



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**PETITION NO. 21 OF 2013**

**JULIUS CHACHA MWITA..... CLAIMANT**

*VERSUS*

**KENYA AIRWAYS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR, OCCUPATIONAL SAFETY &**

**HEALTH SERVICES, MINISTRY OF LABOUR &**

**HUMAN RESOURCE DEVELOPMENT ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Amended Petition dated 5th July 2013 was filed on 9<sup>th</sup> July 2013 seeking the following orders:
  - a. a declaration that the 1<sup>st</sup> Respondent has infringed upon the Petitioner's right to equally and freedom from discrimination on account of health status and / or disability;
  - b. a declaration that the conduct and actions of the 1<sup>st</sup> Respondent is in violation of the Petitioner's inherent dignity and the right to have that dignity respected and protected;
  - c. a declaration that the Petitioner's right to life is under imminent threat of violation and / or infringement in consequence of the actions of the 1<sup>st</sup> Respondent;
  - d. declaration that the Respondents are in violation of **Article 47(1) and (2)** of the Constitution of Kenya entitling the Petitioner to a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair;
  - e. a declaration that the Petitioner's right of access to information under **Article 35** of the Constitution have been intrigued upon by the Respondents;
  - f. a declaration that the Respondents have not accorded the Petitioner right to fair labour practice;
  - g. an order do issue against the 1<sup>st</sup> Respondent rendering invalid the decision and / or the implementation and operation of the decision made on the 4<sup>th</sup> September 2012 declaring the Petitioner redundant;
  - h. an order do issue directing the 1<sup>st</sup> Respondent to retire the Petitioner on medical grounds as advised by Medical Doctors;
  - i. an order for compensation and / or damages do issue against the 1<sup>st</sup> Respondent in lieu of arrears of layover allowances, unpaid salary, bonus and other benefits of which the Petitioner is entitled to upon such retirement and future loss of earnings in the sum of Kshs.57,600,000.00;

- j. general damages for pain and suffering and loss of amenities;
  - k. in the alternative to (i) above, an order for the assessment of the quantum of damages and compensation to be paid by the 1<sup>st</sup> Respondent;
  - l. cost of future medical treatment in the sum of Kshs.30,000.00;
  - m. such further orders as the Court may deem just.
2. The Petition is supported by an Affidavit of the Petitioner, Julius Chacha Mwita and viva voce evidence by the Petitioner.

### **Particulars of alleged infringements**

3. The particulars of the suit as set out in the body of the Petition are as follows, *inter alia*;

That the 1<sup>st</sup> Respondent subjected the Petitioner to; indignity, inhuman and degrading treatment;

- i. by declaring the Petitioner redundant contrary to the advice by its own panel of Doctors nine months prior to retire the Petitioner on medical grounds.
  - ii. by refusing and / or neglecting to acknowledge the fact that the Petitioner sustained injury in the course of duty.
  - iii. declaring the petitioner redundant while on sick leave.
4. The Respondents put the Petitioner's life in peril and / or danger by stopping indefinitely all together his medical scheme cover and not affording the Petitioner means to access treatment.
5. The Petitioner was discriminated against on account of health status by declaring the Petitioner redundant despite being aware of his medical condition contrary to the recommendation of 1<sup>st</sup> Respondent's panel of doctors to retire the Petitioner on medical grounds.
6. The 1<sup>st</sup> Respondent failed to provide the Petitioner in accordance with **Section 22(3)** of the Work Injury Benefits Act, 2007 and **Article 35** of the Constitution with a copy of the notice of the accident and copies of all documents in respect to the injuries sustained by the Petitioner on 4<sup>th</sup> May 2010 despite such request being made.
7. The 1<sup>st</sup> Respondent also failed to provide the petitioner with important information needed for the prosecution of the Petitioner's case.

Furthermore the 1<sup>st</sup> Respondent failed to address the Petitioner's compensation for injuries sustained in the cause of duty.

These averments in the Petition are supported by *viva voce* evidence of the Petitioner and the deposition in the supporting affidavit.

8. The Petitioner told the Court he was thirty one (31) years old and is a former employee of the 1<sup>st</sup> Respondent and was employed on 2<sup>nd</sup> July 2007 as an inflight attendant. The letter of appointment was produced and marked "DCM 1".
9. The terms and conditions of service are set out in the letter including a contributory medical scheme at 2% of monthly salary.

The 1<sup>st</sup> Respondent also had a Group Life and personal Accident Insurance Scheme under which the Petitioner was covered.

In addition, the Petitioner was a member of a provident fund to which both the employee and employer contributed 10%.

The contract was terminable by either party giving one month notice or payment in lieu.

