



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 523 OF 2015

BETWEEN

DAVID KIBE NJURE.....CLAIMANT

VERSUS

SAROVA WHITESANDS HOTEL LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Claimant David Kibe Njire in Person

A.B.Patel & Patel Advocates for the Respondent

JUDGMENT

File history

1. This Claim was initiated at the Chief Magistrate's Court in Mombasa on 13th May 2007. It was registered as Civil Suit Number 1361 of 2007. The Respondent filed its Statement of Defence on 18th June 2007. The Claim is about work injury. The Claimant states he was employed by the Respondent as a Cleaner. He slipped, lost his balance and fell while cleaning at the Hotel, and sustained injuries to his backbone. He was compelled to leave work before the expected age of retirement of 55 years. He seeks damages from the Respondent.
2. The Claim would have been expected to have been heard, and concluded within a reasonable time after closure of Pleadings in 2007. It has taken 11 years to have the matter concluded. It is necessary to examine, and place it on record, why an ordinary work injury claim, has taken 11 years to be brought to a close.
3. Hearing opened before Chief Magistrate C.P. Mwangi, on 12th November 2008. The Claimant gave evidence, and the matter was adjourned, for Claimant to be cross-examined on another date. The record indicates Chief Magistrate Mwangi was transferred before the Claimant could be cross-examined.
4. The new Chief Magistrate R. Mutoka, ordered on 19th August 2009, that the matter is heard afresh. Hearing was scheduled for 9th September 2009. The record does not show what transpired on this date, but there was no hearing. On 18th March 2010, hearing was scheduled for 5th May 2010. The Court was informed the Advocate for the Respondent would be ready to proceed at 2.30 p.m. At 2.30 p.m. the Advocate for the Respondent was said to be unwell. Hearing was adjourned to 2nd June 2010. On 2nd June 2010, the matter was stood over generally because the Claimant needed to amend his Plaint. Amendment was allowed on 1st July 2010. Hearing date was scheduled for 14th October 2010. The date was rescheduled to 25th November 2010 with the consent of the Advocates. No reason is shown for adjournment. On 25th November 2010, the matter was again adjourned because Advocates were engaged at the High Court. Hearing was pushed to 8th December 2010. On this date, Respondent's Advocate objected to the jurisdiction of the Chief Magistrate to hear work injury claim. The matter was adjourned with an order that the Respondent makes a formal application on jurisdiction of the Court. The Respondent duly filed and prosecuted its application as advised. The application was rejected.

5. The matter was placed before another Chief Magistrate on 30th January 2013. The Claimant does not seem to have given evidence afresh or in cross-examination. However, his Doctor Ajoni Adede gave evidence on this date.

6. Subsequently, the Claimant applied in the Employment and Labour Relations Court [E&LRC] Miscellaneous Application Number 10 of 2015, to have the matter transferred to the E&LRC, on the ground that the Chief Magistrate's Court did not have jurisdiction to handle employment disputes, after promulgation of the Constitution of Kenya 2010. An order for transfer issued on 25th June 2015.

7. The matter was placed before the Judge E&LRC on 21st June 2015 for directions. It was directed Parties file Amended Pleadings to conform to the Industrial Court [Procedure] Rules, 2010. The matter was to be heard on 23rd June 2016. The Respondent complained on this date that the Claimant went beyond amending his Pleadings to conform to the Rules, and introduced new causes of action. The Court was compelled to adjourn hearing, and issued further directions in writing, dated 15th July 2016. The Court found there were no new issues radically different from what was contained in the original Statement of Claim, introduced by the Claimant, and directed the dispute goes to trial.

8. The Claimant gave evidence 4th November 2016 and 17th November 2016. His 1st Witness, Dr. Ernest Okoti Mahero gave evidence on 2nd March 2017. His 2nd and last Witness, Dr. Ajoni Adede, gave evidence on 16th March 2017, when Claimant rested his case.

9. Claimant's former Supervisor Fredrick Oroma Okwera gave evidence for the Respondent on 30th November 2017. Human Resource Manager Timothy Gikonyo Waweru gave evidence on 12th February 2018, bringing the hearing to a close. The matter was last mentioned before the Court on 13th June 2018, when Parties confirmed filing of their Submissions.

