



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT AT MOMBASA**

**CAUSE NUMBER 522 OF 2014**

**BETWEEN**

**MOROWA FUMO.....CLAIMANT**

**VERSUS**

**BAMBURI CEMENT LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

**Stephen Oddiaga & Company Advocates for the Claimant**

**Njeru & Company Advocates for the Respondent**

**JUDGMENT**

1. The Claimant was employed by the Respondent Cement Manufacturer as a Welder, on 2<sup>nd</sup> January 1990. He filed this Claim on 22<sup>nd</sup> October 2014 against the Respondent, claiming he suffered loss of hearing due to noise pollution at the workplace. He seeks against the Respondent, the following orders:-

- a. Special Damages.
- b. General Damages.
- c. Exemplary Damages.
- d. The Respondent is compelled to retire the Claimant on medical ground.
- e. The Respondent pays the Claimant adequate compensation, in event the Claimant is retired on medical ground.
- f. Costs and Interest.
- g. Any other suitable remedy.

2. In an Application dated 17<sup>th</sup> November 2014, the Claimant asked the Court to order the Respondent to retire him, before the hearing of the substantive dispute. The Court gave an order for retirement on medical ground, in its Ruling dated 18<sup>th</sup> December 2014.

3. Subsequently the Respondent retired the Claimant as ordered by the Court, with effect from 15<sup>th</sup> January 2015. The Respondent paid to the Claimant, gratuity at Kshs. 8,280,481; 15 days' salary for work done in January 2015 at Kshs. 67,778; 2 months' salary in lieu of notice at Kshs. 271,112; long service award at Kshs. 184,892; accrued annual leave at Kshs. 73,451; and baggage allowance at Kshs. 100,000- total Kshs. 8,977,114. After tax and other deductions, the Claimant take-home was Kshs. 6,183,980. Payments were based on the Collective Bargaining Agreement, concluded between Claimant's Union, Kenya Chemical and Allied Workers' Union, and the Respondent.

4. The Claimant submits, the amount paid to him on retirement, did not satisfy the Claim. He prays for Judgment against the Respondent in the following terms:-

- a) Kshs. 2,000 for medical report.
- b) Kshs. 100,000 for buying medical hearing aid.
- c) Compensation for retirement on medical grounds at Kshs. 8,593,800.
- d) Withheld baggage fees of Kshs. 70,000.
- e) General and exemplary damages at Kshs. 15,000,000.

**Total.....Kshs. 23,765,800.**

- f) Costs and Interest.
- g) Any other suitable remedy.

5. The Respondent's position is captured mainly through the Affidavit of its General Counsel, Betty Kanyagia, sworn on 28<sup>th</sup> November 2014. It is admitted that the Respondent employed the Claimant as a Welder, on 2<sup>nd</sup> January 1990. He was suffering from hearing loss on recruitment, attributable to a pre-existing condition. Loss of hearing was not occasioned by an occupational injury. The Claimant was reviewed by the Respondent in the same year he was employed, 1990, after visiting Respondent's Clinic with complaints of ear pain and oozing. Treatment given was '*surgery for perforated ear drum.*'

6. The first diagnosis of Claimant's hearing loss was made in 1992 by Dr. Mukhesh Shah, an ENT specialist. The Claimant was diagnosed with conductive hearing loss, a type of hearing loss which is not caused by noise pollution. His loss of hearing was not occasioned by an occupational injury. The Respondent reasonably accommodated the Claimant. He was at all times treated and issued hearing aids, at the expense of the Respondent. He was redeployed to a different section. The Respondent referred the Claimant to independent Hearing Centres for specialized medical attention. None recommended retirement on medical ground. The Claimant was severally certified by qualified occupational safety and health specialists, as fit to continue working. There is no proximate cause of Claimant's loss of hearing, which can be linked to the Respondent. Hearing loss probably occurred before the Claimant joined the Respondent. The Respondent submits, it is ready to pay Kshs. 2000 being the cost of medical report, if found to have been negligent. It is not ready to pay Kshs. 100,000 for hearing aid, having already bought a state of the art hearing aid for the Claimant. The claims on compensation for retirement on medical ground, and for baggage allowance have been settled upon Claimant's retirement. The claim for Kshs. 15,000,000 in general damages is excessive and not supported by Judicial Precedent. An award of Kshs. 500,000 would be fair compensation for loss of hearing.

