



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**  
**AT MOMBASA**  
**CAUSE NO. 522 of 2014**

**BETWEEN**

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

**VERSUS**

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

**Rika J.**

**Court Assistant – Mr. Kombe**

**Mr. Oddiaga Advocate instructed by Stephen Oddiaga & Company Advocates for the Claimant**

**Mr. Njeru Advocate instructed by Njeru & Company Advocates for the Respondent**

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**RULING**

1. The Claimant filed an unusual Application dated 17th November 2014. He seeks an order compelling the Respondent, his Employer of 24 years, to retire him on medical grounds. The Application is anchored on Section 12 of the Industrial Court Act 2011, and Article 41 of the Constitution of Kenya.
2. In the main Claim, he seeks Special, General and Exemplary Damages, Compensation, an Order compelling the Respondent to retire him on medical grounds, Costs, Interest and Any Other Suitable Reliefs.
3. He claims as a result of noise pollution at the Respondent Company, he developed difficulty in hearing. He holds the illness is occupational, and annexed several Medical Reports to his Affidavit, in support of his position.
4. The Respondent acknowledges the Claimant has a hearing problem, but states it does not have conclusive evidence that this problem warrants retirement of the Claimant on medical grounds. The Claimant's condition was present on his recruitment in 1990; it was not sustained in occupation. The Respondent cannot retire the Claimant on medical grounds, without exposure to a Claim for unfair termination of employment.

5. The Application was heard on 8th December 2014.

*The Court Finds:-*

6. There is adequate medical evidence that the Claimant has profound loss of hearing. This evidence includes Medical Reports prepared by the Respondent's Doctors. It is medical evidence which is known to both Parties.

7. The letter dated 17th March 2014 from the Respondent's General Counsel B. Kanyagia to the Claimant's Advocate, acknowledges that the Claimant has a health problem. The letter states that the Claimant was offered by the Respondent retirement on medical grounds, which he declined in favour of further medical consultation undertaken at the cost of the Respondent.

8. The question at this stage is not whether the Claimant's illness came before or after his employment, or whether it is an occupational illness; the question in the view of the Court, is whether the Claimant is ill, regardless of causation, to merit retirement on medical grounds.

9. The answer is in the affirmative. Medical evidence overwhelmingly shows the Claimant is hard of hearing. The Respondent's own Doctor Mukesh Shah recommended in 2011 that the Claimant has suffered loss of hearing and should be retired. The Claimant has been moved from one department to the other by the Respondent, in attempts at reasonable accommodation. He has been treated and offered Hearing Aids, at the expense of the Company. He has been offered the option of retirement on medical grounds.

10. The Court does not see why the Respondent would wish to retain the Claimant today, if the Respondent was ready to let him retire in the past. Why would an Employer insist on retaining an Employee who has been certified to have a longstanding hearing problem? The Claimant's medical condition from the time Dr. Mukesh Shah recommended he be retired, has not changed. A separation based on medical grounds appears to the Court mutually suitable, and would not result in a Claim for unfair termination, as apprehended by the Respondent.

11. Clause 5.2(b) of the Respondent Employees' Hand Book allows the Respondent to retire an Employee on medical grounds.

IT IS ORDERED:-

***(a) The Respondent shall within 30 days of this Ruling retire the Claimant on medical grounds, pursuant to Clause 5.2 (b) of the Lafarge East Africa Employees' Hand Book.***

***(b) The matter be mentioned on a date to be agreed upon by the Parties for directions on the hearing of the main Claim, and for confirming compliance with the order on retirement.***

***(c) Parties are encouraged to, in the meantime, negotiate settlement of the other issues raised in the substantive Claim.***

***(d) Costs of the Application in the Cause.***

Dated and delivered at Mombasa this 18th day of December 2014.

James Rika

Judge