



**Wasika v Caddell Construction Co (DE) LLC; Directorate of Occupational Safety and Health Services (Interested Party) (Petition E073 of 2023) [2023] KEELRC 3383 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3383 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E073 OF 2023**

**B ONGAYA, J**

**DECEMBER 20, 2023**

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 22(1) & (3), 23 (1) & (3), 25 (A), 27, 28, 29 (D) AND (F), 35, 41, 50 (1), 165 & 259 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS ARTICLES 28, 29, 35, 41 AND 47 OF THE CONSTITUTION OF KENYA, 2010**

**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, 2007**

**AND**

**IN THE MATTER OF SECTIONS 3, 4 AND 6 OF THE ACCESS TO INFORMATION ACT, 2016**

**AND**

**IN THE MATTER OF SECTION 3 AND 4 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015**

**AND**

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

**BETWEEN**

**BONIFACE ORUBIA WASIKA ..... PETITIONER**

**AND**

**CADDELL CONSTRUCTION CO (DE) LLC ..... RESPONDENT**

**AND**



**DIRECTORATE OF OCCUPATIONAL SAFETY AND HEALTH  
SERVICES ..... INTERESTED PARTY**

**A claim under the Work Injury Benefits Act for a degenerative occupational disease contracted in the performance of work duties could not be deemed to be time-barred**

*The petitioner's role involved changing duct coils, and on October 8, 2021, he sustained an injury while performing his duties, resulting in a lumbar degenerative disc disease with a permanent disability assessed at 15%. The injury also led to the petitioner losing full functionality of his bladder and sphincter, rendering him unable to seek gainful employment due to his deteriorating health condition. The petitioner argued that his employment was unfairly and unlawfully terminated via an SMS while he was on sick leave. The respondent contended that the petitioner consented to separation on July 17, 2022, with full payment of terminal dues, including severance pay. However, the court found that the termination during the petitioner's sick leave was unfair. The respondent's preliminary objection, which argued that the petition was precluded by section 16 of the Work Injury Benefits Act, was dismissed, with the court holding that the petitioner was entitled to seek relief for the alleged constitutional violations and unfair termination.*

Reported by John Ribia

**Constitutional Law** – fundamental rights and freedoms – right to human dignity – where an employee contracted an occupational disease due to the work conditions - whether the petitioner's right to human dignity was violated by the respondent/employer by terminating the employment relationship without reporting the occupational disease to the Director of Occupational Safety and Health – Constitution of Kenya, 2010 article 28; Work Injury Benefits Act (Cap 236) section 21(1).

**Constitutional Law** – fundamental rights and freedoms – right to fair labour practices – right to fair administrative action – where an employee contracted an occupational disease due to the work conditions - whether the refusal to report the occupational disease by completing the relevant forms amounted to an adverse and unreasonable decision in violation of the right to fair administrative action and the right to fair labour practices – Constitution of Kenya, 2010 articles 41 and 47; Work Injury Benefits Act (Cap 236) section 21(1); Employment Act (Cap 226) section 43 and 45.

**Constitutional Law** – fundamental rights and freedoms – right to access information – where an employee contracted an occupational disease due to the work conditions – where the employer failed to fill in the relevant forms - whether the refusal to provide information by declining to fill the relevant forms regarding the petitioner's occupational degenerative disease under section 22 of Work Injury Benefits Act amounted to violation of access to information – Constitution of Kenya, 2010 articles 41 and 47; Work Injury Benefits Act (Cap 236) section 21(1); Employment Act (Cap 226) section 43 and 45.

**Employment Law** – occupational health and safety – work injury benefits – occupational degenerative disease - whether the Work Injury Benefits Act applied to occupational diseases - whether an employee was entitled to compensation for an occupational disease contracted due to the work conditions under the Work Injury Benefits Act - whether an employer was statutory obliged under the Occupational Safety and Health Act to conduct a pre-employment medical examination and to conduct regular medical examinations of employees – Work Injury Benefits Act (Cap 236) section 16, 23(1) and (52), 39, 38, and 22(1) and (5); Employment Act (Cap 226) section 43 and 45.

**Law of Evidence** – expert witnesses – medical evidence – persons that can present medical evidence – private investigators - whether an investigation by private investigators was admissible in determining a petitioner's medical status.

**Brief facts**

The parties mutually agreed that they were in a contract of service. The one-year contract lapsed on January 18, 2022. The parties were not clear on extension of the contract thereafter but, the evidence the claimant



continued working for the respondent until July 17, 2022 when parties separated. The respondent contended that he performed his duties diligently and to the respondent's satisfaction till October 8, 2021 when he was injured in the course of his employment changing duct coil when he suddenly experienced sudden pain and informed the respondent's foreman, who in turn informed his line supervisor and was instructed to seek medical attention from the first aider and was given pain killers. The petitioner sustained a lumbar degenerative disc disease and permanent disability assessed at 15%. That as a result the petitioner had lost full functionality of his bladder and sphincter and was unable to seek any gainful employment due to his health condition. The petitioner filed the instant petition where he sought orders that the respondents violated his constitutional rights and seeking an order of compensation for unfair and unlawful termination.

The respondent stated that the assignment ended and the petitioner consented to separation with full payment of terminal dues on July 26, 2022 including severance payment. The petitioner's account was that he was on sick leave when the respondent terminated his employment by an SMS on July 17, 2022.

