



REPUBLIC OF KENYA



KENYA LAW
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**Msanzu v Kenya Ports Authority (Cause 662 of 2020)
[2022] KEELRC 1492 (KLR) (2 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1492 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 662 OF 2020**

**AK NZEI, J
JUNE 2, 2022**

BETWEEN

ALFRED BAYA MSANZU CLAIMANT

AND

KENYA PORTS AUTHORITY RESPONDENT

JUDGMENT

1. The suit herein was instituted by the claimant on December 18, 2020 vide a Memorandum of Claim dated the same date (December 18, 2020). The claimant pleaded, inter-alia:-
 - a) that he was employed by the respondent as a Machine Clerk from 1998 to January 29, 2020 when he was unprocedurally retired from employment.
 - b) that the claimant was earning a gross monthly of Ksh. 162,000 as at the time of his termination.
 - c) that on January 22, 2018, the claimant fell ill and was admitted at Pandya Memorial Hospital having been diagnosed with rapidly progressive spastic Quadriplegia and subsequently underwent decompressive surgery on February 12, 2018 at Coptic Hospital, Nairobi.
 - d) that the claimant was discharged from Coptic Hospital sometimes in February 2018, and could not go back for review after a few weeks as was required as the respondent's Chief Nursing Officer at Bandari Clinic refused to hand over the discharge summary to the claimant and to the said hospital for review, referring to the same as a waste of time and money.
 - e) that the claimant's condition was not good and he was admitted to Jocham Hospital between 27/2/2018 and 8/4/2018 for in-patient rehabilitation, and was discharged on 8/4/2018 for home-based care.
 - f) that in November 2018, the claimant was seen by Dr. Okanga, who, upon noting tremendous improvement, recommended that the claimant could resume duties at work.



- g) that in July 2019, the claimant was summoned to Bandari Clinic by the respondent's Nurse, Sabina, who advised him to resign on medical grounds, but the claimant refused.
 - h) that since the claimant fell ill in January 2018, his salary was illegally deducted; and the claimant did not receive any salary or medical care since August 2019.
 - i) that on December 6, 2019 the respondent, through the Chief Nursing Officer Bandari Clinic, requested the claimant to separately visit Dr. Omar Ali of Mombasa Trade Centre, Dr. Thuo of Mombasa Hospital and Dr. Miodi of Pandya Hospital, which the claimant did.
 - j) that Dr. Miodi suggested physiotherapy for three months upon which the claimant could report back to work.
 - k) that the medical reports prepared by the three doctors were never availed to the claimant, despite several requests.
 - l) that on January 29, 2020 the claimant, through his spouse, was served with a letter dated August 20, 2019, terminating the claimant's services.
 - m) that during the employment period, the claimant used to work on public holidays and was never paid for those days.
 - n) that the claimant's retirement on medical grounds was unfair, unlawful and unprocedural as he was not given an opportunity to be heard pursuant to section 41 of the Employment Act 2007.
 - o) that the claimant's retirement was without reasonable cause and amounted to unlawful and unfair termination of employment.
 - p) that no valid reasons were given to the claimant, contrary to section 45(2) of the Employment Act, and no notice was issued or payment made in lieu thereof, contrary to section 35 of the Act.
 - q) that the claimant is entitled to gratuity pay for all the years he worked for the respondent.
2. The claimant sought an order declaring his retirement as pre-mature, unfair, illegal and unprocedural, and in the alternative, an order for reinstatement or re-engagement in work comparable to that in which the claimant was employed prior to dismissal or other suitable work at the same salary.
3. The claimant further sought the following reliefs:-
- Compensation for unfair termination of employment and terminal dues as follows:-
- a) unlawful deductions from January 2018 to August 201960,000x19 months =ksh. 1,140,000
 - b) unpaid salary from August 2019 to January 2020162,000x6 months= 972,000
 - c) two months salary in lieu of noticeksh.324,000
 - d) unpaid public holidays for the period 1998 to January 2020 (11 public holidays per year x22 years at daily wage of ksh.5400x 22.....ksh.2,613,600
 - e) outstanding leave pay from 1998 to January 2020 (ksh.162,000x22)ksh.3,564,000



