety instructions in his evidence in stating that the claimant had full control of her headsets, and was expected to control the volume. The safety instructions included that, the user should set the volume control in a low position before putting the headset or headphones on the ears; limit the amount of time the user uses headsets or headphones at high volume; avoid turning up the volume to block out noisy surroundings; and turn the volume down, if the sound from the



- headset or headphones prevent the user from hearing people around the user. Those safety instructions were not shown to relate to the device used by the claimant. Even if they were, it was not shown that the instructions were handed to the claimant, and that she was trained on use of the device subject matter of the safety instructions.
13. The claimant was subjected to prolonged working hours receiving calls. It would not be possible to limit use of the headsets or headphones, while the claimant was subjected to prolonged working hours receiving calls, and while she did not have control of her work schedule. The genesys work force management system exhibited by the respondent applied between 2014 and 2017.
  14. There was no adequate evidence, that the claimant was availed sufficient breaks, from the destructive call decibels, that eventually led to paralysis of her vocal cords. The duty to provide a safe system of work, included provision of proper and adequate means to the employee, to enable the employee carry out his work, without unnecessary risks.
  15. The respondent acted negligently, and did not provide the claimant with proper and safe call devices, and a safe system of work. The parties were in an employer – employee relationship. It was fair, just and reasonable to impose full liability on the respondent.
  16. The claimant was identified by a succession of medical experts as a patient with dysphonia. She was assessed to suffer dysphonia by history, and physical examination. Medical experts recommended that the claimant should undergo voice therapy and microlaryngoscopy, under general anaesthesia.
  17. The claimant periodically lost her voice, which impaired her communication. She was once carjacked, and would not be able to scream for help. She was studying at the university, when one of her very unkind and uncultured lecturer, would ask other students to assist that mute. She was a mute to her lecturer. She suffered mental anguish. People would say that she was beautiful, but nonetheless a mute. Loss of voice was painful, physically and psychologically.
  18. Voice therapy assisted the claimant to recover well especially after she was moved to the SMS section. The claimant even disputed why she was being retired on medical grounds, while she considered herself to have mended sufficiently to continue in employment. The claimant’s voice had recovered. It was not necessary to do microlaryngoscopy under general anaesthesia.
  19. The claimant did not establish her claim for cost of future medical treatment. She did not establish that she needed future medical treatment, having confirmed that she recovered her voice at the end her treatment. She did not attempt to establish an accurate evaluation of her future needs. There was no cost of future care report, filed by the claimant. The cost of future medical treatment could not be given, entirely at the discretion of the court. There must be an accurate evaluation, and a future care report placed before the court, to make a reasonable assessment of future care. The prayer for cost of future medical treatment was declined.
  20. Special damages must not only be specifically pleaded, but also specifically proved. There was adequate evidence to enable the court, to accede to the prayer for general damages for pain, suffering, mental anguish and loss of amenities. There claimant sustained paralysis of her vocal cord; she suffered mental anguish; she was carjacked and could not scream for help; her uncultured lecturer, referred to her as a mute; and she was told, that she was beautiful, but nonetheless a mute. She was constantly in pain, and on bedrest. Her quality of life was impaired. The claimant lost her employment and her source of income, at a tender age of 31 years, on the ground of her occupational injury or illness.
  21. Assessment of general damages was in the discretion of the trial court. The trial court must not take into account irrelevant factors, or grant general damages at an amount which was inordinately low, or inordinately high, that it must be a wholly erroneous estimate of the damage.

*Claim partly allowed.*

### **Orders**

- i. *The respondent was to avail the claimant her certificate of service.*



- ii. *The prayer for general damages for pain, suffering, mental anguish, and loss of amenities was allowed at Kshs 2,500,000.*
- iii. *Costs awarded to the claimant.*
- iv. *Interest allowed at court rate, from the date of judgment, till payment was made in full.*

#### **Citations**

#### **Cases**

##### ***Kenya***

1. *Catholic Diocese of Kisumu v Tete* Civil Appeal 284 of 2001; [2004] KECA 154 (KLR) - (Followed)
2. *Hahn v Singh* Civil Appeal 42 of 1983; [1985] KECA 68 (KLR) 716 - (Explained)
3. *Kemfro Africa Ltd t/a “Meru Express Services (1976)” & another v Lubia & another (No 2)* Civil Appeal 21 of 1984; [1985] KECA 137 (KLR) - (Followed)
4. *Sokoro Saw Mills Ltd v Bernard Muthimbi Njenga* Civil Appeal No 38 of 1995 - (Explained)

##### ***United Kingdom***

1. *Caparo Industries PLC v Dickman* [1990] UKHL 2 - (Explained)
2. *O’Conner v Commissioner for Government Transport* [1954] HCA 11-100 CLR 225. - (Followed)
3. *Taylor v Rover Co Ltd* [1966] 1 WLR 1491 - (Explained)
4. *Wilson & Clyde Coal Co v English* [1938] AC 579 - (Explained)