The respondent filed a preliminary objection where it was submitted that the petitioner should not have failed the petition as section 16 of the Work Injury Benefits Act precluded filing of claims for the recovery of damages in respect of any occupational accident or disease resulting in disablement or death of an employee. Further that the petitioner had failed to invoke the provisions of that Act.

### **Issues**

- i. Whether the Work Injury Benefits Act applied to occupational diseases.
- ii. Whether an employee was entitled to compensation for an occupational disease contracted due to the work conditions under the Work Injury Benefits Act, 2007.
- iii. Whether a claim under the Work Injury Benefits Act, 2007, for a degenerative occupational disease contracted in the performance of work duties could be deemed to be time-barred.
- iv. Whether an employer was statutory obliged under the Occupational Safety and Health Act to conduct a pre-employment medical examination and to conduct regular medical examinations of employees.
- v. Whether an investigation by private investigators was admissible in determining a petitioner's medical status.
- vi. Whether the employee's right of being equal before the law and to equal protection and equal benefit of the law had been violated in the manner the employer failed to report the occupational disease as envisaged in section 21(1) of the Work Injury Benefits Act, 2007.
- vii. Whether the petitioner's right to human dignity was violated by the respondent/employer by terminating the employment relationship without reporting the occupational disease to the Director of Occupational Safety and Health.
- viii. Whether the refusal to report the occupational disease by completing the relevant forms amounted to an adverse and unreasonable decision in violation of the right to fair administrative action and the right to fair labour practices.
- ix. Whether the refusal to provide information by declining to fill the relevant forms regarding the petitioner's occupational degenerative disease under section 22 of Work Injury Benefits Act amounted to violation of access to information.

### **Held**

1. The contract of service ended on July 17, 2024. There was no reason to doubt the respondent's account that the separation was with mutual agreement of the petitioner. The petitioner did not deny that he was duly paid. The termination of the contract of employment, which appeared to have been month to month engagement, was by mutual agreement and was not unfair.
2. The respondent knew or ought to have known about the petitioner's occupational injury or disease as shown by the exhibits on record and filed for the respondent. The occupational injury or disease was acquired in the cause of the employment with the respondent, the petitioner reported the same while in employment and the respondent was duly notified or aware, accordingly.



3. The purported investigator did not state how he may have identified the petitioner. It had not been shown how the investigator or his outfit known as City Spy Investigators being empty on medical practice vested in medical doctors would by their naked eyes determine the petitioner's medical status to perform tasks relative to his health or wellbeing. The purported investigation report was completely misleading and irrelevant to the matters under inquiry in the instant case. The petitioner notified the respondent about the acquired occupational disease and the petitioner continues to suffer degeneration as per the medical reports on record.
4. The petitioner had established that he acquired the occupational injury or disease while in the respondent's employment and the same was attributable to the assigned duties. It was unfortunate that the respondent while praising its new Hire and Safety Orientation Training, there appeared to have been no statutory examination and assessments of its staff including the petitioner on annual or such other regular periods by Designated Health Practitioner (DHP). The Factories and Other Places of Work (Medical Examination) Rules, 2005, rule 4 thereof required that the respondent ensured that all persons employed in its construction project underwent both pre-employment and periodic medical examinations by Designated Health Practitioner as outlined in the first schedule. Rule 8 thereof required the respondent to ensure a certificate of fitness was issued for each of the petitioner's exposure to the hazards.
5. Further, while denying that the petitioner acquired the occupational injury and disease while in its employment, it appeared that the respondent undertook no pre-employment medical assessment for the petitioner's certificate of medical fitness prior to the engagement upon the job which, per the respondent's New Hire and Safety Orientation Training provisions, the respondent knew the risks involved and therefore the necessity of a pre-employment medical certificate of fitness to perform the job.
6. At engagement, the petitioner appeared not to have had any general body weakness or back pains he started to experience a few months into the employment. The injury or disease was attributable to the ensuing tasks in the employment relationship. The respondent failed to discharge the duties of an occupier under part II of the Occupational Safety and Health Act, 2007. In absence of rebuttal evidence, the presumption that the petitioner acquired the occupational disease while in the respondent's employment applies per section 39 of the Work Injury Benefits Act, 2007.
7. The preliminary objection filed by the respondent on grounds that section 16 of the Work Injury Benefits Act precluded filing of claims for the recovery of damages in respect of any occupational accident or disease failed. The petition sought that the respondent who had refused or neglected its voluntary submission to Work Injury Benefits Act be compelled to do so. It was not a claim for compensation for the disablement arising from the occupational disease in issue but it was to enforce the Act and to secure rights and fundamental freedoms as claimed. The preliminary objection was liable to dismissal with costs.
8. The respondent while being aware about the petitioner's occupational disease failed to report the same to the Director under the Work Injury Benefits Act and to trigger the process under the Act. Contrary to all available medical reports, the respondent decided not to report the disease. The petitioner reported his failing health attributable to the occupation and assigned duties on numerous times but the respondent failed to act.
9. Under section 38 of the Work Injury Benefits Act, compensation for an occupational disease was treated as if it was caused by an occupational accident. While in employment the petitioner reported an occupational disease and the respondent subjected him to medical care per employer's duty under the Employment Act, 2007. Having received the medical reports, the respondent was required to report the same within 7 days to the Director in the prescribed form per section 22(1) of the Work Injury Benefits Act. Section 21(5) of the Work Injury Benefits Act entitled the petitioner as the employee to report the occupational disease to the Director at any time. However, in the circumstances of the case,



