



**Ayuya v Kenya Airways Limited (Cause E353 of 2020)  
[2025] KEELRC 637 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 637 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E353 OF 2020  
SC RUTTO, J  
FEBRUARY 28, 2025**

**BETWEEN**

**FREDRICK ODERA AYUYA ..... CLAIMANT**

**AND**

**KENYA AIRWAYS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. It is not in dispute that the Claimant was employed as a Security Officer through African Cargo Handling Limited from 19<sup>th</sup> February 1999. He was subsequently employed by the Respondent with effect from 1<sup>st</sup> July 2004 as an Equipment Operator. From the record, the employment relationship was severed on 5<sup>th</sup> August 2017 when the Claimant was retired on medical grounds.
2. According to the Claimant, he served the Respondent with loyalty and diligence. The Claimant has termed his exit from the Respondent's employment wrongful, unjustifiable, malicious, unfair and unlawful. Consequently, the Claimant seeks the sum of Kshs 1,292,511.00 against the Respondent being one month's salary in lieu of notice and maximum compensation for unfair termination. He has further prayed for the costs of the suit plus interest.
3. Opposing the claim, the Respondent avers that the Claimant had a history of chronic back pain since 2012, and on or about 11<sup>th</sup> March 2016, he presented a medical report from Dr. L.N Gakuu which recommended a lifestyle modification. The doctor further recommended lighter duties for the Claimant.
4. According to the Respondent, the Claimant was placed on lighter duties for a period of over one year but he continued to complain of back pain. Subsequently, the Claimant was examined by the Directorate of Occupational Safety and Health Services (DOSHS) on 24<sup>th</sup> April 2017, following which it was recommended that he be retired on medical grounds.
5. The Respondent considered the report from DOSHS and agreed with its findings.



6. The Respondent further averred that the Claimant was informed of the findings of the report and following three personal therapy sessions ending on 5<sup>th</sup> August 2017, the Claimant was issued with a letter of retirement on medical grounds. He was thereafter paid all his terminal dues.
7. It is the Respondent's case that the decision to retire the Claimant on medical grounds was justified in the circumstances as it was grounded on a valid reason related to his health and considered by the DOSH as well as admitted by the Claimant himself.
8. It is against this background that the Claimant has asked the Court to dismiss the claim with costs.
9. The matter proceeded for hearing on 9<sup>th</sup> April 2024 and 6<sup>th</sup> November 2024, during which both sides called oral evidence.

### **Claimant's Case**

10. The Claimant testified in support of his case and at the outset, he asked the Court to adopt his witness statement and the list and bundle of documents filed alongside his Memorandum of Claim to constitute his evidence in chief.
11. It was the Claimant's evidence that he was terminated simply by the Respondent unilaterally adopting the recommendations of a medical report which conflicted with an earlier medical report by a different doctor which gave the Respondent alternatives of dealing with his condition other than termination.
12. The Claimant contended that during the unlawful dismissal and/or unfair termination, the Respondent neither gave him notice nor paid him salary in lieu of notice.
13. It was the Claimant's further assertion that the Respondent did not give him any warning or invite him to any meeting over the same.
14. In the Claimant's view, his termination was un-procedural, wrongful, and or unfair.

### **Respondent's Case**

15. The Respondent called oral evidence through Mr. Moses Ombokh and Dr. Judith Maye who testified as RW1 and RW2 respectively. Mr. Ombokh, who was the first to go, identified himself as the Respondent's Senior Manager Industrial Relations and Staff Welfare. Similarly, RW1 sought to adopt his witness statement and the list and bundle of documents filed on behalf of the Respondent to constitute his evidence in chief.
16. It was RW1's evidence that on his own motion, the Claimant was examined by the DOSH on 24<sup>th</sup> April 2017 where he was allowed an opportunity to make submissions before the panel. Following the examination, the DOSH recommended that the Claimant be retired from employment on medical grounds.
17. The Claimant presented the said report to the Respondent for its action and following an internal review by the company's doctors they concurred with the findings therein.
18. RW1 further averred that in the meantime, the Claimant had been directed to Amani Counseling Centre for counseling on the impending retirement from 22<sup>nd</sup> July 2017. He attended three sessions, including one on 5<sup>th</sup> August 2017 after being issued with the letter of retirement.
19. That the Claimant received his letter of retirement on 4<sup>th</sup> August 2017 without protest and during his clearance, he wrote a letter dated 17<sup>th</sup> August 2017 in which he sought rectification of his terminal dues on account of the leave days due to him while accepting his retirement on medical grounds.