#### **Texts**

Winfield, PH., et al (Eds) (1979), *Winfield and Jolowicz on Tort* London: Sweet & Maxwell 17th Edn p 188

#### **Statutes**

##### ***Kenya***

Occupational Safety and Health Act, 2007 (cap 236A) section 6(1)(2)- (Interpreted)

#### **Advocates**

*Wesonga, Mutembei & Kigen* for Claimant

*TripleOKlaw Advocates* for Respondent

## **JUDGMENT**

1. The claimant filed her statement of claim, dated June 27, 2013, and amended on December 31, 2015. The claim was initially filed at the Chief Magistrate’s Court, Nairobi.
2. She stated that she was employed by the respondent on May 5, 2008, as a Customer Care Representative. Her letter of appointment is dated February 25, 2008.
3. She was aged 26 years, when she was appointed.
4. She was medically examined before appointment, and was confirmed to be in good health, in particular with regard to her ears and throat.
5. Her work entailed, but was not limited to, working at the respondent’s call centre. She constantly communicated to the respondent’s customers, receiving and attending to their complaints. She constantly wore headsets, in discharge of her role.
6. It was an express or implied term of her contract of employment, that the respondent would take all reasonable care for the safety of the claimant, while she worked. It was the duty of the respondent, not to expose the claimant to risk of injury. The respondent ought to have provided, or made adequate and suitable appliances at the call centre, to enable the claimant carry out her work in safety, and take



- all reasonable measures to ensure the claimant's work was safe. It was the duty of the respondent to provide and maintain a safe system of work.
7. She served diligently, until she was diagnosed with functional dysphonia. She lost her voice. She was operated for thymus swelling in March 2011, but her voice did not improve.
  8. She had repeated throat endoscopy. At the time of amending her claim, she had 17 endoscopies. It was recommended that she takes vocal care. She underwent voice therapy sessions. The respondent paid for only 4 sessions and ceased further payment without reason. The claimant continued to pay for herself for another 6 months, and only stopped paying, when she ran out of funds.
  9. The claimant states that her injury was occasioned solely by the respondent's negligence, carelessness, breach of statutory duty, and breach of contract. She was subjected to prolonged hours of receiving calls. She was not provided safe and proper devices for such work.
  10. Detail of negligence include: -
    - a. Unsafe system of work.
    - b. Failure to provide the claimant with safe and proper speaking and hearing devices.
    - c. Failure to warn the claimant in time, or at all, of the dangers.
    - d. Failure to ensure safety conditions for the claimant.
    - e. Exposing the claimant to dangers the respondent knew, or ought to have known [to exist].
    - f. Knowingly allowing the claimant to work for prolonged hours, without safe and proper working equipment.
    - g. Failure to introduce the claimant to other safe means of performing the said work.
    - h. In so far as practicable under the circumstances, the claimant relies on the doctrine of *res ipsa loquitur*.
  11. The respondent's doctors recommended that the claimant is placed on sick leave, and thereafter placed on different assignment, away from the call centre. She was recalled after 1 month, and deployed to SMS centre.
  12. On October 9, 2012, at the age of 31 years, she was retired on medical ground. She was required to sign a letter dated October 5, 2012 exonerating the respondent from liability. She refused to sign the letter. Her last salary was Kshs 76,766 monthly.
  13. She details her injuries to include: -
    - a. Functional dysphonia.
    - b. Further particulars of injury to be furnished at the hearing, by way of Medical Report.
    - c. The claimant is at the moment having issues with her voice. She cannot keep talking for long continuously as her voice will end up going hoarse, before disappearing completely. She has to keep taking water, having breaks and chewing gum to cope. She can no longer take hot drinks.
    - d. She has undergone surgery without success.
    - e. Her lifestyle has greatly been tampered with, a situation which may remain for the rest of her life.



