



**Alumbe v Ideal Appliances Ltd (Cause 1050 of 2018)
[2023] KEELRC 711 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 711 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1050 OF 2018
AN MWAURE, J
MARCH 16, 2023**

BETWEEN

MARJORIE KUSA ALUMBE CLAIMANT

AND

IDEAL APPLIANCES LTD RESPONDENT

(The claimant filed a memorandum of claim dated 22nd June 2018.)

JUDGMENT

Introduction

1. The claimant filed a memorandum of claim dated June 22, 2018.

Claimant's case

2. It is the claimant's case that she was employed by the respondent by a letter of appointment dated 15th June 2015 as a sales lady with effective date being 1st November 2014. She says that her net salary was Ksh 14,000/-per month.
3. She says her duties were then increased and her salary as well was increased to Kshs 22,816/- and kshs 2,976/- house allowance.
4. The claimant says in August 2017 she started experiencing health challenges as a result of job stress and she developed a stroke on one side. She says she sought medical attention and was placed on sick off from 17th August 2017 to October 2017 and refers to medical certificate dated 7th September 2017.
5. She avers that by 11th October 2017 she had improved and the doctor recommended she resumes work but be placed on light duties. She says she reported to work but the respondent informed her to go back home and await their summons.



6. On 17th November 2017 she got a call from the officer of the respondent informing her to send her husband to collect her letter due to her poor health condition. She says her husband collected her letter.
7. She says that her husband was informed that her employment had been terminated due to her poor health and that she was paid her terminal dues amounting to kshs 37,400/-. This included leave days.
8. She says that her husband was asked to sign the termination letter on her behalf and the letter indicated she had received all her final dues.
9. She says the termination was against best labour practices because she was not given a hearing and there was no independent medical assessment. She says the termination was arbitrary.
10. She says her salary for the month of November 2018 was not paid. She also says she was underpaid in 2014 as she was not paid house allowance and basic monthly pay based on minimum salary wages general order of July 2013 which provided minimum salary at Kshs 22,070.95 excluding house allowance with effect 1/5/2013. She says she was paid kshs 17,700/- as at September 2017.
11. She says she was underpaid in 2015 as per the wages order of June 2015 whose basic salary was capped at Kshs 24,719/50 excluding house allowance. She says in that year she was paid kshs 19,840/- and kshs 2,976 as house allowance.
12. In 2016 she says she was underpaid as she received 19,840/- and kshs 2976 as house allowance instead of kshs 24,719/-.
13. In 2017 she says she was paid kshs 19840 and kshs 2,976 as house allowance instead of kshs 29,169 excluding housing allowance.
14. The claimant says that as a result of the unfair and unlawful termination she has suffered enormous loss and damage.
15. She is demanding terminal benefit and dues amounting to kshs. 1,042,535/20 plus costs and interest and certificate of service.

Memorandum Of Response

16. The respondent filed their response dated 16th August 2018 and concedes that the claimant developed health complications but was not caused by stress related to work. He says that they gave respondent three months sick leave with full pay.
17. The respondent accepts that they got a doctor's report that claimant had improved and could report back to work on light duties. They however aver that the claimant failed to report back to work but asked to resume work on 9th November 2017. He says that even on 9th November 2017 claimant did not report back to work. He says that the claimant did not give a certificate to establish why she did not go back to work. She therefore absconded from duty.
18. Respondent says claimant was invited to attend medical examination several times but she declined to attend.
19. Respondent says they agreed with claimant that she would give a letter of authority to her husband to collect her terminal dues but instead she instituted a suit.
20. Respondent says they are willing to pay claimant's terminal dues and that this suit is an abuse of court process. He prays the claimant's prayers should therefore be declined and respondent should be paid the costs of the suit.