- f) maximum compensation for unfair and unlawful retirement (162,000x12 months)ksh. 1,944,000
- g) gratuity (162,000x22 years)ksh.3,564,000
4. The claimant also sought to be issued with a certificate of service and to be paid costs of the suit and interest.
5. The respondent entered appearance on January 28, 2021 and filed a Response to the Memorandum of Claim on the same date. Basically, the respondent denied the averments made in the claimant's memorandum of claim and put the claimant to strict proof thereof. The respondent specifically:-
- a) pleaded that the claimant was retired on medical grounds after being assessed by a competent medical board which recommended his retirement on medical grounds, and after the respondent complied with all the requisite procedures in accordance with its Human Resource Manual in force.
 - b) stated that the claimant was aware of the reasons for his retirement on medical grounds, having been treated and allowed sick off with full pay for more than a year and a half without recovery.
 - c) denied the claimant's claim for gratuity and pleaded that gratuity was only available to non-pensionable employees; that the claimant was employed on permanent and pensionable terms.
6. On October 13, 2021, the claimant filed Reply to the respondent's Response and reiterated the averments made in the Memorandum of Claim.
7. When trial commenced on January 19, 2022, the claimant, who appeared in court on a wheel chair, adopted his recorded and filed witness statement dated December 18, 2020 as his sworn evidence. He also produced in evidence the fourteen documents listed on his field list of documents dated December 18, 2020, which were marked as the claimant's exhibit nos 1-14 respectively. The claimant further testified:-
- a) that the letter dated August 20, 2019 (retiring the claimant on medical grounds) was never given to him, that the respondent called his wife to collect it in January 2020.
 - b) that although the letter said that the claimant would be paid two months' notice, he was not paid the money, and no other benefit was paid to him; and certificate of service was not issued.
 - c) that prior to the letter dated August 20, 2019, the claimant was not invited for any discussion or given reasons for termination.
8. Cross-examined and re-examined, the claimant testified, inter-alia:-
- a) that he was a permanent and pensionable employee, and that his pension was being deducted every month.
 - b) that during his sick-off (from the date of admission to Coptic hospital to retirement date), he continued receiving his salary but it was not consistent.
 - c) that he had not been paid any benefits.
 - d) that he was not given hospital discharge summary save the one for Pandya Hospital, which he had filed in court.



9. The claimant called one witness (CW-2) who told the court that she was the claimant's wife. The witness, Habibah Kache Mgandi (CW2), adopted her filed witness statement (dated 9th November 2021) as part of her sworn testimony. The witness further testified:
- a) that in January 2020, she received a telephone call from one Sharon of the respondent's Human Resource Office who told her to go and pick a letter from the administrator (a Mr. Doro) as the claimant's employment had been terminated on August 20, 2019.
 - b) that on going for the letter, Mr. Doro told her to go after one week as he had misplaced the letter.
 - c) that the witness went back on January 29, 2020 and the letter was given to her.
 - d) that she had never been telephoned and informed of any meeting to discuss the claimant's work issues, and had never been paid any money on behalf of the claimant, and had not been issued with a certificate of service (on the claimant's behalf).
10. Cross examined, CW-2 told the court that the letter she was called to collect in January 2020 was on the claimant's retirement on medical grounds.
11. The respondent called one witness, Fatma Shafi, a Human Resource Officer at the respondent Authority (RW-1). The witness adopted her filed witness statement dated July 1, 2021 as her testimony, and produced as exhibits the nineteen documents listed on the respondent's list of documents dated July 1, 2021, which were marked as the respondent's exhibits nos 1-19 in their order of listing. The witness testified, inter-alia:-
- a) that the claimant was employed as a permanent and pensionable employee and contributed to a pension scheme, hence he is not entitled for gratuity.
 - b) that the mandatory earnings that were payable to the claimant (while in employment) were the basic salary, standard house allowance and motor transport allowance. That all the other allowances and bonus, payable only to employees in the operations department, were incentives and were paid to employees based on their performance.
 - c) that leave allowance was only payable when an employee proceeded on leave and that the claimant was paid leave allowance for all the years worked upto 2018, that it was only for the year 2019 that he was not paid leave allowance.
 - d) that the claimant's leave allowance was ksh.34,500.
 - e) that pension deductions for the claimant were made from the date of employment and were sent to KPA Pension Scheme, and that this position is captured in the respondent's Exhibit no. 17.
 - f) that the claimant was hospitalized on January 22, 2018 and he never went back to work, and was away for 380 days, and that the respondent paid all medical expenses.
 - g) that before being retired on medical grounds, the claimant was assessed by a three member Medical Board in accordance with the respondent's Policy on Employee Separation (Clause B.14 in the respondent's HR Manual) and the Board recommended that the claimant be retired on medical grounds as he was unlikely to recover fully to resume duty.
 - h) that the claimant was entitled to two months salary in lieu of notice, and that the same was paid in the year 2020.