20. The Claimant thereafter cleared with the Respondent, was paid his terminal dues and was issued with a Certificate of Service.
21. RW1 added that, since the Claimant's first diagnosis, the Respondent accommodated him sufficiently by offering treatment at the company clinic, assigning lighter duties, and affording him counseling sessions prior to retirement for purposes of assisting in his transition.
22. That based on the medical reports by the Department of Occupational Health and Safety as corroborated by the medical team of the Respondent, there was a genuine belief that the Claimant's prognosis was poor and that retirement for medical reasons was therefore justified.
23. In RW1's view, the Claimant's own conduct at the time, indicated that it was his wish to retire on medical grounds having set in motion the process and having never raised any objection throughout the process.
24. Dr. Judith Maye, who testified as RW2, identified herself as the Head of Medical at the Respondent company. Equally, she adopted her witness statement to constitute her evidence in chief.
25. RW2 stated in her testimony that she had reviewed the Claimant's medical history as per his medical records from the Respondent's clinic as well as the various reports produced herein and could confirm that the Claimant was treated at the clinic repeatedly for progressive back pain with analgesics, physiotherapy, and workplace ergonomic interventions before being referred for orthopedic review. According to RW2, a full diagnostic radiological work up that included X-ray, MRI indicated a degenerative disc disorder.
26. RW2 further averred that the Claimant's medical records indicate that he was suffering from degenerative disc disease with resultant chronic back pain.
27. That the Claimant first presented with back pain in 2012 at the Company clinic following which he was put on treatment at various times.
28. That on 11<sup>th</sup> March 2016, the Claimant presented a letter to the Respondent from Dr. L.N. Gakuu in which the following recommendations were made on account of the history of his back pain: avoid carrying anything heavy beyond two kgs; bending should be avoided at all costs; and avoid standing or sit for very long beyond two hours with the current problem.
29. According to RW2, the Claimant was thereafter placed on lighter duties from 2016 to 2017. However, there was no improvement. He was then examined by DOSH which recommended his retirement on medical grounds.
30. It was RW2's opinion that degenerative disc disease is an age-related condition that happens when one or more of the discs between the vertebrae of the spinal column deteriorates or breaks down, leading to pain.
31. With respect to the Claimant's ability to perform any function as an Equipment Operator, RW2 opined that his (Claimant) work was largely spent operating and driving equipment used for loading. Hence, despite the lighter duties, his work activity continued to cause him significant pain. According to RW2, it was thus in the Claimant's best interests and as recommended by DOSH that he be retired on medical grounds since under the circumstances, there was a justifiable reason that had persisted over a period of time.