- the respondent denied the liability per the replying affidavit thereby making the petitioner's capacity to so report not perfected. The petition was well grounded within the court's jurisdiction.
10. The petitioner's rights had been violated as follows:
    1. article 27 of the Constitution has been violated to the extent that the petitioner's right of being equal before the law and to equal protection and equal benefit of the law had been violated in the manner the respondent failed to report the occupational disease as envisaged in section 21(1) of the Work Injury Benefits Act, 2007.
    2. The respondent proceeded to terminate the employment relationship without reporting the occupational disease to the Director of Occupational Safety and Health which violated the petitioner's right to human dignity per article 28 of the Constitution.
    3. The refusal to report the occupational disease by completing the relevant forms amounted to an adverse and unreasonable decision in violation of article 47 on fair administrative action and article 41 of the Constitution on fair labour practices.
    4. The refusal to provide information by declining to fill the relevant forms per section 22 of Work Injury Benefits Act amounted to violation of access to information per article 35 of the Constitution and which information was necessary to enforce the claims and rights under the Act.
  11. The petitioner's claim under Work Injury Benefits Act was not time barred. The instant case was predominantly and clearly so about a degenerative occupational disease which was on-going as a continuing and progressive injury. The petitioner reported the disease in terms of section 21 of the Act while in service and the respondent became aware accordingly. Section 26(2) of the Act stated that once the disease has been reported per section 21 of the Act, then such situation was an exception to section 26(1). Reporting of occupational diseases like in the instant case was treated in like manner as the reporting of occupational accidents per section 38 of the Act. Section 22(5) permitted the employee to report the disease to the Director at any stage. In the instant case the occupational disease was degenerative and the petitioner was entitled to report at any stage.
  12. No injury had been identified as leading to the petitioner's occupational disease. The respondent was misconceived about the broad scope of the Work Injury Benefits Act which covered both accidents leading to injuries or death at work as well as occupational diseases. The respondent was so misconceived that the respondent failed to invoke the statutory services of a Designated Health Practitioner and instead invoked the irrelevant services of the private investigator and who had no role in the respondent's statutory duties towards the petitioner.
  13. The petitioner was suffering an extremely serious and disabling occupational disease acquired while in the respondent's employment and in circumstances that the respondent has failed to discharge its obligations under the Work Injury Benefits Act and the Occupational Safety and Health Act in that regard. The injury was continuing and the issue of time barring did not emerge at all. In terms of section 41 of the Work Injury Act, the petitioner gave notice of the occupational disease, first while in the employment of the respondent when the respondent send him for medical examination and evaluation and after the termination of the contract, the degenerative occupational disease appeared to have intensified in gravity The respondent failed to act per sections 21 and 41 of the Act on completing relevant forms.

*Petition allowed.*

### **Orders**

- i. *Declaration issued that the actions of the respondent in failing to fill and submit the notice by an employer of an occupational accident or disease to an employee to the Directorate of Occupational Safety and Health Services violated the petitioner's right under article 41 of the Constitution.*



- ii. *Declaration issued that the actions of the respondent in failing to fill and submit the notice by an employer of an occupational accident or disease to an employee despite being requested by the petitioner violated the petitioner's right under article 35 of the Constitution.*
- iii. *Declaration issued that the actions of the respondent in failing to fill and submit the notice by an employer of an occupational accident or disease to an employee and failing to give any justifiable reason violated the petitioner's right under article 47 of the Constitution.*
- iv. *Declaration issued that the actions of the respondent contravened and violated the provisions of the Constitution under articles 2, 3, 10, 19, 22 (1) and (3), 23(1) and (3), 25(a), 27, 28, 29 (d) and (f), and thus contravened and violated the rights and freedoms of the petitioner under the Bill of Rights of the Constitution.*
- v. *Order issued compelling the respondent to forthwith fill the notice by an employer of an occupational accident or disease to an employee and forward the same to the Directorate of Occupational Safety and Health Services for purposes of computation of compensation payable to the petitioner.*
- vi. *Payment of KShs 3,500,000.00 by March 1, 2024 being damages for violation of the provisions of the Bill of Rights as found in the instant judgment, and failing, interest to be payable thereon at court rates from the date of the judgment till full payment.*
- vii. *The respondent was to pay petitioner's costs of the petition.*

#### **Citations**

##### **Cases**

##### **Kenya**

1. *Namai v National Bank of Kenya Limited* Constitutional Petition E039 of 2023; [2023] KEELRC 1497 (KLR) - (Mentioned)
2. *Pandya Memorial Hospital v Geeta Joshi* Civil Appeal 62 of 2019; [2020] KECA 65 (KLR) - (Mentioned)

##### **South Africa**

*Dendy v University of the Witwatersrand and others* [2006] 1 LRC 291 - (Mentioned)

##### **Statutes**

##### **Kenya**

1. Constitution of Kenya articles 2, 3, 10, 19, 22(1)(3); 23(1)(3); 25(a); 27; 28; 29(d)(f); 35; 41; 47- (Interpreted)
2. Employment Act (cap 2267) sections 43, 45- (Interpreted)
3. Occupational Safety And Health Act (cap 236A) part II - (Interpreted)
4. Work Injury Benefits Act (cap 236) sections 16, 22(1)(5); 23(1)(52); 38; 39- (Interpreted)

##### **Advocates**

None mentioned

## **JUDGMENT**

1. The petitioner filed the petition dated 17.03.2023 and filed in Court on 18.04.2023 through Ngithi, Koome & Associates Advocates. The petitioner prayed for:
  - a. A declaration order that the actions of the respondent in failing 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, 2010\*](#).



