



**Otieno v United Millers Limited (Cause 77 of 2019)  
[2022] KEELRC 1428 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1428 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 77 OF 2019**

**CN BAARI, J  
JUNE 23, 2022**

**BETWEEN**

**BELINA ACHIENG OTIENO ..... CLAIMANT**

**AND**

**UNITED MILLERS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant lodged this suit vide a Memorandum of Claim dated 26<sup>th</sup> August, 2019, and filed before court on 29<sup>th</sup> August, 2019. She seeks a declaration that her termination from the service of the Respondent is unprocedural, unfair and unlawful and unconstitutional. She further prays for an order for payment of 12 months salary as compensation for unfair termination, three (3) months' salary in lieu of notice, exemplary damages, damages for constitutional violations and a certificate of service.
2. The Respondent filed a response to the claim vide a Memorandum of Response dated 17<sup>th</sup> September, 2021 and filed on similar date.
3. The suit was heard on 7<sup>th</sup> February, 2022. The Claimant testified in support of her case. The Respondent presented their Human Resources Manager named Simon Okokhe Egesa to testify in support of her case.
4. Both parties filed submissions in the matter.

**The Claimant's Case**

5. The Claimant's case is that she was employed by the Respondent in the position of secretary through a Contract of Employment dated 4<sup>th</sup> December, 2010, and earning a gross monthly salary of Kshs.97,020.00.



6. It is the Claimant's case that she performed her duties well as evidenced by her increased salary and benefits until the end of April 2016, when she sought and was granted annual leave to allow her time to seek urgent medical attention.
7. It is her case that she was treated on several occasions in the months of May and June, 2016, and that her doctor advised her to rest for a period of thirty (30) days so as to recuperate. The Claimant further states that she was subsequently operated on, thus requiring her to rest for an additional period and that her last surgery was conducted on 11<sup>th</sup> July, 2016.
8. It is her case that on the 12<sup>th</sup> August, 2016, she received an email from the Respondent's Human Resource Manager inquiring when she would be in a position to resume work.
9. The Claimant states that she responded to the email through a letter dated 23<sup>rd</sup> August 2016, wherein she informed the Respondent that she was still recuperating and attending weekly clinics awaiting advise from the doctors on when she would be fit to resume work.
10. The Claimant states that she did not receive any response to her letter, instead, and to her utter shock, the Respondent immediately stopped remitting her monthly salary at the end of August 2016, without notice in effect terminating her services.
11. The Claimant contends that she was unfairly terminated from employment for reason that at the time of the unlawful termination, the Claimant was sick and she had duly notified the Respondent accordingly. She further contends that the Respondent did not give her any notice and reasons prior to the termination, in total disregard of the provisions of the Employment Act and the Constitution of Kenya.
12. The Claimant states that she is aggrieved with the inhumane, unfair and illegal manner in which her contract was abruptly terminated. It is her further case that she suffered mental and psychological harm and is seeking exemplary damages from the Respondent to be assessed by the court.

### **The Respondent's Case**

13. The Respondent's case is that the Claimant made an application to proceed for her annual leave on the 24<sup>th</sup> April, 2016. It is the Respondent's further case that she approved the claimant's leave vide a letter dated 28<sup>th</sup> April, 2016, and that she was expected back in the office on 15<sup>th</sup> June, 2016.
14. It is the Respondent's assertion that in June, 2016, she was informed that the Claimant was sick and could not report back to work on the scheduled date after the lapse of her annual leave, and further received a Medical Off-duty certificate from the Claimant.
15. The Respondent states that the Claimant was put on sick leave from the date she was to report back to work and that she received her regular salary. The Respondent further states that at the lapse of the Claimant's sick leave in August, 2016, she sought to have an indication on when the Claimant was likely to resume her duties, and that the Claimant indicated to the Respondent that she had a pre-existing condition that necessitated her taking annual leave and she had in fact undergone two surgical procedures and was convalescing at home.
16. The Respondent states that the Claimant thereafter never communicated nor made herself available to resume her work or get any directions in relation to her job.
17. The Respondent's witness (RW1) on cross-examination told the court that the claimant explained to the Respondent in detail the nature of her ailment. He further confirmed that the Claimant's letter



detailing the nature of her illness was received by the Respondent on 24<sup>th</sup> August, 2016, and that no response was made to the Claimant in relation to her job status in view of the ailment.

18. RW1 further told the court on cross-examination that the Respondent did not reach out to the Claimant nor was she given notice on the decision to terminate her service. It is RW1's case that the Claimant's salary was stopped at the end of her sick leave.
19. RW1 told this court that he is aware that the Claimant is now visually impaired, which information he got from an application for leave filled by the Claimant.
20. RW1 confirmed that the Respondent gives her employee's sick leave. It is his position that the Claimant was not terminated but her salary was stopped.