10. Delay in hearing and disposal of the Claim, as can be seen from the file history, is attributable to several factors. The various Trial Magistrates were transferred before they could finalize proceedings; Respondent's Advocates were not ready with the hearing on different occasions; the Parties were uncertain on the jurisdiction of the Chief Magistrate's Court; eventually the Claimant applied for transfer to the E&LRC; and this uncertainty on jurisdiction resulted from ever changing law on work injury claims, in particular on jurisdiction in which such Claims are to be heard. It is disheartening that for over a decade after enactment of the Work Injury Benefits Act 2007, Employers and Employees still find themselves in a state of limbo on work injury dispute resolution, as different Courts have kept giving different interpretation to work injury law, and on employment law in general, particularly on the jurisdiction of the Courts. There is need to settle down the law, have clarity on the procedure and forum in work injury disputes, and prevent simple work injury claims from going on for decades unresolved. The constant legal challenges against the Work Injury Benefits Act 2007, and conflicting case law on jurisdiction, does little in facilitating expeditious disposal of work injury disputes. There should be a degree of certainty and predictability in the field of work injury dispute resolution. This was the intention of the Social Partners, when they came up with the Work Injury Benefits Act 2007. Certainty, predictability of the law, and expeditious disposal of disputes, would tremendously stabilize the labour market. It is unacceptable that a work injury claim takes more than a decade to resolve.

Claimant's case

11. In his Amended Statement of Claim filed on 25th September 2015, the Claimant states he was employed by the Respondent as a Cleaner. His last monthly basic salary was Kshs. 9,136, and service charge at Kshs. 14,058. It was the Respondent's duty of care, to ensure the Claimant was not exposed to risk of injury in the course of his work. The Claimant was in the course of cleaning the Male Changing Room, on or about 31st August 2004, when he fell and got injured. He was cleaning the floor. It was wet. He slipped, lost his balance, and fell heavily on the ground. He suffered blunt injury to the back and displacement of the cartilage between the backbone vertebrae L2, L3, L4 and L5.

12. He details Respondent's negligence to comprise: failure to take any or adequate precaution for the safety of the Claimant; exposing the Claimant to risk and damage; and failure to provide a safe system of work.

13. The Claimant prays for Judgment against the Respondent for:-

- a) Loss of salary up to retirement age of 60 years from 20th November 2006, when the Claimant was 37 years old, at the rate of Kshs. 9,135 per month.
- b) Service charge over the same period at Kshs. 14,069.
- c) Cost of domestic and housing care at Kshs. 3,500 monthly.
- d) Medical Report at Kshs 2,000.
- e) Medical expenses at Kshs. 20,000 per month.
- f) Future medical expenses.
- g) General damages for pain, suffering and loss of libido.
- h) Loss of earning capacity.
- i) Overtime at an average of 2 hours daily, for 7 years.

j) Annual leave of 7 years.

k) Costs.

l) Interest.

m) Any other suitable relief.

14. He told the Court he was employed by the Respondent in August 1999 as a Casual Employee. He was placed under different term-contracts beginning the year 2000. He fell while he was cleaning.

15. He was seen by Respondent's Company Doctor. He was x-rayed at Bahari Hospital, and later at Aga Khan Hospital Mombasa. Later he was seen by a Consultant at Mombasa Hospital. MRI and physiotherapy followed. The Claimant adopted his documents as exhibits. There was objection made by the Advocate for the Respondent on adoption by the Claimant of the medical records however, which necessitated the attendance of the various Doctors in Court, to produce their respective medical records. The Claimant's health continued to deteriorate. The Respondent was advised medically, that the Claimant could not continue to stand for long, or carry heavy objects. The Respondent continued to assign the Claimant night duties, which included carrying luggage for hotel visitors.

16. In August 2006, the Claimant asked for unpaid leave, to go home and rest. He asked for light duty assignment on return. He was not placed on light duty. He was re-evaluated by his Doctor in October 2006, and given sick leave of 1 month. He was asked to see a Psychiatrist because his memory was failing. The Psychiatrist advised the Claimant goes on working while under treatment.

17. On 17th November 2006, the Respondent issued the Claimant a letter of retirement. Doctors had not recommended retirement. He was 37 years on retirement. The Respondent disregarded Doctors' advice.

18. Cross-examined, the Claimant told the Court he was employed on various renewable monthly contracts. He did not have a contract covering the date he was injured at work, 31st August 2004. He confirmed he was still working, although not under any written contract. His Supervisor confirmed he was at work.