- b. A declaration order that the actions of the respondent in failing 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, 2010* .
  - c. A declaration order that the actions of the respondent in failing to fill and submit the notice by an employer of an occupational accident to an employee and failing to give any justifiable reason violated the petitioner's right under article 47 of the *Constitution of Kenya, 2010*.
  - d. A declaration order that the actions of the respondent contravened and violated the provisions of the *the Constitution* under articles 2, 3, 10, 19, 22(1) & (3), 23(1) & (3), 25(a), 27, 28, 29(d) and (f), and thus contravened and violated the rights and freedoms of the petitioner under the Bill of Rights of the *Constitution of Kenya, 2010* .
  - 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 for purposes of computation of compensation payable to the petitioner.
  - f. An order for compensation against the respondent for violating the petitioner's constitutional rights and freedoms.
  - g. An order for compensation in the sum of Kenya Shillings Two Hundred and Sixty-Four Thousand (Kshs 264,000) for the unfair and unlawful termination of the petitioner's contract of employment.
  - h. Costs of the suit and interest thereon.
  - i. Any other order that the honourable court deems fit and just in the circumstances.
2. The petition is supported by the affidavit of Boniface Orubia Wasike, the petitioner herein, sworn on 17.03.2023 and the further affidavit by the petitioner sworn on 04.10.2023 and the exhibits attached thereto. The petitioner's case is as follows:
- a. The petitioner was employed by the respondents in the capacity of a HVAC – Duct Worker vide the employment contract dated January 18, 2021. That his job description entailed inter alia, moving ducts to a designated storage area and performing any other duties as may be assigned by his supervisors. The claimant received an average monthly salary of Kshs 20,000. That the petitioner was stationed at the US Embassy NOX Site, Gigiri.
  - b. That he performed his duties diligently and to the respondent's satisfaction till 08.10.2021 when he was injured in the course of his employment changing duct coil when he suddenly experienced sudden pain and informed the respondent's foreman, who in turn informed his line supervisor and was instructed to seek medical attention from the first aider and was given pain killers.
  - c. The petitioner states that despite this the pain did not subside forcing him to escalate the issue with the respondent's Safety Department in charge, who directed that he be referred to St Teresa Hospital, where he was diagnosed with lower back pain and received physiotherapy with analgesics and electric nerve stimulations. He further states that he was also instructed not to sue the respondent.
  - d. That the petitioner attended to routine physiotherapy sessions since 20.09.2022 having sustained a lumbar degenerative disc disease and permanent disability assessed at 15%. That as



a result the petitioner has lost full functionality of his bladder and sphincter and is unable to seek any gainful employment due to his health condition.

- e. The respondent has failed and refused or ignored to fill the notice by an employer of an occupational accident of an employee (DOSH Form 1) as required under the [Work Injury Benefits Act, 2007](#).
  - f. That on 17.07.2022 while the petitioner was on sick leave as recommended by the doctor, he received notification by way of an SMS from the respondent informing him of the termination of his employment. The petitioner argues that his termination was unlawful, un-procedural, unfair, as a result of the injuries sustained during the course of his employment and his quest for compensation through the Director Occupational Safety and Health.
  - g. That the respondent's action of failing and refusal to fill the notice by an employer of an occupational accident to an employee was unfair and contrary to the provisions of articles 27, 28, 35 and 47 of the [the Constitution of Kenya, 2010](#). He further maintained that his termination was unlawful and unfair as the respondent failed to follow the mandatory requirements as set out in sections 43 and 45 of the [Employment Act, 2007](#).
  - h. The petitioner urged the honourable court to find its petition with merit and to allow it in terms of the reliefs sought therein.
3. In response to the petition, the respondent filed the replying affidavit sworn by Jamisor Taylor, the Project Manager of the respondent herein, on 05.07.2023, through the firm of Nzamba Kitonga Advocates LLP. In the affidavit the respondent admits having engaged the petitioner as claimed in the petition. It however denies all allegations contained in the petition. The respondent states that it trains all its employees on safety and health measures while on duty and has elaborate protocol on how to handle injuries sustained while on duty. Further, that the respondent keeps comprehensive records of all its employees under the safety and health department and is expected to remit the same to the US Embassy as part of security protocol.
  4. The respondent denied the allegation that the petitioner was injured while on duty and argued that there is no record of any injury on the petitioner. It further states that there is no record from its safety and health department indicating and proving the alleged injuries sustained by the petitioner herein. Further that no records from its safety and health department have been produced by the petitioner to support his claims of an alleged injury sustained on 08.10.2021.
  5. The respondent avers that on the said date of the alleged accident, the petitioner worked well even on overtime throughout the month of October 2021 and on public holidays and received adequate compensation. Only coming forward to complain about on 20.04.2022. The respondent maintained that the alleged injuries could therefore not be attributed to his work. It however, out of abundance of caution, took the petitioner through its safety and health protocol as required by law and issued the petitioner with appropriate medication. The petitioner was also referred to St Teresa Hospital, Kiambu for a series of tests all catered for entirely by the respondent. That on 15.06.2022 the petitioner underwent physiotherapy and was recommended 10 days bed rest. That upon expiry of the 10 days' sick leave, he failed to resume duties without notifying the respondent till 01.07.2022 with a written explanation on his absence. He continued working until 17.07.2022 when his employment was terminated on account of redundancy. The respondent denied any allegations of unlawful termination as contended by the petitioner, maintaining that the same was one within the ambits of the law and that the petitioner was paid all his dues at the time of his separation from it including severance pay on 26.07.2022 and executed an end of assignment declaration (JT-8).