10. The Petitioner worked continuously for the 1<sup>st</sup> Respondent until he was retrenched from

- employment on 4<sup>th</sup> September 2012.
11. The Petitioner's remuneration comprised of Night stop allowance; Lay over allowance, House allowance, Duty free commission and basic pay. As an Inflight Attendant, the department operated on a 28 day roster.
  12. On 4<sup>th</sup> May 2010, the Petitioner was scheduled to attend to flight KQ 578, Duala, Cameroon. The flight had five (5) crew including the Captain, 1<sup>st</sup> officer, flight purser and Flight Attendants, Stella Mboyo was the flight purser in charge of services on board. Mr. Jimnah Muchene and Fenwick Ooko were other attendants.
  13. The Petitioner was asked to pull the duty free trolley and to confirm the seal numbers. The Petitioner then went to get the next trolley as they required a full and half cart.
  14. The bar trolley was stuck, the Petitioner shook it a bit but the wheels did not adjust. The Petitioner applied more force to pull it, a second and third time. The Petitioner then experienced a sharp pain on the lower back and developed blurred vision. The Petitioner then saw In-flight Attendant Jimnah Muchene tapping him on the back to go and brief the flight crew. The Petitioner told him what had happened and Muchene immediately informed the Captain and Flight purser. They both came to see the Petitioner. Jimnah administered first aid and the Captain called for a doctor to attend to the Petitioner.
  15. The passengers started boarding and were squeezing between the Petitioner and the Aircraft. The rear door was closed at that point.
  16. The doctor came after 30 minutes, checked on the Petitioner and said it was a serious situation and that the Petitioner should not proceed with the flight. The Petitioner was removed from the flight in a stretcher and taken to a waiting ambulance and rushed to Aga Khan Hospital. He was received at the Emergency Section at 6.30 p.m. where he lay until 8p.m. in the evening with no one attending to him. At the time he was immobilized and sedated. The Petitioner experienced a lot of pain.
  17. The Petitioner started feeling his limbs on the 5<sup>th</sup> May 2010 at 11 a.m. Thereafter, the Petitioner was taken for physiotherapy sessions.
  18. The Petitioner was hospitalized for two days and was discharged on 6<sup>th</sup> May.
  19. The Petitioner told the Court that the flight trolleys got stuck regularly. When this happened the attendant normally shake it and also notify the purser that the trolley required service. The Petitioner did that severally and caused flight delays for that reason as this was a danger to the passengers and the crew. Due to these regular complaints, he was nicknamed Mr. IOSA (the acronym for the organization that regulates flight safety).
  20. The Petitioner testified that the plane had a voyage report in the custody of the flight purser to record any incident inflight. The Petitioner always ensured that the purser recorded any reported incidents. This made the Petitioner unpopular with the supervisors and was told that he was delaying flights due to minor issues. The Petitioner produced the voyage report showing the incident that took place on the material day (5<sup>th</sup> July 2013). It shows that the Petitioner was injured on the back before departure and he was offloaded.
  21. The Petitioner recalled several incidents which he had caused to be recorded in the voyage report.
  22. According to the petitioner, the Captain also has got his report and is obliged to capture any incident reported to him / her in the Air Safety Report. These reports are reviewed at the end of each flight.
  23. The Petitioner was thereafter put on sick-off. The Respondent internal clinic had to be notified of the incident as per the Respondent's regulations to commence processing the Personal Accident Claim.
  24. The Petitioner was given a Personal Accident Claim by the Respondent's Safety Office for purposes of notifying the Director of Occupational Safety. The Petitioner filled the form on 4<sup>th</sup> June 2010 and submitted the same to Mr. Mjini, the Human Resource Manager in charge of Industrial Safety. Mr. Mjini took the form and filled his part and said the Claim could not be paid since he did not have a permanent disability percentage.
  25. In the claim form commonly referred to as DOSH/WIBA4 the Respondent indicated the salary for the Petitioner to be Kshs. 44,088.00 per month. This excluded the Lay over allowance which is paid to cabin crew monthly in terms of **Article 9(c)** of the Collective Bargaining Agreement for the period 2008 – 2010 and 2010 – 2012. It was paid at the rate of 90 US Dollars depending on

- the position of the cabin-crew.
26. The Court was referred to page 256 of the Response in this respect. Night stop allowance was also paid at the rate of 18% of the basic salary. This is payable to cabin-crew and pilots for travel inconvenience. This was also missing in the form.
  27. The Petitioner produced payslips indicating that his basic salary as per January 2013 was Kshs.49,363.96, Night stop allowance of Kshs.9,367.96, House allowance of Kshs.25,328 and Lay over allowance of kshs.69,660.
  28. The Petitioner was the Acting chairman of the Cabin-crew branch of Aviation and Airport Services Workers Union (AASWU) and was therefore conversant with the relevant regulations.
  29. The Petitioner told the Court that in terms of **Section 37(1(b))** of the Work Injury Benefits Act, (WIBA) Remuneration includes allowances paid regularly.
  30. The Petitioner stated that the Respondent submitted the Personal Accident Claim form to WIBA with wrong Remuneration particulars to his loss and detriment.
  31. The Petitioner further told the Court that he was not aware that the form had been forwarded to WIBA. That the Petitioner had requested for the form several times and it was not given to him.
  32. The Petitioner referred the Court to page 107 of the Response showing the DOSH / WIBA 4 – demand for payment of Work Injury Benefit. The Petitioner stated that only the basic salary and house allowance was used.
  33. The Petitioner challenges this omission by the Respondent and his Advocate wrote on 24<sup>th</sup> April 2013, to the Respondent seeking to be given information submitted to DOSH. The Respondent replied and told the Petitioner to get the copies from DOSH. The Director was also copied but he did not respond to the Advocate.
  34. The Advocate wrote a reminder but it was not responded to.

Dr. Jane Munyi is the Head of DOSH at the Respondent.

### **Medical History**

35. On 11<sup>th</sup> July 2011, the Petitioner was referred to the Nairobi MRI Centre by Prof. Gakuu where the following finding was made;

*“There is disc degeneration within narrowing of the disc space at 5/5 There are small Central posterior disc protrusions causing small impressions on the cal sac at L4/5 and 5/5.”*

The Report was by Dr. F, J. O. Wasunna, Radiologist.

On 14<sup>th</sup> October 2011, Prof. L. N. Gakuu Orthopaedic and Trauma Surgeon who had been treating the Petitioner wrote:

*“This is to certify that this patient has been undergoing treatment here since referred on 11/7/2011. He has Lumber spine pain, and is advised to avoid;*

1. *drills exercise*
2. *sitting long hours*
3. *lifting load upward of 5kg until advised otherwise.”*

36. The Respondent transferred the Petitioner to lighter duties following this recommendation.

37. On 29<sup>th</sup> November 2011, Prof. L.N. Gakuu wrote to Dr. Jane Munyi, the Resident Doctor, advising that the Petitioner be transferred from duties that require him to bend and lift loads of 10kg and more.

