



**Hakim Transport Services Limited v Aroko (Appeal E079 of 2023)
[2024] KEELRC 1993 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1993 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E079 OF 2023**

**AK NZEI, J
JULY 31, 2024**

BETWEEN

HAKIM TRANSPORT SERVICES LIMITED APPLICANT

AND

GABRIEL OTIENO AROKO RESPONDENT

*(Being an appeal from the judgment/decree of Hon. Mburu SPM
delivered on 27th July 2023 in Mombasa MCELRC No. E107/2022)*

JUDGMENT

1. The Appellant herein was the Respondent (Defendant) in Mombasa Chief Magistrate's Court Employment Case No. 17 of 2022 whereby it had been sued by the Respondent herein seeking the following reliefs:-
 - a. A declaration that termination of the Respondent's employment by the Appellant was unlawful and unfair.
 - b. Damages for unlawful termination of employment (kshs. 35,735x12).....kshs. 428,820
 - c. Leave days earned but not taken (kshs. 1,191x21 days x3years).....kshs. 75,033
 - d. Issuance of a correct certificate of service indicating that the Respondent worked as a tractor driver.
 - e. Costs of the suit and interest.
 - f. Any other relief that the Court may deem fit and just to grant.
2. The Respondent had pleaded:-



- a. That he was on 26/4/2016 employed by the Appellant as a tractor driver and worked diligently until 3/2/2019 when he was involved in a road traffic accident whereby he sustained injuries and was treated by both the Appellant's doctor and at a public hospital as he continued undertaking his duties with the Appellant.
 - b. That on 14/5/2020, the Respondent's doctor recommended that the Respondent be given light duties, upon which the Respondent was relocated to the Security Department as a Watchman, and worked while undergoing medical treatment.
 - c. That on 4/9/2020, the Respondent attended Coast General Hospital for his routine treatment and a doctor recommended, inter-alia, that the Respondent be given home rest until full recovery.
 - d. That the Respondent reported the doctor's recommendations to the Appellant vide a letter dated 9/9/2020, accompanied by the doctor's treatment notes.
 - e. That on the same date (9/9/2020), the Appellant terminated the Respondent's employment on the basis of the doctor's recommendation.
 - f. That the Respondent was earning a gross salary of kshs. 35,735 at the time of his termination.
 - g. That termination of the Respondent's employment was unlawful in that it was unjustified, was without notice, the Respondent was not given a hearing, was done in breach of the procedure set out in Section 41 of the *Employment Act* and that the Respondent was not required to present himself before a professional medical board for certification of his fitness or lack of it for continued employment.
 - h. That upon termination, the Respondent was issued with a wrongful certificate of service indicting that he was employed as a watchman, thus limiting his employment prospects as he is a skilled professional driver, which the Appellant is well aware of.
 - i. That the Respondent took a rest at home in Gem, Kisumu County while on medication, and has since been certified fit to continue with his routine duties of driving.
3. Documents filed alongside the Respondent's memorandum of claim dated 19/1/2022 and filed in the trial Court on 25/1/2022 included the Respondent's written witness statement dated 19/1/2022 and an evenly dated list of documents listing 9 documents. The listed documents included the Respondent's Port Control Pass, a bundle of sick sheets, a letter dated 3/6/2020 (relocating the Respondent to the Appellant's Security Department), treatment notes dated 4/9/2020, the Respondent's letter to the Appellant dated 9/9/2020, Notice of Termination of Employment dated 9/9/2020, Certificate of Service dated 12/10/2020, medical report dated 16/8/2021, and a bundle of payslips.
 4. The Appellant entered appearance and filed Response to the Respondent's claim on 11/2/2022, denying the claim. The Appellant pleaded:-
 - a. That the Respondent was initially engaged as a Truck Driver and was, on recommendation of his doctor, later re-assigned to the position of a watchman.
 - b. That even after re-assignment to the light duty of a watchman, the Respondent indicted that he was unable to carry out those duties.