6. The respondent states that the petitioner was diagnosed with Lumbar Degenerative Disc Disease in September 2022, months after his employment with the respondent had been terminated and therefore the same cannot be attributed to his duties with the respondent. The respondent further confirmed being contacted by an occupational safety and health officer who carried out investigations on the alleged injuries and was not required at any point instructed to submit the DOSH Form. The respondent maintains that the injuries complained about were not sustained during the cause of the petitioner's employment as confirmed by its own private investigations on the issue that portrayed the petitioner in good health and working for gain contrary to the allegations levelled in his petition. It noted that the injuries could have developed for numerous reasons including aging, daily activities, sports or injuries. It denied all the allegations of violating the petitioner's fundamental rights and freedoms as protected under the *Constitution of Kenya, 2010* as alleged in the petition.
7. The respondent urged this honourable court to find the petition without merit and to dismiss it in its entirety with costs to the respondent.
8. In further to the petition, the respondent filed a Notice of Preliminary Objection dated 31.10.2023 raising the following grounds:
  - a. That the petition herein is incompetent, misconceived and otherwise an abuse of the due process of this Honourable Court.
  - b. That the honourable court lacks the requisite jurisdiction to entertain the said petition because it offends the provisions of section 16, 23(1) & 52 of the *Work Injury Benefit Act* No 13 of 2007.
  - c. That petition is fatally defective in law because the *Work Injury Benefit Act* No 13 of 2007 confers on this honourable court appellate jurisdiction and not original jurisdiction over work injury matters which is vested in the Director of Occupational Safety and Health Services.
  - d. That consequently, this suit should be struck out with costs.
9. In a brief rejoinder to the respondent's replying affidavit the petitioner filed a further affidavit sworn by the petitioner on 04.10.2023, in which he states that his injuries were as a result of injuries he had sustained in the course of his employment with the respondent herein. The petitioner further argues that even if his termination was on account of redundancy as alleged by the respondent, he ought to have been given sufficient notice prior to such termination.
10. The petitioner states that the respondent has acknowledged his injuries and has been paying for his treatment is a clear admission on its part of the injuries sustained in the course of the petitioner's employment. He further states that the person referred to by the private investigator is not the petitioner but his co-worker by the name Vincent Onditi. He maintains that he is unable to get gainful employment following his diagnosis with erectile dysfunction and loss of splinter control (bladder) secondary to the Lumbar Disease as evidenced by the medical report by Dr Njau dated 14.07.2023. He therefore urged this Honourable Court to find his petition with merit and allow it in terms of the reliefs sought therein.
11. Parties thereafter filed and exchanged their written submissions. The Court has duly considered and makes its findings as follows.
12. To answer the 1<sup>st</sup> issue, the parties mutually agree that they were in a contract of service. The respondent employed the petitioner effective 18.01.2021 for a term of one-year as HVAC -Duct Worker. His salary or wage was Kshs.80.00 per hour. The employment was governed by the laws of Kenya. His job description entailed cutting and shaping fibre glass sheets to form heating and air-conditioning



ducts using hand tools and moving the ducts to designated storage area, and, to perform any other assigned duties. The one-year contract lapsed on 18.01.2022. The parties are not clear on extension of the contract thereafter but, the evidence is that the claimant continued working for the respondent after 18.01.2022- until 17.07.2022 when parties separated. The respondent states that the assignment ended and the petitioner consented to separation with full payment of terminal dues on 26.07.2022 including severance payment. The petitioner's account is that he was on sick leave when the respondent terminated his employment by an SMS on 17.07.2022. The Court finds that the contract of service ended on 17.07.2022.

