



REPUBLIC OF KENYA



Juma (Suing as the Personal Representative of Maurice Otieno Tengu - Deceased) v Kibos Sugar & Allied Industries Ltd (Cause 239 of 2017) [2024] KEELRC 1352 (KLR) (6 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1352 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 239 OF 2017**

CN BAARI, J

JUNE 6, 2024

BETWEEN

CAROLYNE ALLUOCH JUMA (SUING AS THE PERSONAL REPRESENTATIVE OF MAURICE OTIENO TENGU - DECEASED) CLAIMANT

AND

KIBOS SUGAR & ALLIED INDUSTRIES LTD RESPONDENT

JUDGMENT

Introduction

1. The late Maurice Otieno Tengu lodged a Statement of Claim against the Respondent dated 24th May, 2017. He unfortunately passed on in December, 2022 before this matter was heard and determined, necessitating substitution and amendment of the claim which is dated 13th June, 2023.
2. Under the Amended Statement of Claim, the Claimant seeks the following reliefs: -
 - i. A declaration that the Respondent's decision to retire the Claimant from employment was unfair, illegal and unlawful for being an express violation of the Claimant's right under *the Constitution* and the *Employment Act*, 2007.
 - ii. An order directing the Respondent to compensate the Claimant for time lost out of employment.
 - iii. Compensation for unlawful, unfair and wrongful dismissal.
 - iv. Costs of the suit and interest thereon.
3. The Respondent filed a response to the statement of claim dated 6th September, 2017, which it relied on without amendment.



4. The suit proceeded for hearing with the Claimant testifying on 28th November, 2023. Mr. David Odongo testified on the same day in support of the Respondent's case. Both the Claimant and the Respondent's witness adopted their witness statements and produced the documents filed in support of their respective cases as exhibits in the matter.
5. Parties thereafter filed written submissions.

The Claimant's Case

6. The Claimant states that her husband, the deceased-Maurice Otieno Tengu, had been in a contract of employment with the Respondent until the year 2014, when he was unlawfully terminated based on false medical grounds.
7. It is her case that the deceased's employment contract was governed by the *Employment Act*, 2007 and *the Constitution* of Kenya, 2010
8. The Claimant avers that the deceased was a loyal employee of the Respondent from August, 2007 until somewhere in March, 2012, when he started developing health complications. It is her case that consequent to the health complications, the deceased attended several hospitals and was diagnosed with peptic ulcers resulting from his working conditions and an unfavourable working environment.
9. It is her case that on 8th November, 2013, the deceased was tasked by the Respondent to produce a medical document from a government doctor indicating his ability to work in a busy factory setting.
10. She avers that the deceased went to Kisumu District Hospital where he was re-examined and a report given that he was fit to continue working.
11. It is her position that in early 2014, the deceased sought further medical attention at Nyabondo Mission Hospital who conducted a corrective surgery on him, and issued a report evidencing his fitness to work.
12. The Claimant states that upon the deceased resuming duty after the corrective surgery, the Respondent verbally retired him on medical grounds despite him having presented a report supporting his medical fitness.
13. The Claimant further states that the deceased union sought redress from the Respondent, but who did respond on the issue. She states that her deceased husband's dismissal was unfair and irregular.
14. On cross-examination, the Claimant confirmed that her deceased husband had been ailing and was found unfit to work.
15. It is her prayer that she be awarded the prayers in her amended statement of claim.

The Respondent's Case

16. The Respondent states that it employed the Claimant's deceased husband as a crystallizer attendant on 7th December, 2007. It states further that the deceased started ailing in 2009 and had been on and off duty due to illness.
17. It is their case that a letter written to the Respondent by its chief chemist, indicated that the Claimant's frequent absenteeism was affecting the Respondent's company production and shift operations.
18. That on various dates in 2011, the deceased was variously admitted to hospital forcing him to apply for days off, which the Respondent approved.



19. It states that again on various occasions in October, 2013, the Claimant was in and out of hospital, resulting in the Respondent issuing him with a show cause letter dated 6th November, 2013, resulting from his frequent absenteeism.
20. In his response to the show cause, the Respondent states that the Claimant indicated that he was unwell and had been admitted at Nightingale and Jalaram hospitals, and further produced medical records as prove of the admission.
21. It is the Respondent's assertion that on 8th November, 2013, it asked the deceased to submit medical documents from a registered government doctor certifying that he was fit to work in a factory.
22. The Respondent states that the deceased was again admitted in hospital on severally occasions in December, 2013 and January, 2014, and that he underwent corrective surgery on 1st March, 2014.
23. The Respondent's further case is that it issued the deceased a letter dated 18th February, 2014, giving him one month notice of retirement on medical ground as he was no longer capable of performing his duties due to ill health.
24. It states that it paid the deceased his full salary for the months of January and February, 2014, despite him being absent from duty for the greater part of the two months.
25. RW1 told the court on cross-exam that a government doctor had confirmed that the deceased was fit to continue working.
26. The Respondent states that the Claimant's claim against it is without basis, unmerited and an abuse of the court process and prays that it be dismissed with costs.

The Claimant's submissions

27. It is the Claimant's submission that the deceased was fit to work and no evidence was given to the contrary. She submits further that the Respondent did not prove that there was a valid and fair reason for terminating the deceased's services through retirement on medical grounds, as there was no medical board or assessment done by themselves to confirm the state of the deceased's health.
28. It is submitted that the procedure stipulated in Section 41 of the *Employment Act* was not followed as the deceased was never called to any meeting and nor was a representative present during the meeting.
29. That Section 43 of the *Employment Act* places a burden on the Respondent to demonstrate and prove the reason for termination based on the facts, matters, and circumstances that existed at the time of termination.
30. She submits that the retirement of the deceased on medical grounds was unfair, unlawful and or illegal.

The Respondent's Submissions

31. The Respondent submits that it exercised due care and sensitivity in retiring the deceased. It submits further that it approved all the leave (sick-off) applications by the deceased, accepted all the explanation(s) given by the deceased for his absence and/or absenteeism, and that it allowed the deceased to resume work as and when the deceased felt strong enough to do so. Reliance was had to the



case of Kennedy Nyanguncha Omanga v Bob Morgan Services Limited [2013] eKLR for the holding that:

“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/or want of procedural fairness.”

32. The Respondent submits that it requested the deceased to avail a medical report as to his ability to continue working, as a result of which he vailed the report dated 13/11/2013. It is submitted that although the report showed that the deceased could work, his health deteriorated and the frequent applications for leave (sick-off) followed.
33. The Respondent submits that it gave the deceased a specific notice of the impending termination vide a letter dated 18/02/20, hence it acted within the parameters set out in Kennedy Nyanguncha Omanga (supra).
34. The Respondent submits that during cross-examination in court, the Claimant confirmed the statement as pleaded and reiterated that as at the time the deceased was terminated, he was unable to work.
35. The Respondent placed reliance in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR where the court stated:

“... any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded ... ”
36. It is the Respondent’s admission that there are “final dues” that are payable to the deceased, but which were not specified as the said dues had not been computed. It submits further that with the said admission, the court should make an order directing the Respondent to compute the said final dues and pay the same to the Claimant who is the Administrator of the estate of the deceased.
37. It finally submits that owing to the nature of the issues herein, the conduct of the deceased in not prosecuting the claim since 2017 and that of the Administrator in taking long to substitute the deceased and failing to prosecute the Claim as soon as she took over, the court is urged not make orders on costs

Analysis and Determination.

38. I have carefully considered the pleadings, the witnesses’ testimonies and the submissions by both parties. Two issues present for determination: -
 - i. Whether the deceased retirement was fair; and
 - ii. Whether the Claimant is entitled to the remedies sought.



Whether the deceased retirement on medical ground was fair

39. The letter dated 18th February, 2014 giving the deceased notice of retirement, states: -

“We refer to the above subject matter and wish to inform you that you have been given a one month notice to retire on medical grounds because you are not capable to perform your duties due to ill health.”

40. Ill health is without doubt a valid reason for termination of employment contract subject only to an employer following due process. Section 41 of the *Employment Act* states: -

“(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.”

41. An employer considering termination of an employee on the grounds of ill health, must exercise due care and sensitivity failure to which, the termination may be considered unfair.

42. In *Kennedy Nyanguncha Omanga v Bob Morgan Services Limited* [2015] eKLR the court spelt out the procedure that an employer should observe when terminating on medical grounds:

“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 (emphasis own).

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/or want of procedural fairness.

43. The record shows that the deceased performance was affected by absenteeism caused by his frequent hospital admissions, and which at some point resulted in being issued with a show cause letter. His absence from duty became acute in the years 2013 and early 2014, following which, the Respondent issued him with notice of retirement on medical grounds.

44. It is also RW1's evidence that he received letters from the Respondent's chief chemist indicating that the deceased absenteeism was affecting the company's production and shift operations. All these, would in my view justify the deceased termination through retirement on medical ground/ill health.

45. It is not disputed that the deceased was issued one month notice of retirement on medical ground. It is also true that other than the letter he was asked to obtain from a government doctor/hospital to ascertain his fitness to work, no evidence was led to show that the Respondent subjected the deceased to a specific medical examination aimed at establishing his ability to resume work in the foreseeable future.



46. Furthermore, the report that the deceased delivered to the Respondent indicated that he was fit to work, and which should therefore have been the basis upon which the Respondent should have undertaken their independent medical examination on the deceased fitness for the job.
47. In light of the foregoing, I return that the Respondent's failure to subject the deceased to a medical examination on his fitness to work, rendered the termination vide the retirement unfair.
48. On whether the Claimant is entitled to the remedies sought, it goes without saying that a finding of an unfair termination entitles the Claimant to compensation (See Benjamin Langwen v National Environment Management Authority (2016) eKLR).
49. The court in making an award of compensation is guided by the statutory capping detailed in Section 49(4) of the *Employment Act*, 2007.
50. The deceased was employed by the Respondent in 2007 and started falling ill in the year 2012, all through to 2014, when he was finally retired. Both the court record and the witness' evidence was that the deceased was absent from duty on various occasions owing to his poor health that resulted in hospital admissions.
51. It is also not disputed that the Respondent continued paying the deceased his full salary, including in months he was barely at work.
52. Considering the Respondent's support for the deceased, I deem an award of eight (8) months' salary sufficient compensation for the unfair termination.
53. The *Employment Act*, does not provide a remedy for loss of employment. Compensation for unfair termination thus suffices.
54. The Respondent in their submissions admitted owing the deceased on account of final benefits, and which it has sought an order directing it to release the final benefits to the Claimant.
55. I thus order that the Respondent computes and pays the Claimant all final benefits owed to the deceased as at the time of his retirement on medical grounds.
56. In whole, Judgment is entered for the Claimant as against the Respondent as follows; -
 - a. A declaration that the Respondent's decision to retire the deceased from employment on medical grounds is unprocedural, hence unfair.
 - b. 8 months' salary for unfair termination at Kshs. 128,240/-
 - c. An order directing the Respondent to compute and pay the Claimant all final benefits owed to the deceased at the time of his retirement
 - d. Costs of the suit be borne by the Respondent.
57. It is so ordered.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 6TH DAY OF JUNE, 2024.

C. N. BAARI

JUDGE

Appearance:

N/A for the Claimant



Ms. Onsongo present for the Respondent

Ms. Anjeline Wanjofu- C/A

