Munyili v Carbacid (Co2) Limited (Cause 1860 of 2017)
[2022] KEELRC 3810 (KLR) (19 August 2022) (Judgment)

Neutral citation: [2022] KEELRC 3810 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1860 OF 2017

SC RUTTO, J

AUGUST 19, 2022

BETWEEN

PETER KATIVA MUNYILI ..... CLAIMANT

AND

CARBACID (CO2) LIMITED ..... RESPONDENT

JUDGMENT

1. It is common ground that the claimant was employed by the respondent with effect from June 17, 2004 as an office messenger. It is also not dispute that while in the employment of the respondent, the claimant underwent a minor surgery. It is subsequent to the claimant's surgery and prognosis that the respondent retired him on grounds of ill health. It is that retirement that has triggered the instant suit as the claimant deems the same as an unlawful termination of his employment. Consequently, the claimant seeks against the respondent, a declaration that its decision to terminate his services was unlawful and unfair; an order that the respondent pays the claimant terminal dues totaling the sum of Kshs 1,245,659.10; certificate of service; costs of the suit and interest.

2. The claim is opposed with the respondent stating that it accommodated the claimant by assigning him light duties and reducing his working hours. That the conclusions and findings contained in a medical report by one Dr Kiboi, made it impossible for the claimant to resume his duties as a motor bike rider and it was impossible to reassign him duties for lack of a vacancy in other sections. That there was therefore a substantial, genuine and fair reason to terminate the claimant's employment by way of retirement on medical grounds. As a result, the respondent asks the court to dismiss the claim with costs.

3. When the matter proceeded on April 20, 2022, both sides called oral evidence.

Claimant's Case

4. The claimant testified as CW1 and at the outset, adopted his witness statement and bundle of documents, which he asked the court to admit as his evidence in chief. He also produced the said bundle of documents as exhibits before court.

5. The claimant told court that he fell sick while in the employment of the respondent and following his treatment, his consulting medical expert by the name Dr Vincent Wekesa, advised him to resume work but to undertake light duties. That consequently, he resumed work in February, 2017 and the respondent recommended that he be subjected to a further medical examination by another independent medical expert. That it was Dr Kiboi who conducted the medical examination and confirmed that he was to undertake light duties pending a review after six months.

6. That following Dr Kiboi's report, the respondent vide a letter dated May 24, 2017, invited him for a meeting scheduled for May 29, 2017, to discuss the way forward. That on the said May 29, 2017, he availed himself as requested and instead of the discussions alluded to, he was asked to tender his resignation. That subsequently, on May 31, 2017, he was served with a termination letter on grounds of ill health. That his attempts to seek reasons for such a drastic, unfair and unlawful termination yielded no result.

Respondent's Case

7. The respondent called oral evidence through its Human Resource Officer, Ms. Faith Amisi, who testified as RW1. She also adopted her witness statement and bundle of documents filed on behalf of the respondent to constitute her evidence in chief. The said documents were also produced as exhibits before court.

8. RW1 testified that the claimant was away on sick off from October 24, 2016 and subsequently, on annual leave until February 10, 2017. That the claimant was paid full salary throughout this period. That during the claimant's absence, the respondent outsourced the services of an external motorcycle messenger to temporarily take over his duties at an extra cost of Kshs 25,000/= per month.

9. That upon the claimant resuming duty, he was assigned light duties which entailed filing delivery notes of cylinders issued. That further, the claimant only worked for three hours per day instead of eight. That the assignment to take up light duties was a temporary measure to enable the claimant recover fully. That further, the light duties undertaken by the claimant was part of another employee's job description hence this meant that two employees were carrying out duties of one employee while the respondent was outsourcing the services of a motor cycle rider. That there was therefore no vacancy at the respondent company, for the light duties to be undertaken by the claimant.