- f. Constant pain, necessitating use of pain killers regularly with the risk of addiction and abuse thereof.
  - g. For 3 years, the claimant lost her voice completely. She continues to lose her voice occasionally. She needs surgery.
  - h. In light of the injuries, it has not been easy to secure another job as many prospective employers are concerned about her medical condition.
  - i. Further particulars of injury to be furnished during the hearing by way of medical report. [repetitious].
14. She avers that she sustained special damages by way of medical reports and medical expenses, details which would be presented to the court at the hearing.
15. She claims general damages and the cost of future medical treatment to be proved at the hearing. At the time of retirement, the doctors had recommended that the claimant undergoes further surgery to reinforce her vocal cords. She did not have a medical insurance cover, and this could not be carried out. She continues to endure pain.
16. She prays for judgment against the respondent for: -
- a. Liability against the respondent, for injury sustained by the claimant in the course of employment.
  - b. Special damages.
  - c. General damages for pain, suffering, mental anguish, and loss of amenities.
  - d. Any other suitable relief.
  - e. Costs.
  - f. Cost of future medical treatment.
  - g. Certificate of service to issue.
17. The respondent relies on its statement of response, filed on July 30, 2013. It is not contested that the claimant was employed by the respondent.
18. The respondent took all reasonable measures, provided and maintained a safe system of work, constituting equipment certified to be safe by its call centre attendants. Headsets supplied by the respondent, are operated within the allowable safe decibel levels.
19. The respondent denies having exposed the claimant to any risk of injury which was known, or which ought to have been known, or which was reasonably foreseeable.
20. Any injury to the claimant was not attributable to the nature of the work the claimant was engaged in, or the use of the headsets provided to the claimant. The control on the use of voice, in terms of audibility, is exclusively within the user's prerogative. The respondent had no direct control on device audibility.
21. The respondent did not subject the claimant to prolonged hours, receiving calls. The it did not fail to provide safe and proper devices to the claimant. Details of negligence, carelessness and unspecified breach of statutory duty are denied.
22. Reasonable measures taken by the respondent, in deploying the claimant to the call centre include: -



- a. Provision of equipment certified to be safe for use by its call centre attendants.
  - b. Headsets issued to the claimant and other employees were new, and for specific use by the assigned employee.
  - c. Provision of training and user safety manual to the claimant.
  - d. Placing limits on work shifts constituting breaks between the working hours.
  - e. Implementation of a workforce management system, to manage the shifts.
  - f. The claimant was availed 2 days off, every week.
23. The respondent denies details of negligence and injury.
  24. The prayers sought have no merit.
  25. The respondent prays for dismissal of the claim.
  26. The claimant filed reply to the statement of response, on October 20, 2013. No new issue is raised in the reply. The claimant reiterates her pleadings and disputes the correctness of the statement of response.
  27. The original file went missing and orders for reconstruction of the file issued only on October 8, 2021, which explains partly, why the claim has not been disposed of, since 2013.
  28. There were other related claims filed by the claimant's colleagues against the respondent. The parties informed the court that there had been issued an order for consolidation. The claimant's advocate later opted to prosecute the present claim separately, submitting that the facts in the consolidated files were not an exact match.
  29. Betty Eva Kathambi, the claimant herein, gave evidence on July 26, 2022 and July 27, 2022. She rested her claim on December 5, 2022. Odhiambo Ooko, Senior Manager Labour Relations, gave evidence for the respondent on March 8, 2023, closing the hearing. The matter was last mentioned on April 20, 2023, when the parties undertook to file and exchange their submissions.
  30. Claimant's case. She told the court that she is an Environmental Researcher. She restated her employment history with the respondent, from 2008 to 2012. She adopted her 3 witness statements on record as her evidence. She filed and adopted 3 bundles of documents, containing documents marked as exhibits 1-14.
  31. She was assigned line 100 at call centre, taking care of customer needs. In 2010, she lost her voice for 10 days. She was there for about 2 months, before being moved to line 234, dealing with M-pesa queries. She continued to lose her voice and was moved to the voiceless SMS section. She worked at the SMS section until October 12, 2012, when she was retired on medical ground.
  32. She was instructed by the respondent to see an ENT specialist. She was treated by Professor Macharia, who advised that she is moved to a voiceless department. She was given 10 days' sick-off. On return her voice was husky. She was assigned the same section. 3 months later, she lost her voice again.
  33. She was seen by ENT specialists, and placed on antibiotics because her throat was inflamed. Professor Macharia examined her vocal cords. Her right vocal cord was found to be disjointed from the others, and therefore the inability to produce sound.
  34. She was given 30 days' rest. She was placed on voice therapy at Aga Khan Hospital, Nairobi. She was recalled by Call Centre Manager, Human Resource Manager, and her supervisor, before her 30 days' rest had expired. She submitted her medical records to them. She was advised that she must submit