Claimants Submissions

21. The claimant in their submission aver that the respondent dismissed her from her employment without an independent medical assessment report on the claimant's medical inability. They rely on the case of *Dennis Mwenda Gitonga vs Ernest Young LLP* [2013] eKLR where the court affirmed requirements for terminating an employee on account of sickness as laid out in *Kennedy Nyanguncha Omanga vs Bob Morgan services Limited* [2013] eKLR where Court held:

"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."
22. They submit that it is trite law that an employer cannot dismiss an employee on basis on poor health without an independent medical assessment.
23. They further submit that allegation that claimant absconded from duty is false as it has not been proved. She requested for light duties and was then dismissed from her employment.
24. They also aver tht the allegation that the claimant had agreed with respondent for termination is not true.
25. Finally the claimant aver that the respondent failed to follow the right procedure in terminating her as provided in section 41(1) of the *Employment Act* they aver that claimant was not afforded a fair hearing.
26. The claimant avers tht on a balance of probability she was dismissed without a valid or fair reason. The respondent did not comply with the statutory procedures of section 41, 43, 44 & 45 of *Employment Act* and prays she be granted the prayers outlined in the memorandum of claim with costs.

Respondents Submissions

27. The respondent raised issues for determination. They refer to the effect of email from claimant's lawyer dated 12th July 2022 where they aver the lawyer agreed to payment of 3 months' salary for unfair termination. He says claimant would only be entitled to three months compensation not 12 months.
28. They also submit that they had valid reason to terminate the claimant as she was unable to discharge her duties. They rely on the case of *Sospeter Bungoya Oyange vs Bob Morgan Services Limited* (2018) eKLR where court held that medical incapacity was justifiable reason for termination. The court held:

"....In this case, the reason for termination was cited as medical grounds after the claimant was incapacitated for more than 100 days. The claimant has not disputed that he was incapacitated for over 100 days. After careful consideration of the claimant's letter of appointment, it is clear that the medical ground cited for the termination of the claimant's services was valid and fair. Clause 8(iv) of the said letter stated that the claimant's employment was terminable without prior notice if he was prevented from performing his



duties by reason of ill health, incapacity, accident or otherwise for more than 75 consecutive days or an aggregate of more than 60 days within the same year.”

29. He says further that they tried to accommodate the claimant by giving her 90 days leave fully paid and yet she was not getting better. They say that the claimant’s termination on medical grounds therefore was valid and justifiable.
30. They also submit that they adhered to the provisions of sections 41 and 45 of the *Employment Act* while terminating the claimant’s employment.
31. The respondent also relying on the case of Kennedy Nyanguca Omanga (supra) assert they exercised due care and sensitivity towards the claimant. They say they allowed her to go on sick leave at a full pay and invited claimant for a medical check-up by their doctor but claimant declined to attend. They say they even summoned her on 17th November 2017 but she claimed she could not be able to go.
32. The respondent submit they have all along demonstrated good faith and could even have settled the case out of court. They submit that claimant is therefore not even entitled to costs and also that they acted within the law in terminating the claimant.

Determination

33. The parties recorded a partial consent as follows:-
 - a. Salary underpayment
 - b. One moth salary in lieu of notice
 - c. Leave balance
 - d. House allowance
 - e. Salary for November 2017 for 17 days.
34. The parties however failed to agree on general damages costs and interest. The court now has one issue to determine and that is whether the claimant was unlawfully terminated because of her challenged health and if so is she entitled to general damages and for costs and interest or alternatively did she abscond from her employment.
35. The mandatory provisions in employment law is that before an employer terminates an employee on grounds of gross misconduct, physical incapacity or poor performance the employer must explain the employee in a language the employee understands the reason for which the employee 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.
36. This is a mandatory provision provided in section 41(1) of the *Employment Act* 2007.
37. In the present case there is no contention from both parties that the claimant got sick sometime in August 2017. The claimant claims the stroke was due to stress related to her work but the respondent denies the same. Anyhow she was placed on sick leave by the doctor until October 2017. At that point the doctor affirmed she could go back to work but on light duties. There is a letter in the file as claimant’s exhibit dated 11th October 2017 recommending she resumes work but on light duties. There is still another letter dated January 2018 from Dr Barae S.K stating full recovery will be in 3 to 6 months’ time. And still another dated 29th April 2018 stating she was fit to resume work except for vigorous physical activities. This was from Presike Medial Health Case.