10. That vide a medical report dated March 22, 2017, Dr Vincent Wekesa who was the claimant's medical doctor, advised that he resumes his normal duties with close monitoring. That the recommendation by Dr Wekesa was not well understood by the respondent hence it sought a second medical opinion with the consent of the claimant. That the second medical assessment was undertaken by Dr Kiboi who stated that the claimant may be prone to convulsions that may cause him to loose consciousness hence it was practically unsafe to operate machines and/or ride a motorcycle as this would expose him to potential risk of injury. That subsequently, a meeting was held on May 29, 2017, to discuss a way forward in light of the findings contained in the medical report. It was the evidence of RW1 that the claimant attended the meeting and was accompanied by a shop steward by the name Mr Henry Shitemi.

11. That at the meeting, the respondent advised the claimant on its duty of care and that it did not have a vacancy in "light duties". That subsequently, a sendoff package of Kshs 315,184/= was agreed upon at the meeting. That the claimant requested for time to consult further and hence, he was granted one day off on May 30, 2017. That another meeting was scheduled for May 31, 2017, when the claimant stated that the sendoff package was too small. That as such, the respondent offered to enhance the same by an additional Kshs 75,645.58, being an ex gratia payment. That the revised send off package came to Kshs 421,819.65 and constituted two days worked in June, 2017, three months' notice, baggage allowance, salary for three months, ex gratia payment and other benefits including medical treatment for an additional year up to July, 2018 and 100% provident fund on medical grounds.

12. That the claimant was subsequently retired on grounds of ill health with effect from June 2, 2017 and was informed of his right to appeal. That the claimant later had a change of heart and vide a letter dated June 8, 2017, declined the retirement and demanded to be reassigned the duties he was performing since February, 2017. That the claimant was therefore invited for an appeal hearing on June 14, 2017, but in a letter dated June 13, 2017, he declined to attend and requested for seven days to prepare. That as such, the respondent rescheduled the appeal hearing to June 20, 2017. That on June 20, 2017, the claimant requested to be allowed to continue working for the respondent but to be assigned light duties.

13. That following the appeal hearing, the respondent requested for time to evaluate the claimant's grievances. That the respondent subsequently, sought for the recommendation of the Occupation, Health and Safety Medical Board on whether the claimant should be subjected to review. That the Board scheduled a review for June 29, 2017 and the same was communicated to the claimant vide a letter dated June 28, 2017. That the claimant failed and/or neglected to appear before the Board hence through Dr Malitu, the Board advised the respondent to proceed with retiring the claimant pursuant to Dr Kiboi's recommendations. That the claimant never presented a medical report to prove that he could resume his normal duties.

14. That the claimant received his provident fund but declined to receive his terminal dues hence the respondent sought advice from the sub county labour office who in turn advised on how to process and remit the same.

Submissions

15. The claimant submitted that the meeting held on May 29, 2017 with the respondent did not amount to a fair hearing but was a forum for informing him of the decision to retire him on medical grounds. That the meeting was therefore an ambush. It was further submitted that the decision to retire the claimant was rushed and premature hence was premeditated. To support this position, the claimant placed reliance on the case of *Kenndey Nyangucha Omanga v Bob Morgan Services Limited* [2013] eKLR. The claimant stated in further submission that the respondent had no valid ground to retire him on grounds of ill health. That the claimant's incapacity was not a permanent one that could hinder his performance. The cases of *Samuel Langat Tanui v Director General, National Intelligence Service & another* [2017] eKLR and *Duncan Otieno Waga v Attorney General* [2014] eKLR were cited in further support of the claimant's submissions.

16. On its part, the respondent submitted that an employee's capacity was a fair reason for termination under section 45 of the *Employment Act*. That as per the medical report by Dr Julius Kiboi, the respondent had genuine reasons to believe that the claimant could not resume motor cycling duties.

17. It was further submitted by the respondent that it met the procedural requirements set out under section 41 of the *Employment Act*.

Analysis and Determination

18. From the record, the following issues stand out for determination: -

    i. Whether the respondent had justifiable reason to retire the claimant on grounds of ill health?

    ii. Whether the claimant was afforded a fair hearing prior to being retired on grounds of ill health?

    iii. Is the claimant entitled to the reliefs sought?