- c. That the Respondent's termination, which took into account recommendations of the Respondent's doctor, the Respondent's wishes and the compromised business environment due to Covid 19 pandemic, was fair, lawful and procedural.
 - d. That the Respondent was issued with a notice commencing on 9/9/2020; issued pursuant to recommendations of a competent medical professional and supplied by the Respondent himself.
 - e. That the Appellant took the Respondent through a hearing as per Section 41 of the *Employment Act*.
5. Documents filed alongside the Appellant's Response to Claim included a written witness statement of Rajab Yeri Kombe and a list of documents dated 7/3/2022, listing 9 documents. The listed documents were the Respondent's contract of employment dated 20/4/2016, a letter dated 12/10/2020 terminating the Respondent's employment on account of retirement on medical grounds. Advisory Committee Attendance Sheet dated 9/9/2020, Minutes of a Meeting held on 9/9/2020, final tabulation of the Respondent's dues dated September 2020, Petty Cash Voucher for ex-gratia payment, transfer letter dated 3/6/2020, leave application forms and a certificate of service dated 12/10/2020.
 6. At the trial, the Respondent adopted his filed witness statement, which basically replicated the Memorandum of Claim, as his testimony. He also produced in evidence the documents referred to in paragraph 3 of this judgment. Cross-examined, the Respondent (being the Claimant in the primary suit) testified that he filed his doctor's report whereby the doctor stated that the Respondent was unable to drive, and that the Respondent wrote the letter dated 9/9/2020. That he (the Respondent) was called to a committee sitting where his health condition was discussed. That he was paid in lieu of notice, but his leave days were not paid in full. He denied having received ex-gratia payment.
 7. The Appellant called one witness, Yeri Kombe Rajab (RW1), who adopted his filed witness statement as his testimony and produced in evidence the Appellant's documents referred to in paragraph 5 of this judgment. He further testified that the Respondent was not dismissed, but was retired on medical grounds on recommendation of his doctor. That the Respondent's doctor had recommended that the Respondent could neither drive nor do watchman duties. That the doctor recommended that the Respondent be retired on medical grounds. That the Respondent was called to a meeting and was paid his terminal dues, being outstanding leave and salary, plus an ex-gratia payment of kshs. 20,000.
 8. RW-1 further testified that the Respondent had been a driver, but was a watchman at the time of exit. That the Appellant could retrieve the Certificate of Service issued and reflect that position.
 9. Cross-examined, RW-1 testified that the doctor had recommended home rest, not retirement, until full recovery. That the Respondent's certificate of service could be rectified to show that he worked as a driver/watchman.
 10. The trial Court delivered its judgment on 27/7/2023 and rendered itself as follows:-
 19. In the present case, the Respondent invited the Claimant to an "Advisory committee Meeting" on 9th September 2020 to discuss the Claimant's medical condition. The records of the meeting indicate that the verdict was to be communicated in three days. The Claimant was not notified that the Respondent considered terminating his employment on medical grounds. During the meeting, the Claimant was also not made aware of the risk of termination, neither was he explained the grounds for termination. I, therefore, find that the Claimant's termination was not conducted as prescribed in the statute....



22. The Claimant is entitled to a Certificate of Service pursuant to Section 51 of the Act. The Respondent has undertaken to rectify the issued certificate of service.
- Conclusion
23. It is my finding that the Claimant's employment contract was terminated unlawfully and unfairly. I therefore, pronounce judgment in favour of the Claimant in the following terms:-
- (a) An award of 10 months' gross salary for unfair and unlawful termination.....kshs., 357,350.
 - (b) The Respondent is to issue a new certificate of service showing that the Claimant worked as a tractor driver within 14 days.
 - (c) Costs and interest.”
11. Aggrieved by the said judgment, the Appellant preferred the present appeal and set forth the following grounds of appeal:-
- a. The learned magistrate erred in fact and in law in finding that the Respondent was unfairly terminated.
 - b. The learned magistrate erred in fact and in law in finding that the Appellant did not issue notice before the Respondent's retirement.
 - c. The learned magistrate erred in fact and in law in failing to consider the Appellant's notice vide the letter dated 9th September 2020, advising the Respondent of the impending retirement on medical grounds.
 - d. The learned magistrate erred in fact and in law in disregarding the medical report presented by the Respondent on his medical condition.
 - e. The learned magistrate erred in fact and in law in failing to consider the financial implication of having a non-working employee on the Appellant's payroll for an indeterminate duration.
12. The Appellant sought the following reliefs on appeal:-
- a. That the Appellant's appeal be allowed in whole.
 - b. That the Judgment of the Hon. Mburu, Senior Principal Magistrate, dated 27th July 2023 be varied and/or set aside.
 - c. That the Appellant be awarded the costs of the appeal and the costs in the subordinate Court.
13. This is a first appeal, and the evidence presented in the trial Court is before this Court for fresh evaluation. This Court, however, takes cognizance of the fact that it neither saw nor heard the witnesses testify first hand.
14. In my view, issues that present for determination are as follows:-
- a. whether termination of the Respondent's employment by way of retirement on medical grounds was unfair.
 - b. whether reliefs sought in the trial Court were deserved.
15. Before delving into the aforesaid issues, it is important to note and to take cognizance of the fact that from the pleadings filed in the trial Court and evidence adduced thereon, it is quite evident that the



genesis of the Respondent's medical condition/situation that led to termination of his employment was injuries sustained by him in an Occupational road traffic accident, following which he received treatment from both the Appellant's doctor and from a public hospital.

