



**Muyala v Equator Bottlers Limited (Cause E018 of 2020)
[2022] KEELRC 1307 (KLR) (7 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1307 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E018 OF 2020**

CN BAARI, J

JULY 7, 2022

BETWEEN

EMMA EMILY MUYALA CLAIMANT

AND

EQUATOR BOTTLERS LIMITED RESPONDENT

JUDGMENT

Introduction

1. Before court is the claimant memorandum of claim dated November 11, 2020, and filed on even date. The claimant's prayer is for an order for payment of damages for unfair termination, gratuity, exemplary damages, reinstatement and the costs of the suit and interests thereon.
2. The respondent entered appearance through the firm of Kiragu Wathuta & Co Advocates, and filed a response to the claimant's claim dated December 2, 2020, and filed on December 9, 2020.
3. The claimant's case was heard on December 8, 2021, followed by the defence hearing on January 31, 2022. The claimant testified in support of her case, and adopted her witness statement dated November 11, 2020, and further produced her bundle of documents of similar date.
4. The respondent presented their human resources business partner, one Ms. Florence Mukiria to testify in her defence. Ms Mukiria adopted her witness statement and produced a bundle of documents filed in the matter in support of the respondent's case.
5. Both parties filed submissions in the matter.

The Claimant's Case

6. The claimant's case is that the respondent employed her as a logistics' in-charge on August 1, 2013, on permanent and pensionable basis.



7. The claimant avers that she served the respondents diligently for over seven (7) years without any disciplinary and/or integrity issues. The claimant states that due to her exemplary service, she was promoted to the position of logistics manager on December 1, 2015, and later deployed to the position of warehouse team leader.
8. The claimant states that on December 7, 2017, it was alleged that she had a motor vehicle registration No KCH 401W which was leased to the respondent that would amount to conflict of interests. The claimant was issued with a notice to show cause and subsequently invited to a disciplinary meeting where the issue was addressed, and the claimant absolved of blame on the premise that by then the respondent policy on conflict of interest had not been communicated to employees.
9. The claimant states that she had a good working relationship with the respondent and her fellow employees until January 10, 2020, when the relationship between her, and her line manager a Mr Basweti became strained, upon her reporting issues of harassment to the human resource manager.
10. The claimant avers that immediately after reporting the strained relationship with her line manager, she was placed on a performance improvement plan (PIP), despite the fact that her role was a collective role, and could not be assessed alone, but which she willingly submitted to.
11. The claimant states that to her utter surprise, the respondent abandoned the PIP process midway which conduct left the claimant apprehensive that the respondents were up to no good and were in fact being malicious.
12. The claimant further contends that she is asthmatic, and that she made her condition known to the respondent and even provided a medical report from her personal doctor. The claimant further avers that owing to her medical condition, she was advised by her doctor to avoid dusty areas and cold conditions as they would predisposed her to asthma attacks which might lead to fatality.
13. The claimant contends that despite the fact that the respondent has a policy against discrimination on health grounds, the respondent unfairly targeted and discriminated against her on the premise of her health condition among many other employees with similar conditions.
14. It is the claimant's case that the respondent subjected her to three different medical examinations with three different doctors and instructed the doctors never to share the results with the claimant despite the fact that examinations were done on the claimant against medical professional ethics. It is her case that she requested the respondents human resource manager to furnish her with the medical report on the medical examination done by the purported respondent's doctors, but to no avail.
15. The claimant avers that after she was subjected to numerous medical examinations and the doctors accordingly furnished the respondent with the medical reports indicating the risks of enlisting her for night shift, the respondent in brazen disregard of the doctor's professional report continued to list her for night duties.
16. It is the claimant's case that on May 21, 2020, the respondent released a shift schedule for the following week, and listed her for night shift on Monday May 25, 2020, Tuesday May 26, 2020, and Wednesday May 27, 2020, against the doctors' advice.
17. The claimant states that out of vigilance she wrote an email to the respondent informing them that she would not report to the night shift, citing her health reports which were already known to the respondent.
18. The claimant avers that to her utter shock, and dismay she was sent on an indefinite leave by the respondent's human resource manager and after some time she was advised to visit yet another doctor



for medical examination. It is her case that only after the third doctor compiled the medical report and after the claimant requested for the report that the three medical reports were availed her.