### **The Respondent's Submissions.**

21. The Respondent submits that after the lapse of the sick-leave which it duly paid, the Claimant went quiet and only resurfaced when her advocates wrote a demand letter.
22. It is submitted for the Respondent that when it sought to know how long the Claimant was likely to remain on sick leave, she did not specify. All she stated was that she was still recuperating at home after two surgeries.
23. The Respondent submits that the Claimant was the sole author of the circumstances leading to her exit from the Respondent's employment. The Respondent submits that the Claimant did not come out clearly that she needed to take sick leave as opposed to her annual leave. This explains why the leave was approved with a resumption date.
24. It is further submitted for the Respondent that the Claimant withheld material information regarding her health status, and instead of applying for and being granted sick leave right from inception, she merely applied for her annual leave and only when she was unable to account for her return to work did she disclose that she was in fact sick from the time she applied for her annual leave.
25. The Respondent submits that she never terminated the Claimant. The Respondent further submits that the Claimant did not lead evidence on the said termination and that the document constituting such termination and when the termination took place.
26. The Respondent submits that her failure to remit the Claimant's salary, deduct the statutory dues after July, 2016, did not amount to terminating her employment but simply not paying salary for no work done.
27. The Respondent further submits that it could not have been expected to give the Claimant a Certificate of Service from August, 2016, because she never indicated whether or not she deemed herself a former employee of the Respondent. The Respondent sought to rely on the decision in Mombasa ELRC No.364 of 2018 – *Joseph Chigodi Mwarocha Vs. Winstar Security Guards* for the holding that the burden of proof of an unfair termination lies with the Claimant as contemplated in Section 47(5) of the *Employment Act*, 2007.

### **Analysis and Determination**

28. I have considered the pleadings, the witnesses' oral testimonies and the party's submissions. The issues for determination are:
  - i. Whether the Claimant was unfairly terminated.
  - ii. Whether the Claimant is entitled to the remedies sought.



### **Whether the Claimant was unfairly terminated.**

29. The question of fair termination has largely been settled to depend on the employer's adherence or lack thereof to the tenets of fair procedure and the substantive justification of a termination. To determine whether the Claimant was fairly terminated, I will rehash the circumstances leading up to the separation of the parties herein.
30. The Claimant took her annual leave with the aim of seeking medical attention for an ailment she was experiencing prior to the taking of leave. The ailment the court was told, was within the knowledge of the Respondent, and which is the reason the Respondent approved 36 leave days, when the Claimant had only 21 days outstanding on account of leave. During her leave, she travelled to Nairobi from Kisumu to seek medical attention as planned.
31. The court was told that upon treatment, the Claimant was given sick leave on the Doctor's advice, and that in between her sick leave she would be called to the Respondent's offices to help retrieve certain documents, which the Claimant did and returned home to recuperate.
32. The Claimant was again admitted in hospital where she underwent surgery after she had suffered an infection. The many visits to the hospitals and the treatments she received resulted in the Claimant losing her eye sight.
33. The Claimant called her office and explained her problem. Her salary was nonetheless stopped in August, 2016, and when she called her office to find out why her salary had not been remitted, the Human Resource Manager informed her that she had been dismissed, and that no money will be remitted to her account.
34. The evidence before court is that upon the lapse of the Claimant's leave, she was given a one-month sick leave and was then due to report back to work on 15<sup>th</sup> July, 2016.
35. The Respondent told court that after the Claimant's sick leave ended, she reserved the right to put the Claimant on any salary and hence she was put her on half salary between 15<sup>th</sup> July, and 30<sup>th</sup> July, 2016. The Claimant told the court that she did not receive salary after July, 2016.
36. There is no doubt that the Claimant made the Respondent aware of her ailment, and the turn of events after her botched treatment. RW1 confirmed to this court that the Claimant informed the Respondent in writing that she had lost her sight as a result of the surgeries she went through. RW1 again confirmed that when they got the information they did not reach out or at least respond to the Claimant's letter on the way forward regarding her employment.
37. The Respondent's assertion that she did not terminate the Claimant does not hold. Silence on the part of an employer upon stoppage of an employee's salary in my opinion is an implied termination.
38. The Respondent did not inform the Claimant the decision to put her on half salary, and the subsequent decision to stop her salary all together.
39. Contrary to the Respondent's assertion, the Claimant was obviously terminated by the Respondent's action to stop her salary and doing so without notifying her for how long that was going to be and the reasons thereof. In the case of *Kenya Plantations & Agricultural Workers Union v. Rea Vipingo Plantations & Another* (2015) eKLR, it was held that where an employee is injured or taken ill during employment, the employer has the obligation to reasonably accommodate the employee, and which obligation goes beyond the grant and exhaustion of sick leave.