7. Through an Application dated 27<sup>th</sup> July 2015, the Respondent applied to the Court to have the dispute referred for medical arbitration by the Directorate of Occupational Safety and Health- Ministry of Labour. The Court stayed its proceedings in a Ruling dated 9<sup>th</sup> December 2015, and referred the dispute to the Conciliation of a Panel comprising the Principal County Labour Officer Mombasa, and 2 Certified Occupational Safety and Health Medical Practitioners, designated by the Directorate of Occupational Safety and Health Services Mombasa, with the concurrence of the Parties. The Conciliation Panel was to table its report to the Court within 120 days of the Ruling.

8. On 9<sup>th</sup> February 2017, the Court noted Conciliation had failed, mainly due to non-facilitation of the Doctors proposed to comprise the Panel, by the Respondent herein. It was ordered that hearing proceeds before the Court, and Parties were placed at liberty to bring as much medical evidence as they wished, during trial.

9. Parties subsequently agreed to proceed by way of Submissions, adopting Documents and Pleadings on record. On 7<sup>th</sup> November 2017, the Respondent was granted leave to file additional documents by end of 7<sup>th</sup> November 2017, and to file its Closing Submissions within 7 days. On 8<sup>th</sup> November 2017, a day after the order of 7<sup>th</sup> November 2017, the Respondent filed a comprehensive Witness Statement of Diana Rachugo, described as Health Advisor of the Respondent. The Statement seeks to clarify or contradict medical records already filed by the Parties, before 7<sup>th</sup> November 2017.

10. The Statement filed by Diana Rachugo is improperly before the Court. There was no leave granted for filing of Witness Statements, on 7<sup>th</sup> November 2017. The Respondent was given leave to file any additional documents by the end of the day- 7<sup>th</sup> November 2017, and file Submissions within 7 days. There was no question about filing of Witness List and Witness Statement. The Witness Statement was filed without leave, and is hereby expunged from the record.

11. The issues that remain to be resolved, as understood by the Court are these:-

- a) Was the Respondent liable for the Claimant's loss of hearing?
- b) Was the Claimant adequately compensated by the Respondent, for any loss attributable to the Respondent?
- c) What remedies if any, are available to the Claimant against the Respondent?

**The Court Finds:-**

**[i] Loss of Hearing**

12. The Claimant was employed by the Respondent as a Welder. He was subjected to Pre-Employment Medical Examination by the Respondent. The Examination Report indicates the Claimant was examined by Dr. Muoki on 25<sup>th</sup> October 1989. He was employed, according to the Respondent, on 2<sup>nd</sup> January 1990.

13. This initial Medical Examination Report indicates, on the state of the Claimant's Ear, Nose and Throat as 'NAD.' In medical terms, this could mean 'No Appreciable Disease' or mean procedure requested, 'Not Actually Done.' The Parties did not assist the Court in understanding whether, no appreciable disease was found, or whether examination was not actually done, on the Claimant's Ear, Nose and Throat, before employment. The Report is specific with regard to other organs or systems, subjected to examination. Nervous system was indicated as 'normal,' circulatory system 'normal,' digestive system 'normal,' chest and lungs 'normal,' teeth 'normal,' and vision 'good.' Examination of urine, ear, nose and throat is recorded as 'NAD.' It is not clear to the Court what was meant by 'NAD.' It is not possible therefore, for the Court to conclude, relying on the initial Medical Examination Report, that the Claimant had, or did not have, a pre-existing hearing problem, at the time he was recruited by the Respondent in 1989/90. The Doctor concluded that the Claimant was fit for appointment with the Respondent. The Claimant was appointed effective 2<sup>nd</sup> January 1990.

14. The Claimant underwent various Medical Examinations after employment, before he could be issued Certificates of Fitness to continue serving. In some of the Medical Reports, it is indicated that the Claimant had an ear operation in 1991. The Respondent states the Claimant complained about pain and oozing in his ear in 1990. The treatment advised was 'surgery for a perforated ear drum.' If the Claimant had an ear operation in 1991, it would appear to the Court this was as advised, by the Respondent's Doctor in 1990, as shown in Respondent's exhibit 2.

