



**Thuku v Mini Bakeries Limited (Cause 950 of 2018)  
[2024] KEELRC 1349 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1349 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 950 OF 2018  
NZIOKI WA MAKAU, J  
JUNE 6, 2024**

**BETWEEN**

**PETER MWANGI THUKU ..... CLAIMANT**

**AND**

**MINI BAKERIES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. Through the Memorandum of Claim dated 4<sup>th</sup> May 2018, the Claimant filed this suit against the Respondent for the unfair or unlawful dismissal from employment and non-payment of terminal dues and compensatory damages. The Claimant averred that the Respondent employed him as a Dough Maker from July 2000 and he continuously served the Company diligently until his dismissal, with his last monthly salary being Kshs. 22,000/-. He averred that from 2000 to 2011, the Respondent never remitted his NSSF dues to the relevant authorities and he neither proceed for his annual leave nor was paid in lieu thereof.
2. The Claimant's case was that while on duty at work on 18<sup>th</sup> August 2016, he slid and fell on his back sustaining very severe injuries as the trolley and the flour he was loading onto it both fell on him. He was initially treated at Marie Stopes Clinic in Eastleigh and then referred to Kenyatta National Hospital (KNH) for further treatment and after recuperating, the Respondent's management insisted he provides them with the Medical Report from KNH. The Claimant averred that despite supplying the Respondent with the said Medical Report as advised, the management terminated his services on grounds of ill health. He contended that he had done nothing wrong to warrant the termination and no notice and reason were issued to him prior to the intended dismissal from employment. He therefore prays for Judgment against the Respondent for a declaration that his dismissal from the Respondent's service was unfair and unlawful, an order for the Respondent to pay him his terminal dues, compensatory damages totalling Kshs. 638,000/- and costs with interest thereon.



3. The Respondent replied in its Memorandum of Response dated 9<sup>th</sup> May 2019 that the Claimant's claim, if any, is time barred. It averred that without prejudice and in the alternative, the Claimant was its employee from 5<sup>th</sup> April 2011 and a member of a union, that it paid him all his dues for 2011 as set out in the CBA and remitted his NSSF contributions. While admitting it requested for medical reports from the Claimant, the Respondent denied having terminated his services upon receiving the medical report, as alleged. According to the Respondent, it followed due process in arriving at the decision to lawfully retire the Claimant on grounds of illness. That the Claimant had taken sick-offs exceeding the 90 days allowed under the CBA and that having completed one (1) year of treatment, he was not fully recovered to resume duty. The Respondent asserted that the Claimant all along knew of the reasons for his retirement as the same was explained to him at a hearing of ill health proceeding on 17<sup>th</sup> May 2017 and a notice of dismissal issued to him after the hearing. That notably, the Claimant attended the Disciplinary/Ill Health Retirement Committee together with his witness after they were well informed of the agenda of the hearing. The Respondent further averred that thereafter, through a letter dated 19<sup>th</sup> May 2017, it referred the Claimant to KNH for a medical examination to ascertain his health status. That the outcome of the said examination as stated in the Medical Report dated 8<sup>th</sup> September 2017 indicated that the Claimant had not fully recovered to resume duty and that he would need medical attention. That this deemed it necessary for the Claimant to be retired from his duties on grounds of ill health, which it therefore did by a letter dated 12<sup>th</sup> September 2017.
4. The Respondent denied the claim for notice pay, stating that the Claimant was paid two months' salary in lieu of notice. It asserted that the claims for payment in lieu of untaken leave and for service gratuity are unfounded and time barred and that further and in the alternative, service gratuity fell due daily pursuant to the CBA. The Respondent stated that the Claimant was paid all terminal benefits owed to him for the period worked between 1<sup>st</sup> May 2011 to 15<sup>th</sup> September 2017 and that his pension was paid by way of cheque. It argued that the Claimant accepted the said payment in full and final settlement of all his dues and is therefore estopped from lodging any claim. The Respondent thus prays for the Court to declare that the Claimant's retirement from its employ on grounds of ill health by the Respondent was legal and he is not entitled to the claim sought. It further sought that the Claimant pays for the cost of this cause.
5. The Respondent also filed a Witness Statement dated 15<sup>th</sup> September 2023 by Mr. Hashim Mwaura Mwangi who stated that on 12<sup>th</sup> May 2017, the Claimant was served with a notice to show cause why he should not be retired on medical grounds, which he duly received and signed. He denied the Claimant's claim for 2000 to 2011 NSSF as the Claimant was not registered with NSSF, was not an employee of the Respondent and his claim for service cannot be sustained because he was pensionable.