19. The claimant states that from the reports, it was apparent that the respondent was all along wrongfully discriminating on her, and subjecting her to mental stress and anguish as the three doctors' reports were consistent on the claimant's medical condition, and had infact advised the respondent not to expose the claimant.
20. The claimant states that as discussions were on regarding her proposed deployment, she was summoned to a capability hearing, which turned out to be a medical hearing. She avers that no doctor was called to appear in the hearing.
21. The claimant states that it was at this hearing that she was asked to choose between three vacant posts on the basis that she was not medically fit to hold the position she held then. The claimant further states that she declined to pick a position for reasons that the respondent knew her qualification and could place her in a post equivalent to the one she held.
22. The claimant states that she was terminated from the service of the respondent. She further states that she did not engage in any form of misconduct to warrant termination, but was discriminated against on the basis of her health status.
23. The claimant states that there were other employees in the service of the respondent, but who were assigned alternative roles and further that there were alternative roles within the respondent's employ that would have fitted her qualification.
24. The claimant contends that she was summoned by the general manager and human resource manager on September 3, 2020, at 6.00pm and handed a termination letter on the premise of inability to perform her current role. The claimant states that her salary at termination was Kshs 120,000/-.
25. On cross-examination, the claimant states that she had other disciplinary issues, but which were resolved and was reprimanded.
26. The claimant confirmed on cross-exam that her role was a 24-hour role, and which was important for the business of the respondent. She further states that holders of her position worked both day and night shifts.
27. The claimant states that she was given two options, one being to accept a lower position or pick a higher position so as to ensure she does not accept either. The claimant states that she interviewed for the higher position but was not successful. She further states that she did not deserve to be terminated for failing an interview.
28. The claimant states that she could have held her position on a day shift as there was always a team leader on the day shift but the respondent rejected her proposal.
29. The claimant states that her termination was a result of a strained relationship with her bosses, and that the two bosses have since left the employ of the respondent, and that she would thus work well if reinstated.
30. The claimant states that the respondent has an elaborate human resource manual that caters for the welfare of her employees and goes as far as prohibiting all forms of discrimination including discrimination on health status.
31. The claimant prays that the court awards her the reliefs as per her statement of claim.



The Respondent's Case.

32. The respondent states that she appointed the claimant to the position of logistic assistant on July 25, 2013, on a basic monthly salary of Kshs 28,200.00 and a house allowance of Kshs 6,000.00. The respondent further states that on November 7, 2013, the claimant was promoted from logistics assistant to logistics in-charge and that again on January 22, 2014, the claimant was appointed as a dispatch and logistics manager.
33. Around the year 2017, the respondent was notified that the claimant was involved a case of conflict of interest related to motor vehicle registration No KCH 401W, contrary to the respondent's governance routines and processes. The claimant was notified of the claim and she admitted that the allegations were true. As a result, she was invited to a disciplinary hearing through a memo dated December 5, 2017. The memo notified the claimant of her right to have an employee or representative of her choice present at the hearing.
34. The respondent states that upon receipt of the doctors report on the claimant's health situation, they offered the claimant alternative positions from posts that were vacant at the time. The respondent states that the claimant chose a senior position which she interviewed for and did not succeed.
35. The respondent states that the claimant was given a chance to appeal the decision to terminate her but did not. The respondent's further case is that she did the most it could for the claimant under the circumstances.
36. On cross-examination, RW1 told the court that the medical report confirmed that the claimant was fit to work, but only on day shift. She further confirmed that the termination did not arise from misconduct, but the claimant's ability in view of her health status.
37. RW1 further confirmed that the work the claimant did had both a day and a night shift. RW1's further evidence is that the hearing that took place was to confirm how tenable the claimant's employment was, and further confirmed that there was no doctor in the meeting.
38. RW1 further told the court that the respondent had many other employees who were suffering from various ailments and have not been terminated.
39. RW1 states that when an employee interviews for a senior position and fail the interview, they remain in the positions they held prior to the interview. The respondents stated that the claimant declined all offers made to her except those that were higher or lateral.
40. The respondent states that there would be no costs attendant to the claimant working day shift except for complaints from other staff. RW1 told the court that she had no evidence to show that staff at the position of the claimant (lateral) rejected the claimant's request to work on a day time shift.