- herself to the respondent's medical facility, and that if the respondent's Doctor Rupani contradicted Professor Macharia, she would be dismissed. Her sick off was cancelled. She was assigned to the SMS section from M-pesa. SMS did not use active calls.
35. Dr Rupani conducted voice tests on the claimant and confirmed her diagnosis. He recommended the same rest and therapy. Call Centre Manager advised that the claimant continues to work at SMS, as she underwent therapy.
  36. She worked well and surpassed targets. She retained a score of 100%, until she was retired.
  37. She was seen by Professor Macharia, Dr Munene and also Dr Nyaga who attended to her, until she recovered her voice.
  38. There was no medical report, saying she could not continue working at SMS section. There were several colleagues with work-related illnesses. Most had acoustic shock. They were taken through fair procedures before retirement. Some were away from work for as long as 1 year, before retirement on medical ground. The claimant had already been moved to SMS, and there was no medical report, advising that she could not continue working there.
  39. Before employment, there were comprehensive medical tests including ENT, which she passed. The Call Centre employees at first had nortel system, using oracle system, which managed calls. They had headsets which they shared. There was no call intrusion from call managers.
  40. When the process was digitized, any call manager could intrude. The Employee had to shout to hear and to be heard by, the customer. 3 or 4 call managers would intrude, compelling the employees to shout.
  41. The employees had 2 random days off. There was no mutual consent on retirement, on October 9, 2012, as alleged by the respondent. The claimant's last working day was September 30, 2012. She had been asked by the respondent to stay at home, until recalled.
  42. She was recalled on October 9, 2012 and asked to sign an agreement on retirement, discharging the respondent from any further liability. She did not agree with this, and did not sign.
  43. The claimant told the court that she does not know respondent's witness, Odhiambo Ooko. He joined the respondent in 2016 after the claimant had left.
  44. She used nortel headsets, not the brand shown in the respondent's documents. The respondent used oracle system.
  45. The redeployment policy exhibited by the respondent became effective in June 2012. The claimant was not regulated by this policy, because she had already been redeployed to SMS section, from August 2010. The medical surveillance policy exhibited by the respondent, similarly did not apply to the claimant. It came into effect, on October 1, 2013.
  46. There were no medical checks after one was employed, unless one fell sick, and required to have such medical checks. There was no need for the respondent to offer further redeployment, while the claimant was settled at SMS. There were 16 colleagues of the claimant, in the same medically-induced position.
  47. The claimant's loss of voice was painful. She endured social intolerance. People would comment that she is a beauty, who could not talk. She was car-jacked, and could not scream. She has engaged in casual tasks, since retirement.



48. Cross-examined, the claimant confirmed that she held a meeting with the respondent, on October 9, 2012. She was told that she had been retired. She was aggrieved by the decision.
49. She amended her statement of claim. She does not pursue her grievance on retirement; she pursues compensation for work injury.
50. She states at paragraph 5 of the claim, that she lost her voice on June 30, 2010. She has the report by Professor Macharia. It is not from June 2010. She first was examined at AAR Sarit Centre on June 30, 2010. AAR referred her to Professor Macharia. It was in July 2010. Professor Macharia gave her 30 days of rest, broken down in particular days a week. She was reviewed weekly. It may not have amounted to 30 days, but rest days were given by Professor Munene.
51. Her witness statement of July 14, 2022 at paragraph 3, states that she lost her voice in March 2010. This was the first time. Earlier statement states it was in June 2010. This was the second loss, after March 2010. Professor Macharia saw the claimant in March 2010. The claimant did not file report for March 2010. Professor Macharia recommended that the claimant changes her workstation. There is no document capturing this recommendation.
52. Professor Macharia confirmed that the claimant suffered vocal cord paralysis. This was corroborated by the voice therapist. The claimant's right vocal cord was paralyzed.
53. She was moved to SMS on August 3, 2010. It was about a month, after she lost her voice. She continued working until she was retired. There was continuity of work. The respondent refused to pay for further therapy. In terms of work shift, the respondent accommodated the claimant. The respondent paid for 4 therapy sessions. The claimant continued to pay for herself afterwards. She did not have receipts to show that she paid for herself.
54. She has not pleaded any specific figure by way of special damages. She stated she would exhibit medical reports and receipts during the hearing, in her amended statement of claim. She did not exhibit any receipts for medical expenses.
55. She did not exhibit the instructions, advising her not to report to work. She had a question and answer [Q&A] with Bob Collymore, respondent's CEO. He could not hear the claimant, so she wrote her answers down. She could hear his answers. She was not deaf. She received the retirement letter.
56. She was offered *ex-gratia* payment of Kshs. 717,000. She was paid 2 months' salary for each complete year of service. It was paid pursuant to a court order.
57. The claimant did not have expert report, faulting the quality of the respondent's headsets. She knew how the headsets functioned from her experience. Previously, the employees used analogue system, which allowed them to pick one call at a time. There was no call intrusion. She was the only one who suffered voice injury. Other colleagues used the same tools. Professor Macharia and Dr Rupani had recommended that the claimant undergoes training on sign language. It was not recommended in writing. Training on sign language was an example of pain and suffering the claimant endured. She was car-jacked in 2013. She did not exhibit police occurrence book extract, on this crime.
58. Redirected, she clarified that *ex-gratia* was paid through an order of the court in other related proceedings, where the claimant was not a Party. The respondent acted based on these other claims. All doctors opined that there was excessive voice usage, by the claimant at the call centre. She did not have voice problems previous to her employment with the respondent. Other employees suffered ear injuries and acoustic shock. It was attributable to the headsets. The claimant suffered mental anguish. She was studying for her Master's Degree. The lecturer would say to her colleagues, "please assist that mute."



