



**Guanjai alias Zaverio Guantai v P.J Dave Flowers Limited (Petition
2 of 2021) [2022] KEELRC 13132 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13132 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
PETITION 2 OF 2021
DKN MARETE, J
OCTOBER 31, 2022
SECTION 3, 6, 101 OF THE OCCUPATIONAL SAFETY AND HEALTH
ACT NO.1 OF 2007 AND THE EMPLOYMENT ACT CAP 22.**

BETWEEN

ZAVERIO GUANJAI ALIAS ZAVERIO GUANTAI PETITIONER

AND

P.J DAVE FLOWERS LIMITED RESPONDENT

JUDGMENT

1. This matter is originated by way of a petition dated February 18, 2021.

The Respondent in a Memorandum of Defence dated April 26, 2021 denies the petition and prays that this be dismissed with costs.

The Petitioner thereon files a further affidavit in support of the petition. A reply to Memorandum of Defence dated May 27, 2021 and also a Further Affidavit in support of Petition sworn on July 7, 2021.

The Petitioner's case is that at all material times to this petition and from 2013 to December 30, 2020 he was an employee of the Respondent. This comprised a seven (7) year stint of service.

2. The Petitioner's further case is that on July 1, 2016, he suffered an industrial accident which left him permanently incapacitated. He was disabled and could not perform his duties and therefore resigned on December 30, 2020 on medical grounds. He issued the requisite notice to the Respondent.

The Petitioner's other case is that the industrial accident was as a result of the respondents breach of statutory and constitutional obligation for Article 41 as follows;

i. The Respondent did not adhere to provide reasonable working conditions as provided by the Constitution in particular Article 41 (2) (b).



- ii. The respondent was in violation of Statutory Provisions under the *Occupational Safety and Health Act* No 15 of 2007 and in particular Section 6 thereof to wit, the respondent failed in;
 - a. Provision and maintenance of systems and procedures of work that are safe and without risk to health.
 - b. Arrangements for ensuring safety and absence of risks to health in connection therewith.
 - c. Provision of supervision as is necessary to ensure the safety of the petitioner.
 - d. Provision and maintenance of a working environment for the petitioner that is safe and adequate facilities and arrangements for the petitioner's welfare at work.
 - e. Informing the petitioner of the imminent danger of his work.
 - f. Refusing to carry out appropriate risk assessments in relation to the safety of the petitioner at work and on the basis of the result to adopt preventive and protective measures to ensure the petitioner is safe and without risk of health and comply with the requirements of safety and health.
- iii. Exposing the petitioner to danger which the respondent knew or ought to have known.
- iv. Allowing the petitioner to climb on the roof of green house without safety equipment.
- v. Failing to provide adequate facilities to ensure the petitioner was safe at his work place.
- vi. Failing to provide protective equipment to protect the petitioner from injury.

He cites his particulars of injuries as follows;

- a. Wedge compression fracture on the 3rd Lumbar Vertebrae with reduction in height.
 - b. Wedge compression fracture of the 4th Lumbar Vertebrae with reduction in height.
 - c. Lumbar mal-alignment of the 3rd and 4th Lumbar Vertebrae
 - d. Scoliosis of the 3rd and 4th Vertebrae.
 - e. Degeneration of the inner-vertebral disc between the 3rd and 4th Vertebrae
3. The Petitioner's current health complications and complains are enlisted as follows;
- i. Persistent lower back pains which make him unable to work.
 - ii. Walking with a cautious walk.
 - iii. Noticeable mal-alignment of the lower lumber spine.
 - iv. Active flexion of the spine is grossly reduced and passive ones are also reduced and painful.
 - v. Reduced rotation of the back.
4. His other case is that as a consequence of the above, the petitioner has suffered loss and damages and shall require medical attention now and in future. Special damages incurred in this process are as follows;
- i. Medical Report Kshs 20,000.00
 - ii. Medical and other related expenses to include



Physiotherapy at Mr Kenya Physiotherapy Clinic
Purchase of Lumbosacral corset & drug therapy
and massage gels Kshs 639,000.00

- iii. Physiotherapy Report Kshs 15,000.00
Kshs 674,000.00

His future medical & related expenses are also enumerated as follows;