## **Evidence**

6. The Claimant testified that he was not called for any disciplinary hearing and the Respondent never gave him any show cause as alleged. He asserted that the doctor did not recommend his termination and that his services were terminated on medical grounds yet he could work. The Claimant stated under cross-examination that he was employed in May 2011 which was also when he joined NHIF, Pension and NSSF. He confirmed having received payment for two months' notice, leave for days not taken and one month's salary. Further, that his back has never been the same ever since he got the injury and that he had received treatment for over one year. He denied having signed any document or minutes of any meeting and stated in re-examination that the Company did not get him to see any doctor. On the other hand, the Respondent's witness, Mr. Hashim Mwangi, stated under cross-examination that as per the medical report, the doctor recommended that the Claimant's services should be terminated on medical grounds.



## Claimant's Submissions

- 7 The Claimant submitted that section 45 of the *Employment Act*, 2007 stipulates that no employer shall terminate the employment of an employee unfairly and that for termination to be deemed fair, the reason for the termination must be valid and fair, and the termination must be in accordance with fair procedure. He argued that sickness or injuries sustained in the course of employment by an employee is in itself not a fair reason for termination and that for termination on medical ground to be regarded as fair, the employer must prove that they acted fairly and objectively in reaching the decision. He cited the case of *Kennedy Nyanguncha Omanga v Bob Morgan Services Limited* [2013] eKLR in which the Court set out the conditions that an employer must satisfy before terminating an employee's services on medical grounds, including showing support to the employee to recover and resume duty, subjecting the employee to a specific medical examination aimed at establishing the employee's ability to resume work in foreseeable future, and giving the employee specific notice of the impending termination.
8. It was the Claimant's submission that the Respondent relied on a treatment note in terminating his employment without subjecting him to any specific medical examination to establish his ability work. That apart from medical treatment notes, the Respondent did not provide any detailed medical report confirming that he could not perform his duties and that the Treatment Note it relied upon clearly indicates that the Claimant reported mild improvement but still needed medical attention. The Claimant argued that for this Court to make a finding that the termination was fair, it must be satisfied that the employer made all reasonable efforts to accommodate the infirm employee, including assigning him lighter or alternative duties. That this Court should therefore find that the Respondent's failure to follow fair procedure rendered the termination unfair within the meaning of section 45 of the *Employment Act*, 2007 and further considering that the Respondent did not justify its actions. The Claimant concluded that the unfair and inhumane manner in which the his employment was terminated justifies full compensation with interest and costs as prayed for in the Memorandum of Claim.

## Respondent's Submissions

- 9 The Respondent submitted that it had reasonable cause to terminate the services of the Claimant because firstly, clause 32(b) of the CBA for the period provides that an employee may be retired on grounds of ill health upon receipt of a medical certificate by a medical doctor. That therefore when it received the doctor's report from KNH on the Claimant, it proceeded to pay him his dues as set out in clause 32(c) of the CBA. Secondly, it had demonstrated to this Court that the Claimant was not productive and always away on sick leave and that there was no evidence on record that the Claimant was capable of performing his duties. Thirdly, section 28(2) of the Workmen Benefits Act provides that the maximum number of months a workman can receive periodical payments is 12 months. That in this case, the Claimant resumed work and continued receiving his wages for more than 12 months even when he had not fully recovered and was underperforming. That in essence, the Respondent accommodated him but there was no improvement in his performance, which was affecting production. The Respondent urged this Court to thus hold that there is sufficient evidence on record to support the Claimant's retirement on basis of incapacity as a result of ill health.
10. The Respondent further submitted that the Minutes of the meeting held with the Claimant were produced as Exhibit 8 and that its correspondence to KNH and the resultant Medical Report are in Exhibit 11. The Respondent submitted that the letter of termination produced as Exhibit 10 fully explained to the Claimant the reasons for his retirement on medical grounds and that he had exceeded the maximum number of sick off days. It was submitted that the doctor had certified he had made no



