



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. 126 OF 2016

NANCY WANGUI KURIA.....CLAIMANT

VERSUS

THOMSONS FALLS LODGE.....RESPONDENT

JUDGEMENT

1. The Claimant filed her Memorandum of Claim on 6th April, 2016, contending unfair termination and payment of terminal dues. She prays for the following remedies: -

- 1. That this Honourable Court do order the Respondent to pay the Claimant Kshs. 27072/- being Payment in lieu of 3 months' notice.**
- 2. This Honourable court do order the Respondent to pay the Claimant Kshs. 35,478 as her service gratuity.**
- 3. This Honourable court do order the Respondent to pay the Claimant Kshs. 157,872 as arrears for underpaid wages.**
- 4. This Honourable court do order the Respondent to pay the Claimant Kshs. 23,264 as reimbursement of cash paid by her for medical purpose.**
- 5. This Honourable Court do order the Respondent to pay the Claimant Kshs. 112,464 as Compensation for wrongful termination.**
- 6. This Honourable Court do order the Respondent to give the Claimant her certificate of service.**
- 7. This Honourable court do order the Respondents to bear the costs for this suit as provided under Section 12 (4) of the Employment and Labour Relations Act.**
- 8. This Honourable court do make further orders as it shall deem fit as provided for under Section 12 (3(viii) of the Employment and Labour Relations Act.**

2. The summary of this case is that the claimant was employed by the Respondent on 1st August, 2007 as a kitchen steward earning a basic salary of Kshs 5,223 and house allowance of Kshs 3,229 all adding up to Kshs. 8,452.

3. On 30th October, 2014 the claimant fell ill and sought for medical attention at Nyahururu District Hospital where she was diagnosed with severe osteoarthritis and granted two weeks' sick leave with review to be carried out on 15th November, 2014. She was also treated at North Kinangop catholic Hospital and Nairobi West Hospital and her total medical expenses were Kshs 21,264 and her transport expenses were Kshs,2000.

4. While still recuperating she informed her employer about her condition and sought to be given lighter duties in line with the doctor's advice.

5. On 30th January, 2015 she received a termination letter on the basis that the respondent could not give her lighter duties anymore and that the termination was effected in accordance with section 16(a)(iii) of the Collective Bargaining agreement based on medical grounds.

6. The claimant avers that she was earning a gross salary of Kshs. 10,698 at the time of termination but she was not paid her terminal dues.
7. The claimant contends that her termination was unfair in the circumstances and urged this Court to allow the claim as prayed.
8. The Respondent filed a response to claim on the 6th July, 2016 through the firm of Geoffrey Otieno and company advocates merely denying all the averments of the claim and putting the claimant to strict proof thereof.

Hearing

9. The claimant testified as CW-1 and adopted her witness statement dated 18th October, 2021 and produced the documents dated 15.3.2016. In summary the claimant testified that she was employed by the Respondent on 1.8.2007 as a steward. That on 5.9.2014 while at work she injured her leg and sought medical attention the next day on 6.9.2014 and received treatment at a Catholic dispensary in Nyahururu. She then continued working since there were less staff however her foot got swollen and she sought for further treatment at Kinangop Hospital where an MRI was carried out and it was discovered that she had sever Osteoarthritis. She testified that normally she took her annual leave in August but in 2014 she could not take her leave since there was shortage of staff and she had to work alone in the month of August and September. That she was then terminated in January, 2015 while on medical leave.

10. Upon cross examination by **Chepngetich Advocate**, the claimant testified that she took her leave from 15th September, 2014 to 23 October, 2014 and since she was ill, she did not report back to work and instead sought medical attention and inform the Respondent of her whereabouts. That she was terminated on 30.1.2015 while still unwell and she cleared in February, 2015 with the Respondent without receiving her terminal dues.

11. The Respondent called one witness, **Veronica Njeri Wangahu**, the Respondent's Human Resource Manager as RW-1. RW-1 adopted her statement filed on 22nd March, 2018 and produced documents dated 18.3.2019. She testified in summary that the claimant was employed as a shop steward and tasked with cleaning the kitchen and cooking staff meals. That the staff complained of poorly cooked meals when she was on duty forcing the Respondent to transfer her to housekeeping department through the letter of 10th October, 2014 which was to take effect on 24th October, 2014 upon her return from her annual leave.

12. Prior to the transfer, the claimant applied for her annual leave together with 9 off days pending totaling to 39 days which were granted and she started her leave on 14th September, 2014 to 23rd October, 2014. On 24th October, 2014 the claimant did not report back to work and on following up the claimant furnished the Respondent with a sick off sheet from Nyahururu District Hospital dated 30th October, 2014 that was to run for two weeks. On the lapse of the two weeks, the claimant did not report to work nor communicate her whereabouts and in mid-December, 2014 she served the Respondent with another two weeks sick off sheet from Nyahururu County Hospital. Later on 20th January, 2015 she furnished the Respondent with medicine prescription and receipt of even date and on 26th January, 2016 she requested to report back to work as a steward in the kitchen and not as a housekeeper as by the transfer letter of 10th October, 2014. The Respondent was not agreeable to her terms and her employment was terminated.