Justifiable Reason For Retirement?

19. The point of entry in determining this question, is sections 43(1) and 45(2) (a) and (b) of the *Employment Act* (Act). In respect to this, section 43(1) of the Act requires an employer to prove reasons for termination and failure to do so, such termination is deemed to be unfair. On its part, section 45 (2) (a) and (b), provides that 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 employees conduct, capacity or compatibility; or

        ii) based on the operational requirements of the employer;....

20. It therefore follows that termination from employment must pass the "fairness and "validity" test. As it is, the test applicable is quite subjective hence the same can only be determined depending on the circumstances of each case. It is also instructive to note that the burden of proof lies with the employer.

21. In the instant case, the claimant was exited from employment through retirement on grounds of ill health. His letter of retirement reads as follows: -

> "Subject: Retirement on grounds of ill health"
>
> It is with sincere regret that Carbacid CO2 Limited is retiring you on grounds of ill health effective June 2, 2017.
>
> In October, 2016, you were medically diagnosed subsequently taken in for treatment. On recovery you proceeded on sick leave and annual leave and resumed work in February, 2017 albeit light duties as recommended by your doctors. After a couple of months with your consent we sort your doctor's advice if you could resume normal duties as a motorcycle messenger. The report recommended resumption but with close monitoring. Subsequently, the company sort an independent medical opinion with your consent. According to the independent medical report, you were found to be unfit to effectively discharge your duties as a motorcycle messenger for the next two years. Both reports were made available to you.
>
> Consequently you were issued with a notice for hearing to discuss the way forward. In the hearing, your views were taken regarding both medical recommendations, however, the company explained its current position in terms of duty to care and no vacancy for light duties which you confirmed and agreed.

As an employee we are bund by duty to care, and are therefore left with no choice but to retire you on grounds of ill health. As agreed In the hearing the following terminal dues are due to you subject to statutory deductions.

> 2 days salary for the month of June, 20173 month's pay in lieu of notice3 months salaryEx gratia paymentBaggage allowance.

In addition

> Access to medical treatment from another financial year till July 31, 2018 according to company medical schemeAccess to your provident fund contributions as per the Retirement Benefits Acts (RBA) rules on grounds of retirement on grounds of ill health.

Kindly read the above dues and make any claims before payment is effected. If in disagreement with the verdict, you have the right to appeal in writing this should be received before June 9, 2017.

We appreciate the great service and wish you all the very best in your endeavours."

22. This was precipitated by the claimant's prognosis upon undergoing a minor surgery on the head. Following the surgery and upon resumption of duty, D. Wekesa who was attending to the claimant stated as follows in his medical report: -

> " The abovenamed patient is doing well...(illegible)...kindly allow him regular duties but with close monitoring."

23. It was subsequent to this recommendation that the claimant was assigned light duties which the respondent maintains was a temporary measure to allow him recover fully.

24. The respondent through RW1 told court that the recommendation by Dr Wekesa on "resuming normal duties with close monitoring" was not well understood given that the same was not possible on account of the claimant's nature of work. It is on this account that it addressed the claimant as follows in a letter dated April 4, 2017: -

> " We are in receipt of your medical practitioners report which proposes you resume duties but under maximum supervision.
>
> We do not fully comprehend this proposal. We request your cooperation to seek an independent medical review from a renowned neurologist on your ability to perform your normal messengerial duties with the aid of a motorcycle....the report from the neurologist will be shared with you. If you accept our request kindly consent by appending your signature below. If in disagreement, kindly respond in writing."