- i) that the claimant was paid all his entitlements by the respondent, and his pension was paid by the Pension Scheme under KPA.
12. Cross-examined, the witness testified:-
- a) that in the entire process leading to the claimant's retirement on medical grounds, there was no correspondence to the claimant and that the decision to refer the claimant to a Medical Board was not communicated to him.
- b) that the advice by the respondent's Head of Medical Department to the Human Resource Department to retire an employee on medical grounds is usually written, but none had been produced in court in the case of the claimant.
- c) that although a second medical opinion is usually recommended before an employee is retired on medical grounds, none had been recommended in the claimant's case.
- d) that the decision to retire the claimant on medical grounds was reached on August 20, 2019 and a letter retiring him was written, but the letter did not reach the claimant until January 29, 2020.
- e) that the witness (RW-1) had no evidence that the two months salary in lieu of notice referred to in the letter dated August 20, 2019 was paid to the claimant.
- f) that the basic salary for a Machine Clerk was ksh.67,530 and a house allowance for the post was ksh.26,675, while motor transport allowance was ksh.14,000.
- g) that as a Machine Clerk, the claimant's leave allowance was ksh.34,500.
- h) that whenever an employee worked on public holidays, payment for the same would be made together with their salary as overtime.
- i) that although the claimant's letter of appointment stated that he was entitled to gratuity, this position was changed by the letter of confirmation (dated July 10, 2000) which confirmed him as a permanent and pensionable employee, and became ineligible for gratuity.
13. Parties did not file a joint statement of agreed issues. Upon considering the pleadings filed and evidence presented by both parties, issues that emerge for determination, in my view, are as follows:-
- a) Whether retirement of the claimant on medical grounds was procedural, and whether it amounted to unfair termination of employment.
- b) Whether the claimant is entitled to the reliefs sought.
14. The fact of the claimant having been the respondent's employee is not in dispute. Indeed, the respondent (RW1) testified that the claimant's mandatory monthly earnings at the time of his retirement on medical grounds was made up of basic salary of ksh.67,350, standard house allowance of ksh.26,675 and Motor transport allowance of ksh.14,000, and that leave allowance for the year 2019, being ksh.34,500 had not been paid. The date of the claimant's employment is also not in dispute.
15. On the 1st issue, it is settled that by dint of section 41 of the Employment Act 2007, every employer contemplating termination of an employee's employment on grounds of misconduct, poor performance or physical incapacity must comply with the mandatory procedural requirements set out in the said Section. In the present case, the respondent was retiring the claimant on medical grounds/on account of physical incapacity, and was therefore obligated to comply with the mandatory procedural requirements of the Section 41, regardless of whether or not it had complied with its



internal procedural requirements as set out in the respondent's Human Resource Manual or any other institutional rules and procedures.

16. Section 41 of the *Employment Act* 2007 provides:

“(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.”

17. The respondent was not shown to have complied with the foregoing mandatory requirements of the statute. This position was confirmed by the respondent's witness (RW-1) who testified that the respondent did not correspond with the claimant during the entire retirement process. The claimant was not notified of the intention to retire him on medical grounds, neither was he given an opportunity to be heard on the issue.

18. As if non-compliance with section 41 of the *Employment Act* 2007 was not enough procedural transgression against the claimant, the respondent, in the words of RW-1, failed to call for a second medical opinion on the claimant before retiring him on medical grounds, contrary to its own internal procedural requirements/practice.

19. Section 45(5) (c) of the *Employment Act* provides that in deciding whether it is just and equitable for an employer to terminate an employee's employment, the court shall consider the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate of service under Section 51 and the procedural requirements set out in Section 41.

20. The court of Appeal held as follows in the case of *Kenfright [E.A.] Limited v Benson K Nguti* [2016] eKLR:-

“apart from issuing a proper notice according to the contract (or payment in lieu of notice provided), an employer is duty bound to explain to an employee, in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken....We come to the conclusion and find, in agreement with the trial Judge, that the termination of the respondent's contract of service in the circumstances, was unfair, the payment in lieu of notice notwithstanding...”

21. It was held in the case of *Kennedy Nyanguncha Omanga v Bob Morgan Services Limited* [2013] eKLR as follows:-

“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.....this procedure was not followed and I therefore find the termination of the claimant's employment on medical grounds unfair for want of due process...I award the claimant the equivalent of 10 months' salary as compensation for unfair termination of employment..."