38. Meanwhile on the 17th November 2018 the claimant had been relieved of her employment on the grounds of poor health. The respondent in their letter referred as “medical condition” states that they had decided to terminate her employment as he could not meet the company’s expectations. They explained that her job as a sales person involved moving a lot with a lot of work pressure to enable her meet her targets.
39. The respondents in their pleadings claim that the claimant did not report to work and so she absconded. In their aforesaid letter addressed as “medical condition” and which indeed was a termination letter did not allude to her having absconded her work. There is no reference that they were terminating her on the grounds of absconding her employment.
40. Absconding work is a serious offence and according to section 44(4) of *Employment Act* 2007 it provides as one of the grounds for gross misconduct that justifies summary dismissal. The respondent should have demonstrated that the claimant absconded from her employment and that they did attempt to recall her and finally informed her they would terminate her on the grounds of desertion.
41. In the case of *Boniface Karagania V. Protective Custody Limited* Cause no 243/2017 the Judge held that desertion is a ground for dismissal or sufficient to demonstrate there was no unfair dismissal but the respondent must demonstrate the absence of intention to resume work. It must be deliberate and unjustified because abandonment is a matter of intention and cannot merely be presumed from certain equivocal acts.
42. In the current case the respondent merely alluded to the fact that the claimant failed to turn up to work but there is no proof of abandonment of employment by the claimant.
43. By the respondent’s letter of termination he clearly states that the company had decided to terminate her employment because she could no longer cope with the pressure tied to her targets as a result of her ill health. Obviously that must be the reason behind the claimant’s termination of her employment.
44. The respondent did not put the claimant through an independent medical assessment to confirm if she needed to be terminated on medical grounds.
45. The respondent also failed to give the claimant the opportunity to give her explanation in the presence of her fellow worker as her witness or a shop floor union representative as well mandated in section 41 of the *Employment Act* 2007 as pertains to her medical health. The medical report suggested she could go back to work on light duties but the respondent seems not to have considered that opinion.
46. There is no evidence tendered that the respondent clearly explained why he concluded the claimant could no longer perform her duties and furthermore the claimant was not given an opportunity to be heard.
47. There are numerous authorities that mandate that if employee is injured or taken ill at the place of work the employer should accommodate him. In the case of *Kenya Plantation & Agriculture Workers Union Vs REA Vipingo Plantations Limited & Another* (2015) eKLR the court held that an employee injured or taken ill during employment the employer has a duty to accommodate the employee. The court held:-

“Where an employee is injured or taken ill during employment, the employer has the obligation to reasonably accommodate the employee. This goes beyond the grant and exhaustion of sick leave. Reasonable accommodation calls on the employer to genuinely explore ways through which the job performed by the stricken employee can be temporarily modified to suit the medical restrictions of the employees. The employer could limit the



working hours for the employee in the same job, not necessarily to the 2 hours recommended for children in the employment (general) rules. Thirdly the employer may change the working environment through physical modification of the workplace to suit the affected employee. This may involve the employer acquiring special equipment to enable the injured or diseased but qualified employee, continue being productively employed. Fourthly and lastly, reasonable accommodation requires the employer explores the possibility of reassignment of the employee, to a different job without the same enterprise.”

48. Also in the case of *Kennedy Nyaguncha Omanga vs Bob Morgan Services Limited* (2013) eKLR the court held:

“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.

49. Before making the final conclusion the respondent referred to an email apparently written by claimant’s advocate conceding to acceptance of 3 month’s compensation. They claim that in view of that email claimant cannot be entitled to more than 3 months compensation and the court disagrees with that contestation as an advocate’s email even if it was written is not a consent order.

50. The court having followed the claim by the claimant and the respondent’s response, the submissions by the parties and the statutory law and authorities the court is convinced the respondent terminated the claimant from her employment due to poor health and the respondent did not follow the mandated procedure in terminating an employee due to poor health. The court therefore declares that the termination of the claimant’s employment was unlawful and unfair.

Remedies

51. Having settled the other prayers in the claim the claimants’ is awarded equivalent of 4 months’ salary as her full compensation for unfair and unlawful termination amounting to Kshs 29,169x4= Kshs 116,676/-. She is also awarded costs and interest at court rates from date of judgment till full payment.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16TH DAY OF MARCH 2023.

ANNA NGIBUINI MWAURE

JUDGE

