



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1484 OF 2018

DOMINIC KIOKO THYAKA.....CLAIMANT

VERSUS

KENYA ELECTRICITY GENERATING

COMPANY LIMITED..... RESPONDENT

JUDGEMENT

The claimant is a male adult. The respondent is limited liability Company incorporated under the provisions of the Companies Act.

On 1st January, 1991 the respondent employed the claimant who worked until he was retired on medical grounds while serving in the position of Shift Controller based at Wanjii Power Station and earning Ksh.221, 890 per month.

The claim is that during the course of employment he often worked under risky conditions which threatened his life and he sustained injuries. He sustained profound hearing loss that was wholly attributable to excessive noise exposure at his work place as a result of which the National Medical Board (NMB) recommended that he was not to work in a noisy place and suggested that he could retire on medical grounds and awarded him 100% permanent disablement by way of hearing loss.

On 26th January, 2015 a work injury evaluation clinic was held on the claimant by the Directorate of Occupational Safety and Health Services (DOSHS) and on 30th January, 2015 made findings that the claimant had suffered profound sensor neural hearing loss and awarded him a 38% permanent incapacity.

On 5th March, 2015 DOSHS assessed a compensation of Ksh.6, 410,630.40 based on the 38% incapacity by the work injury evaluation clinic. Instead of paying the claimant the full compensation of ksh.6, 410,630.40 the respondent opted to pay him Ksh.3, 156,906.20.

As a result of the condition which was fully attributable to workplace conditions he was treated in various health facilities with the full knowledge of the respondent and on 17th August, 2015 he was once again assessed by the NMB which diagnosed him with Noise Induced Deafness caused by exposure of high levels of noise and waded him 100% permanent disability

Following the assessment by the NMB, the DOSHS assessed compensation afresh and awarded the claimant Ksh.16, 870,080 and the respondent was directed to pay the claimant less Ksh.3, 156,906.20 earlier paid to him but instead of the respondent paying such amounts they paid Ksh.4, 603,330.56 only. A balance of Ksh.9, 109,843.20 is due as awarded under DOSHS.

The claim is for reinstatement back to employment without loss of benefits and in the alternative payment of ksh.2,662,680 being 12 months compensation for wrongful retirement on medical grounds and the payment of the owing work injury dues assessed under DOSHS all at ksh.9,109,843.20. The claimant is also seeking payment of his costs.

In evidence to support his case, the claimant testified that he started working for the respondent in the year 1988 as a trainee and was later absorbed in 1991 and worked for 24 years until 24th February, 2016 when the respondent issued him with letter directing him to prepare for exit on medical grounds. Upon receipt of the letter he decided to approach his supervisor seeking to know why he was being retired on medical grounds yet he had just given him a letter of transfer from control room to environment department.

The claimant also testified that Mr Mwangodi was his supervisor and had engaged him with regard to his work environment and need for change from control department where he had suffered a work injury to environment where there was no noise and he had agreed. But upon receipt of the letter of retirement on medical grounds he was unable to effect the transfer as he had been directed to retire the claimant.

The retirement on medical grounds was without notice. The claimant was not given a chance to argue his case. He therefore went to the

human resource officer Mr Ombwayo and pleaded with him to extend the exit date by a month to 3rd March, 2016 so that he could be able to prepare himself and family and relocate from the company premises.

The claimant raised with the human resource manager that he had been transferred from control to environment department in the year 2015 by letter dated 14th May, 2015. The control room was too loud and it was affecting his hearing. The letter had been written by Mr. Mwagodi and copied to the operations manager and engineer Upper Tana Hydro and where he worked from June, 2015 until March, 2016 when he was issued with letter to retire.

The claimant had continued to work well and had no disciplinary incident for the entire period of employment. He was therefore shocked to be retired on medical grounds yet he had a young family which depended on him and he had been working well.

The claimant also testified that he had been diagnosed with a hearing impairment. His first test was done in the year 2013 together with other workmates in the control room and in the year 2014 he did more tests together with others and he was referred to a specialist doctor and then to the Medical Board severally and this may have been used to retire him on medical grounds.

The Medical Board made a report in the year 2015.