19. He was employed in house-keeping section. He cleaned the outdoor premises, not inside the hotel rooms. He was a Cleaner from the year 1999. He was experienced.

20. He was working with 2 other Cleaners at the time of the accident. The floor was made of marble, and was being cleaned using water, soap and cleaning machine. The Claimant was aware there was water on the floor. He had complained to the Supervisor about not being provided with safety boots. He could not stop working because he had been told to work first, and complain latter. He was injured on 31st January 2004. He saw the Doctor on 1st September 2004. It is not true that he was first seen by Dr. Mulimba on 13th May 2005. There were other treatment records, not exhibited before the Court.

21. The accident took place at night. The Claimant would be asked to assist carry visitors' luggage at night. He was not a Porter.

22. He was issued a letter of regular employment dated 29th September 2005. Effective date was 1st October 2005. His health was deteriorating at the time. At times, the Respondent used to meet Claimant's medical expenses. He was denied leave in September 2006. He was allowed sick off-duty days. He rested on Monday, Wednesday, and Friday. He asked to be assigned light work. He did not write complaining that such light work was not availed to him. He would forget things. It was a mental issue. The letter of appointment said he would be certified medically fit by Respondent's Doctor. He did not recall if he was certified as medically fit. He signed the letter of appointment. The letter of appointment did not provide for retirement age at 60 years. He prays for cost of domestic care. He does not have support for the sum of Kshs. 3,500 pleaded under this head. The Respondent catered for medical bills before Claimant's retirement.

23. The Doctors recommended the Claimant swims, to assist his body in recovery from his injury. He did not swim. He did not exercise. He did not fail to submit to surgery as had been recommended. The Respondent failed to facilitate surgery. He had a medical cover. He was paid a net sum of Kshs. 5,569 shown at page 51 of his bundle of documents. He received the sum on without-prejudice basis. He received a Certificate of Service. The letter of retirement states no other Claims would be entertained after the Claimant accepted payment.

24. Dr. Ernest Okoti Mahero had occasion to treat the Claimant after the Claimant was injured. The Claimant was on treatment for lower back injury. The Doctor examined him on 11th October 2006. He was referred to Dr. Mahero by Professor Mulimba for psychiatric evaluation. The Claimant had been on lower back pain since 2004. He had been receiving medicine, without improvement. Scans had failed to reveal the source of pain. The pains started after the Claimant's fall while in the course of duty. He had disturbed pattern of sleep. He experienced headaches at the back of his head. He had become quite forgetful. Dr. Mahero observed the Claimant was emotional and vulnerable. He developed these symptoms 2 months before he was examined by Dr. Mahero. The Doctor concluded the Claimant was suffering depressive disorder. The Doctor advised the Claimant to take anti-depressants. He continued to be treated by Dr. Mahero up to 2007. Dr. Mahero availed his Report dated 13th November 2006 to the Court.

25. Dr. Mahero told the Court on cross-examination that he examined the Claimant in 2006. The pain in Claimant's lower back had been there from 2004. Dr. Mahero relied on his conversation with the Claimant, and the Doctor's own evaluation, in preparing his Report. He did not have any past medical records. He is a Psychiatrist. There was a note from Professor Mulimba referring the Claimant to Dr. Mahero. Headaches and disturbed sleep patterns developed 2 weeks before Dr. Mahero saw the Claimant. The Claimant was treated up to 2007. He left feeling much better. The Claimant did not influence the findings by Dr. Mahero. He could not be examined however, without his input. The findings did not relate to future treatment. The Claimant was relieved of his symptoms. He was never hospitalized when seen by Dr. Mulimba. He was never an inpatient of Dr. Mahero.

26. Dr. Ajoni Adede prepared Medical Report dated 25th April 2007. He confirmed that the Claimant was injured at work, on 31st August 2004. He suffered disc prolapse, and was extensively treated at Coast General Hospital, Jocham Hospital and Respondent's Clinic. Treatment included MRI and other Scans. He was seen by Neurosurgeon, and Psychiatrist. He walked unaided but was stiff. He complained of forgetfulness. He was emotionally fragile and broke down in tears during examination. He suffered permanent partial disability and trauma.