15. Did his hearing problem pre-exist, or did it develop within the 1<sup>st</sup> Year of the Claimant's employment? There is no conclusive evidence that the condition pre-existed. It is similarly improbable that the Claimant just developed hearing problem in his 1<sup>st</sup> year of employment. All that can be concluded, in the 1<sup>st</sup> Report of Dr. Muoki, is that the Claimant was fit to join the Respondent. His ears were either found to have no appreciable disease, or were not examined altogether. The Claimant's complaints soon after employment may point to the onset of his hearing problem, or it could also have been that the problem was not detected by Dr. Muoki. Work injuries or illnesses may occur over an extended period. Loss of hearing may result, or is aggravated by exposure to industrial noise. Medical journals suggest such loss could be a gradual onset injury. It can also result from exposure to sudden loud noises such as explosions or heavy hammering in what ENT specialists refer to as 'impact noises.' The Medical Reports exhibited by the Parties are not decisive on causation. Was it a gradual illness or injury, predating his employment? Was it gradual illness or injury sustained during employment? Was the Claimant affected by some 'impact noises' in 1990, immediately he was employed? Or was his hearing loss a combination of factors? These are questions which have not been conclusively dealt with, by medical evidence on record. When dealing with occupational illnesses or injuries, Parties have to supply the Court with clearer medical evidence, than what the Parties exhibited in this dispute. Occupational illnesses or injuries do not always have a traceable date of occurrence, unlike road traffic accidents, where the date of the accident and probably when the injury is sustained, is easily traceable. Causation is not always a straight forward issue in the field of occupational illnesses and injuries.

16. Reports made after 1990 confirm the Claimant had a hearing problem. Doctors, one after the other, recommended the Claimant was fit to continue working, so long as he was provided with hearing aid. The Respondent relied on the medical advice and retained the Claimant in employment. He was provided hearing aids, at the expense of the Respondent. He was redeployed to a Section the Respondent considered less noise polluted. To an appreciable extent, the Respondent discharged its obligation, to reasonably accommodate the Claimant.

17. On 8<sup>th</sup> December 2011, the Claimant was examined by Respondent's appointed Doctor Mukesh Shah. The Doctor concluded that the Claimant had suffered loss of hearing due to noise trauma, at the workplace. Dr. Mukesh recommended the Claimant is retired on medical grounds. At this point, it should have been clear to the Respondent that the Claimant had suffered hearing loss, attributable to industrial noise.

18. Regardless of the early origin of Claimant's hearing problem, the Report by Dr. Mukesh suggests continued exposure to noise pollution, had exacerbated the hearing problem, warranting the Claimant is retired on medical grounds. The Respondent did not explain why, it did not agree with the Report of its own Doctor, issued way back in 2011. It continued to employ the Claimant from 2011 to 2015 when the order for retirement on medical ground was enforced.

19. The Court finds the Respondent to have acted contrary to the advice of its own Doctor, from the year 2011, aggravating the Claimant's hearing defect. By the time of leaving employment, the Claimant states he had become totally deaf. This could have been avoided had the Respondent adhered to the advice of Dr. Mukesh. There was no reason to retain the Claimant after 2011.

20. The Affidavit of Betty Kanyagia suggests that the Claimant suffered conductive hearing loss, which was not caused by noise pollution. This argument was taken up at length by Diana Rachugo, whose Witness Statement has been rejected by the Court. The Report of Dr. Mukesh Shah exhibited by the Respondent as 'BK2,' does not support this interpretation of medical evidence. The Doctor states the Claimant suffered sensorineural hearing loss, not conductive hearing loss. Another Certificate issued by Dr. S.A. Seboru, dated 19<sup>th</sup> April 2011, at page 15 of Claimant's documents filed on 22<sup>nd</sup> October 2014, agrees with 'BK2,' that the Claimant suffered sensorineural hearing loss. The Certificate of Re-deployment signed by Dr. Phillip Mwashe, Respondent's exhibit 'BK4,' identifies type of risk present as 'noise.' The Respondent did not discount exposure to environmental noise, as being an exacerbating factor, to sensorineural hearing loss. The Court is satisfied the Claimant's loss of hearing was exacerbated by exposure to environmental noise. The Respondent did not act to stop this exposure, when advised to do so by Dr. Mukesh. There could be no greater negligence on the part of an Employer, than to compel an Employee who has been certified as medically incapacitated, to go on working and aggravating his loss of hearing. Clause 2.1 [f] of the Employees' Handbook bound the Respondent to carry out all its operations in a safe working environment, and ensure observance of health, safety and welfare of Workers. The Respondent did not adhere to this clause in its handling of Morowa Fumo.