In a letter dated 27th January, 2015 the Minister for Labour addressed the findings of work injury and in the opinion found a 38% permanent incapacity and awarded the claimant Ksh.3.1 million.

By letter dated 5th March, 2015 there was another assessment and award of Ksh.6,410,630 from the 38% disability assessment but the respondent refused to pay.

The Medical Board found he claimant to have profound hearing impairment and that the left ear hearing loss was permanent and the conclusion was that as a shift controller he had hearing due to exposure to loud noise. The Board recommended that the claimant should secured a hearing aid and he should be removed from the department and he be retired on medical grounds due to 100% hearing loss.

Upon assessment by DOSHS the claimant was awarded Ksh.16, 870,080 less what he had already been paid for the 38% hearing loss and total award was Kshs. 9,109,843.20.

The issue of retirement on medical grounds was not brought to the claimant's attention until letter dated 2nd February, 2016 which he received after he had been transferred to another department which was quiet and this was after he had been diagnosed with hearing loss. He had been undertaking his duties just well until the retirement and is thus seeking a reinstatement back to his duties without loss of earnings.

The claimant also testified that in October, 2017 the respondent called him to Stima Plaza the head office and one Kanana gave him a paper to write and said she was a clerk and was required to sign the paper before his compensation was paid to him. He questioned why the Minister for Labour had directed the payment to the respondent's office but Kanana insisted that he had to sign before he could be paid. He received ksh.4, 603,333 by EFT to his bank account and the respondent later filed a Deed of Settlement which stated that the claimant had confirmed receipt of ksh.7, 844,587.20 in full and final settlement which was not the case.

The claimant testified that he signed on a paper on the understanding that if he had any claim he was to forward it later. He is now claiming the unpaid balance. He went to the Ministry of Labour and was given an outline of the total payment and noted that what the respondent had paid him was not recognised as final payment.

The claimant reported the matter to the office of the Ombudsperson and who held that his claim had been settled through the Deed of Settlement.

There was no appeal against the Medical Board decision which had found 100% permanent disability and had made an award assessed by DOSHS.

If reinstatement is not possible, the termination of employment was wrongful and unfair and he should be compensated and paid his full dues in accordance with the Ministry of Labour and DOSHS assessment. The balance due is Kshs. 9,109,843.20.

In response, the respondent's case is that the claimant was an employee but was not earning Ksh.221, 890 per month as alleged. The injuries suffered by the claimant are regulated under the Work Injury Benefits Act (WIBA) and section 30 of WIBA directs that compensation for permanent disablement should be calculated on the basis of 96 months earning and an employee who has sustained an injury as defined under the first column is deemed to be permanently disabled on the degree set out in the second column of the First Schedule. The compensation due to the claimant was subject to reduction by 50% as per the second column of the first schedule of WIBA.

It was legally erroneous and untenable for DOSHS not to subtract 50% from the award of the claimant.

The response is also that the respondent was advised by its insurers that the claimant was referred to and underwent a medical assessment at the Nairobi ENT Clinic on 15th August, 2017 and a report by Dr. Chimmey Olende determined that the claimant had suffered a binaural hearing disability of 93%. On this report the claimant and respondent entered into a Deed of Compensation Settlement in which the claimant accepted the sum of Ksh.7, 844,587.20 being full and final payment and settlement. The settlement took into account the provisions of section 30 of WIBA and the level of disability suffered and the medical report of Dr. Chimmey Olende and the claimant's monthly salary of Ksh.175, 730.

The claimant has since been paid the sum of Ksh.7, 844,587.20 in two equal instalments of Ksh.3, 156,906.20 and Ksh.4, 603,330.56 which sum and payment are admitted by the claimant.

The response is also that the Medical Board comprising Dr. Pacifica Onyancha, Dr. Catherine Mutisya, and Dr. Dennis Otworu recommended that the claimant be retired on medical grounds as he was not fit to work due to profound hearing loss. The respondent accepted these recommendations and acted accordingly and the claims made should be dismissed with costs.

Haron Mbaiko the insurance claims officer of the respondent testified that the claimant was earning a salary of ksh.175, 730 and during the course of his employment he complained of hearing problems which was assessed and found to have lost 38% hearing loss. Later the hearing loss increased to 100% as the claimant was assessed by his doctor.