## **Respondent's Case.**

59. Odhiambo Ooko, Senior Manager Labour Relations, relied on his witness statement, dated December 6, 2021, and documents filed by the respondent, [1-5], dated December 8, 2021.
60. Cross-examined, he told the court that he was employed by the respondent in 2016. The claimant was employed in 2008 and left in 2012. Ooko did not interact with the claimant. She was retired on medical grounds, in October 2012. The documents exhibited by the respondent, show the headphones that were in use, at the time of the claimant's employment. Ooko did not have documents showing purchase of the headphones. There was a procurement and purchase process. There are procurement records. He could provide the records to the court, if required to do so. The work management report for 2014 to 2017 did not apply to the claimant, because her contract had already been terminated. The system did not apply to her. Ooko did not have evidence showing genesys system had already been installed. The table shift exhibited by the respondent, does not have the claimant's name. The redeployment policy became effective in June 2012. Ooko was not sure if the claimant had already been redeployed at the time, to SMS department. The respondent made reference to medical report dated August 9, 2010. He did not know that the claimant lost her voice permanently in June 2010. Medical report of August 2010, recommended claimant's redeployment. Page 13 bullet 1.1. makes reference to occupational illness or injury. He was not aware when she was initially redeployed. He doubted it was August 2010. The medical surveillance policy came into force on October 1, 2013. The claimant had already left employment. By the time office of occupational safety and health was created, the claimant had already left employment. Ooko was not in employment, when the claimant went through medical issues.
61. Redirected, Ooko told the court he was testifying based on the records filed by the respondent. He did not have any document showing that the claimant suffered.
62. The issues as read from the evidence and pleadings filed by the parties, based on the statement of claim, amended on December 31, 2015, are: -
  - a. Whether the claimant suffered occupational injury or illness, in the course of employment with the respondent.
  - b. Whether the injury or illness was occasioned through the respondent's negligence, by failure to provide safe and proper work environment.
  - c. Whether the claimant merits general and special damages, cost of future medical treatment, certificate of service, costs and interest.

## **The Court Finds**

63. The claimant was appointed by the respondent for a training course, on February 25, 2008. This was a prequalification course for the position of Customer Care Representative. She completed training and was fully employed on December 5, 2008.
64. She states, and there is no evidence given by the respondent to contradict this, that she was medically examined prior to employment, and given a clean bill of health. Her ENT system was sound.
65. Her duty at the call centre, involved constant communication with the respondent's subscribers, attending to their complaints over the phone, and seeking solutions. She constantly used headphones, supplied by the respondent.



### **a. Occupational Injury or Illness.**

66. After about 2 years of employment, multiple medical reports confirm that she suffered injury or illness to her throat. On August 2, 2010, Professor Muthure Macharia, an ENT expert, head and neck surgeon, reported that the claimant had a history of recurrent dysphonia.
67. On July 6, 2010, Professor Macharia reported that the claimant presented 5 days' history of dysphonia, without upper respiratory infection. The doctor concluded that she had a whispering voice, and videostroboscopy showed poor vocal cord opposition.
68. She was seen by other doctors, including the respondent's own Doctor Harish Rupani. Dr Rupani reported on November 23, 2010, that the claimant had a voice problem since June 2010. The problem recurred in August 2010. Dr Rupani, diagnosed the claimant with functional dysphonia. It was recommended that the claimant undergoes microlaryngoscopy, if her voice did not improve. This was the view of the respondent's own doctor.
69. On August 18, 2011, Professor Macharia reviewed the claimant. It was noted that the claimant had been undergoing voice therapy sessions and had been seeing a counsellor in the intervening period. There was improvement in the pitch and projection of her voice. The doctor concluded that the claimant's voice was improving.
70. Her voice problem, is further confirmed by medical reports from the Aga Khan Hospital dated October 12, 2010 and July 14, 2010. She was placed on at least 1- week rest, with the advice that she is excused from using her voice. On July 19, 2010, Aga Khan Hospital confirmed that the claimant suffered vocal cord paralysis. In this report, the hospital suggested that vocal cord paralysis was being occasioned by use of her voice in the department she worked in.
71. On July 28, 2010, the Nairobi Hospital's Rehabilitation Unit, recommended that the claimant undergoes speech and language therapy.
72. On August 17, 2011, Dr J.C. Munene confirmed that he had treated the claimant 5 months earlier, and unfortunately, she had not recovered her voice.
73. Professor Kiama Wangai, MD-advocate, reviewed all the medical reports from Professor Macharia, Dr Rupani, Dr Munene, Aga Khan Hospital and Nairobi Hospital, and prepared a report dated May 15, 2013, opining that the claimant suffered functional dysphonia. His opinion was that the claimant suffered severe harm. Her condition was heavily associated with her occupation. She required to avoid overuse of her vocal cords. Her voice had not improved, and she required microlaryngoscopy under general anaesthesia.
74. There is therefore strong and irrefutable medical evidence, to show that the claimant suffered functional dysphonia, or in a language easier to understand, vocal cord paralysis.
75. Was it occupational? Medical evidence above affirms, that the injury or illness of the claimant's vocal cord, was related to her occupation. She did not have the voice problem when she was examined on recruitment in 2008, and given a clean bill of health to start working at the respondent's call centre. The report from Aga Khan Hospital, dated July 19, 2010, states that the claimant should be assigned duty to a section where she was not required to use her voice. Dr Kiama states that the claimant's condition was heavily associated with her occupation.
76. The court is satisfied that the claimant suffered injury or illness to her throat, specifically to her vocal cords, and the injury or illness was occupational. It is a condition attributed to her occupation, based on a series of medical reports.