21. The Court would therefore find the Respondent liable, for failure to stop the continuing injury occasioned to the Claimant from the year 2011. Supply of hearing aids and other acts of reasonable accommodation extended to the Claimant by the Respondent were not, after the advice of Dr. Mukesh in 2011 to retire the Claimant, sufficient to avoid or diminish liability, on the part of the Respondent. The Respondent must be held liable for continuing to expose the Claimant to noise pollution after 2011, and for the actual injury occasioned to the Claimant

as a consequence of such persistent exposure.

### **[iii] Remedy for hearing loss**

22. The Claimant submits he merits general and/or exemplary damages at Kshs. 15,000,000. He relies on this Court's decision in ***Dr. Ezekiel Nyangoya Okemwa v. Kenya Marine & Fisheries Research Institute [2016] e-KLR*** in quantifying general damages.

23. The quantification of general damages by the Claimant, at Kshs. 15,000,000, is way out of proportion with the nature of injury sought to be redressed. The decision cited in support of this colossal amount is distinguishable. Okemwa was compensated for loss of employability, after he was charged wrongly with corruption by the State. He demonstrated he lost opportunities for employment by international institutions, as a result of his criminal trial. His professional reputation as an internationally acclaimed Marine Scientist was injured. His stock in the international labour market dipped. The Claimant in the current dispute, Morowa Fumo, has not shown that he suffered loss of employability as a result of his hearing loss. He did not refer to any potential Employer who offered to employ him after retirement, and rescinded the offer, on account of discovering that Morowa Fumo was hard of hearing. Respondent's Employees' Handbook and the CBA applicable to the Claimant at the time of retirement, set normal retirement age for Employees at 55 years. The initial Medical Examination Report on record indicates the Claimant was born in 1960. In 2015, the year of retirement, the Claimant was about 55 years. He was ripe for normal retirement. He did not suffer any loss of employability. He did not expect to be employed after retirement, his medical condition notwithstanding. He did not show that he looked for employment and was rebuffed on account of his unfortunate illness. His Claim has no support in the decision of Okemwa on compensation for loss of employability.

24. The decisions cited by the Respondent in its Submissions on quantum of damages for loss of hearing, appear to the Court more helpful, than the decision availed by the Claimant. The Court has considered however, that these decisions are not recent. It has also taken into account that the Respondent ignored its own Doctor's advice, and retained the Claimant from 2011, when it ought to have retired him in 2011, and avoid aggravating his loss of hearing. By the time of retirement, the Claimant had reached normal retirement age. The Court has taken note of this. There was really not much adverse effect on his capacity for future earning, as he had already arrived at his final post, at the time the Court ordered he is retired. He has received reasonable gratuity and other benefits. Any personal and economic injury sustained, has through the remedial actions of the Respondent, been greatly mitigated. He would have left employment on normal retirement, at the same time he left. He was paid terminal benefits due on normal retirement. The Respondent however made the Claimant continue working, when there was credible medical evidence that he ought to be retired. There was no second medical opinion which specifically faulted Dr. Mukesh on his advice for retirement of the Claimant. No second opinion was sought by the Respondent, specifically to answer any lingering doubt, on the soundness of Dr. Mukesh's advice, on retirement of the Claimant on medical ground. Clause 5.1 [b] [i] and [ii] of the Handbook regulated retirement on medical ground. An Employee could be retired on medical ground, upon a Medical Expert attesting to infirmity. In event of a dispute on the Medical Report, the Company could seek second opinion. It has not been suggested there was a dispute about the advice given by Dr. Mukesh. There was no second opinion sought. Why did not the Respondent act on this advice? The Claimant was routinely examined by Occupational Doctors for purposes of fulfilling a statutory obligation, with relation to issuing of annual Medical Certificate. None was called to review the Report of Dr. Mukesh, and advise why it should be departed from. The Claimant was persistently exposed to industrial noise, and his hearing problem gradually worsened. By the time of leaving employment, he was complaining about total deafness. He must be compensated for pain and suffering he endured from 2011 to 2015. ***The Court allows the prayer for general damages on a global figure of Kshs. 1,500,000.***