Mr. Mbaiko testified that in view of the assessments on the claimant hearing loss, compensation was warranted under WIBA and under section 30 which allows for assessment and compensation based on 96 months' earnings. The nature of injuries the claimant suffered were assessed and based on the applicable law, further assessment by Dr. Chimney Olende on 15th August, 2015 he was found to have suffered 93% hearing disability.

The parties then executed a Deed of Compensation Settlement; and the claimant accepted a payment of Ksh.7, 844,587.20. The claimant has since been paid.

The respondent was guided under section 30 of WIBA and the Deed of Settlement.

The payment was not as directed by DOSHS. Parties had an agreement.

Mbaiko also testified that based on the Medical Board recommendation, the claimant was retired on medical grounds. He has no information as to whether the claimant was invited to attend before the Medical Board save the respondent got a report and adopted the recommendation.

Both parties agreed to file written submissions. Only the respondent complied.

The respondent submitted that the Claimant's termination was valid, fair and lawful owing to the fact that there was a valid ground. The proper procedure was followed and the Claimant was well compensated pursuant to Section 30 (2) of the Work Injury Benefit Act. The termination of Claimant engagement with the Respondent was based on recommendations of the Medical Board which advised that the Claimant retires on medical grounds as he was not fit to work due following his hearing loss. The Respondent acted on that recommendation.

There were valid grounds for termination and termination was based on recommendations by the Medical Board which recommended that the Claimant was unfit for service. Section 45(2) of the Employment Act provides that termination of employment of an employee is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. A sufficient ground had been cited in this case and in the case of **Kennedy Nyanguncha Omanga v Bob Morgan Services Limited [2013]eKLR** where the court stated that employers are entitled to terminate employment on ground that the employee is too ill but must exercise due care and sensitivity.

On the issue of compensation, the respondent submitted that the claimant was compensated in accordance with Section 30 (l) of the Work Injury Benefits Act which provides that compensation for permanent disablement as that of the Claimant shall be calculated on the basis of ninety-six (96) months' earnings. That it is upon those calculations that the Respondent paid the Claimant Kshs. 7, 844, 587.20 being the total amount and a deed of compensation settlement which was signed by both the Claimant and the Respondent. The award due to the Claimant was subject to reduction 50% as per the second column of the First Schedule of the Work Injury Benefits Act and the reliefs sought and that the instant claim should be dismissed with costs.

Determination

Whether the Deed of Compensation Settlement fully settled the claims between the parties;

Whether there was unfair termination of employment and whether the remedy of reinstatement should issue;

Whether the reliefs sought should issue.

It is not in dispute that the claimant suffered a work injury leading to 100% hearing loss and permanent hearing disablement.

The claimant was assessed at different levels and particularly by the National Medical Board and DOSHS and who agreed that due to exposure of the claimant to high levels of noise at the workplace, he had suffered 100% permanent disability.

Following the National Medical Board assessment, On 17th August, 2015 DOSHS assessed the compensation due to the claimant all at Ksh.16,870,080 less Ksh.3,156,906.20 which the claimant had previously been paid upon being assessed and found to have 38% disability due to the hearing impairment. The total payable was thus ksh.13, 713,173.76 and which sum, the respondent through a Deed of Compensation Settlement with the claimant has paid Ksh.9, 109,843.20.

The assessment of work injuries and compensation due is regulated under the WIBA. An employee who is injured at work is directed to report to the Director and an assessment done therefrom and upon which, compensation is assessed directed to the employer to pay the employee accordingly.

Under WIBA there is no enforcement mechanism in respect of awards of the Director and recourse is section 87 of the Employment Act, 2007 where an employee who is awarded compensation can apply to ensure the employer has paid. See **Ruth Wambui Mwangi & another versus Alfarah Wholesalers Limited [2017] eKLR**

that an award of compensation to an employee under WIBA provisions may only be enforced by filing suit with the court under the provisions of section 87 of the Employment Act, 2007.

In this case, the director, DOSHS has assessed the work injury and awarded the claimant Ksh.16,870,080 and factored the earlier award of ksh.3,156,906.20 all being ksh.13,713,173.76 and of which the amount of ksh.4,603,330.56 leaving an unpaid amount of Ksh.9,109,843.20.