- i. Physiotherapy to include heat massage & manipulation
Twice a week at Kshs 2,000.00 per session for a lifetime
(Approximately 25 years)
 $2,000 \times 2 \times 4 = \text{Kshs } 16,000/=$ per month
For 25 years it shall be $16,000 \times 12 \times 25$ Kshs 5,800,000.00
- ii. Lumbo Sacrol Corset 2 per year at Kshs 12,000/-
each for 30 years $12,000 \times 2 \times 25$ Kshs 600,000.00
Kshs 6,400,000.00
Grand Total Kshs 7,074,000.00
5. The Petitioner further avers that the respondent in failing to exercise fair labour practices and reasonable working conditions was therefore negligent as hereunder.
- a. Failing to make adequate precaution for safety of the petitioner while engaged in the work.
- b. Failing to provide or maintain adequate or suitable appliances and in particular safety equipment or protection gear to carry out the work of construction to protect the petitioner body from injury carrying out the said work.
- c. Directing the petitioner to climb the roof of a green house without safety equipment.
- d. Assigning the petitioner a dangerous mission without adequate safety gear.
- e. Failing to take responsible steps in respect to the petitioner's employment to lessen danger or injury to the petitioner by safety equipment.
- f. Failing to provide hanging gear and safety belt or rope to the petitioner while at work.
6. Again, the Respondent has failed, neglected and refused to pay the petitioner's dues upon resignation which is in further breach of the Constitution under Article 41 thereof as hereunder;
- i. That the delay infringes the petitioner's right to fair labour practices.
- ii. That the petitioner had legitimate expectation that his terminal benefits would be paid immediately to mitigate his medical ordeal.

The Petitioner prays the following as his terminal benefits;

- i. Basic pay from November 1, 2020 to December 30, 2020.
- ii. House allowance from November 1, 2020 to December 30, 2020.



- iii. Service gratuity for each completed year of service at Kshs 13,160.
- iv. Any leave due.
- v. One way travelling allowance.

The Petitioner claims damages.

He prays as follows;

- a. A declaration that the petitioner's rights to fair labour practices and right to reasonable working conditions under Article 41 and 41 (2) (b) of the Constitution of Kenya, 2010 were breached by the respondent.
- b. Damages for unfair labour practices under Article 41.
- c. Damages for breach of right to reasonable working conditions under Article 41(2) (b)
- d. An award of terminal benefits as follows;
 - i. Basic pay from November 1, 2020 to December 30, 2020.
 - ii. House allowance from November 1, 2020 to December 30, 2020.
 - iii. Service gratuity for each completed year of service at Kshs 13,160.
 - iv. Any leave due.
 - v. One way travelling allowance.
- e. An order for compensation for injuries sustained under general damages for pain, suffering and loss of amenities and an award for future medical and related expenses.
- f. Damages for loss of earning and future earning capacity.
- g. Special damages as pleaded.
- h. Costs and interest at 14% on a, b, c, d, e, f and g above.
- i. Any other relief or award that this court may deem fit and proper to grant in the interests of justice.

The Respondents case is a denial of the claim.

It is her further case that

- a. That on December 29, 2021, the petitioner absented himself from his place of work without any reason and attempts were made to reach him through his declared telephone No 0721951633 and he could not be reached.(Attached and marked PJ 1 is a copy of the muster roll)
- b. That on January 30, 2021, the petitioner returned back to work and went to see the Human Resource Manager claiming that he wanted leave work since he was feeling unwell. He was sent to visit the company clinic to go and see the nurse but opted to go home and he did not return back to work to date.
- c. That a show cause letter was sent to him through his union Branch Secretary's office, Kenya Plantation & Agricultural Workers Union to explain his whereabouts and also inviting him for a disciplinary hearing. (Attached and marked PJ 2 is a copy of the show cause letter)