**25. The prayer for cost of the Medical Report at Kshs. 2,000 is granted.**

26. There is evidence on record that the Respondent purchased hearing aid for the Claimant, before the Claimant retired. The aid was procured around the year 2012/2013. Dr. Adede in his Report dated 27<sup>th</sup> March 2013, suggested the aid should be replaced every 10 years, at the cost of Kshs. 100,000. It was stated in this Report that the hearing aid purchased by the Respondent had expired. It was no longer useful to the Claimant. The Claimant prays for a sum of Kshs. 100,000, to enable him acquire Phillips model hearing aid in replacement. He does not claim for the cost of hearing aids in the subsequent years after the 1<sup>st</sup> 10-year period. He at the same time indicated to the Court in the course of the proceedings, that he has completely lost his hearing. It is not clear to the Court whether a hearing aid would be of any help to him, if he has completely lost his hearing. The Court shall however go by the Report of Dr. Adede and accede to the prayer for future medical care. ***The Respondent shall pay to the Claimant Kshs. 100,000 to assist the Claimant in acquiring a suitable hearing device.***

### **[iiiii] Adequacy of compensation/other reliefs**

27. The amount paid to the Claimant upon retirement, included a sum of Kshs. 100,000 as baggage allowance. He has not justified his demand for Kshs. 70,000 submitted to comprise '*compensation for withheld baggage fees.*' The item is rejected.

28. The Claimant was paid Kshs. 8,977,144 pre-tax, on retirement. His prayer for a separate payment of Kshs. 8,593,800 in compensation for retirement on medical ground has no basis. He appears to argue a case for double compensation for a single act of termination of employment.

29. The Claimant's contract included clauses from both the Employees' handbook and the CBA in place at the time of retirement. The 2 labour instruments do not constitute separate regimes for managing labour, but must be read as part of the Claimant's single contract of employment. Parties cannot duplicate rights and obligations as the Claimant tends to do, by pursuit of terminal benefits under the CBA and under the Employees' Handbook. The Claimant cannot have gratuity, notice pay and other benefits twice. His contract was terminated for medical reason, once. In retiring the Claimant, the Respondent was obliged to follow the requirements of the CBA and the Employees' Handbook, as a single complementary regime, rather than separate instruments. The Employees' Handbook has clauses on Unionisable and Non-Unionisable Staff. The clauses on Unionisable Staff should reflect what is in the CBA. It is not correct as stated by Respondent's General Counsel in her Affidavit filed in Court on 27<sup>th</sup> November 2014, that the Employees' Handbook, did not apply to the Claimant. The Handbook would not distinguish between different cadres of Employees, if it was not meant to apply to Unionisable Employees. The Claimant was Unionisable, drawing his terms and conditions of service from his Individual Employment Contract, the CBA and the Employees' Handbook. There is no specific clause in the CBA on retirement on medical grounds. The Respondent adopted clauses on

redundancy and normal retirement, in redressing medical retirement, which seems to the Court in line with clause 5.2.2. , of the Employees' Handbook, which states that in all forms of retirement, the Employee shall be entitled to payment of full terminal benefits as per policy in force. Nowhere is it stated that if retired on medical grounds, an Employee shall be treated as though his position has been rendered redundant, and paid redundancy benefits, separate from retirement benefits. There is no evidence that the Claimant was not properly compensated, except on notice pay. Clause 5.2.2 of the Employees' Handbook provided for notice of 3 months, in all cases of retirement. The Claimant was paid 2 months' salary in lieu of notice under the CBA, which was less favourable than the period given under the Handbook. ***He is granted the balance of 1 month salary in lieu of notice at Kshs. 135,566.***

30. **Costs of the entire Claim granted to the Claimant.**

31. **Interest allowed at 14% per annum from the date of Judgment till payment is made in full.**

IN SUM, IT IS ORDERED:-

**[a] The Respondent shall pay to the Claimant: general damages at Kshs. 1,500,000; cost of Medical Report at Kshs. 2,000; cost of hearing aid at Kshs. 100,000; and balance of 1 month salary in lieu of notice at Kshs. 135,566- total Kshs. 1,737,566.**

**[b] Prayers [d] and [e] of the Statement of Claim, on retirement of the Claimant and payment of retirement dues, are marked as settled, the Claimant having been paid by the Respondent, a net sum of Kshs. 6,183,980, pursuant to the Ruling of the Court dated 18<sup>th</sup> December 2014.**

**[c] Costs of the entire Claim to the Claimant.**

**[d] Interest granted at the rate of 14% per annum from the date of Judgment till payment is made in full.**

**Dated and delivered at Mombasa this 8<sup>th</sup> day of June 2018.**

**James Rika**

**Judge**