38. On 4<sup>th</sup> January 2012, Prof. Gakuu, wrote to Dr. Munyi again regarding the Petitioner as follows;

*“The progress*

*In view of above scenario he is not improving on medications and physiotherapy. The pains and*

*numbness persist. He can benefit from a Neurosurgeon opinion. However he is not keen on surgery. In the meantime he is to continue with medications and light duties, avoid bending and lifting heavy objects. In the long run he will benefit by early retirement on medical grounds.” (emphasis is mine)*

39. Again, on 13<sup>th</sup> March 2012, Prof. L. N. Gakuu wrote to Dr. J. Munyi as follows;

*“He has been seen here today and still complaining of low back pains even on doing light duties.*

*He is NOT responding to medications and physiotherapy. He is NOT keen on surgery.*

*Kindly consider retiring him on medical grounds since he is unable to work.*

*Kindly assist in the interest of his health.” (emphasis is mine)*

40. By a letter dated 2<sup>nd</sup> July 2012, the Head of Human Resources, Relationship management and Record, Mr. Tom Shivo, wrote to the Petitioner, advising him of stoppage of payment of Lay over allowance in view of the fact that the Petitioner had not performed flying duties since June 2011 with effect from 1<sup>st</sup> July 2012.

41. The Petitioner was referred by the Respondent to Dr. Timothy Kagado Byakika for a 2<sup>nd</sup> opinion and the Doctor wrote a note to Dr. J. Munyi on 29<sup>th</sup> February 2012 in which he recommended thus;

*“in my opinion it is reasonable to offer Julius the option of decompression of his spinal canal via a micro discectomy by a Neurosurgeon. I have explained the pros and cons of this procedure to him and he is now willing to give it a shot. I therefore refer him to Dr. C. K. Musau a consultant Neurosurgeon for micro discectomy surgery of his Lumber spine. It would be advisable to make a final disability assessment if any, after the surgery.”*

42. The Petitioner told the Court that Dr. C. K. Musau was not keen to operate on him due to the intricacy of the procedure. The Petitioner was also seen at the Respondent’s clinic by a visiting Doctor from India and he was also not keen on operating him. No correspondence or report was produced in respect of the two latter Doctors. The Petitioner told the Court that the Indian Doctor gave a report to Dr. Munyi though he never saw its contents.

43. In March 2012, Prof. Gakuu put the Petitioner on complete sick off and he therefore stopped working. The Prof. did this stating that the Petitioner was endangering his life. The Petitioner continued attending physiotherapy sessions and required assistance from a 3<sup>rd</sup> party to walk due to numbness. One Mr. Deogrates Leopoy became his aid. He accompanies him all the time.

44. Petitioner told the Court that he could not stand for more than 20 minutes and his condition has continued to deteriorate.

45. On 4<sup>th</sup> September 2012, the Respondent declared the Petitioner redundant and consequently his medical cover came to an end.

The Petitioner was unable to access medicines and physiotherapy since he no longer had source of income. The declaration of redundancy of the Petitioner and many of his colleagues was challenged in Court and therefore he had to wait for many months to await the resolution of that dispute. The matter was heard and determined by the Industrial Court (as then referred) and the decision of the Court was appealed.

46. The Court of Appeal finalized the matter in 2013 and awarded the retrenchees including the Petitioner six months compensation for the unlawful and unfair declaration of redundancy in addition to the terminal benefits granted to them by the Respondent which included;

- i. salary and allowances for days worked;
- ii. Severance pay calculated at 20 days for every completed year of service;

- iii. 3 days pay in lieu of notice;
- iv. 47.23 days;
- v. provident Fund contributions in accordance with the Provident Fund Rules.

47. The Petitioner described the pain and suffering he underwent following the retrenchment especially on his medical situation and in taking care of his two children who were going to school.

48. The petitioner faults the Respondent for not following the professional advice of Prof. Gakuu to retire him on medical grounds and prays the Court to award him as prayed.

Meanwhile WIBA assessed the work injury claim at Kshs.2,208,489. The Claimant was paid kshs.1.4 million following a Court order.

49. The Petitioner claims Kshs.5,061,219.00 as compensation under WIBA. The Petitioner's claim is based on calculation of 96 months salary at a monthly gross salary of Kshs.117,157.86.

50. The Petitioner states that the assessment by the Director was low because the Respondent omitted to include Lay over allowance and Night stop allowance as part of his regular monthly income. Instead, the Respondent only included the basic salary and House allowance in the Work Injury Claim form to the loss and detriment of the Petitioner.

(ii) The Petitioner further claims Kshs.2,880,000.00 for constant help and use of a personal assistant as he could not walk alone. This Claim is also made under WIBA. The Petitioner states that he gets numbness attacks and requires someone by his side all the time.

(iii) Petitioner seeks future medical expenses to be assessed by the Court and awarded accordingly.

(iv) The Petitioner further seeks compensation by the 1<sup>st</sup> Respondent for breach of statutory duty in the sum of Kshs. 7 Million.

(v) Petitioner also seeks payment in respect of loss of future earnings in the sum of Kshs.55,308,945.00 calculated on his monthly salary until retirement at age 60.

(vi) The Petitioner seeks the Court to assess retirement benefits at the rate of six (6) times the annual basic salary as provided under paragraph 4.23.1 of the Human Resource Manual.

(vii) The Petitioner claims six (6) months' salary in lieu of notice, applicable in case of early retirement under CBA. He was paid three (3) months' salary in lieu of notice upon retrenchment.

(viii) Further claims include – Kshs.3,000,000.00 for violation of his human rights by the 1<sup>st</sup> Respondent.

(ix) Aggravated damages in the sum of Kshs.2 Million.

These claims are contained in the amended Petition. The petitioner further states that due to the conduct of the 1<sup>st</sup> Respondent, the Petitioner was unable to service his loan balance of Kshs.2,356,311 at the time and same has continued to accumulate interest. The Petitioner has reduced the balance, however, with the part payment.

51. The Petitioner has produced the CBA and relies on **Clause 48(d)(i)** on early retirement.

### **Respondent's Case**

52. The Respondent filed a Replying Affidavit of Melisia Makokha, Senior Legal Counsel of the 1<sup>st</sup> Respondent sworn on 9<sup>th</sup> July 2013 in which the 1<sup>st</sup> Respondent has provided detailed Response to

the matters raised in the Petition.

53. The Deponent has annexed numerous appendices in support of the 1<sup>st</sup> Respondent's case from pages 1 to 446 of the Response.