25. It is pursuant to this letter that the claimant appeared before Dr Kiboi for a second medical assessment. As it would be, Dr Kiboi recommended that the claimant should not be allowed to operate machines, drive or ride a motorcycle as he could suffer convulsions. His recommendation reads in part:-

> " ...The latest CT Scan brain performed on April 24, 2017 confirms no recurrent tumor but a thickened right trigeminal nerve with right temporal lobe gliosis and encephalomalacia which suggests that he may easily have epilepsy in future. This temporal lobe changes can

cause him to get episodes of convulsions that may cause him to lose consciousness while operating machines or driving/riding and this may cause accidents.

I recommend that he is given other duties and he is not allowed to drive or ride cars or motor cycle until after one to two years of no confirmed convulsions after the surgery. He can still work in the office in other duties because his mental abilities are normal..."

26. The *Employment Act* recognizes ill health as a ground for termination. In this regard, section 45 (2) (b) of the Act permits an employer to terminate the services of his employee on ground of lack capacity to perform his contractual duties.

27. It is not in dispute that prior to his surgery, the claimant was working as a motor cycle rider. Upon resumption of duty, the claimant was not in a position to undertake his normal duties as a motorcycle rider hence he was assigned lighter duties, which the respondent termed as a temporary measure. Then came Dr Kiboi's medical report which threw everything into a spin. With that report and given the prognosis, it became apparent that the claimant could not resume his normal duties within the next one to two years as he was not to operate machinery drive of ride a motor cycle.

28. In this regard, the claimant may not have been totally incapacitated but his medical condition was such that he could not perform the duties he used to perform previously.

29. Further, in the meetings held with the respondent on May 29, 2017 and June 20, 2017, the claimant seemed to concede that he was not in a position to resume his normal duties as a motorcycle rider, hence his plea that he continues performing light duties.

30. In the South African case of *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration and others* (JR 662/06) [2007] ZALC 98; [2008] 4 BLLR 356 (LC); (2008) 29 ILJ 1239 (LC), the court set out the following stages of enquiry to be undertaken by an employer prior to terminating an employee's employment on grounds of ill health, thus: -

> " As an employer bears the onus of proving an employee's incapacity to justify dismissing her, the LRA Guidelines for incapacity dismissal contemplates a four-stage enquiry before an employer effects a fair dismissal. .... An enquiry to justify an incapacity dismissal may take a few days or years, depending mainly on the prognosis for the employee's recovery, whether any adjustments work and whether accommodating the employee becomes an unjustified hardship for the employer. To justify incapacity, the employer has to "investigate the extent of the incapacity or the injury... (and).... all the possible alternatives short of dismissal."
>
> Stage One: The employer must enquire into whether or not the employee with a disability is able to perform her work. If the employee is able to work, that is end of the enquiry; the employer must restore her to her former position or one substantially similar to it. Where possible, the job should correspond to the employee's own choice and take account of her individual suitability for it. If the employee is unable to perform her work and her injuries are long term or permanent, then the next three stages follow.
>
> Stage Two: The employer must enquire into extent to which the employee is able to perform her work. This is a factual enquiry to establish the effect that her disability has on her performing her work. The employer may require medical or other expert advice to answer this question.
>
> Stage Three: The employer must enquire into the extent to which it can adapt the employee's work circumstances to accommodate the disability. If it is not possible to adapt the employee's work circumstances, the employer must enquire into the extent to which

it can adapt the employee's duties. Adapting the employee's work circumstances takes preference over adapting the employee's duties because the employer should, as far as possible, reinstate the employee. During this stage, the employer must consider alternatives short of dismissal. The employer has to take into account relevant factors including "the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement" for the employee.

Stage Four: If no adaptation is possible, the employer must enquire if any suitable work is available."

31. I am satisfied that the respondent passed stage two of the above-mentioned enquiry when it received the claimant's medical report from Dr Kiboi, indicating the extent of his injuries and the nature of duties he could perform.