16. From the evidence of the Appellant's witness (RW-1), the Respondent sustained the aforesaid injuries while driving the Appellant company's tractor. This is clearly stated in RW-1's filed witness statement which he adopted as his testimony in Court at the trial.
17. The Appellant (RW-1) did not address the trial Court on whether the Appellant, being the Respondent's employer, complied with the provisions of the *Work Injury Benefits Act* (Cap 236 Laws of Kenya) by reporting the accident to the Director of Occupational Safety and Health Services pursuant to Section 22(1) of the said *Act*, and whether the Respondent was subjected to any medical examination under the said Act with a view to determining the degree of his incapacity and/or disablement, if any.
18. From the evidence on record, what the Respondent presented to the Appellant under cover of his letter dated 9/9/2020 (written in Kiswahili language) are handwritten treatment/clinical notes dated 4/9/2020 from Coast General Teaching & Referral Hospital titled "Diagnosis and Treatment." Part of the notes read as follows:-

"....the following is recommended:-

1. Unfit for driving
2. Unfit to be a security officer.
3. Home rest until full recovery."

19. Medical and/or professional qualifications of the author of the said treatment/clinical notes are not indicated. The Appellant, being the employer, did not subject the Respondent to any specific medical examination aimed at establishing his ability to resume work in the foreseeable future. It was held as follows in *Kennedy Nyaguncha Omanga - v Bob Morgan Services Limited*[2013] eKLR:-

" 16. 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 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."

20. In the present case, the Respondent presented the aforesaid clinical/treatment notes to the Appellant on 9/9/2020, and on the same date he was issued with a termination notice which states in part:-

"We acknowledge receipt of your letter dated 9th September 2020 together with your medical report that was presented to the Advisory Committee during the meeting that was held on 9th September 2020. The committee wishes to inform you that the company would



have wished to retain you in our employment but have been forced to comply with the recommendations of the Doctor.

The management has decided to give you a one-month notice from the date of this letter and thereafter retire you at the expiry of the said period...”

21. The Appellant exhibited what it referred to as Minutes of its Advisory Committee Meeting held on 9/9/2020 at 11.30 am. Although the Respondent is indicated as having been present at the meeting, the Court was not told when and how the Respondent had been notified of and/or invited for the said meeting, whether he had been notified within a reasonable time of the charges against him, and whether he had been notified of his right to be accompanied to the meeting by a fellow employee or by a union official. Indeed, it was not demonstrated that the Respondent even knew the purpose of the said meeting, and whether it could result in termination of his employment. The meeting appears to have been cobbled up the minute the Respondent presented the said clinical/treatment notes. His termination notice was written on the same date (9/9/2020).
22. Further, the said Advisory Meeting, purporting to discuss the Respondent’s medical condition, is not shown to have included medical experts.
23. Termination of employment on medial grounds, whether in the name of retirement or otherwise, falls within the purview of Section 41 of the Employment Act, which states 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.
 - (2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”
24. The Appellant was obligated to comply with the foregoing mandatory statutory requirements, but it did not. This rendered the termination procedurally unfair; giving of a termination notice notwithstanding.
25. On substantive fairness, the Appellant did not demonstrate the Respondent’s inability to work in the foreseeable future, as it did not subject the Respondent to any specific medical examination. It is worthy noting that the treatment notes presented to the Appellant by the Respondent on 9/9/2020 did not indicate the expected period of the Respondent’s recovery. Valid reason for the termination was not demonstrated pursuant to Section 45(2) (a) of the Employment Act.
26. It is my finding that termination of the Respondent’s employment was substantively and procedurally unfair, and I so declare. I uphold the trial Court’s findings on unfairness of the termination.
27. On the second issue, and having taken into account the circumstances and the manner in which the Respondent’s employment was terminated, I uphold the award of the equivalent of ten months’ salary as compensation for unfair termination of employment.
28. The Appellant shall forthwith issue the Respondent with a proper Certificate of Service as ordered by the trial Court, if the same has not yet been issued.



29. In sum, the appeal fails, and is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 31ST July 2024

AGNES KITIKU NZEI

JUDGE

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Appellant

.....Respondent