The Respondent's case may be summarized as follows;

54. The 1<sup>st</sup> Respondent acknowledges that the Petitioner while undertaking his normal duties on 4<sup>th</sup> May 2010, reported having felt pain on his back. That the reported pain was not occasioned by the 1<sup>st</sup> Respondent's failure and or breach of duty to provide safety and healthy systems at work as alleged by the Petitioner or at all. That the Petitioner was treated at Aga Khan Hospital and the 1<sup>st</sup> Respondent's clinics as provided for under the 1<sup>st</sup> Respondent's medical scheme provided to all employees.

55. That whereas, the incident and pain was experienced by the Petitioner on 4<sup>th</sup> May 2010, it was not until March 2012, when the Petitioner officially reported the matter to the 1<sup>st</sup> Respondent as required by the Occupational safety and Health Act (OSHA).

56. That the procedure under the OSHA to be followed by an employer in the event of any incident at work is that the employee fills a form known as Notice by an Employer of an Occupational Accident / /Disease by an Employee (DOSH I) which is then submitted by the employer to the 2<sup>nd</sup> Respondent. That this obligation on the employer is conditional on the employee, reporting any alleged incident and filing the said form.

57. That upon receiving the report of incident on 7<sup>th</sup> March 2012, the 1<sup>st</sup> Respondent reported to the 2<sup>nd</sup> Respondent the incident of 4<sup>th</sup> May 2010. A notice (DOSH I) is attached to the reply and marked MM-2.

58. That the Petitioner further delayed in having a medical report signed by his doctor forwarded to the 1<sup>st</sup> Respondent. Despite the same being dated 4<sup>th</sup> January 2012, it was not until March 2012 that the Petitioner forward the same to the 1<sup>st</sup> Respondent.

The Petitioner has an obligation to report the incident of 4<sup>th</sup> March 2010 to the Director but he did not do so until May 2012.

59. That by a letter dated 21<sup>st</sup> March 2012, the Director issued a demand for payment of compensation in the sum of Kshs.2,208,489.00. The same is attached and marked MM-3.

That the Director having assessed the payment for the injury experienced by the Petitioner cannot now claim additional amounts in respect of the same.

60. That this Court lacks jurisdiction to interfere and / or change such assessment and the Petition to this extent lacks merit and ought to be dismissed by this Court.

61. That the jurisdiction of the Industrial Court following an assessment by the Director is appellate in nature and that this not being such appeal then this Court lacks jurisdiction to interfere with and / or determine the issue of compensation on the alleged injury as a result of the pain suffered by the Petitioner and / or the adequacy of the same.

### **Redundancy**

62. That the issue whether Petitioner ought to be declared redundant is *resjudicata*, the same having been adjudicated upon by this Court in **Industrial Court at Nairobi Cause No. 1616 of 2012, Aviation Workers Union Vs Kenya Airways .**

### **Retirement on medical grounds**

63. The 1<sup>st</sup> Respondent avers on this matter as follows;

That on 4<sup>th</sup> January 2012, Dr. Munyi requested Professor Gakuu to provide a summary on the Petitioner's treatment.

That the Dr. furnished a report dated 4<sup>th</sup> January 2012 at page 79 – 80 of the Petitioner's documents.

64. In the report, Dr. Gakuu informed Dr. Munyi that the Petitioner was not keen on undergoing surgery even though he could benefit from the opinion of a Neurosurgeon. That Dr. Gakuu recommended that the Petitioner may in the long run benefit from early retirement.
65. That a 2<sup>nd</sup> opinion requested by the 1<sup>st</sup> Respondent from Dr. Byakika, recommended that the Petitioner undergoes surgery by a Neurosurgeon for the pain he was experiencing and thereafter a disability assessment would be made. That the Petitioner having declined to undergo the surgery, it was not possible to assess his alleged disability as a result of which there was and still is no basis for early retirement on medical grounds as there was a possibility of the Petitioner recovering from the pains he alleged to experience if he had undergone surgery.
66. That as at 4<sup>th</sup> September 2012, when the Petitioner was declared redundant, he had not undergone surgery as recommended by Prof. Gakuu and Dr. Byakika and Dr. Munyi insists there was no basis to assess his disability.
67. That it is a prerequisite for retirement on medical grounds, that there be a certification from a doctor that the employee will never be able to continue to discharge his duties as an employee with the 1<sup>st</sup> Respondent. That the Petitioner was thus redeployed to ground duties. That the 1<sup>st</sup> Respondent cannot be penalized for the Petitioner's failure to follow the recommendation of the specialist doctors to undergo surgery.
68. That upon receipt of Dr. Byakika's report, the 1<sup>st</sup> Respondent made a decision not to retire the Petitioner on medical grounds since there is no evidence he could not recover if he undergoes surgery.
69. That the decision not to retire the Petitioner is based purely on this finding but not on discrimination and or malice as alleged by the Petitioner or at all.
70. That the Petitioner was deployed to work at the Flight Operations Library and did not fly after June 2011.

### **Lay over allowance**

71. That Layover allowance is paid to all the 1<sup>st</sup> Respondent's flying crew to cover the cost of staying outside Kenya. This is based on a guaranteed nine (9) nights per month while the rate is based on one's job grade.
72. That the petitioner was issued a letter dated 2<sup>nd</sup> July 2012 stopping the Layover allowance due to the prolonged grounding since June.
73. The 1<sup>st</sup> Respondent denies that the Petitioner is incapacitated and or that he is unable to stand or sit as alleged or at all.

That the 1<sup>st</sup> Respondent settled the medical bills of the Petitioner upon his injury on 4<sup>th</sup> May 2010.

74. That the injury was not as a result of any negligence or the system of work and that the 1<sup>st</sup> Respondent complied with the provisions of the Occupational Safety and Health Act. The 1<sup>st</sup> Respondent was therefore neither negligent nor in breach of duty owed to the occupier and the Petitioner in particular.
75. That the Petitioner did not report any health hazards and risks at work at the place as per the provisions of the Occupational Safety and Health Act.

That the injuries sustained by the Petitioner are attributable to him having failed and / or neglected to ensure his own safety and health at work.