32. Stages three and four of the enquiry entails accommodating the employee. According to the respondent, it accommodated the claimant by assigning him light duties and allowing him to work for three hours which was short of the normal working hours. However, the respondent termed this as a temporary measure which was meant to allow the claimant recover fully. In other words, what I hear the respondent to be saying is that the arrangement was not sustainable. Several reasons were proffered namely: -

a) The light duties were part of another employee's assignments hence the claimant was assigned a portion that would engage him for three hours;

b) That this meant that the respondent had two employees carrying out one person's duty while outsourcing the services of a motor cycle rider at an extra cost of Kshs 25,000/= per month;

c) The claimant had been assigned to fill in cylinder receipt notes and delivery notes of cylinders issued but was unable to carry out these duties; and

d) That he only wrote one delivery note for a period of three months.

33. It is notable that the above position was not controverted by the claimant.

34. In other words, it would seem that the respondent could only accommodate the claimant as a motorcycle rider and not in any other capacity. This brings up the issue of hardship on the side of the employer, in accommodating the employee.

35. In the case *Trident Steel (Pty) Ltd v Metal and Engineering Industries Bargaining Council and others* (DA 14/05) [2007] Zalac 32, the South African Labour Appeal Court has this to say on the issue: -

> " In a case such as this an employer's obligation to try and accommodate the employee does not require the employer to do more than what can reasonably be expected from it in the circumstances. If the employer is shown to have acted reasonably to try and accommodate the employee, it can be said that it has discharged its obligations...In my view appellant acted reasonably throughout the entire period. I cannot find any acceptable basis for the second respondent to have found that there was unfairness in the appellant's conduct in this regard."

36. It is notable that the respondent took a step further to obtain a third medical opinion from the Director of Occupation Safety and Health (DOSH) medical board. Through a letter dated June 29, 2017 the claimant was advised as follows: -

> " Following the appeal hearing held on June 20, 2017, we sort (sic) the opinion of the Directorate of Occupational Health and Safety under the Ministry of Labour and Social Security Services. We are hereby invited and scheduled for an appointment with its medical board on June 29, 2017 at 9:00 am.
>
> We request your attendance."

37. Judging by the claimant's letter of June 28, 2017, it is apparent that he did not appear as advised. The letter was very express that the claimant's attendance was required hence it is not clear why he was seeking a clarification to that effect. Indeed, in cross examination, the claimant admitted that he did not want to see another doctor for a third medical opinion. It would thus seem that come what may, he was not willing to undergo another medical assessment. He did not give the employer much option.

38. As the claimant failed to attend the meeting with the Board, his retirement on grounds of ill health was effected. The respondent thus communicated to the claimant, in its letter of July 6, 2017, as follows: -

> " Following review of both Dr Vincent Wekesa (Employee's neurosurgeon) and Dr Julius Kiboi (independent neurosurgeon) medical reports the medical board advised that we proceed with Dr Julius Kiboi's recommendation with referenced to the matter."

39. From the foregoing sequence of events, it is apparent that the claimant did not avail the respondent a further opportunity for review to determine whether and when he could resume his normal duties, hence it opted to go with Dr Kiboi's recommendation and retire him on medical grounds.

40. I have agonized as to what more the respondent could have done in order to accommodate the claimant given the nature of his duties vis a vis the available duties he could undertake within the respondent company. I have found none.

41. Taking into account the medical reports before it and the nature of the claimant's duty, and the context of the provisions of section 43 (2) of the Act, which state that the reason or reasons for termination are matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee, I am satisfied that the respondent has proved on a balance of probability that it had a valid reason to retire the claimant on grounds of ill health.

42. The upshot of the foregoing, is that the respondent had valid and fair grounds to retire the claimant from employment on medical grounds.

43. Having established as such, the next issue for determination is whether the respondent accorded the claimant a fair hearing prior to his retirement.

Whether The Claimant Was Subjected To A Fair Hearing Prior To Retirement On Medical Grounds?

44. Pursuant to section 45 (2) (c) of the *Act* a termination of an employee is deemed unfair if the employer fails to prove that the termination was effected in accordance with fair procedure. Section 41 (1) addresses the manner in which fair procedure is to be achieved. It provides as follows: -

> "(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."