40. The Claimant's call to the Respondent's human resource office that informed her that she had been dismissed was not controverted. This goes to confirm that the Respondent made no effort to accommodate the Claimant, her 15 years of service notwithstanding. In *Kennedy Nyaguncha Omanga v Bob Morgan Services Limited* (2013) eKLR, the court held that while employers are entitled to terminate employment on the ground that an employee was too ill to work, they are required to exercise due care and show support to the employee to recover and resume duty, and where termination is inevitable, the employer must give the employee specific notice of the impending termination.
41. The court again in the case of *Samuel Wanyonyi Wamalwa v Wells Fargo Limited* (2014) eKLR, reaffirmed that employees whose termination is based on physical incapacity have a right to a hearing.
42. I proceed to the conclusion that in the absence of notice and reasons for the termination, the termination fell short of the requirements of Section 41, 43, 45 and 47 of the *Employment Act*, 2007. The termination is both procedurally and substantively unfair. I so hold.

#### **Whether the Claimant is entitled to the reliefs sought.**

43. The Claimant seeks a declaration that her termination from the service of the Respondent is unprocedural, unfair and unlawful and unconstitutional. She further prays for an order for 12 months salary as compensation for unfair termination, three (3) months' salary in lieu of notice, exemplary damages, damages for constitutional violations and a certificate of service.

#### **Compensation for unfair termination**

44. The Claimant's termination has been declared unfair. This holding entitles the Claimant to compensation in accordance with Sections 49 and 50 of the *Employment Act*, 2007. (See *Benjamin Langwen v National Environment Management Authority* (2016) eKLR.)
45. The Claimant is now visually impaired. Considering that the chances of her securing alternative employment are now limited, and the Claimant's long service, I hold that the Claimant has proved a case for maximum compensation.
46. I award the Claimant 12 months' salary as compensation for unfair termination.

#### **Salary in lieu of notice**

47. The employment agreement between the Claimant and the Respondent, provides for a one month termination notice for either party intending to terminate the contract. The Claimant has therefore no basis to seek to be paid three months' salary in lieu of termination notice.
48. The Claimant not having been given notice of termination is hereby awarded one-month salary in lieu of termination notice.

#### **Exemplary damages**

49. The general rule is that exemplary damages are not payable in cases of breach of employment contract (See *Margaret Omondi v Kenya Revenue Authority*).
50. There are instances that have been held to warrant the award of exemplary damages in addition to compensation for unfair termination. Lord Devlin in *Rookes v Barnard* (1964) AC 1129, summarized the three instances where exemplary damages may be awarded as follows:
- i. For tortious intrusion or trespass that are profit motivated such as a landlord's wrongful eviction of her tenants;



- ii. Where there is oppressive conduct by government agents;
  - iii. Where acts of the defendant have caused distress and intolerable anxiety.”
51. Based on the third instances from the holding by Lord Devlin in *Rookes v Benard* (Supra) exemplary damages can be awarded in respect of discriminatory acts suffered by an employee while in employment, in addition to compensation for unfair termination.
52. The Respondent kept contact with the Claimant until the point when the Claimant informed her of the nature of her ailment, and that she had suffered visual impairment. Communication lines went dead and the Claimant left on her own.
53. The Respondent certainly made no effort to accommodate the Claimant, notwithstanding that she lost her eye sight while in her employ. The silence on receiving information that the Claimant had lost sight, no doubt caused the Claimant pain, distress and a hell of anxiety. The Respondent by her actions violated the Claimant’s right not to be discriminated on the basis of her health.
54. I have no doubt in my mind that being blind and jobless caused the Claimant unimaginable distress and anxiety that warrants the award of exemplary damages.
55. The Claimant is hereby awarded Kshs.3,000,000/- in exemplary damages.
56. Consequently, Judgment is entered for the Claimant as against the Respondent as follows:
- i. A declaration that the Claimant’s termination is unfair.
  - ii. One-month salary in lieu of notice at Kshs.97,020.00/-
  - iii. 12 months’ salary as compensation for unfair termination at Kshs.1,164,240/-
  - iv. Kshs.3,000,000/- in exemplary damages
  - v. A certificate of service.
57. It is so ordered.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS  
23RD DAY OF JUNE, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Mr. Njomo present for the Claimant

Mr. Ouma present for the Respondent

Christine Omollo- C/A