The claimant has filed the instant suit to claim for payment of the due amount.

The respondent contested the claims made on the grounds that under section 30 of WIBA the assessment of compensation ought to have applied 96 months' salary and based on a salary of ksh.175,730 instead of Ksh.221,890 allegedly being earned which amount is not correct.

The respondent's case is also that the claimant was assessed by a specialist at the Nairobi ENT Clinic, Dr Chimmey Olende on 15th August, 2015 and who found him to have suffered a hearing loss of 93% and which was applied to arrive at Deed of Compensation Settlement for the sum of ksh.7, 844,587.20 of which sum the claimant has been paid in full. That under section 30 of WIBA the DOSHS did not apply the correct tabulations which the respondent has done with its insurers.

Where the respondent was aggrieved or contests or objects to the award of the Director on the compensation awarded to the claimant under DOSHS, pursuant to section 51 and 52 of the WIBA, an appeal was required. To invite the claimant to another assessment with the advice of the insurers outside WIBA was a misnomer. Such matter of the due compensation is regulated in law and if dissatisfied, objections are allowed and the due process outlined as set out above in sections 51 and 52 of WIBA.

In the case of **Hadisha Engineering Co. Ltd & another versus Benson Chege Karoki [2015] eKLR** that any objections to the award by dint of section 51 of the WIBA should be preferred within 60 days to the Director. After 30 days an objector may lodge an appeal.

The Director awarded the claimant under the WIBA which is not contested by the respondent. Such claim remains subject of enforcement as herein done. The respondent has failed to make full payment or file any appeal as required under section 51 and 52 of the WIBA.

Further to the above, in employment and labour relations, an employer and employee in paying dues owed to an employee, such is regulated under the provisions of section 35(4) of the Employment Act, 2007. Whether a Deed of Settlement, Discharge Agreement, or a Settlement agreement or as the case may be are/is signed and parties in an employment relationship agree to pay terminal benefits, under the law, nothing stops the employee from disputing the lawfulness or fairness of termination of his employment.

Section 35(4) provides that;

(4) Nothing in this section affects the right—

(a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or

The respondent with the option to file an objection or an appeal against the award and compensation under DOSHS opted to invite the claimant into a Deed of Compensation Settlement. Such in my view taken into contest, the right to contract put into account, the claimant is entitled to the full award in compensation all at Ksh.9, 109,843.20.

Even where the claimant was bound by the Deed of Compensation Settlement, he signed such document without the full appreciation of what it contained and meant with regard to his award under WIBA and DOSHS assessment and award. The claimant testified that he was called to Stima Plaza the head office of the respondent where he met a clerk, one Kanana and was directed to sign a blank sheet of paper.

This evidence was not contested.

Of importance was the fact that, the document was signed blank and the alleged witness to the document, Jeniffer Mbugua, the Human Resources Manager was not present when the claimant signed the Deed but one Kanana. The evidence that the claimant signed a blank paper stands true.

In employment and labour relations, the best practice with regard to engaging with an employee in drafting, signing and making agreements is to be found under section 9(4) of the Employment Act, 2007. The employer is directed to read the document to the employee in a language the employee is able to understand it and if illiterate, to ensure the same is explained to the employee.

(4) Where an employee is illiterate or cannot understand the language in which the contract is written, or the provisions of the contract of service, the employer shall have the contract explained to the employee in a language that the employee understands.

A best practice is also secured under section 35(3) of the Employment Act, 2007;

(3) If an employee who receives notice of termination is not able to understand the notice, the employer shall ensure that the notice is explained orally to the employee in a language the employee understands.

The employer is directed to ensure all notices issued to the employee are well understood and explained to the employee.

Such best practice was called for in this case. The respondent left the role to a clerk, one Kanana and who simply wanted the claimant to sign a blank paper and be done away with. The promise was that the claimant would receive his money through a bank transfer which was done but less as awarded under DOSHS assessment.

Such Deed of Compensation Settlement was therefore executed with misrepresentation, duress, undue influence, coercion and fraud. It failed to give effect to the intentions of the claimant to be paid his full dues as assessed under DOSHS.