## **b. Negligence, Failure to Provide Safe and Proper System of Work.**

77. The claimant worked with line 100 taking care of customer's needs. She was there for about 2 months. She was then moved to M-pesa line 234. She lost her voice in 2010, while working in these lines, before being moved to the voiceless SMS section.
78. She was not clear on cross-examination by the respondent's advocate, whether she first experienced voice problem in March or June 2010. This lack of clarity on the dates, can be excused, because the claimant was giving evidence 12 years after the event. The medical reports speak for themselves.
79. She told the court that she had worked for 2 years, before her voice was lost. She was provided with Nortel System which managed calls. There were headsets which were shared. There was no call intrusion from the Call Managers. The system was changed to digital, enabling Call Managers to intrude. 3 or 4 Call Managers would intrude. The Customer Care Representatives were forced to shout to be heard by the customers.
80. On cross-examination, the claimant stated that she did not have expert report, on quality of the headphones. She learnt how headphones worked from experience. Previously, she used an analogue system and was allowed to attend to one call at a time. There was no call intrusion.
81. In countering the claimant on her evidence concerning the headsets, the respondent placed before the court user's guide on plantronics; email of Ooko showing shift schedule; redeployment policy; and medical surveillance policy.
82. On cross-examination, Ooko told the court that he did not have documents showing purchase of the headphones, shown in the respondent's user's guide document. He could provide these to the court, if required. There were no procurement records. The shift management schedule exhibited by the respondent, covered 2014-2017, when the claimant had already left employment. There was no evidence that genesys system regulating shifts, breaks, reporting, attendance and overtime, was in use at the time the claimant worked. The shift table did not have the claimant's name.
83. The respondent did not therefore adduce evidence, relevant to the period the claimant worked, discounting her evidence that she was not availed a safe and proper system of work. Her evidence was that the change from analogue system to digital system, resulted in voice intrusion by Call Managers. She and her colleagues were compelled to shout, to communicate with the respondent's customers. She suffered vocal cord paralysis, while some of her colleagues were alleged to have suffered acoustic shock.
84. *Winfield and Jolowicz on Tort*, 17<sup>th</sup> Edition, states that an employer has a duty to take reasonable care, so as to carry on operations, in a manner that does not subject an employee to unnecessary risk. This includes the duty to avail to an employee, adequate equipment, and a safe system of work.
85. Section 6 (1) of the *Occupational Safety and Health Act, 2007*, requires every occupier / employer, to ensure the safety, health and welfare at work, of all persons working, or present, in their workplace. Section 6(2), restates the duty of an employer to provide an employee systems and procedures of work, that are safe and without risks to health.
86. In *Sokoro Saw Mills Limited v Bernard Muthimbi Njenga*, Nakuru High Court civil appeal No 38 of 1995, the court held an employer's duty, to include warning an employee against unusual dangers, and making the workplace as safe as the exercise of reasonable skill and care, would permit.
87. The English case of *Wilson & Clyde Coal Co v English* [1938] AC 579, emphasized that an employer is under duty to provide an employee adequate material and safe system of work. In *Caparo Industries Plc v Dickman* [1990] UKHL 2, the court held that in order for the duty of care to arise, harm must



be reasonably foreseeable, as a result of the respondent's conduct; parties must be in a relationship of proximity; and it must be fair, just and reasonable to impose liability.