13. Upon cross examination by **Wachira Advocate**, RW-1 testified that the claimant had initially sought for lighter duties that's why she was transferred to housekeeping. She stated that the Respondent did not receive any information from the doctor that the claimant was unwell. She then stated that the claimant was grated her wish to carry out the lighter duties in housekeeping however she refused to take up the said duties requesting to be retained in Kitchen department as a steward. She then testified that the claimant was not paid her terminal dues since she had not cleared with the Respondent, however on shown document number 11, she admitted that it's the claimant's clearance certificate indicating that indeed she cleared with the Respondent.

14. In re-examination, the witness testified that the transfer from Kitchen to Housekeeping was in the bid to give the claimant the lighter duties she sought.

Claimant's Submissions.

15. The claimant submitted that she was terminated from employment while still on sick leave. It was argued that as much as the CBA empowered the Respondent to terminate any employee on medical ground, it was upon the Respondent to find out the suitability of the claimant to continue working by subjecting the employee to medical examination and if indeed the employee is found unfit then they can be retired or terminated on medical ground. The claimant supported her arguments by relying on the case of **Sylvester Oduor Othwila V Phoenix Aviation Limited [2013] eKLR** and argued that in this case the claimant submitted that while on sick leave she requested for lighter duties due to her condition and in response the Respondent terminated her services.

16. It was further submitted that even if the claimant was unfit for continuing employment, she ought to have been subjected to the provision of section 41 of the Employment Act.

17. The claimant then submitted that the termination was unfair in the circumstances and urged this Court to allow the claim as prayed.

Respondent's submissions.

18. The Respondent on the other hand submitted that the claimant applied for her annual leave and was granted to begin on 14th September, 2014 to 23rd October, 2014. That when the claimant applied for the said leave she was of good health. That after the lapse of her leave she did not report to work nor communicate the reason thereof and upon inquiry by the Respondent, the claimant produced sick leave forms issued by the Nyahururu Hospital. It was argued that the claimant remained at home from October, 2015 till January, 2015 about three months. The Respondent then terminated her services in accordance with section 16(a)(iii) of the Collective Bargaining Agreement on

medical grounds. The Respondent in support of its case relied on the case of **David Gichana Omuya V Mombasa Maize Millers Limited [2014] eKtr.**

19. The respondent then submitted that it terminated the service of the claimant based on a sound reason and in accordance with the law under the CBA , therefore that the claimant is not deserving of the reliefs sought.

20. I have examined the evidence and submissions of the parties herein. From the evidence of the parties herein, the claimant was terminated vide a letter dated 30th January, 2015 which indicated that she was terminated under the CBA Rule 16 (a) for being on sick leave for over 3 months.

21. The claimant has not denied she had been unwell and requested to be given light duties which the respondent declined to give.

22. Clause 16 of the CBA (b) the respondent & the union provides as follows;

16. SICK LEAVE

After two months continuous service with an employer, an employee shall be entitled to sick leave which mean leave arising out of illness or injury with pay as follows;-

a) Two (2) months with full pay and one month with half pay. Provided that:-

i. An employee shall not be entitled to such payment unless he/she produces to the employer a certificate of incapacity covering the period of sick leave, claimed signed by a medical doctor/consultant/or by a person authorized by him in writing or acting on his behalf. Where an employee falls ill or suffers an injury while on leave, then on production of the certificate of incapacity as above, the employer will take into account the duration of the illness or injury. It shall be within 48 hours that he/she has fallen ill at which time the employer shall have the right to have the employee examined by a doctor of hospital approved by the employer.

ii. An employee shall not be eligible for sick leave under this clause in respect of any incapacity due to gross neglect on his/her part.

iii. After the periods of sick leave as detailed and contained in paragraph (a), (b) and (c) herein above, if it is apparent from medical records that the employee cannot resume work by the end of sick leave, the arrangement shall be made between the employer and the employee that the employee can retire or be retired on medical grounds as per the provision of clause 10 hereof.

23. My reading of this clause at (iii) above indicates that even if sick leave is exhausted, an arrangement shall be made between the employer and the employee that the employee can retire or be retired on medical grounds as per the provision of Clause 10 hereof.

24. The arrangement envisaged is in my view a form of a hearing as stipulated under Section 41 of the Employment Act 2007 which states as follows;

Notification and hearing before termination on grounds of misconduct

"41(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, an 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 grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make".

25. In the circumstances of this case, there is no indication that the claimant was subjected to any hearing. She was just slapped with a letter informing her of her termination without notice or a hearing.

26. It is therefore my finding that the claimants dismissal was unfair and unjustified as envisaged under Section 45 (2) of the Employment Act 2007 which states as follows;

"45. (1).....

(2) A termination of employment is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure".

1. Given that the claimant was terminated while on sick off and without a hearing, it is my finding that the respondent acted on a most callous manner and therefore the claimant is entitled to maximum compensation under the law of 12 months = 12 x 8,452 = 101,424/=

2. I also find for the claimant and I award her 3 months salary as notice pay as per clause 9 (c) of the CBA

= 3 x 8,452/=

= 25,356/=

3. The claimant is further awarded service gratuity as provided for under clause 10 (i) of the CBA

= 2/5 of the gross pay for every completed year of service being 7 years.

= 2/5 x 8,452 x 7 = 23,666/=

TOTAL AWARDED = 150,446/=

Less statutory deductions

4. The respondent shall also issue the claimant with a certificate of service.

5. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED VIRTUALLY THIS 30TH DAY OF MARCH, 2022

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wachira for Claimant – present

Geoffrey Otieno for Respondents – Absent

Court Assistant - Fred