27. Cross-examined, Dr. Adede told the Court he examined the Claimant 2½ years after the accident. The Claimant had a bundle of medical documents, including scans. Dr. Adede did not recall if the Claimant had a certificate showing he was medically fit, as of 2005. The Doctor was not aware of any letter which stated the Claimant was medically fit. Dr. Adede holds a degree in surgery, and is also a venereologist. The Claimant suffered disc prolapse and stiffness in 2007. This was caused by his fall while at work. Breaking down was a sign of depression. He had report from a Psychiatrist. Dr. Adede was of the view that pain began after the fall. It was caused by disc prolapse, which was caused by the fall. Depression had been there for some time, after loss of employment.

Respondent's Case

28. The Respondent filed its Amended Statement of Response, on 7th June 2016. It is conceded the Claimant was employed by the Respondent, on a salary of Kshs. 9,135 monthly. It is denied that the Claimant was injured as a result of Respondent's negligence. If the accident occurred at all, it was caused by the Claimant's own negligence. The Claimant failed to look out for his own safety and /or take precaution or sufficient caution to prevent his fall. The Respondent urges the Court to dismiss the Claim with costs.

29. Fredrick Oroma Okwera told the Court he had worked for the Respondent Hotel for 24 years. He found the Claimant already in employment, at the time Okwera joined the Respondent. Okwera came to know the Claimant around the year 2003. The Claimant worked on casual terms initially. He was later placed under contracts. At the time of leaving he was on permanent terms. He worked in Okwera's section. Okwera supervised the Claimant. The Claimant cleaned general public areas.

30. He was cleaning with 2 other Employees on 31st August 2004. Okwera was there. The 3 Cleaners were to clean Men Changing Room. The Claimant fell down. Okwera saw him fall. Okwera lifted the Claimant up. The Claimant said he was okay, and went on cleaning. He told Okwera he lost his balance, occasioning the fall.

31. There was no negligence on the part of the Respondent. The Claimant had worked for years. He had on the material day placed a 'slippery' signage at the premises. He was aware there was water with soap on the floor. Employees are trained every day and week. They are taken through refresher courses. The Respondent has cleaning procedures and tools. The Claimant was aware of these procedures and tools. He opted to use a water bucket, instead of a hose pipe. He fell while he was rinsing the floor. He worked contrary to instructions. The Respondent did not know the Claimant was injured.

32. The next day after the accident, the Respondent received information from its Clinical Officer that the Claimant was unwell and could not come to work. The Respondent continued to employ the Claimant, assigning him light work. He dusted public areas. Carrying luggage for Hotel Visitors is not mandatory. Employees do this to earn tips from the Visitors. There are Porters employed to carry Visitors' luggage.

33. Okwera told the Court he never heard of the Claimant's loss of his memory. The Claimant left employment around 2006/2007. Okwera has met the Claimant after this. The Claimant told Okwera he was fine, and farming at Kiembeni, in Mombasa. Okwera was left with the impression that the Claimant is in perfect health. In the past, the Claimant used to look like he was in some kind of pain. The Men Changing Room has a terrazzo floor. It is not ordinarily slippery. Okwera told the Court it is true that the Claimant fell, but the Respondent was not liable for his fall.

34. Cross-examined, Okwera stated that safety boots, and full uniforms were provided. Cleaners use gum and safari boots for the Changing Rooms. The Claimant was assigned light duties in accordance with the Doctor's advice. If there was extra work, such as carrying of luggage, Employees are requested to assist. Redirected, the Witness told the Court that the Claimant had been provided with full uniform. He chose to wear safari boots instead of gumboots.

35. Human Resource Manager, Timothy Gikonyo Waweru told the Court the Claimant's letter of appointment issued in September 2005, states he would sign the contract, on being certified medically fit. The Claimant worked, and was eventually retired on medical grounds. There was a Report by Professor Mulimba, which recommended the Claimant undergoes surgery. Surgery did not take place. The Claimant retired. He was paid terminal dues at Kshs. 19,771, and workmen's compensation of about Kshs. 122,000. Respondent's Clinic had recommended the Claimant swims daily. Professor Mulimba recommended the Claimant resumes duty, but is assigned light duty. Cleaning was both light and heavy duty. There was no light duty available for the Claimant. He was paid his final dues. Cross-examined, Waweru reiterated that the Claimant was advised to swim. The Respondent was not to take the Claimant for swimming. The Witness did not know that the Claimant has been surviving on well-wishers. The Claimant was paid his terminal dues. He had not finished the number of years required, to be eligible for gratuity. It is not true that the Respondent paid terminal dues merely to mitigate its wrongdoing. Waweru advised the Claimant that light work was not available.