45. From the record, it is evident that the parties held meetings in regards to the issue. The first meeting was on May 29, 2017 and was initiated by the respondent through a letter dated May 24, 2017, which reads in part: -

> "In response to the letter dated April 5, 2017, we hereby avail to you the results of the independent medical report performed by Dr Julius Kiboi. We request that you read through the report carefully and avail yourself on May 29, 2017 for a further discussion on the way forward.
>
> The meeting will be held at the head office board room at 2:00 pm. This will be a dialogue meeting on the way forward and would therefore appreciate your contributions and opinion on the report. You are encouraged to attend with a colleague of your choice..."

46. The claimant's contention is that the aforestated letter did not constitute a notice and that the meeting of May 29, 2017 was a forum to retire him medical grounds.

47. Revisiting the letter and its contents, it is apparent that the meeting was to discuss the way forward based on the findings by Dr Kiboi. Following deliberations on the medical report and its implications on the claimant's performance of his normal duties going forward, the idea of retirement on medical grounds was floated by the respondent. From the minutes, it is recorded that the claimant agreed with the respondent's perspective and a sendoff package was negotiated.

48. It is therefore evident that the letter did not expressly disclose to the claimant that the meeting was to discuss his exit from the respondent company. It never made any mention of that idea. The issue seemed to have arisen in the course of the deliberations on the medical report.

49. Accordingly, it is not clear whether going in for the meeting, the claimant was fully aware that the same would take the trajectory it did and that at the end of the day, he would be on his way out of employment. Seemingly, the respondent was very much aware that the claimant's retirement on medical grounds was one of the issues on the agenda. Why did not it disclose this beforehand? An excerpt of the minutes of May 29, 2017 reads as follows: -

> "Faith indicated that if Mr Munyili resumed his messengerial duties and got injured during work hours or due to the nature of work his medical condition worsened, Carbacid would be sued for and charged for negligence and a work related injury. Duty to care is demanded of all employers according to the Kenyan laws. For the above reasons Mr Munyili has to consider retirement on medical grounds. Mr Munyili finally agreed with the company's perspective"

50. Knowing the ramifications of the deliberations, the respondent ought to have been explicit in its letter, that it was considering terminating the claimant's employment based on the findings in Dr Kiboi's medical report. This was no ordinary meeting. The claimant ought to have been psychologically prepared going in for the meeting that his job was on the line. The question thus arises, did the claimant have time to process the information before reverting? In my view the answer is in the negative.

51. It was therefore not surprising that the claimant had a change of heart despite agreeing to take early retirement.

52. On this score, I will reiterate the court's finding in the case of *Kennedy Nyanguncha Omanga v Bob Morgan Services Limited* [2013] eKLR thus: -

> " 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."

53. Therefore, in as much as the respondent had a valid reason to retire the claimant on medical grounds, the process it employed in retiring him was tainted with irregularity for want of procedure.

54. Against this background, I find that the retirement of the claimant was procedurally unfair hence unlawful.

Reliefs

55. On account of the fact that the respondent failed to comply with procedure, the claimant is awarded compensatory damages equivalent to three (3) months' gross salary. This award takes into account that the nt had been paid terminal dues which comprised notice pay for three months and three months' salary including an ex gratia amount.

Orders

56. In the final analysis, I enter Judgment in favour of the claimant against the respondent and he is awarded the sum of Kshs 163,491.00, being compensation equivalent to three (3) months gross salary.

57. The award shall attract interest at court rates from the date of Judgment until payment in full.

58. Costs of the suit to be borne by the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2022.

.....

STELLA RUTTO

JUDGE

Appearance:

For the claimant Ms Luchuveleli.

For the respondent Mr Njuguna.

Court assistant Abdimalik Hussein.

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on March 15, 2020 and subsequent directions of

April 21, 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with order 21 rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by article 159(2)(d) of the *Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under article 48 of the *Constitution* and the provisions of section 1B of the *Civil Procedure Act* (chapter 21 of the laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE