



Wasonga v Board of Trustees of National Social Security Fund (Cause 2 of 2019) [2024] KEELRC 800 (KLR) (8 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 800 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2 OF 2019
B ONGAYA, J
APRIL 8, 2024**

BETWEEN

JENNIFER A WASONGA CLAIMANT

AND

**THE BOARD OF TRUSTEES OF NATIONAL SOCIAL SECURITY
FUND RESPONDENT**

JUDGMENT

1. The claimant filed the statement of claim on 02.01.2019 through Amadi & Amadi Advocates. The claimant prayed for judgment against the respondent for:
 - a. A permanent injunction to issue restraining the respondent from terminating the services.
 - b. Damages for violation of the claimant's constitutional rights.
 - c. In alternative:
 - i. Reinstatement.
 - ii. Damages for unfair termination.
 - iii. Damages for violation of the claimant's constitutional rights and stigmatization.
 - d. Costs of the suit.
2. The claimant pleaded as follows:
 - a. The respondent employed her on 26.01.2001 as a shorthand typist II.
 - b. In 2014, the claimant was confirmed to have a hearing disability and registered with the National Council of Persons with Disabilities as a person with disability.



- c. Prior to employment the claimant complied with the requirement, to provide a medical certificate of fitness to work as appointed.
 - d. In July 2018 the respondent summoned the claimant to appear before the National Medical Board for the Board to determine her continued fitness to continue to work. The same followed the respondent's HR Department's requests for the claimant to go to Hospital owing to her HIV status that needed continuous monitoring and consistent treatment.
 - e. The claimant ended up disclosing her HIV status to the respondent's HR Department because whenever she returned from Hospital, she would return the treatment records to the HR Department and the records clearly indicated her HIV status.
 - f. After the respondent summoned the claimant to appear before the National Medical Board, two persons visited her office and interviewed her and focusing on her HIV status and hearing disability and she trusted the exercise would lead to a medical report to be tabled before the respondent. A medical report was generated from that interview held at the claimant's office and a notice dated 03.12.2018 was issued terminating the claimant's employment by requiring her to retire on medical grounds because she was unfit to continue working. The notice gave the claimant a 30-days' notice to cease working, the 30 days running from 03.12.2018 and lapsing on 03.01.2019. She had never received a warning letter about her wanting performance.
 - g. The medical board was irregularly constituted, its members not disclosed, and the purpose of the interview not disclosed. Reliance on the report by the irregular board to terminate her employment violated her right to fair administrative action under Article 47 of [*the Constitution*](#).
 - h. The claimant knows that she was declared unfit to work following her disability and HIV status, which she finds discriminatory, and an extreme violation of her rights under Articles 27 and 28 of [*the Constitution*](#).
3. The respondent filed a statement of defence on 17.07.2019 through the Federation of Kenya Employers. The respondent pleaded as follows:
- a. The respondent admitted employing the claimant as pleaded for the claimant.
 - b. On 30.03.2017 the respondent wrote to the Director of Medical Services for a medical opinion about the claimant's ability to continue discharging her duties in view that her deteriorated health since 2009 when she was diagnosed with bilateral hearing loss. Further, her appraisal reports attached to the letter showed her low performance report.
 - c. On 13.07.2018 the respondent informed the claimant she was required to appear before the medical board on 19.07.2018 to determine her suitability for continued fitness to work. The claimant appeared on 19.07.2018 per schedule and the board of three doctors unanimously found her unfit to continue working as a secretary or office administrator. The board report was communicated to claimant on 03.12.2018 being retirement because of unfitness to continue working as employed.
 - d. The issue of the HIV status alleged for the claimant was not in focus as the medical board was only to determine her fitness for continued working. The reason for termination was fair per section 45(2) of the [*Employment Act*](#) as it related to the claimant's capacity to perform. The issue had been discussed with the claimant and she knew the reason of attending the medical board. The respondent had no basis to challenge the opinion of the board.



- e. The respondent prayed that the suit be dismissed as lacking factual basis.
4. The claimant had filed the memorandum of claim together with an application for interim orders. The interim orders were issued staying the notice of termination of employment and at the hearing on 27.02.2024, the respondent's witness (RW) Regina Ndunge Mua, the Principal Human Resource Officer for Employee Relations confirmed that the claimant was in the office working as an assistant office administrator but with unexpected performance levels.
5. To answer the 1st issue, the Court finds that the looming termination as communicated to the claimant was unfair as due process was not followed. Section 41 of the *Employment Act* required that the claimant is given a notice and heard in view of the intended termination of employment because of physical incapacity arising from ill health. Section 41(1) of the Act provides thus, "(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 RW confirmed that no such notice and hearing took place." RW testified that the claimant was not given a warning letter and further, "After conclusion by the Medical Board, claimant was not invited to a meeting to be explained to decision of Medical Board prior to her termination. The termination issued. It was not a disciplinary meeting. The claimant was not given a chance to defend herself prior to termination on medical grounds." The Court finds that the procedure adopted towards terminating the claimant's employment was unfair and was in breach of sections 41 and 45 of the Act. The Court considers that even if the Medical Board had concluded that she was unfit for continued service as an assistant office administrator or secretary, it was mandatory to comply with section 41 of the Act on due process of a notice and hearing in presence of a representative as prescribed in the section. Further, a hearing would enable the parties to consider alternative options such as rehabilitation and redeployment or re-designation to more suitable work assignments.
6. The taking effect of the termination notice SF/P/2435/48 dated 03.12.2018 purported to take effect on 03.01.2019 was arrested by the interim court order of 03.01.2019 so that the claimant has never left the workplace as was desired. The relief that appears just therefore is to set aside the notice of termination SF/P/2435/48 dated 03.12.2018 with orders the claimant to continue in the respondent's employment unless the contract of service is lawfully terminated. The issue of discrimination and stigmatization or damages for violation of the Bill of Rights does not emerge in the instant case. In particular, as submitted for the respondent, the evidence does not disclose discrimination and stigmatization upon alleged HIV status. Further, the termination having been arrested by interim orders on record, the termination never took effect and claims or prayers for reinstatement or compensation because of unfair termination do not arise in the instant case. The claimant has substantially succeeded and the respondent will pay costs of the suit. The Court returns accordingly on the 2nd issue, being on the reliefs available to the claimant.

In conclusion, judgment is hereby entered for the claimant against the respondent for orders:

1. The respondent's notice of termination addressed to the claimant by letter Ref. No. SF/P/2435/48 dated 03.12.2018 is hereby set aside with orders that the claimant to continue in the respondent's employment unless the contract of service is lawfully terminated.
2. The respondent to pay the claimant's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 8TH APRIL 2024.



BYRAM ONGAYA
PRINCIPAL JUDGE

Page 2 of 2