36. The issues as understood by the Court are:-

- a) Whether retirement of the Claimant on medical ground was fair and lawful.
- b) Whether the Respondent was negligent, occasioning the Claimant to fall and injure his back, in the course of cleaning Respondent's premises.
- c) Is the Claimant entitled to the remedies detailed in his Amended Statement of Claim filed on 25th September 2015?

The Court Finds:-

37. The Claimant was initially employed as a Casual Employee by the Respondent in 1999. He was subsequently offered seasonal contracts. He was later, according to the evidence of his former Supervisor Fredrick Oroma Okwera, employed on permanent terms. His letter of appointment dated 28th September 2005, indicates the Claimant was appointed as a Cleaner Union Grade 1. He was employed upon being certified as being medically fit by a Physician of Respondent's choice. He was confirmed in this position on 13th November 2006.

38. However, on 17th November 2006, the Respondent wrote to the Claimant, retiring the Claimant on medical grounds. The Respondent relied on a Medical Report prepared by Professor J.A.O Mulimba, dated 4th October 2006. It is shown to have been received by the Respondent on 11th October 2006. The Respondent had the Report on 13th November 2006 when it confirmed the Claimant as a Cleaner.

39. Professor Mulimba reported that he had reviewed Claimant's lower back problems. The Professor states he had resisted taking the Claimant through an operation, but confirmed the Claimant was in pain. The Doctor recommended the Claimant has surgical intervention; he is observed after surgery; if there is no improvement, the Claimant is discharged on medical grounds; if he is not keen on surgery, he is discharged on medical grounds; and a psychiatric assessment is done on the Claimant by Dr. Mahero.

40. Dr. Mahero made a Report dated 13th November 2006, 4 days before the Claimant was retired. He confirmed that the Claimant experienced pain since 2004, when he fell at work while cleaning. He experienced pain at his back after making love to his wife, but not during the act of making love. The Doctor confirmed that that the Claimant suffered headaches, and had become quite forgetful, emotional and vulnerable. The Doctor concluded that the Claimant was suffering a depressive disorder which required pharmacological treatment. It was the view of Dr. Mahero also, that the Claimant suffered emotional traumatic experience during the fall, and required psychological treatment. Dr. Mahero did not recommend that the Claimant is retired; he recommended that the Claimant continues working while under treatment.

41. Dr. Mahero and Dr. Ajoni Adede gave evidence in Court and produced their Reports. The Reports agree that the Claimant was injured at work, and suffered pain and depression after the fall. There are other medical records exhibited in the Claimant's bundle of documents, which conclusively establish he was injured while at work. He was unable to stand for long, and could not lift heavy objects after the fall. Dr. Mahero reports that the Claimant was in pain after making love to his wife, but not during the act of making love.

42. Medical evidence available immediately before retirement of the Claimant, leads the Court to the conclusion that retirement on medical grounds was not fair or justified. This conclusion is based on the following grounds:-

- a) On 28th September 2005, the Respondent appointed the Claimant to the position of Cleaner.
- b) Appointment was subject to the Claimant being certified by Respondent's own Doctor as being fit to work. The Claimant was confirmed as a Cleaner, on 13th November 2006.
- c) The Claimant must have been certified by Respondent's own Doctor as being fit work.
- d) He went on working until retirement on 17th November 2006.
- e) Professor Mulimba recommended the Claimant undergoes surgery and is placed under observation after surgery.
- f) He could be retired if he did not improve after surgery, or if he was not keen on surgery.
- g) There was no evidence given by the Respondent that the Claimant underwent surgery, or was not keen on surgery, to warrant retirement one month after Professor Mulimba gave his advice.
- h) Professor Mulimba also advised the Claimant is viewed by a Psychiatrist.
- i) Consequently the Claimant was seen by Dr. Mahero.
- j) Dr. Mahero confirmed the Claimant was injured while at work; he suffered back pain; and suffered depressive disorder. The Doctor recommended the Claimant keeps working while undergoing pharmacological and psychological treatment. This advice was given in a Report dated 13th November 2006, 4 days before the Claimant was retired on medical grounds.
- k) In retiring the Claimant, the Respondent did not act in accordance with the advice given by the Doctors.
- l) The Respondent failed to reasonably accommodate the Claimant, having only recently confirmed him in employment, relying of the medical advice of its own Physician.
- m) The decision to retire the Claimant was made too close to the advice of Professor Mulimba and that of Dr. Mahero, before treatment as recommended by the Doctors, was attempted.
- n) There is no evidence that the Claimant refused to undergo surgery between the date the Doctors advised on his treatment, and the date of retirement. Similarly, the Respondent did not show if any steps were taken by the Respondent, to facilitate treatment. The

Respondent merely alluded to the presence of a medical insurance cover. It was not disclosed if the Respondent advised the Claimant he must undergo surgery, or face retirement.