76. That once the employment of the Petitioner ceased by fact of declaration of redundancy, the medical cover automatically ceased for employees. Employees contribute 1% of their salary to the

medical scheme.

77. The 1<sup>st</sup> Respondent has never at any time threatened or violated the petitioner's right to life guaranteed under Article 26 of the Constitution.
78. In the event of an occupational injury, the employee first utilize medical allocation provided under the medical cover taken out pursuant to the Work Injury Benefits Act available to the employee based on his position and grade. This is regardless of whether the illness is occupational or not. Treatment is done and bills sent to the insurance for reimbursement. This is an internal arrangement. There is therefore no demarcation on medical for WIBA or normal medical treatment. The letter of Kshs.200,000 at page 86 of the Petition was a letter seeking to have a sum of Kshs.200,000 expended on the Petitioner for the years stated therein recovered from the insurer. The letter was therefore not in any way a follow up on or seeking to have the petitioner retired on medical grounds as alleged or at all.
79. All the allegations of different treatment and / or discrimination are denied by the 1<sup>st</sup> Respondent in view of the foregoing. That the 1<sup>st</sup> Respondent took proper and fair administrative steps to deal with the Petitioner's case in accordance with **Article 47** of the Constitution. That the conduct by the 1<sup>st</sup> Respondent was lawful, fair and consistent with fair labour practices provided under Article 41 of the Constitution.

That no case for violation of the Petitioner's right to information under **Article 35(1)(b)** of the Constitution has been made out.

That the 1<sup>st</sup> Respondent did not deliberately deny the Petitioner relevant documents relating to his injury and claim and that upon issuance of an order by the Court in Industrial Cause No. 114 of 2013 on 15<sup>th</sup> may 2013, to furnish, the Petitioner with all relevant documentation, there has not been any inordinate delay in doing so.

### **Viva voce evidence**

80. The parties supported their respective cases with viva voce evidence. The Claimant testified extensively on the case and was closely and extensively cross-examined by counsel for the Respondent.
81. The Respondent on the other hand called Dr. Jane Njeri Munyi the Resident Medical Doctor and designated DOHS practitioner. She testified in support of the averments already set out in this judgment and was also cross-examined by counsel for the Petitioner.
82. RW2 was Linda Itindi, Manager Industrial Safety and Environment also testified for the 1<sup>st</sup> Respondent and in support of the averments set out herein before by the 1<sup>st</sup> Respondent regarding this matter.
83. In particular, RW1, Dr. Munyi described the procedure followed by the 1<sup>st</sup> Respondent in dealing with a case of retirement on medical grounds as follows;

An employee ought to have been on prolonged sick leave for over 90 days if the employee is unionised and 180 days for management.

84. The next step depends on whether the employee continues with treatment and the Report by the Doctor.

The company continues to support the treatment while the employee is on half pay for three (3) months, where continued treatment is required.

85. If treatment is still required the employee stays on half pay for further three months and if the employee is unable to resume work thereafter, recommendation is given by Human Resource Director to convene a medical Board comprising of three (3) independent Doctors excluding the company Doctor.
86. The three Doctors give their opinion upon examining the employee and if at least two (2) give a recommendation for retirement, the 1<sup>st</sup> Respondent takes a decision on the matter accordingly.

- The views of the treating doctor are essential in this regard.
87. With respect to the Petitioner's case, RW1 recalled the history and the various steps taken by the 1<sup>st</sup> Respondent. The conclusion by Dr. Munyi is that 1<sup>st</sup> Respondent was not in a position to assess the final disability of the Petitioner given the various reports by Professor Gakuu and those by Dr. Byakika. This is in view of the fact that the Petitioner declined to undergo neurosurgery as advised.
  88. The 1<sup>st</sup> Respondent did not therefore convene a medical Board yet the 1<sup>st</sup> Respondent was still providing treatment for the Petitioner even though Dr. Gakuu had proposed retirement on medical grounds in the long term.
  89. RW1 stated that she had recommended Dr. Muinde to give an opinion on the ability by the Petitioner to perform flying duties. Following the advice by Dr. Muinde, the Petitioner was removed from flying duties.
  90. RW1 also told the Court that she discussed with the Petitioner why he did not want to take surgery before she recommended that the Petitioner be redeployed to lighter duties.
  91. RW1 denied that she summoned the Petitioner and his wife and told them that the Petitioner would be retired on medical grounds. RW1 said that she thought that the Petitioner would accept to be operated on as he was not responding to conservative treatment.
  92. Dr. Munyi added that she referred the Petitioner to a visiting Doctor from India, by the name Dr. Billal Shah, a spine specialist who visited Nairobi every three months. RW1 told the Court that, she did not get a report from Dr. Shah.
  93. RW1 withstood very vigorous cross-examination by counsel for Petitioner. RW1 said she was not aware that the Petitioner was referred to Dr. Musau and did not see Dr. Musau's report. RW1 relied on the report of Dr. Byakika who recommended a final assessment after surgery. That is how she closed the matter by a letter dated 20<sup>th</sup> February 2012 by deploying the Petitioner to lighter duties. RW1 said that she was not consulted by management of the 1<sup>st</sup> Respondent before they retrenched the Petitioner and other employees of the 1<sup>st</sup> Respondent. RW1 did not know the performance of the Petitioner upon being deployed to lighter duties.
  94. RW2, Linda Itindi testified on the handling of the DOSH Claim by the 1<sup>st</sup> Respondent. She told the Court once a report is made, the Department fills a form called DOSH I. the employee has no role in the filing of that form.
  95. The employee is given DOSH II to take to the treating Doctor with a copy of DOSH I. The employee returns the forms to Insurance Department. Then the Safety Office is notified for onward transmission to the Director. The Doctor fills DOSH II and states the percentage of disability awarded. The Director then fills DOSH IV.
  96. In the case of the Petitioner, DOSH I was not filled. RW2 did not know who filled the form at page 105 of the Claim dated 7<sup>th</sup> March 2012. The Accident occurred on 4<sup>th</sup> ay 2010 and the Doctor gave an assessment on 4<sup>th</sup> January 2011. RW2 said that allowances are included in DOSH I for some of the employees. This depends on whether the employee is unionsable or in management.
  97. DOSH IV was filled and is on page 107. It gave a figure of 9,939,161. An employer or employee may challenge the assessment by making a formal Appeal to the Director failing which the assessment is conclusive, RW2 stated. RW2 stated further that, the Department of Industrial Safety and Environment at the 1<sup>st</sup> Respondent notifies DOSH within seven (7) days after the injury. RW2 added that the 1<sup>st</sup> Respondent is very effective in handling safety issues.
  98. Under cross-examination, RW2 insisted that an employee is not involved in filling DOSH I. The Department gets the employees details from the records. RW2 said if there is an error on the salary applicable in the Claim, in the DOSH I, an employee may challenge at the time the employee gets the Form DOSH I from the Insurance Office to take to the treating Doctor. RW2 did not know if the Petitioner got a copy of DOSH I from the Insurance Office. RW2 said the salary filled in the form is per the salary package of the employee. That the Human Resource Department is responsible of ensuring that the correct salary is filled in the form. That the Department of Safety did not fill DOSH I for the petitioner.
  99. RW3 was Lilian Halima Sakali, Cabin Manager of the 1<sup>st</sup> Respondent. Her work is to audit flights to ensure safety standards are adhered to and that there is no wastage on Board. RW3 told Court that she always liaised with the crew to perform her work. That the inflight crew undergo a