## Submissions

32. It was the Claimant's position that there is absolutely no indication either in the pleadings or the evidence that the Respondent made an attempt to comply with Section 41 of the *Employment Act* in deciding to retire him on medical grounds.
33. In the Claimant's view, this alone, without more, renders that retirement to be an unfair termination. In support of the Claimant's position, the Court was invited to consider the determination in the Supreme Court case of Simon Gitau Gichuru vs Package Insurance Brokers Ltd (Supreme Court Case No.36 of 2019).
34. The Respondent on the other hand submitted that its actions were based on fair and valid reasons as there is undisputed proof of extensive medical examination and proof of the recommendation that the Claimant be retired on medical grounds by certified medical professionals. On this issue, the Respondent placed reliance on the decision by the Supreme Court in Gichuru vs Package Insurance Brokers Ltd [supra].
35. The Respondent further urged the Court to conclude that the Claimant has failed to prove that the retirement on medical grounds was unfair, as required by Section 47 (5) of the *Employment Act*.
36. In further submission, the Respondent posited that it is unfair to expect it to have retained the Claimant, where the Directorate of Safety and Health Services recommended his retirement on medical grounds, as this would have exposed the Respondent to possible litigation. In the same breath, the Respondent submitted that continued work would only serve to aggravate the Claimant's condition and that retirement on medical grounds was the best possible outcome.
37. Referencing the case of Frank J. Mahinga vs Trustees of Arya Samaj Education Board (2014) eKLR, the Respondent further submitted that the Claimant's retirement was initiated by DOSH and that he (Claimant) has not laid any shred of evidence before this Court to prove that it was the Respondent's initiative.
38. The Respondent further urged the Court to consider the fact that the Claimant presented the letter recommending light duties and the evaluation by DOSH recommending retirement in light of the facts and disposition in Ndiritu vs Boc Gases Kenya Limited [2022] KEELRC 13304 (KLR) where the Claimant initiated the retirement on medical grounds.
39. In further support of its case, the Respondent submitted that it exercised due care and sensitivity by according the Claimant the necessary support to recover and resume his normal course of duties which is in line with the reasoning in Kennedy Nyangucha Omanga vs Bob Morgan Services Limited (2013) eKLR.
40. According to the Respondent, it reasonably accommodated the Claimant where such accommodation was manifested in assigning him lighter duties.
41. The Respondent further posited that it did not have a choice on whether or not to comply with the recommendations of DOSH given the persisting pain suffered by the Claimant over the one year when he was placed on light duties.

## Analysis and Determination

42. Upon considering the Claim before Court, the evidentiary material on record as well as the rival submissions, the following issues stand out for determination:



- i. Whether the Claimant's retirement on medical grounds was justified;
- ii. Whether the Claimant was accorded procedural fairness prior to being retired on medical grounds;
- iii. Is the Claimant entitled to the reliefs sought?

### **Justification for retirement on medical grounds**

43. It is the Claimant's case that the Respondent unilaterally adopted recommendations of a medical report which conflicted with an earlier medical report by a different doctor which gave alternative ways of dealing with his condition other than termination.
44. The Respondent countered this position and averred that it was in the Claimant's best interest that he be retired on medical grounds.
45. In her testimony, RW2 averred that the Claimant's work as an Equipment Operator was largely spent operating and driving equipment used for loading hence despite the lighter duties assigned, his work activity continued to cause him significant pain.
46. According to the Respondent, it accommodated the Claimant since his first diagnosis, by offering him treatment at the company clinic and assigning him lighter duties.
47. It is common ground that at the time the Claimant was retired on medical grounds, he was serving in the position of Equipment Operator and had been diagnosed with degenerative disc disease. As such, he was suffering from low back pain.
48. During cross-examination, the Claimant testified that his nature of work entailed loading. This was confirmed by the medical report dated 29<sup>th</sup> March 2016, exhibited by the Claimant in which Dr. Kirsteen Awori noted that the Claimant's work included lifting objects and bending in awkward positions.
49. In light of the foregoing, the question that begs an answer is whether the Respondent was justified in retiring the Claimant on medical grounds based on his diagnosis and bearing in mind the nature of his duties.
50. The record bears that the Claimant was initially evaluated by Prof. Gakuu, a consultant orthopaedic and trauma surgeon. Through a medical report dated 11<sup>th</sup> March 2016, Prof. Gakuu, noted in his medical report that the Claimant has a permanent incapacity of 10% and heavy duties were not recommended. Specifically, Prof. Gakuu indicated that the Claimant has to avoid anything heavy beyond two kgs, bending at all costs, and standing or sitting for very long beyond two hours.
51. It is the Respondent's position that following the recommendation by Prof. Gakuu, the Claimant was assigned light duties for a period of over one year. This observation was also made in the report dated 24<sup>th</sup> April 2017 by DOSH.
52. Notably, the Claimant did not discount this position.
53. It is apparent that the Claimant underwent further medical evaluation by Dr. Kirsteen Awori and it is apparent that in the medical report dated 19<sup>th</sup> March 2017, Dr. Awori observed that the Claimant had suffered low back pain since 2012 and that on the day, he evaluated the Claimant, he still complained of low back pain that was radiating to the right hip and thigh. It is also worth noting that this was close to one year after the Claimant's evaluation by Prof. Gakuu whereupon he had advised against the Claimant lifting heavy objects.