43. In general the Respondent did not reasonably accommodate the Claimant. In ***Kenya Plantation and Agricultural Workers' Union v Rea Vipingo Plantations Limited & Another [2015] e-KLR***, the E&LR Court discussed the concept of reasonable accommodation. The Employer ought to extend sick leave to the Employee. Clause 7 of the letter of appointment provided for sick leave. The Respondent did not show if it granted, or considered granting the Claimant sick leave, if he was injured or diseased to an extent of being unable to discharge his duties. Sick leave ought to have been extended to the Claimant after the advice given by Professor Mulimba and Dr. Mahero. Reasonable accommodation requires the Employer to temporarily modify the Employee's job; limit the hours of work; modify the work environment; provide special working tools; assign different work within the same enterprise; and /or assign alternative work which is not necessarily light work. The Claimant wrote to the Respondent asking for alternative work. Some jobs, as the Court held in the above-cited decision, are sedentary yet require Employees to apply their mental energy fully. Others are physical yet they do not task the brain. The Respondent does not seem to the Court to have explored the concept of reasonable accommodation satisfactorily. There was a rush to retire the Claimant based on a partial recommendation of one Doctor. Other aspects of this Doctor's advice, and the advice of other Doctors, were disregarded. The letter of appointment states the Parties' contract incorporated CBA concluded between Claimant's Union KUDHEIHA and the Hoteliers Association. The Respondent did not justify its decision to retire the Claimant, under any clause of the CBA. The letter retiring the Claimant simply advised him he had been retired, as recommended.

44. Retirement on medical grounds was hasty. It was not fair and lawful.

45. Is the Respondent liable for work injury and disease, suffered by the Claimant? The common evidence by the Parties is that the Claimant fell while cleaning the Men Changing Room at the Respondent Hotel. The Respondent states the Claimant was at fault, or substantially at fault. He had worked for long, and had the necessary skills and experience. The Claimant blames the Respondent, for not providing him with safe system of work, and tools of work. The Claimant did not have safety boots. The floor was wet, with soapy water. He slipped, lost his balance and fell in the year 2004. This was the beginning of his physical and psychological pain.

46. In this ***Court's Appeal Number 1 of 2015 between Rashid Ali Faki v Said Transporters [2016] e-LKR; Nakuru High Court Civil Appeal Number 38 of 1995 between Sokoro Saw Mills Limited v. Bernard Muthimbi Njenga; and Mombasa High Court Civil Suit Number 209 of 2007 between Amani Kufaa Bakari v. Wanachi Marine Products Kenya Limited***, it was held that, Employers have a duty to provide Employees with safe system of work. This does not include mere warning to the Employees by their Employers against unusual dangers known to the Employers, but must also include making the workplace as safe as the exercise of reasonable skill and care would permit. Employers must adequately rebut allegations of negligence whenever such allegations are made.

47. The Court is not satisfied that the Respondent provided a safe working environment to the Claimant. It was foreseeable that a Cleaner working with soap and water could slip and fall as did the Claimant. The Respondent did not establish that it provided the Claimant with safety boots, or that the Claimant neglected to wear such boots while cleaning. The Respondent did not offer any convincing evidence showing that the Claimant's workplace accident, injury and disease, resulted from the Claimant's deliberate and willful conduct or omission. It was not shown that Claimant was solely or substantively responsible for his fall, injury and disease. The Claimant was in the ordinary course of duty, working in a system and using tools, provided by the Respondent. He was not at the time of the accident, acting in contravention of the law, or any instructions given by the Respondent. He fell because the floor was slippery. It was the responsibility of the Respondent to ensure there was a safe system of work in place, and the tools availed to the Claimant afforded the Claimant protection from risk of slipping and injuring himself.