13. To answer the 2<sup>nd</sup> issue, there is no reason to doubt the respondent's account that the separation was with mutual agreement of the petitioner as set out in the replying affidavit. The petitioner has not rebutted the employer's account in the replying affidavit. The petitioner does not deny that he was duly paid. The Court finds that the termination of the contract of employment, which appears to have been month to month engagement, was by mutual agreement and was not unfair.
14. The 3<sup>rd</sup> issue is whether the petitioner was injured or developed an occupational disease while in the respondent's employment. The Court readily finds that the petitioner has established and the respondent in the replying affidavit has indeed shown that the petitioner acquired an occupational injury or disease while in the respondent's service. In particular, Jamison Taylor, the respondent's Project Manager in the replying affidavit has confirmed as follows:
  - a. The respondent is construction company working at the United States Embassy and being fully aware of possible risks in its line of work keeps comprehensive medical records of all its employees under its Safety and Health Department and submits the records to the US Embassy as part of the security protocols. Under its New Hire & Safety Orientation Training Manual an employee is required to report incidents immediately.
  - b. While by exhibited counselling letter dated 21.03.2022 the petitioner was reminded about his under performance in attending safety trainings as scheduled and there being no report by the petitioner as alleged by the petitioner of his injury on 08.10.2021, the respondent's exhibit JT-3 shows that the petitioner had had 11 visits to the respondent's First Aid Station. The first three visits show that the petitioner had specified injuries on 26.01.2021, 28.01.2021, 10.02.2021, and 13.03.2021. The petitioner reported general body weakness on 05.07.2021, 22.07.2021, and 06.08.202. On 22.12.2021 the petitioner reported headache, and he reported lower back pain on 20.04.2022 and 06.05.2022. He was sent to St. Teresa Hospital Kiambu on 13.05.2022 for further investigations and treatment. The exhibit JT-1 is a report by the respondent's own Registered Clinical Officer, Job Obare Mosei. The medical report by St Teresa Hospital Kiambu Ltd is dated 14.05.2022 and it is exhibit JT-1. It confirms that the petitioner had a chronic lower back pain per the MRI report and was referred to physiotherapy department for further management and evaluation and which recommended at least 5 sections on the same. The conclusion of the MRI report date 15.09.2022 was thus, "Lumbar myofascial spasms; L5/S1 disc desiccation; L4/5 & L5/S1 diffuse discs bulges causing bilateral neural foramina stenosis"
  - c. The respondent facilitated the petitioner to be seen by Dr Kevin W Ongeti, Consulting Orthopedic Surgeon whose report per exhibit JT-6 dated 15.06.2022 was that the petitioner had work related back injury with low back pain and radiculopathy. Further that the petitioner had undergone physiotherapy with analgesics and transcutaneous electrical stimulation. Further that the petitioner had a flare of back pain and he needed electrical stimulation and analgesics with 10 days bed rest. The consulting orthopedic surgeon recommended that the respondent provides the petitioner with a TENS machine for home therapy



- d. In July 2022 the petitioner partially, resumed work and was terminated by mutual consent on 17.07.2022.
15. By that evidence in the replying affidavit of Jamison Taylor, the Court returns that the respondent knew or ought to have known about the petitioner's occupational injury or disease as shown by the exhibits on record and filed for the respondent. The Court returns that the occupational injury or disease was acquired in the cause of the employment with the respondent, the petitioner reported the same while in employment and the respondent was duly notified or aware, accordingly.
16. The respondent has filed the affidavit of Benjamin Maurice Matheka the Co-director of City and General Consulting Center to investigate whether the petitioner could undertake specified tasks including heavy lifting, carpentry works and construction works and that the petitioner voluntarily agreed to perform such tasks and exhibited the report and the compact disc for the audio-video clips showing the petitioner would comfortably perform the tasks. During cross-examination the said Benjamin Maurice Matheka confirmed that the exhibited clips did not show the petitioner at all thus, "... I have no image of Boniface. His images not filed." In his further affidavit sworn on 04.10.2023 the petitioner plainly denies the contents of the audio video and responded thus, the clips show his former colleague while he worked for the respondent one, Vincent Onditi and further, "9. That presently, am unable to work and I have since been diagnosed with erectile dysfunction and loss of splinter control- (bladder) as a result of the Lumbar Disease as evidenced by the recent medical report by Dr Njau. If I was able to work, I would not have bothered with the Respondent." He attached the report by Dr. Michael Njau, Consulting Orthopaedic Surgeon, Kiambu Level 5 Hospital dated 14.07.2023 confirming that the petitioner has herniated lumbar discs with degeneration attributable to lifting a heavy load. the report confirms that the condition is progressive and irreversible and the petitioner has erectile dysfunction, loss of splinter control (bladder) as a complication of the disc disease. It concludes thus, "He needs surgical depression as a last result due to the rapid deterioration. His ability to work is highly compromised now and in future."
17. Further the petitioner has exhibited the affidavit by Vincent Onditi sworn on 04.10.2023 confirming that he is a male adult of Kenya identity card No xxxxxx and confirming that he is the person in the video recording exhibited in the affidavit of the investigator Benjamin Maurice Matheka and that it is not the petitioner performing the tasks per the video clips. The Court finds that there is no reason to doubt that as per the affidavit of Vincent Onditi sworn on 04.10.2023 the petitioner is not the person in the audio-video clips exhibited. The Court observes that the purported investigator Benjamin Maurice Matheka does not state in his affidavit or report how he may have identified the petitioner. In any event it has not been shown how the said Benjamin Maurice Matheka or his outfit known as City Spy Investigators being empty on medical practice vested in medical doctors would by their naked eyes determine the petitioner's medical status to perform tasks relative to his health or wellbeing. The Court finds that as per the petitioner's rebuttal, the purported investigation report was completely misleading and irrelevant to the matters under inquiry in the instant case.
18. The court finds that the petitioner notified the respondent about the acquired occupational disease and the petitioner continues to suffer degeneration as per the medical reports on record.
19. To answer the 4<sup>th</sup> issue the court returns that the petitioner has established that he acquired the occupational injury or disease while in the respondent's employment and the same was attributable to the assigned duties. It is unfortunate that the respondent while praising its New Hire & Safety Orientation Training, there appears to have been no statutory examination and assessments of its staff including the petitioner on annual or such other regular periods by Designated Health Practitioner (DHP). The Factories and Other Places of Work (Medical Examination) Rules, 2005 Rule 4 thereof