progress 16 months after treatment and needed further treatment. It was the Respondent's submission that the Claimant had failed to prove his claim for payment in lieu of leave not taken from 2000 to 2010 and in any case, the said claim is time barred by virtue of the provisions of section 90 of the *Employment Act*. As regards the claim for service gratuity, it noted that the same is unsustainable further because the Claimant was contributing to NSSF and was a member of the Respondent's pension scheme and thus not entitled to any gratuity by virtue of the provisions of section 35(6) of the *Employment Act*.

11. The Claimant is in a precarious position on account of an accident at the workplace. It is common ground that he got injured while on duty. It is asserted the Claimant was given sick off to the extent he exceeded the days one can get for the same. It is apparent the Claimant was unable to resume work to the same level as he had in the past. The retirement of an employee on account of ill health is not expressly provided for in the *Employment Act*. What is provided for under section 41 is grounds for dismissal for physical incapacity. Under the provision, an employer is required to give an employee who is deemed to have a physical incapacity, the same safeguards and protection for the employee as would be done in cases of an employee facing any charges of misconduct.
12. The Claimant had been on treatment since 16<sup>th</sup> August 2016. He was off duty for quite a long while and the Claimant was referred by the Respondent for a medical check on 19<sup>th</sup> May 2017 at Kenyatta National Hospital. The aim of the medical examination was to ascertain the Claimant's health status and the outcome of the examination contained in the Medical Report dated 8<sup>th</sup> September 2017 was that the Claimant had not fully recovered to resume duty. It indicated the Claimant would need additional medical attention and it was thus deemed necessary for the Claimant to be retired from service on grounds of ill health. The Respondent issued the letter of termination on 12<sup>th</sup> September 2017 dismissing the Claimant on grounds of medical incapacity.
13. In the case of *Kennedy Nyanguncha Omanga v Bob Morgan Services Limited supra*, cited by the Claimant, Ndolo J. held thus:

While employers are entitled to terminate employment on the ground that an employee is too ill to work, they must exercise due care and sensitivity. First, the employer must show support to the employee to recover and resume duty. Second, once the employer begins to consider termination, they must subject the employee to a specific medical examination aimed at establishing the employee's ability to resume work in the foreseeable future. Treatment notes and sick off sheets do not qualify as medical reports for purposes of termination of employment on medical grounds. Third, the employer must give the employee specific notice of the impending termination. Failure to follow this procedure even where there is overwhelming evidence of an employee's inability to work amounts to unfair termination for want of procedural fairness.

[Emphasis provided]

14. The Claimant was provided ample time to recover, the Respondent made all the necessary steps to cater for the Claimant's needs. In specific instance, the Claimant was subjected to an examination to establish his capacity to resume work. The report was not indicative of ability by the Claimant to resume work. The Respondent, in my considered view, did all that was required of it in law before terminating the services of the Claimant. As a result, I do not find any fault on its part to warrant a sanction by way of payment of any relief to the Claimant. The Claimant sadly did not press any claims for leave not taken between 2000 and 2010. Those claims were stale within 3 years of the default and in respect to the ones for 2010, they became stale in 2013. As such he cannot recover the same. The Respondent in my view showed compassion despite the unfortunate circumstances that befell the Claimant. The suit is therefore declined and stands dismissed. There however will be no orders as to costs.



It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF JUNE 2024**

**NZIOKI WA MAKAU**

**JUDGE**