- three month inflight training which includes safety procedures and how to handle equipment in the flight.
100. RW3 knew the Petitioner well and stated, the petitioner was trained on handling trolleys, emergency equipment among other duties. They are trained to ensure the trolley is serviceable. The crew do a preflight check for example, trying to move a trolley, if, the trolley is defective, it is removed upon informing the Lead Cabin Attendant. This is recorded in a voyage report and in the cabin log where all issues are recorded. The trolley could be tagged to show it is not serviceable.
  101. On the material day of 4<sup>th</sup> May 2010, there is a report on trolleys. None was defective and none was off loaded. What is recorded is that Julius felt a pain on his back. It is not recorded that he was pulling a trolley when he experienced the pain, the witness said under cross examination. The information in the voyage report is that the Petitioner snapped and felt a sharp pain when he was sent to pull a trolley. RW3 said that the Petitioner must have been doing a check. She said that the weight of the trolley depends on the load in it.
  102. RW4, Mrs Angela Nderu, an Operational Excellence Manager of the 1<sup>st</sup> Respondent told the Court that currently she was responsible for running special projects touching on inefficiencies within the Airline. Previously she was the Inflight Performance Manager. She managed cabin crew and ensured quality services and products on board. The Petitioner worked in her cluster. She was his Manager and she was aware of his injury between 2010 – 2012.
  103. RW4 told the Court that during the period the Petitioner was unwell he had adhoc illnesses and also had a back injury. That the Petitioner was treated and he proceeded on sick leave. After 2010 incident he resumed inflight duties but only for a short while and went on sick-off again.
  104. The 1<sup>st</sup> Respondent got a medical report to ground the Petitioner to enable him recover. This was done procedurally and was not based on discrimination.
  105. RW4 said that she did not know whether the Petitioner's earnings changed. The witness testified that the voyage report for 4<sup>th</sup> May 2010 did not show that there was unserviceable trolley. The witness said the first point of report is the Flight Purser who is directly in charge of the cabin crew. ASR is then filled by the Captain. The Flight Purser determines the location of each crew.
  106. The witness said that she was aware of the circumstances under which the Petitioner got sick. She added that a trolley is about a metre high and its weight depended on the load. She said that, a trolley is quite heavy but manageable. She was not aware if the trolley was examined and removed after the incident.
  107. RW4 said that the deployment of the Petitioner did not affect his remuneration because the Petitioner still held the position of inflight crew as per the letter of deployment. RW4 said further, that the Petitioner continued to receive layover allowance because he was grounded for injury purposes. RW1 added that the layover allowances was part of the Petitioner's and other inflight crew's standard monthly payment.
  108. RW5 was M/S Lucy Munyu, the Head of Employee Relations in the Human Resource Department. She told the Court that she was familiar with the Respondent's Human Resource Manual.
  109. In this respect, she told the Court that the document guided sick leave for employees. In terms thereof, an employee was entitled to thirty (30) days paid sick leave. If the sick leave went beyond thirty (30) days, the salary is deducted.
  110. The witness told the Court that the Petitioner was on sick leave from March to September 2012. The Petitioner was thereafter retrenched. The witness added that, when an employee is on sick leave emanating from a work injury, salary is not deducted even after the thirty (30) days period. The payment is done until separation. This is what happened to the Petitioner. The witness said that the Petitioner was treated fairly and without discrimination in the circumstances.
  111. RW5 stated that retirement on medical grounds is covered under Clause 8.6.5. of the Human Resource Manual at page 66.
  112. In terms thereof, the company reserves the right to retire an employee on medical grounds upon approval by a medical Board. The witness said that, had the Petitioner been retired on medical grounds, he would have been entitled to two (2) months' salary in lieu of notice which is normal and that there is no special package provided for in the Human Resource Manual and CBA for that purpose.
  113. The witness refuted assertion by the Petitioner that Clause 48 of the CBA at page 17, provided six (6) months' salary in lieu of notice in case of retirement on medical grounds stating that Clause

- 48(a)** provides for six (6) months' notice on normal retirement at sixty (60) years. She added that, the CBA was silent on retirement on medical grounds.
114. Furthermore **Clause 25(e)** at page 11 of the CBA provides for a situation where an employee is unable to attend work for a continuous period. The maximum period allowed is one hundred eighty (180) days which days are then set-off against the leave days entitlement or employment is terminated.
115. The witness denied any sort of discrimination against the Petitioner until he left in September, 2010 upon retrenchment. The witness added that the Petitioner has been paid his final dues including six (6) months' salary being compensation for loss of employment ordered by the Court of Appeal.
116. The witness concluded that the Petitioner was not productive to the 1<sup>st</sup> Respondent at the time he was retrenched since he was constantly on sick leave, yet continued to sit in union meetings for long hours during negotiations. The medical cover for the petitioner was in place until he left the employment.
117. With regard to the group accident cover available to all employees, the witness said that the employees were entitled to six (6) times of the annual basic salary as compensation for occupational accidents. This is administered by a third party.
118. RW4 concluded that no accident was reported in respect of the Petitioner and by a letter dated 20<sup>th</sup> June 2012, the Petitioner's Claim for compensation under group insurance policy was rejected.