88. The respondent did not show that it provided the claimant with any form of training on changeover from analogue to digital system. The explanation that it was at the discretion of the claimant to control the voice decibels, does not seem to the court, to have been the attitude of an employer, who was fully aware of its duty of care. The respondent filed user's guide, on devices which it was not able to show, were the devices in use, at the time the claimant was stricken. It was acknowledged that shift management system captured in the documents filed by the respondent, was not in use at the time the claimant worked.
89. The claimant's vocal cord paralysis coincided with the changeover from analogue to digital system. The claimant told the court that a number of her colleagues sustained ENT injuries or illnesses mostly of their ears. They suffered acoustic shock. It can reasonably be inferred that the devices supplied to the claimant, which allowed 3 to 4 call managers to intrude on her system, compelling her to constantly raise her voice to be heard, were not fit for purpose; the respondent offered no evidence to counter that of the claimant, on the safety of the devices; it was not even ascertained by the respondent that the devices purported to have been in use, were procured and purchased by the respondent; and manufacturer details and quality standards, were not presented before the court.
90. The respondent did not lead technical evidence on the call devices in use, at the time the claimant suffered dysphonia. Odhiambo Ooko, who gave evidence is a Senior Labour Relations Manager. He could not give satisfactory evidence about the devices in use, their safety and the safety of the respondent's call infrastructure. cross-examined on the procurement and purchase of the devices, Ooko could only say that given time, he could supply details of procurement and purchase. There was no evidence led by the respondent, from its occupational safety and health office. The respondent did not even call its call centre attendants, who are said, to have certified the equipment as safe and proper to use. Its occupational safety and health office, was according to the evidence of Ooko created, only after the claimant left employment.
91. There is evidence on record to show that the respondent did not supply the claimant with proper and safe call devices. There was no provision of a safe system of work. In *Taylor v Rover Co Ltd* [1966] 1 WLR 1491, the court found the employer negligent for supply of defective equipment to its employee.
92. The duty to provide a safe system of work includes the systems layout, the manner of use of the equipment, training and supervision. The documents exhibited by the respondent on plantronics and user's guide did not establish that the respondent discharged this duty. The safety instructions relating to the plantronics documents exhibited by the respondent, were not shown to have been related to the device the claimant was using, and were not shown to have been handed to the claimant. The respondent's witness Ooko, seems to have relied on the Safety Instructions in his evidence, when he told the court, that the claimant had full control of her headsets, and was expected to control the volume. The safety instructions include that, the user should set the volume control in a low position before putting the headset or headphones on the ears; limit the amount of time the user uses headsets or headphones at high volume; avoid turning up the volume to block out noisy surroundings; and turn the volume down, if the sound from the headset or headphones prevent the user from hearing people around the user. These safety instructions were not shown to relate to the device used by the claimant. Even if they were, it was not shown that the instructions were handed to the claimant, and that she was trained on use of the device subject matter of the safety instructions. The claimant told the court that she was subjected to prolonged working hours receiving calls. It would not be possible to limit use of the headsets or headphones, while the claimant was subjected to prolonged working hours receiving calls, and while she did not have control of her work schedule. The genesys work force management system



exhibited by the respondent applied between 2014 and 2017. The safety instructions, although not shown to have been applicable to the device used by the claimant, state that exposure to high volume sound levels, may damage the user's hearing. If the user experienced discomfort, the user should cease listening. Would it have been practicable for the claimant to disengage from taking customer's calls, if she had discomfort in her throat? There was no adequate evidence, that the claimant was availed sufficient breaks, from the destructive call decibels, that eventually led to paralysis of her vocal cords. The duty to provide a safe system of work, includes provision of proper and adequate means to the employee, to enable the employee carry out his work, without unnecessary risks, as held in *O'Conner v Commissioner for Government Transport* [1954] HCA 11-100 CLR 225.

93. There is sufficient evidence to show that the respondent acted negligently, and did not provide the claimant with proper and safe call devices, and a safe system of work. The parties no doubt were in an employer – employee relationship. It is fair, just and reasonable to impose full liability on the respondent.

### **c. General and Special Damages, and Cost of Future Medical Treatment.**

94. The claimant was identified by a succession of medical experts, as a patient with dysphonia. She was assessed to suffer dysphonia by history, and physical examination. It was, through the last medical report on record, recommended by Professor Kiama, that the claimant should undergo voice therapy and microlaryngoscopy, under general anaesthesia.
95. She periodically lost her voice, which impaired her communication. She told the court that she was once carjacked, and would not be able to scream for help. She was studying at the university, when one of her very unkind and uncultured lecturer, would ask other students, "to assist that mute." She was a mute to her lecturer. She suffered mental anguish. People would say that she was beautiful, but nonetheless a mute. Loss of voice was painful, physically and psychologically.
96. The last report by Professor Kiama Wangai, MD-Advocate dated May 15, 2013, states that the claimant's voice had not improved, and she required microlaryngoscopy under general anaesthesia.
97. The claimant did not however, explain what report was made by her main doctor, Professor Macharia, after he reviewed her within 3 months, of the medical report dated August 19, 2011. This last report of Professor Macharia, states that the claimant's voice was improving and prognosis was good.
98. In her evidence-in-chief on July 26, 2022, the claimant appears to support the last medical report of Professor Macharia of August 19, 2011. She states: -
- “I saw Professor Macharia. I had voice related medical procedure. I saw Dr Munene, a cardiovascular medic. I also saw Dr Nyaga, who took over, from Professor Macharia. He continued with me, until I recovered my voice.”
99. This evidence is consistent with the last medical report on record, prepared by Professor Macharia her long-time Doctor. If her voice recovered, it was as predicted by Professor Macharia; her voice was improving and prognosis was good.
100. She recovered well, after she was moved to SMS section, and even disputed why she was being retired on medical ground, while she considered herself to have mended sufficiently to continue in employment.
101. In reaching this finding, the court notes that it was not given the benefit of hearing the evidence of either Professor Macharia or Professor Kiama, on their respective and seemingly inconsistent last medical reports.