- d. That on January 5, 2021, a disciplinary hearing meeting was convened in the absence of the petitioner to discuss his conduct on absenteeism. The committee resolved that the petitioner be terminated from employment. (Attached and marked PJ 3 are copies of the disciplinary hearing minutes)
 - e. The termination of the petitioner was communicated through a letter dated January 7, 2021 and the same was sent through the union Branch Secretary's office, Kenya Plantation & Agricultural Workers Union in Timau. (Attached and marked PJ 4 is a copy of the summary dismissal letter)
 - f. That the petitioner has never returned back to date to the respondent to carry out clearance to facilitate payment of his terminal dues.
 - g. That the petitioner was well aware that being absent from place of work was a gross misconduct as per clause 18 of the employment contract that he had been issued with. (Attached and marked PJ 5 is a copy of the employment contract)
 - h. That after his termination the Petitioner has never returned to the work place to carry out clearance to facilitate payment of his terminal dues.
 - i. That the respondent is not aware of any accident suffered by the petitioner over the duration of his employment.
He was summarily dismissed and therefore non-fitted for the relief sought.
The issues for determination therefore are;
 - 1. Whether the allegations of an industrial accident involving the Petitioner are founded.
 - 2. Whether there was a termination of employment of the petitioner by the Respondent by way of dismissal.
 - 3. Whether the termination of the employment of the petitioner, if at all, was wrongful, unfair and unlawful.
 - 4. Whether the Petitioner is entitled to the relief sought.
 - 5. Who bears the costs of this cause.
7. The 1st issue for determination is whether the allegations of an industrial accident involving the Petitioner are founded. The Petitioner submits on this in the positive and seeks to rely on his affidavits sworn on February 18, 2021 and May 27, 2021.
- The Petitioner's attempts to buttress his case by relying on the authority of *Menginya Salim Murgani v Kenya Revenue Authority* HCCC No 1139 of 2002, where the court observed thus;
- “...in so far as the employee spends the bulk of his or her time in the service of the employer, there is little other livelihood, in the employee outside the framework of the employment relationship. Of this fact, this court takes judicial notice; and it must then be considered that the status of employment relationship inherently vests in the employee both normal rights and legitimate expectations...”
8. The Petitioner in a written statement dated February 18, 2021 narrates his torment after an industrial accident on July 1, 2016 in which he suffered incapacitating injuries. He has also tendered documentary



evidence of this and treatment formulae involved. He has also exhibited his letter of resignation on medical grounds to the Respondent dated December 30, 2020.

It is his case and submission that his rights have been wholly infringed and the Respondent is responsible. He therefore seeks relief as expressed in the authority of *Stanley Munga Gitbunguri v Republic (1986) eKLR*, where the court held thus;

“When you leave here raise your eyes unto the hills. Utter a prayer of thankfulness that your fundamental rights are protected under the judicial system of Kenya.”

9. The Respondent vehemently denies the petition and posits that the petitioner absented himself from work and was taken through a procedural and lawful disciplinary process out of which he was found culpable and dismissed from employment. He never even attended the disciplinary proceedings despite notice and invitation.

It is her further case and submission that the Petitioner has not produced medical documents relating to the period of accident but brings out some from 2019 onwards. Indeed the accident occurred in 2016. Further, in the event of an accident severe enough to cause 45% incapacity would require admission notes to hospital and medical drugs issued and billed. The evidence adduced by the Petitioner is therefore faulty, inconclusive and unreliable as evidence in support of the petition.

10. Further, the Petitioner has not attached documents in support of leave while he attended treatment for 9 days. This is beyond his entitlement. Again, the documentation in support of the petition is dubious and inauthentic. There is nothing to indicate that the letter of resignation was received by the Respondent, or at all. The petition is therefore not supported by any verifiable evidence.

The Respondent further submits on a case of a procedural disciplinary process leading to the dismissal of the petitioner for abstention from duty. She displays a show cause letter, minutes of disciplinary proceedings, a letter of summary dismissal dated January 7, 2021 and the parties employment contract dated March 6, 2015. This is the basis for the Respondent’s case and found for a determination in favour of the Respondent. This is because the petitioner does not demonstrate a case of an industrial accident on a balance of probabilities. His case comes out as concocted and based on quick sand. It is not convincing and comes out as fiction. It is therefore my finding that the industrial accident is unfounded and also that there was a dismissal of the petitioner by the Respondent on valid grounds.

The 3rd issue for determination is whether the termination of the employment of the petitioner, if at all, was wrongful, unfair and unlawful. On a finding of dismissal on valid grounds, a case of lawful termination of employment of the petitioner by the Respondent ensues. I so find.

11. The 4th issue for determination is whether the petitioner is entitled to the relief sought. He is not. Having lost on a case of both an industrial accident at the work place and also unlawful termination of employment he becomes disentitled to the relief sought.

I am therefore inclined to dismiss the petition with orders that each party bears their costs of the same.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF OCTOBER 2022.

D K Njagi Marete

JUDGE

Appearances

Mr Mwanzia instructed by Muia Mwanzia & Co Advocates for the Petitioner.

Mr Mariaria instructed Agricultural Employers Association for the Respondent.