54. In the medical report dated 19<sup>th</sup> March 2017, Dr. Awori made the following observations regarding the Claimant's medical condition; "Several factors work against the Claimant's performance at work: the very nature of his work that includes lifting objects, bending in awkward positions that put a lot of strain on his back muscles, and finally the long term use of the corset he is (sic) been through, which is undesirable as it results in back muscle atrophy resulting in corset dependence syndrome".
55. Dr. Awori further indicated his hesitation to offer any guarantee to clear the Claimant's pain challenge from the non-suitable postures adopted while executing his duties. He further noted that while he recommends transforaminal epidural steroid injections for 1.4 and 1.5 roots for relief of the radiculopathy, he (Claimant) would probably feel better for an unspecified period after the injections, then the pain would recur if his work environment remains the same.
56. Consequently, Dr. Awori recommended that the Claimant undergo transforaminal epidural steroid injections for management of the radiculopathy, then retire on medical grounds if he does not have the qualifications to do softer (high skilled) duties that are less punitive to his back at his age.
57. There is no evidence on record that the Claimant possessed qualifications that would allow the Respondent to redeploy him to a suitable position that would not entail duties that were not heavy in nature and in consonance with the recommendations by Prof. Gakuu in the medical report dated 11<sup>th</sup> March 2016.
58. Indeed, what manifests from the recommendations by Prof. Gakuu and Dr. Awori's medical reports is that the Claimant's continued employment with the Respondent was subject to a complete shift in his roles and redeployment from his current position as Equipment Operator.
59. In the case *Trident Steel (Pty) Ltd vs Metal and Engineering Industries Bargaining Council and Others* (DA 14/05) [2007] ZALAC 32, the South African Labour Appeal Court had this to say with respect to accommodation of an employee: -
- "In a case such as this an employer's obligation to try and accommodate the employee does not require the employer to do more than what can reasonably be expected from it in the circumstances. If the employer is shown to have acted reasonably to try and accommodate the employee, it can be said that it has discharged its obligations...In my view appellant acted reasonably throughout the entire period. I cannot find any acceptable basis for the second respondent to have found that there was unfairness in the appellant's conduct in this regard."
60. In this case, the Respondent has averred that following Prof. Gakuu's medical report, it accommodated the Claimant by assigning him lighter duties. However, one year down the line, upon a medical evaluation by Dr Awori, the Claimant still complained of low back pain. This being the case, I pose to ask, what more could the Respondent have reasonably done to accommodate the Claimant?
61. The Claimant having been evaluated by different medical experts who arrived at a similar conclusion that it was not tenable for him to continue performing his normal duties on the basis of his medical condition and prognosis, I am led to find that the Respondent had reasonably accommodated the Claimant in the circumstances. This is bearing in mind that despite being assigned lighter duties, the Claimant's condition persisted one year later.
62. Indeed, and as can be discerned from Dr. Awori's medical report, he was hesitant to offer any guarantee to clear the Claimant's pain challenge from the non-suitable postures adopted while executing his



duties. It was on this basis that he recommended the Claimant's retirement on medical grounds in the event he did not possess qualifications to do softer duties (high skilled).