## **Determination**

### **Issues**

119. The following issues stand for determination in this matter.
- i. Was the Petitioner's right to equality and freedom from discrimination on account of health status and / or disability violated by the failure by the Respondent to retire the Petitioner on medical grounds?
  - ii. Did the Petitioner suffer permanent disablement in the course of employment due to the 1<sup>st</sup> Respondent's negligence and / or breach of its statutory duty?
  - iii. Is the act of retrenching the Petitioner *resjudicata*, by fact of determination in Industrial Cause No. 1616 of 2012 and the Court of Appeal?
  - iv. Was the 1<sup>st</sup> Respondent in breach of statutory duty and failing to comply with the provisions of the occupational safety and Health Act 2007 and thereby imperiling the Petitioner's right to wholesome life?
  - v. What remedies if at all are available to the Petitioner?

### **Issue I**

120. The Court has carefully considered the evidence before it on the history of the injury suffered by the Petitioner as narrated by the protagonists in this matter and has come to the following conclusion of fact:
- i. That the Petitioner sustained a serious back injury on 4<sup>th</sup> May 2010 while performing his duties as a Cabin Crew. Before he became unconscious, he communicated to his colleagues Jimnah Muchene about the accident who notified the Flight Purser and the Captain. Other employees present were Stellah Boya and Fenwick Oolo.
  - ii. The incident was captured on the Voyage Report by the Flight purser whose duty included recording of all occurrences inflight.
  - iii. The Petitioner was immobilized and was offloaded from the flight and taken to Aga Khan Hospital where he was hospitalized for two (2) days and upon discharge remained bedridden for four weeks.
  - iv. The Petitioner was examined by various doctors including Prof. Gakuu a consultant orthopedic

and trauma Surgeon who constantly provided the Petitioner with medication and physiotherapy. Prof. Gakuu recommended that the Petitioner be assigned lighter duties and not lift weights exceeding 5kgs, conduct dull exercises, sit or stand for long hours. As a result the Petitioner was redeployed from inflight services to ground services.

By a letter dated 4<sup>th</sup> January 2012, Prof. Gakuu recommended that the Petitioner should benefit from early retirement on medical grounds in the long run as he was not keen on surgery.

- v. The Petitioner was also seen by Doctor Timothy Byakika a consultant or orthopaedic surgeon on 23<sup>rd</sup> February 2012 and the doctor prepared a report on 29<sup>th</sup> February 2012. Dr. Byakika recommended neurosurgery be done on the Petitioner and he referred the Petitioner to Doctor C.K. Musau, a consultant neurosurgeon for the purpose.
- vi. No surgery was done on the Petitioner and the Petitioner told the Court this was because, Doctor C.K. Musau on three occasions advised the Petitioner not to risk the operation, because of the possibility of paralysis.

The Doctor was not called to testify nor was a report availed to the Court. This version remains uncontroverted therefore.

On 13<sup>th</sup> March 2013 Prof. Gakuu further recommended that the Petitioner be retired on medical grounds in the interest of his health, however, the Respondent made a decision not to retire the Petitioner on medical grounds because there was no conclusive evidence that he had permanent disability based on Dr. Byakika's recommendation that the Petitioner undergoes neurosurgery.

- vii. A medical Board to determine whether the Petitioner was legible for retirement on medical grounds was therefore not constituted which is a mandatory requirement in terms of the Human Resource Manual of the Respondent.
- viii. Meanwhile the Petitioner was declared redundant with many other employees of the Respondent and has since received the full package provided under the redundancy exercise. The Petitioner further received six (6) months' salary as compensation for the unlawful and unfair termination pursuant to orders of the Court of Appeal.

- 121. It is the Courts considered view that the 1<sup>st</sup> Respondent was under no obligation to retire the Petitioner on medical grounds until it had fully satisfied itself that the Petitioner had sustained permanent disability and therefore was unable to work.
- 122. That the failure by the Petitioner to access neurosurgery available to him through medical schemes provided by the 1<sup>st</sup> Respondent did not help matters.
- 123. The Petitioner cannot turn around and blame the 1<sup>st</sup> Respondent for the failure to retire him on medical grounds given the circumstances of this case.
- 124. The matter of declaration of redundancy of the Petitioner by the 1<sup>st</sup> Respondent is *resjudicata*, the same having been fully ventilated in the Industrial Cause No. 1616 of 2012 and by the Court of Appeal and determined in favour of the Petitioner and his colleagues. The prayer by the Petitioner to be reinstated back to his work by the Respondent was refused by the Court. The Petitioner cannot therefore have a second bite on the cherry in this respect.

## **Issue II**

- 125. On the issue whether the Petitioner suffered permanent disability in the course of employment due to the 1<sup>st</sup> Respondent's negligence and / or breach of his statutory duty, the Court has this to say:

The evidence before Court clearly shows that the Petitioner suffered permanent disability due to an injury sustained in the course of his duty. However, no particulars of negligence or breach of statutory duty by the 1<sup>st</sup> Respondent are set out in the body of the Petition and as a matter of fact no sufficient evidence was adduced by the Petitioner or at all to show that the injury he sustained on the

4<sup>th</sup> May 2010 while performing cabin crew duties was as a result of any negligence and / or any breach of duty by the 1<sup>st</sup> Respondent.

126. The real issue here is whether or not the Petitioner was properly compensated under the Work Injury Benefits Act, upon submission of the Claim to the Director of Occupational Safety and Health. If the compensation was not proper, whether this was a result of breach of statutory duty by the 1<sup>st</sup> Respondent.