22. In the present case, the claimant was not notified of the impending retirement on medical grounds; and was not given an opportunity to be heard. The respondent wrote the retirement letter on August 20, 2019 and kept it until January 29, 2020 when it was given to the claimant's wife. This act by the respondent did not demonstrate care and sensitivity, and was devoid of elementary diligence and responsibility expected of an employer.
23. Retiring the claimant on medical grounds without complying with the mandatory requirements of section 41 of the Employment Act amounted to unfair termination of employment, and I so find, hold and declare.
24. On the second issue, and having found and declared that termination of the claimant's employment was unfair, and taking into account the circumstances in which the claimant's employment was terminated, I award the claimant the equivalent of eleven months' salary being compensation for unfair termination of employment. As stated in paragraph 14 of this judgment, the claimant's mandatory monthly salary at the time of termination was made up of basic salary (ksh.67,530), house allowance (ksh.26,675) and motor transport allowance (ksh.14,000). This comes to a total of 108,205 per month. The equivalent of eleven months' salary is ksh.1,190,255.
25. On the claim for two months' salary in lieu of notice, the letter retiring the claimant on medical grounds (dated August 20, 2019) indicated that the claimant would be paid two months' salary in lieu of notice in addition to all benefits upto and including September 6, 2019. The claimant pleaded and testified that the notice pay was never made to him. RW-1 testified that she had no evidence that the payment was ever made. The claim is allowed at Ksh.216,410.
26. On the claim for unpaid salary from August 2019 to January 2020, the claimant and his witness (CW-2) testified that the claimant did not know of his retirement until the letter retiring him on medical grounds, dated August 20, 2019, was given to CW-2 by the respondent on January 29, 2020. This evidence was corroborated by the respondent's witness (RW-1). The claimant testified that he stopped receiving his salary in August 2019. This evidence was not controverted by the respondent. The respondent's exhibit no. 17 however, shows that the claimant's salary for August 2019 (ksh.108,205.74) was paid and that for September 2019, only ksh.18,034.27 was paid. It is my finding that the claimant remained an employee of the respondent until January 29, 2020 when the termination of his employment by way of retirement on medical grounds was communicated to him. The claimant is entitled to his salary for the months of September, October, November and December 2019 and January 2020, less the ksh.18,035.27 paid in September 2019. I allow the claim and award the claimant ksh.522,993.43.



27. The claim for unpaid public holidays was not proved and the same is declined. The claimant did not specify or particularize the public holidays on which he worked. The respondent (RW-1) on the other hand testified that whenever an employee worked on public holidays, payment thereon was made with their salary as overtime. I have noted from the claimant's exhibit no. 13 (which is a bundle of payslips) that the claimant received payment for overtime from time to time. Could this have been payment for work done on public holidays? The claimant did not shade light on this.
28. On the claim for outstanding leave pay, I have noted from the respondent's exhibit no. 17 (the claimant's earning history) that the claimant was paid leave allowance every year, save for the year 2019. RW-1 testified that the claimant was entitled to ksh. 34,500 being his leave allowance for the year 2019 as he had taken leave, and the leave allowance had not been paid. The claimant did not demonstrate that he did not take leave during the period of employment, and why leave allowance would be paid to him each year (save for the year 2019) if he did not take leave. I allow the claim at ksh. 34,500, being leave allowance for the year 2019.
29. The claim for unlawful deductions is disallowed. The respondent's witness (RW-1) candidly testified that allowances, including third shift allowance (for working at night), berth productivity allowance, paid break and bonus were incentives which were performance based. This explains why the claimant's salary went down when he fell sick and stopped working. He continued earning his mandatory earnings made up of basic salary, standard house allowance and motor transport allowance. The claim is declined.
30. The claim for gratuity (service pay) is declined. It is clear from the claimant's exhibit no. 13 (a bundle of payslips) that the claimant was contributing to /was a member of a Pension Scheme. RW-1 testified that the claimant contributed to KPA Pension Scheme. That evidence was not controverted by the claimant. Section 35(5) of the Employment Act excludes members of such pension schemes operated by employers from service pay.
31. Ultimately, and having considered written submissions filed by Counsel for both parties, judgment is hereby entered for the claimant against the respondent for:-
- a) Eleven months' salary being compensation for unfair termination of employmentksh. 1,190,253.
 - b) Two months salary in lieu of noticeksh.216,410
 - c) Unpaid salary for part of September 2019, October, November and December 2019 and January 2020.....ksh. 522,993.43
 - d) Outstanding leave allowance (for 2019)ksh. 34,500.00
- Total ksh. 1,964,156.43
32. The respondent shall issue the claimant with a Certificate of Service in accordance with section 51(1) of the Employment Act within thirty days of this judgment.
33. The claimant is awarded costs of the suit and interest at court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2ND DAY OF JUNE 2022

AGNES KITIKU NZEI

JUDGE

ORDER



In view of restrictions on physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Yunis for claimant

Miss Kamau for respondent

10

Msa Elrc 662/2020