The Claimant's Submissions

41. It is submitted for the claimant that her termination falls short of the requirements of sections 41 and 43 of the *Employment Act*, and article 27 of the *constitution*. The claimant further submits that both the *Employment Act* and the *Constitution* abhors discrimination. The claimant had reliance in the holding of Justice Nduma in *VMK v CUEA* [2013] eKLR to buttress this position.
42. The claimant submits that the process that culminated in her termination was fraudulently flawed and the termination ought to be declared unfair.
43. The claimant submits that she was targeted for termination on the ground of her health status.



The Respondent's Submissions.

44. The respondent submits that the claimant's termination was fair and lawful. It is further submitted that the role of warehouse team leader was no longer suitable for the claimant based on the fact that the role was shift based, and as such she was not able to fully operate and meet the requirements for the role.
45. It is the respondent's submission that the claimant was duly notified of the job specification and description, and the respondent complied with the doctor's reports to offer alternative employment, but the claimant fell short of the criteria required for the alternative post and as such, the respondent was constrained to terminate her rather than jeopardize her health further.
46. The respondent submits that she terminated the claimant for fair and reasonable grounds, since she considered the claimant's capacity, her compatibility to her role and the respondent's operational requirements. The respondent sought to rely on the case of [*Joseph Mwaniki Nganga v United Millers Limited* \[2022\]eKLR](#) to support this position.
47. It is the respondent's submission that the court finds that there was no aspect of discrimination on medical grounds subjected upon the claimant in this matter. The respondent cited the cases of [*Denis Mwenda Gitonga v Ernest & Young LLP* \(2018\)eKLR](#) and [*Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited* \[2013\]eKLR](#) to buttress this position.
48. It is submitted for the respondent that the claimant is not entitled to the remedies sought. They sought to rely in the holding in [*Municipal Council of Eldoret v Titus Gatitu Njau* \(2020\)eKLR](#) to support this position.

Analysis and Determination

49. I have considered the pleadings, the witnesses' oral testimonies and the submissions by both parties. 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

50. The claimant was terminated on the basis that her employment with the respondent was no longer tenable for reason of a doctor's advice that she works only during the day, while her job had both day and night shifts.
51. The claimant's role was shift based and the doctors' advise that she was not fit to work on night shifts became the borne of contention. The respondent invited the claimant for a hearing christened "capability hearing session" to deliberate her situation. The letter inviting the claimant to the meeting informed her of her right to appear with a representative and that she would be assisted to access any documentations she may need for the hearing.
52. The claimant was then asked to choose between three alternative positions that were vacant at the time. The claimant picked a higher position than she held then, but did not succeed in the interview, which according to the respondent necessitated her termination.
53. The question for this court is whether the claimant's termination was fair. That a termination is fair or not, is dependent on the employers compliance with the requirements of the law in arriving at the decision to terminate. 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.

54. In the case of *Samuel Wanyonyi Wamalwa v Wells Fargo Limited* [2014] eKLR, the court stated:
- “It was not correct that an employer was only required to explain to the employee the reason for an intended termination, where that reason is physical incapacity, with not requirement for a hearing. In all circumstances of gross misconduct, poor performance, physical incapacity or fundamental breach of contract, there was an obligation to hear the employee in the manner stipulated under section 41 of the *Employment Act*.”
55. The claimant was invited for a capacity hearing and not informed that the hearing was informed by an intention to terminate her services. The hearing does not meet the requirements of section 41 of the *Employment Act*.
56. Further, although the respondent had no obligation to appoint the claimant to a senior position that she advertised for and which the claimant applied, she had an obligation in light of the claimant’s medical condition to accommodate her through assigning her duties on a day shift similar to those she does during the night shift. 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.
57. The respondent offered the claimant three choices of what she termed vacant posts. One of the positions was senior to what the claimant held, and the other two were lower positions. The claimant interviewed for the senior position, and according to the respondent, did not succeed, and hence the termination. RW1 told the court that under normal circumstances, when an employee interviews for a position and does not succeed, she is retained at the position she held before the interview. If indeed the respondent was willing to accommodate the claimant, why would she offer her just a position that is higher and lower than the one she already held. This clearly was to ensure that the claimant declines the offer so as to set her up for termination.
58. I perfectly understand why the claimant would not take an offer of a position lower than she already held despite her desperate situation. The evidence before court is proof that she had slowly grown through the ranks and going back would have disadvantaged her career progression. There was obviously no offer on the table for the claimant, it was all a ploy to make her leave.
59. The RW1 told the court that there would be no costs attendant to the claimant working day shift except for possible complaints from other staff, and further confirmed that she had no evidence to show that staff at the position of the claimant (lateral) rejected the claimant’s request to work only on day time shifts. This leads this court to the conclusions that the respondent did not make sufficient effort to accommodate the claimant.
60. Further, although the respondent tried to introduce previous cases of misconduct that the claimant faced to support the termination, it is clear that the earlier issues were addressed and concluded, and the only reason the claimant was terminated, and which is the subject of this suit, is her medical condition.
61. On the question of whether or not the claimant was discriminated upon based on her health status, I do agree with the respondent that the claimant’s termination had no element of discrimination. It was a purely a case of unfair termination premised on the claimant’s health status. In the case of, *Denis Mwenda Gitonga v Ernest & Young LLP* [2018]eKLR the honourable court relied on the case of



Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited [2013]eKLR cited by the respondent, where the court had this to say on discrimination:

“Where a person is treated differently from others similarly situated like him, then this amounts to discrimination”.

62. Nothing showed that there were other employees who by reason of illness, required to do day shifts and were allowed while the claimant was denied the chance.
63. The reasons given for the claimant’s termination are not valid, fair and justified reasons. The termination is unfair.

Whether the claimant deserves the remedies sought

64. The claimant’s prayer is for an order for payment of damages for unfair termination, gratuity, exemplary damages, reinstatement and the costs of the suit and interests thereon.

Damages for Unfair Termination

65. 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.)
66. The claimant was in the service of the respondent from the year 2013 to 2020. Although she had previous issues of misconduct, she was cleared of the charges and the termination subject of this case is not for reason of misconduct. Consequently, I find and hold that the claimant has made a case for maximum compensation and is hereby awarded 12 months salary for unfair termination.

Gratuity

67. A pay slip produced in evidence before court, indicated that the claimant was a member of the respondent’s provident fund, and that she contributed to the National Social Security Fund (NSSF).
68. Further, the claimant’s letter of appointment did not provide for payment of a gratuity. For these reasons, the claim for payment of gratuity is without merit and is hereby dismissed.

Exemplary Damages

69. The general rule is that exemplary damages are not payable in cases of breach of an employment contract. (see *Margaret Omondi v Kenya Revenue Authority*).
70. There are however instances when exemplary damages can be awarded in respect of discriminatory acts suffered by an employee while in employment, in addition to compensation for unfair termination (*Rookes v Benard* [1964] AC 1129).
71. The court has found the claimant’s case to be a case of termination of employment on medical grounds, and not a case of discrimination to warrant an award of exemplary damages. The claim of exemplary damages fails and is dismissed.

Reinstatement

72. The claimant has sought to be reinstated to the service of the respondent. The *Employment Act*, 2007, empowers this court to order reinstatement as an exclusive remedy to unfair termination under certain specific circumstances. A reinstated employee is supposed to be treated in all respects as if the employee



was never terminated (see *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & Others* [2008] 12 b.i.l.r 1129 (CC))

73. Section 49(4) of the *Employment Act*, 2007, lays down settled principles that guides the court in exercising its discretion on whether or not to make an order for reinstatement.
74. The medical reports produced before court are prove that the claimant is asthmatic and is not medically fit to work on night shifts. Although the claimant indicated that her former supervisors left the employ of the respondent, and hence does not have to report to them if reinstated, the respondent has demonstrated her unwillingness to accommodate the claimant in her medical condition, and therefore, a situation similar to that giving rise to this suit is likely to recur, making reinstatement untenable.
75. The claimant is unlikely to enjoy working in an already muddled environment.
76. Consequently, I find and hold that owing to the circumstances under which the claimant was terminated, it is impractical to make an order for reinstatement. The claim for reinstatement fails on this account.
77. In whole, judgment is entered for the claimant against the respondent as follows:
 - a. Payment of 12 months salary as compensation for unfair termination at Kshs 1,440,000/-
 - b. Costs of the suit and interest until payment in full.
78. Judgment of the court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 7TH DAY OF JULY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Mabalau H/B for Mr. M.M. Omondi for the Claimant

Ms. Mulongo H/B Mr. Kiragu for the Respondent

Christine Omollo- C/A