Nothing stopped the claimant from enforcing his rights secured under section 35(4) of the Employment Act, 2007. He has challenged the lawfulness of such settlement.

By letter dated 24th February, 2016 the respondent retired the claimant from his employment on medical grounds. The respondent stated that;

RETIREMENT ON MEDICAL GROUNDS

Further to your medical assessment on 16th July, 2015 by the National Medical Board, we wish to advise that the company has decided to retire you on medical grounds with effect from 24th March, 2016.

The claimant testified that he went into shock upon receipt of this letter and went to his supervisor who had transferred him from the control department which was loud and causing him hearing problems to environment department which was quiet and he had been performing his duties well. The claimant therefore requested for more time to organise him and family to be able to move out of the premises and travel home. He was added a month. He was allowed until 24th April, 2016.

The respondent's case is that, following a recommendation of the Medical Board that the claimant be retired on medical grounds as he was not fit to work due to his profound hearing loss, the respondent accepted such recommendation and acted accordingly.

The witness called by the respondent Mr Mbaiko testified that the claimant was not given a hearing after the recommendation of the Medical Board and he could not tell whether the claimant was invited before the Medical Board to argue his case.

The Medical Board held a sitting on 30th July, 2015 and present were its members only. The record submitted is that they discussed the claimant following what was considered *present complaint of involved in an illness*.

The *history of the present complaint* was that *in June, 2014, Dominic was noted to have developed hearing difficulties and taken to Aga Khan Hospital for evaluation and treatment.*

The Medical Board then made a recommendation of *retirement on medical grounds as he is not fit to work due to his profound hearing loss (100% hearing loss).*

Such was the finding of the Medical Board without the presence of the claimant or the respondent.

On the other hand, the claimant remained the employee of the respondent and his employment regulated under the contract of employment and had rights secured under the law. such law, Employment Act, 2007 at section 41 directed the respondent that before termination of employment, the due process was mandatory;

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation

Whatever the reason(s) leading to termination of employment, the employer is directed in mandatory terms to issue notice to the employee and to allow the employee a hearing in the presence of another employee of his choice. Even in a case of matters relating to the employee's misconduct, ***poor performance or physical incapacity***, such are matters which must be subjected to notice, a hearing and the due process.

The respondent was clear. On the recommendation by the National Medical Board, they acted accordingly and proceeded to retire the claimant on medical grounds. No notice issued. There was no hearing.

The claimant testified that at the time the notice to be retired on medical grounds issued he had already been transferred from control department to environment department and he was working well. He was shocked since such notice removed him from employment after undergoing treatment, assessed under DOSHS and was placed accordingly in an environment that he could work well.

The motions of section 41 of the Employment Act, 2007 were not complied with. The resultant effect is unfair termination of employment.

The claimant is seeking reinstatement back to his position without loss of any benefits.

The claimant worked until 24th April, 2016. He filed suit on 31st October, 2018. At the time the claimant was aged 48 years based on the Medical Board report.

It has since been over 3 years. the primary remedy is overtaken in time. the alternative remedy sought is compensation for the unfair termination. The claimant had worked for over 24 years, he was retired and employment terminated without the due process, there is no plausible reason given by the respondent for the failure to accord him the benefits of the law and had the respondent allowed the claimant to urge his case at a hearing, it would have been clear that he was already reasonably accommodated and transferred by his supervisor from the department where his hearing was suffering to a department that was conducive. He was denied such an opportunity.

The court finds the maximum compensation of 12 months pursuant to section 49 of the Employment Act, 2007 is reasonable and fair in this case.

The claimant has applied a salary of Ksh.225, 890 per month. The respondent has contested such salary and applied Ksh.175, 730. The last payment statement issued to the claimant the gross salary was ksh.213, 246.82 which shall apply and x 12 all Ksh.2, 558,962 in compensation.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

- a) The Directorate of Occupational Safety and Health Services award Ksh.9,109,843.20 is hereby confirmed putting into account the payments acknowledged by the claimant;**
- b) Compensation for unfair termination of employment ksh.2,558,962;**
- c) Costs of the suit.**

DELIVERED IN COURT AT NAIROBI THIS 20TH DAY OF DECEMBER, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and