102. The court attaches more weight to the medical report of Professor Macharia, which finds resonance in the oral evidence of the claimant, that she continued to be seen by Dr Nyaga after Professor Macharia completed attending to her, and that she recovered her voice. Both Professor Macharia and Dr Rupani had reported that it would be necessary to do microlaryngoscopy, if her voice did not improve. These reports predated the last report of Professor Macharia, and the claimant herself told the court her voice recovered. It was not necessary to do microlaryngoscopy under general anaesthesia.
103. Some details of injuries pleaded by the claimant were not backed by medical evidence. She states that she lost her voice completely, for 3 years. When did she lose her voice completely, for 3 years? She states that she has been compelled to take pain killers, which could lead to drug abuse and addiction. This is not supported by any medical report, on record.
104. The claimant did not establish her claim for cost of future medical treatment. She did not establish that she needs future medical treatment, having confirmed that she recovered her voice at the end the treatment by Dr Nyaga. She did not attempt to establish an accurate evaluation of her future needs. There was no cost of future care report, filed by the claimant. The cost of future medical treatment cannot be given, entirely at the discretion of the court. There must be an accurate evaluation, and a future care report placed before the court, to make a reasonable assessment of future care. The claimant pleads that at the moment, she has to keep taking water, having breaks and chewing gum. This cannot aid the court in assessing the cost of future care.
105. The prayer for cost of future medical treatment is declined.
106. The Court of Appeal of Kenya, in *Hahn v Singh*, in civil appeal No 42 of 1983 [1985] KLR 716, held that special damages must not only be specifically pleaded, but also specifically proved. On cross-examination, the claimant stated that she does not plead any specific figure in her amended statement of claim. She pleads that she would supply receipts for medical expenses, which she did not do. She did not have receipts for medical reports.
107. The prayer for special damages has no support in evidence and is declined.
108. Although the claimant adduced evidence to show that she was unfairly retired, she has not pleaded any prayer on unfair termination. She told the court that she was moved from line 100 and 234 [customer care and M-pesa] to SMS, where she was not required to apply her voice. She contested retirement on medical grounds, and declined to sign the agreement drafted by the respondent, indicating that there was consensus on the claimant leaving employment on medical grounds. She has not pursued a claim for unfair termination. This is perhaps explained by her evidence that she received an *ex-gratia* payment from the respondent, equivalent of 2 months' salary for each complete year of service, computed at Kshs 550,523 after tax. The only prayer relating to termination, is on grant of certificate of service. The court grants the prayer for certificate of service.
109. There is adequate evidence to enable the court, to accede to the prayer for general damages for pain, suffering, mental anguish and loss of amenities. There is no dispute that the claimant, sustained paralysis of her vocal cord; she suffered mental anguish; she was carjacked and could not scream for help; her uncultured lecturer, referred to her as a mute; and she was told, that she is beautiful, but nonetheless a mute. She was constantly in pain, and on bedrest. Her quality of life was impaired. Ultimately, she lost her employment and her source of income, at a tender age of 31 years, on the ground of her occupational injury or illness.
110. The Court of Appeal in *Catholic Diocese of Kisumu v Sophie Achieng' Tete*, civil appeal No 284 of 2001 [2004] 2KLR, and *Kemfro Africa Ltd t/a Meru Express Services [1976] & another v Lubia & another [No 2]* [1985] e-KLR, established that assessment of general damages, is in the discretion of the trial



court. The trial court must not take into account irrelevant factors, or grant general damages at an amount which is inordinately low, or inordinately high, that it must be a wholly erroneous estimate of the damage.

111. The court grants the claimant general damages for pain, suffering, mental anguish and loss of amenities, at Kshs 2,500,000.
112. Costs to the claimant.
113. Interest allowed at court rate, from the date of the judgment, till payment is made in full.

**In Sum, it is Ordered**

- a. The respondent shall avail the claimant her certificate of service.
- b. The prayer for general damages for pain, suffering, mental anguish, and loss of amenities is allowed at Kshs 2,500,000.
- c. Costs to the claimant.
- d. Interest allowed at court rate, from the date of judgment, till payment is made in full.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY VIA E-MAIL AT NAIROBI, UNDER PRACTICE DIRECTION 6 [2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 25<sup>TH</sup> DAY OF JULY 2023.**

**JAMES RIKA**

**JUDGE**