48. The Court is satisfied the accident happened as a result of Respondent's negligence, and holds the Respondent 100% liable for the occurrence.

Remedies:-

49. There was no evidence given by the Claimant to support his assertion that he was to work until he attained the age of 60 years. It is not in his contract, and he did not point out any clause in the CBA applicable to him, which entitled him to work until the age of 60 years.

50. Service charge was paid to Employees under the CBA. The Claimant did not adduce evidence on the mode of payment of service charge. He did not call any evidence from KUDHEIHA, to show how service charge was computed, how and when it was to be paid. He did not establish that he would be entitled to service charge, even after he had left employment. His prayers for loss of salary and service charge up to the age of 60- years are without foundation. The ***Court of Appeal in Elizabeth Wakanyi Kibe v. Telkom Kenya Limited [2014] e-KLR*** held that, Courts have an obligation to observe the principle of fair-go-all round, in examining what remedies are suitable in unfair termination claims. The Claimant was 37 years old when retired. He states he should be paid salaries and service charge until the age of 60 years. A grant of anticipatory salaries and service to the Claimant for 23 years, while the Claimant ceased working in the year 2006, would not be fair or reasonable remedies.

51. There was no evidence at all given by the Claimant to support his prayer for cost of domestic and housing care, at Kshs. 3,500. The Claimant is engaged in farming at Kiembeni and is physically active, though still in pain. He was not rendered totally incapacitated by his injury, so as to justify his prayer for domestic and 'housing' care. He ably attended Court, without any aid, and prosecuted his case to the end.

52. There is similarly no evidence of loss of libido. Dr. Mahero states the Claimant experienced post-coital pain. He did not suffer pain during sex. There is no confirmation by the Doctors that the Claimant lost his libido. Dr. Mahero referred to pain after sex, rather than loss of libido.

53. The Claimant prays for medical expenses at Kshs. 20,000 per month, which he also pleads, is to be 'assessed later.' There is no support for this amount in his evidence. He pleads separately for future medical expenses. His prayers, notwithstanding that he acted in Person, and

appeared to the Court to still have mental depression at the time of giving evidence, needed to be clear and consistent. He is however to be lauded, for his industry in prosecuting his case, and in making the Court understand the basics of his Claim.

54. To redress unfair and unlawful retirement, the Court grants the Claimant equivalent of 7 months' salary at Kshs. 9,135 x 7 = Kshs. 63,945 in damages.

55. He is allowed the prayer for Kshs. 2,000 as the cost of Medical Report.

56. The evidence given by Dr. Ajoni Adede concluded the Claimant suffered permanent partial disability due to disc prolapse, continuous back pain and psycho-trauma depression. He endures excruciating pain after sex. His soft tissue injuries have healed well. The Claimant therefore suffered, and continues to suffer, physical as well as psychological pain. Employers have an obligation to guard Employees against work-related physical as well as emotional injury. The Claimant merits damages for pain, suffering, loss of amenities and future medical care. He may need surgery which was recommended at the time of retirement. He is no longer in employment. He probably cannot meet the cost of the surgery on his own. He survives on farming activities at Kiembeni. General damages are given at the discretion of the Court, and must not be inordinately high or low, in proportion to the degree of injury or disease occasioned to the Claimant. The Claimant suffered both physical injury and depressive disorder, following his workplace accident. The Court has taken into account that he was paid Kshs. 19,771 in terminal dues and approximately Kshs. 122,000 in workmen's compensation. The Court has granted him equivalent of 7 months' salary in compensation for unfair and unlawful retirement. **He is granted general damages at Kshs. 1,800,000 for pain, suffering, loss of amenities, and to enable him cater for his future physical and psychological healthcare.**

57. Costs to the Claimant.

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

IN SUM, IT IS ORDERED:-

a) It is declared retirement of the Claimant by the Respondent was unfair and unlawful.

b) The Respondent was negligent and solely liable for the workplace accident, injury and disease occasioned to the Claimant.

c) The Claimant is granted equivalent of 7 months' salary at Kshs. 63,945 in damages for unfair and unlawful retirement; cost of Medical Report, at Kshs. 2,000; and general damages for pain, suffering, loss of amenities and for future cost of physical and psychological healthcare at Kshs. 1,800,000- total Kshs. 1,865,945.

d) Costs to the Claimant.

e) Interest allowed at the rate of 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 28th day of September, 2018.

James Rika

Judge