127. The Petitioner relies on **Section 21(3)** of the Occupational Safety and Health Act, which provides;

*“where an accident in a work place causes non-fatal injuries to a person therein, the employer shall send to the area Occupational Safety and Health Officer, a written notice of the accident in the prescribed form within seven days of the occurrence of the accident.”*

128. The employee under the Section is obliged to give notice of the accident to the employer verbally. In this case the Petitioner made the report before he was rushed to hospital.

Under **Section 22(1)**

*“an employer shall report an accident to the Director in the prescribed manner within seven days after having received notice of an accident or having learnt that an employee has been injured in an accident.”*

129. There is no doubt that the 1<sup>st</sup> Respondent was notified of the injury sustained by the Petitioner immediately the same occurred. It cannot be an excuse that this information was not immediately given to the relevant department of the 1<sup>st</sup> Respondent.

130. The 1<sup>st</sup> Respondent failed to act timeously to process the claim in respect of the injury suffered by the Petitioner on 4<sup>th</sup> May 2010. It was not until 2012 when the claim form was sent to the Director DOSH.

131. Secondly, the 1<sup>st</sup> Respondent provided erroneous particulars of salary to the Director DOSH and as a result an erroneous assessment of compensation to the Petitioner was made. RW5 told the Court that allowances paid monthly constituted remuneration for purpose of assessment of compensation.

132. The Respondent did not provide the Petitioner with the information submitted to the Director DOSH timeously, even after persistent demand by the Petitioner and as a result, the Petitioner was not aware that erroneous remuneration was used in the assessment of his claim to his loss and detriment.

133. The assessment was done on 21<sup>st</sup> March 2012 for a sum of Kshs.2,208,489.00 but this information was not given by the 1<sup>st</sup> Respondent to the Petitioner in its letter dated 30<sup>th</sup> April 2013, to the Petitioner in which the 1<sup>st</sup> Respondent simply asked the Petitioner to enquire for information from DOSH.

134. The petitioner wrote a further reminder to be provided with information on his claim on 7<sup>th</sup> May 2013 but again the 1<sup>st</sup> Respondent did not provide the information sought by the Petitioner.

135. It is the Petitioner's case which the Court agrees with that, the 1<sup>st</sup> Respondent was under obligation to provide information to the Petitioner to enable him pursue his right to proper compensation. That the 1<sup>st</sup> Respondent being a government institution was obliged under **Article 35(1)a** of the Constitution to give access of this information to the Petitioner.

136. The 1<sup>st</sup> Respondent failed to respond to the letters of request by the Petitioner to his loss and detriment. Only part of the information was later availed in the replying affidavit of the 2<sup>nd</sup> Respondent filed on 18<sup>th</sup> June 2013.

137. The Court finds that the 1<sup>st</sup> Respondent was in breach of its statutory obligation by its failure to timeously file the claim for compensation in respect of the Petitioner and by providing wrong information to the Director DOSH to the loss and detriment of the Petitioner and the Petitioner is

- entitled to compensation in this respect.
138. In the case of **Law Society of Kenya V. Attorney General and Another, Nairobi Petition No. 185 of 2008 [2009] eKLR**, it was held that submission of the DOSH is what leads to an inquiry process by the Director under the provisions of the work injury Benefits Act.
139. That DOSH I need not necessarily be completed by the affected employee as the Court was confirmed by RW5. The information in the form is obtained by the employer from the employee's employment records.
140. The payslips produced by the Petitioner are such relevant records ordinarily in the possession of the employer and ought to have been used to provide the current remuneration of the Petitioner but in this case was ignored by the 1<sup>st</sup> Respondent.

## **Compensation**

141. The 1<sup>st</sup> Respondent is bound to provide the correct remuneration to DOHS and the 2<sup>nd</sup> Respondent is bound to use the remuneration in assessing compensation under **Section 30(1)** of WIBA 2007 which calculation is based on ninety-six months earning while **Section 37** provides for the manner of calculating earnings which should include;
- the value of any rations, living quarters or both supplied by the employer to the employee on the date of the accident or report of disease;
  - allowances paid regularly; and
  - overtime payment or other special remuneration of a regular nature or for work ordinarily performed.
142. In the case of the Petitioner, a medical certificate had been issued denoting a 45% permanent disability in the month of June 2010 which in terms of **Section 10(6)** of WIBA is considered a serious disablement.
143. The Petitioner's pay including regular allowances in the month of May 2010 when the injury occurred and in March 2012 when the 1<sup>st</sup> Respondent alleges to have submitted the DOSH I form is  $Kshs.29,834.004.450 \times 5,608,46 \times 65,205 = 117,157.86 \times 96 \text{ months} \times 0.45 = Kshs.5,061,219$ .
144. Due to the failure by the 1<sup>st</sup> Respondent to provide correct information, the claim was assessed at Kshs.2,208,489 out of which kshs.1,433,580 was paid pursuant to a Court order.
145. The Court finds that the Petitioner is entitled to his full entitlement as calculated above less the amount already paid. The Court therefore awards the Petitioner as against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents Kshs.3,627,639.00
146. This Award should absorb the 1<sup>st</sup> Respondent from any additional award of damages / compensation for breach of statutory duty which led to the flawed assessment of the compensation under WIBA.
147. The Claim for compensation for negligence fails in view of the finding of the Court on this issue.
148. Furthermore, the Court finds that the Petitioner has not established violation of constitutional rights of the Petitioner by the 1<sup>st</sup> Respondent except in respect of the failure to provide the correct and timeous information to Director DOSH and to the Petitioner when requested by his Advocate for purposes of making a proper assessment of compensation under WIBA. The Court has already made an award in respect of the erroneous assessment of compensation and that suffices. The Court makes no further award for alleged violation of Petitioner's constitutional right to information by the 1<sup>st</sup> Respondent.
149. In the final analysis the Court awards the Petitioner as against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent jointly and severally the balance of compensation under the Work Injury Benefit Act, 2007 Kshs.3,627,639.00.
150. The amount is payable with interest at Court rates from the date of filing this suit till payment in full.
151. The Petitioner is awarded the costs of the suit.

**Dated and Delivered at Nairobi this 31<sup>st</sup> day of July, 2015.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**