required that the respondent ensures that all persons employed in its construction project undergo both pre-employment and periodic medical examinations by Designated Health Practitioner as outlined in the first schedule. Rule 8 thereof required the respondent to ensure a certificate of fitness is issued for each of the petitioner's exposure to the hazards. Further, while denying that the petitioner acquired the occupational injury and disease while in its employment, it appears that the respondent undertook no pre-employment medical assessment for the petitioner's certificate of medical fitness prior to the engagement upon the job which, per the respondent's New Hire & Safety Orientation Training provisions, the respondent knew the risks involved and therefore the necessity of a pre-employment medical certificate of fitness to perform the job. The Court finds that the evidence is elaborate that as at engagement, the petitioner appears not to have had any general body weakness or back pains he started to experience a few months into the employment. The Court finds that the injury or disease was attributable to the ensuing tasks in the employment relationship. The Court further returns that the respondent appears to have failed, in view of the findings, to discharge the duties of an occupier under part II of the [Occupational Safety and Health Act, 2007](#). In absence of rebuttal evidence, the presumption that the petitioner acquired the occupational disease while in the respondent's employment applies per section 39 of the [Work Injury Benefits Act, 2007](#).

20. To answer the 5<sup>th</sup> issue, the court returns that the preliminary objection must fail. It was submitted that the petitioner should not have failed the petition as section 16 of the [Work Injury Benefits Act](#) precludes filing of claims for the recovery of damages in respect of any occupational accident or disease resulting in disablement or death of an employee. Further that the petitioner had failed to invoke the provisions of that Act. However, the court returns that as submitted for the petitioner, the petition seeks that the respondent who has refused or neglected its voluntary submission to that Act be compelled to do so. It is not a claim for compensation for the disablement arising from the occupational disease in issue but it is to enforce the Act and to secure rights and fundamental freedoms as claimed. The preliminary objection is therefore liable to dismissal with costs. The evidence is that the respondent while being aware about the petitioner's occupational disease failed to report the same to the Director under the Act and to trigger the process under that Act. The replying affidavit confirms that contrary to all available medical reports, the respondent decided not to report the disease. The replying affidavit is full of numerous instances that the petitioner reported his failing health attributable to the occupation and assigned duties but the respondent failed to act. Under section 38 of the [Work Injury Benefits Act](#), compensation for an occupational disease is treated as if it was caused by an occupational accident. The evidence is that while in employment the petitioner reported an occupational disease and the respondent subjected him to medical care per employer's duty under the [Employment Act, 2007](#). Having received the medical reports the respondent was required to report the same within 7 days to the Director in the prescribed form per section 22 (1) of the [Work Injury Benefits Act](#). Section 21 (5) of the [Work Injury Benefits Act](#) entitles the petitioner as the employee to report the occupational disease to the Director at any time. However, in the circumstances of the case, the respondent denied the liability per the replying affidavit thereby making the petitioner's capacity to so report not perfected. The court finds that the petitioner has established that the petition was therefore well grounded within the court's jurisdiction.
21. To answer the 6<sup>th</sup> issue, as pleaded and submitted for the petitioner, it is established that the petitioner's rights have been violated as follows:
  - a. Article 27 of the [Constitution](#) has been violated to the extent that the petitioner's right of being equal before the law and to equal protection and equal benefit of the law has been violated in the manner the respondent failed to report the occupational disease as envisaged in section 21(1) of the [Work Injury Benefits Act, 2007](#).



- b. As urged for the petitioner, the respondent proceeded to terminate the employment relationship without reporting the occupational disease to the Director of Occupational Safety and Health which violated the petitioner's right to human dignity per article 28 of the [Constitution](#).
  - c. The refusal to report the occupational disease by completing the relevant forms amounted to an adverse and unreasonable decision in violation of article 47 on fair administrative action and article 41 of the [Constitution](#) on fair labour practices.
22. The refusal to provide information by declining to fill the relevant forms per section 22 of [Work Injury Benefits Act](#) amounted to violation of access to information per article 35 of the [Constitution](#) and which information was necessary to enforce the claims and rights under the Act.
23. To answer the 7<sup>th</sup> issue, the court returns that the petitioner's claim under [Work Injury Benefits Act](#) has not become time barred. It is submitted for the respondent that under section 26 of the Act, a claim for compensation in accordance with the Act shall be lodged by or on behalf of the claimant in the prescribed manner within 12 months after the date of the accident or in case of death, within 12 months after the date of the death. The Court has already found that the instant case is predominantly and clearly so about a degenerative occupational disease which is on-going as a continuing and progressive injury. The court has found that the petitioner reported the disease in terms of section 21 of the Act while in service and the respondent became aware accordingly. Section 26(2) of the Act states that once the disease has been reported per section 21 of the Act, then such situation is an exception to section 26(1). As earlier stated, reporting of occupational diseases like in the instant case is treated in like manner as the reporting of occupational accidents per section 38 of the Act. Section 22(5) permits the employee to report the disease to the Director at any stage. In the instant case the occupational disease is degenerative and the petitioner is accordingly entitled to report at any stage.
24. While making that finding, the court has observed the submission for the respondent that no injury has been identified as leading to the petitioner's occupational disease. It is obvious that the respondent is misconceived about the broad scope of the [Work Injury Benefits Act](#) which covers both accidents leading to injuries or death at work as well as occupational diseases. It is also not surprising that the respondent is so misconceived as the Court has already found that the respondent failed to invoke the statutory services of a Designated Health Practitioner and instead invoked the irrelevant services of the private investigator and who had no role in the respondent's statutory duties towards the petitioner. The medical reports and other evidence on record establish without doubt that the petitioner is suffering an extremely serious and disabling occupational disease acquired while in the respondent's employment and in circumstances that the respondent has failed to discharge its obligations under the [Work Injury Benefits Act](#) and the [Occupational Safety and Health Act](#) in that regard. The injury is continuing and the issue of time barring does not emerge at all. In any event, in terms of section 41 of the [Work Injury Act](#), the petitioner gave notice of the occupational disease, first while in the employment of the respondent when the respondent send him for medical examination and evaluation and after the termination of the contract, the degenerative occupational disease appears to have intensified in gravity per the petitioner's Advocates' letter dated 09.12.2022. per that letter, it is stated that the petitioner has required the respondent to complete DOSH Forms 1 but the respondent had refused to comply. The respondent appears to have failed to act per sections 21 and 41 of the Act on completing relevant forms.
25. The 8<sup>th</sup> issue is on remedies. The court returns as follows:
  - a. The petitioner is entitled to the declaration that the actions of the respondent in failing to fill and submit the notice by an employer of an occupational accident or disease 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, 2010](#).