63. It is also noteworthy that the Respondent obtained a third medical opinion from the DOSH. In the report dated 24<sup>th</sup> April 2017 by the DOSH, signed by three medical doctors (Dr. Musa Nyandusi, Dr. Kowino, and Dr. Kimani) who evaluated the Claimant, it was recommended that he be retired on medical grounds. The panel of medical doctors opined that the Claimant had been on light duties for one year prior to that with little improvement in his symptoms.
64. In view of the three medical reports by different medical experts and the nature of the Claimant's duty, I am persuaded that the Respondent has proved on a balance of probabilities that it was reasonably justified to retire the Claimant on the basis of his medical condition.
65. Having so found, I now turn to consider whether the Respondent accorded the Claimant procedural fairness prior to his retirement on medical grounds.

### **Procedural fairness?**

66. Pursuant to Section 45 (2) (c) of the *Employment Act* termination of an employee is deemed unfair if the employer fails to prove that the termination was effected in accordance with fair procedure. Section 41 (1) addresses the manner in which fair procedure is to be achieved. It provides as follows: -
  - “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”
67. It is the Claimant's contention that the Respondent did not give him notice prior to his termination or invite him to any meeting over the same.
68. Refuting the Claimant's position, the Respondent has averred that the decision to terminate the Claimant on medical grounds was properly communicated to him and he was provided ample time and opportunity to protest. That he was further granted counseling sessions all in a bid to ensure that the process was carried out procedurally.
69. It is apparent from the record that following the report from DOSH, the Claimant underwent counselling sessions with Amani Counselling Centre from 22<sup>nd</sup> July 2017 up to 5<sup>th</sup> August 2017. Thereafter, the Respondent issued him with the letter dated 4<sup>th</sup> August 2017, effectively retiring him on medical grounds.
70. There is no evidence on record to indicate or suggest that following the medical report from DOSH and prior to retiring the Claimant on medical grounds, the Respondent convened a hearing to explain to him the reason why it was considering his retirement based on the medical reports at hand. This position was confirmed by RW1 during cross-examination.
71. What can be deduced from the record is that upon receipt of the medical report from DOSH, the die was cast and the Respondent put in motion the retirement process without much ado.
72. To its credit, the Respondent facilitated counseling sessions for the Claimant to prepare him psychologically for the impending retirement. Be that as it may, it should be appreciated that this did not supplant the statutory requirement under Section 41 of the *Employment Act*. In the same vein,



the Claimant's appearance before the DOSH was not a substitute for the process contemplated under Section 41 of the *Employment Act*.

73. On this score, I will reiterate the Court's finding in the case of Kennedy Nyanguncha Omanga vs Bob Morgan Services Limited [2013] eKLR thus: -

“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.”

74. Therefore, in as much as the Respondent had a valid reason to retire the Claimant on medical grounds, the fact that it did not apply the process contemplated under Section 41 of the *Employment Act* in effecting the said retirement on medical grounds rendered the retirement procedurally unfair.

75. To this end, the Court finds that the retirement of the Claimant on medical grounds was procedurally unfair hence unlawful.

### **Reliefs?**

76. Having found that the Respondent failed to comply with the statutory requirements of a fair process in retiring the Claimant on medical grounds, the Court awards him compensatory damages equivalent to four (4) months of his salary. This award takes into account the length of the employment relationship and the fact that the Respondent has proved that it was reasonably justified to retire the Claimant on medical grounds.

77. The claim for one (1) month's salary in lieu of notice is declined as the same was paid as part of the Claimant's terminal dues.

### **Orders**

78. In the final analysis, Judgment is entered in favour of the Claimant against the Respondent for the sum of Kshs 397,388.00 being compensation equivalent to four (4) months of the Claimant's gross salary.

79. The award shall attract interest at court rates from the date of Judgment until payment in full.

80. The Claimant shall also have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF FEBRUARY 2025.**

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**STELLA RUTTO**

**JUDGE**

In the presence of:

For the Claimant Mr. Malanga

For the Respondent Mr. Sewe

Court assistant Milicent

### **Order**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They



have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