- b. The petitioner is entitled to the declaration that the actions of the respondent in failing to fill and submit the notice by an employer of an occupational accident or disease to an employee despite being requested by the petitioner violated the petitioner's right under article 35 of the [Constitution of Kenya, 2010](#).
- c. The petitioner is entitled to the declaration that the actions of the respondent in failing to fill and submit the notice by an employer of an occupational accident or disease to an employee and failing to give any justifiable reason violated the petitioner's right under article 47 of the [Constitution of Kenya, 2010](#).
- d. The petitioner is entitled to the declaration that the actions of the respondent contravened and 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 contravened and violated the rights and freedoms of the petitioner under the Bill of Rights of the [Constitution](#) .
- e. The petitioner is entitled to the order compelling the respondent to fill the notice by an employer of an occupational accident or disease to an employee and forward the same to the Directorate of Occupational Safety and Health Services for purposes of computation of compensation payable to the petitioner.
- f. The petitioner prayed for compensation against the respondent for violating the petitioner's constitutional rights and freedoms. It was submitted for the petitioner that in [Dendy v University of Witwatersrand, Johannesburg & Others](#) [2006] 1 LRC 291 the Constitutional Court of South Africa held thus

“...an award of damages was a secondary remedy to be made in only the most appropriate cases...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringed and to deter their future infringement. The test was not what would alleviate the hurt which the plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”

It was submitted for the petitioner that in view of the violations in the instant petition, an award of Kshs.10,000,000.00 was just. It was submitted that in [Vincent Namai v National Bank of Kenya Limited](#) ( Constitutional Petition E039 of 2023) [2023] KEELRC 1497 (KLR) the court awarded the petitioner for violation of Constitutional rights. Further in [Pandya Memorial Hospital v Geeta Joshi](#) [2020] eKLR the Court of Appeal awarded Kshs.3,000,000.00 as damages for discrimination. For the respondent it was submitted that Kshs.10,000,000.00 was unwarranted, exaggerated, and not based on any scale as the amount is not justified. The Court has considered the submissions. It is that the [Work Injury Benefits Act](#) institutes a no-fault system of efficient, effective and minimal costs to compensating for occupational injuries, diseases and deaths. The public policy undermined in the instant petition is the need for both employers and employees to readily submit to the process. The respondent failed to submit to the Act and the petitioner appears to have thereby suffered serious degeneration of his health without due and prompt compensation under the Act. The Court has found that the respondent failed on the obligations under both the [Work Injury](#)



Benefits Act and the Occupational Safety and Health Act. Taking all the circumstances into account, the Court returns that Kshs.3,500,000.00 will vindicate the violations of the relevant provisions of the Bill of Rights in the instant case.

- g. The Court has found that unfair termination has not been established and the petitioner is not entitled to an order for compensation in the sum of Kenya Shillings Two Hundred and Sixty-Four Thousand (Kshs.264,000/-) for the unfair and unlawful termination of the petitioner's contract of employment.
  - h. The petitioner has succeeded and is awarded costs of the petition.
26. In conclusion judgment is hereby entered for the petitioner against the respondent for:
- a. The declaration that the actions of the respondent in failing to fill and submit the notice by an employer of an occupational accident or disease 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, 2010.
  - b. The declaration that the actions of the respondent in failing to fill and submit the notice by an employer of an occupational accident or disease to an employee despite being requested by the petitioner violated the petitioner's right under article 35 of the Constitution of Kenya, 2010.
  - c. The declaration that the actions of the respondent in failing to fill and submit the notice by an employer of an occupational accident or disease to an employee and failing to give any justifiable reason violated the petitioner's right under article 47 of the Constitution of Kenya, 2010.
  - d. The declaration that the actions of the respondent contravened and 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 contravened and violated the rights and freedoms of the petitioner under the Bill of Rights of the Constitution of Kenya, 2010.
  - e. The order compelling the respondent to forthwith fill the notice by an employer of an occupational accident or disease to an employee and forward the same to the Directorate of Occupational Safety and Health Services for purposes of computation of compensation payable to the petitioner.
  - f. Payment of Kshs 3,500,000.00 by 01.03.2024 being damages for violation of the provisions of the Bill of Rights as found in this judgment, and failing, interest to be payable thereon at Court rates from the date of this judgment till full payment.
  - g. The respondent to pay petitioner's costs of the petition.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 20<sup>TH</sup> DECEMBER, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

