



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 677 OF 2017

KATANA KAZI MUMBO.....CLAIMANT

VERSUS

KK GROUP OF COMPANIES.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 30th April, 2021)

JUDGMENT

The claimant testified as follows. That at all material time he was employed by the respondent as a security officer. On 22.05.2015 he was on duty and he fell. In the process he did not realise that he had been seriously injured. On 23.05.2015 he became very sick by reason of the said injury. He therefore took a sick leave and he went to hospital to be treated. He did not improve and he was put on two sick leaves. The first sick leave was per the letter dated 20.07.2016 and the second one was sometimes in September 2016. He was on sick leave in May, June, July, August and September 2016 during which time he was on the respondent's payroll with full or half monthly pay. The claimant testified further that throughout the sick leave period he had not written or reported to the respondent that the sickness had originated from the injury he had suffered while on duty. The claimant testified that he was hospitalised for about 8 months.

The claimant further testified that he was given an initial two months' sick leave and then a two months' sick leave. Thus he was paid for 4 months of sick leave being full monthly pay for initial two months and half pay for the next two months. The last sick leave was from 20.09.2016 to 10.11.2016 and at the end of the sick leave he was still unwell and he was terminated on account of ill health. He testified that he expected some good pay after the termination on account of ill health but that turned out not to be the case. He testified thus, **"Consequential to termination on account of ill health I was entitled to terminal dues. I expected that prior to termination they consult my doctors to confirm whether I could return to work or not. I was a permanent employee. It was fair to share losses of my circumstances because myself or company did not cause the ill health."**

That testimony shows why the claimant filed the memorandum of claim on 03.08.2017 through Marende Necheza & Company Advocates. The claimant, in the amended memorandum of claim filed on 29.11.2017, prayed for judgment against the respondent for:

- a) One-month salary in lieu of termination notice Kshs.14, 134.00.
- b) Salary for remainder of the contract period 14, 134 x 12months x 21 years making Kshs.3, 561, 768.00.
- c) Service pay 15 days' salary x years worked (7067 x 12 years) Kshs.84, 804.00.
- d) Compensation for unfair termination 12months x 14, 134 Kshs. 169, 608.00.

Total Kshs.3, 830, 314.00.

- e) Benefits calculated as per the Work Injury Benefits Act (but which prayer was abandoned by consent order made at the hearing on 10.03.2021).
- f) Exemplary damages to be assessed by the Honourable Court for discrimination against the claimant on account of disability.
- g) Costs of the claim plus interest.
- h) Any other relief the Honourable Court may deem fit to grant.

The claimant pleaded that the respondent employed him as a security officer sometimes in 2002 and he worked until 23.05.2016 at a last monthly pay of Kshs.14, 134.00. On 23.05.2016 he slid and fell thereby sustaining a back injury. He was hospitalised and placed on 50 days of sick leave from 21.07.2016 to 20.10.2016 and further leave from 20.09.2016 to 10.11.2016. After the sick leave he received the respondent's letter dated 11.11.2016 terminating his services on medical grounds. His case is that the termination was without notice, malicious and unfair.

The respondent filed on 01.03.2018 the memorandum of response through the Federation of Kenya Employers. The respondent's case is as follows:

- a) There was no dispute that parties were in a contract of employment as pleaded for the claimant.
- b) On 05.07.2016 the respondent received a medical report from Metropolitan Diagnostic Centre to the effect that the claimant had suffered a significant cord compression and cord edema.
- c) The claimant was put on sick leave for 52 days from 21.07.2016 to resume duty on 21.10.2016.
- d) On 21.10.2016 the claimant resumed duty but could not work effectively as a security officer and so the respondent terminated his employment on medical grounds per letter of termination dated 11.11.2016.
- e) Upon the suit being filed the respondent opted to negotiate a settlement but no compromise was reached. The respondent admits that it did not follow the procedure to terminate the claimant but it had a valid reason to terminate the contract of service; especially that in paragraph 8(b) of the amended memorandum of claim it is stated that the claimant was unable to perform essential functions of life without assistance from another person.
- f) The claimant cannot be paid for the period not worked and being after he left employment by reason of termination on medical grounds.
- g) Service pay is not due because the claimant was a member of the NSSF.
- h) The respondent having acknowledged that it did not follow due procedure for termination on account of ill health, it offered to pay 5 months' salary but the offer was rejected.
- i) There was no report that the claimant was injured while on duty.
- j) The claimant was not disabled but was sick per medical reports and claim for discrimination on account of disability is misconceived.

The Court has considered the pleadings, the evidence, and the final submissions and makes findings as follows:

- 1) It is found that there is no dispute that parties were in a contract of service as pleaded and testified for the claimant and admitted for the respondent.
- 2) It is found that there is no dispute that the contract of service was terminated by the letter dated 11.11.2016 and on account of the claimant's medical condition.
- 3) The Court finds that the respondent has established that as at termination (and as per section 43 of the Employment Act, 2007) there existed a genuine or valid reason for the termination, namely, the claimant's medical condition did not allow him to continue working as a security officer. The claimant in his evidence admitted as much – that his condition did not allow him to continue serving as a security officer.
- 4) The court finds that as admitted for the respondent the procedure leading to termination was unfair because the claimant was not given a notice and a hearing as envisaged in section 41 of the Act. The respondent's witness (RW) was Jacinta Kimathi, the respondent's Human Resource Officer. She testified thus, **"The procedure for termination on medical grounds was not followed. That procedure is, upon employee reporting sickness and sick leave ending, we ask for doctor's report. The report is taken to designated health practitioner. The affected employee is to meet the designated health practitioner together with his doctor's medical report. The medical practitioner (Designated Health Practitioner - DHP) analyses the employee and recommends on fitness or no fitness to work or other action is recommended to the respondent. The respondent's Human Resource Department proceeds per DHP. That was not followed."** Accordingly, the Court finds that the respondent failed to accord the claimant due procedure.
- 5) The Court has considered the parties' submissions and the factors in section 49 of the Employment Act, 2007 towards awarding the just compensation. In the statement of response, it is pleaded that 5 months' salaries would be just in the circumstances of the case. It was submitted for the respondent that the claimant had testified and confirmed that throughout the sick leave he was paid by the respondent full salary for 2 months and half pay for subsequent two months of sick leave. Section 30(1) of the Employment Act, 2007 on sick leave provides thus, **"After two consecutive months of service with his employer, an employee shall be entitled to sick leave of not less than seven days with full pay and thereafter to sick leave of seven days with half pay, in each period of twelve consecutive months of service, subject to production by the employee of a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre."** In the instant case, as per the claimant's testimony, the respondent paid him throughout the

leave period and way above the stipulated statutory rate of pay in event of sick leave. The Court returns that the payment during the sick leave amounted to a substantial mitigating factor in favour of the respondent. The Court has also considered the respondent's remorseful conduct of admitting the procedural unfairness and willingness to voluntarily purge the same. Further, exhibit R1 shows that despite the long period of paid sick leave, the final dues paid to the claimant included pay for pending annual leave days Kshs.3, 911.00 and service pay up to the date of termination Kshs.70, 000.00. The net final payment was Kshs. 69, 249.00. For the claimant no submissions were made to justify the award of 12 months' salaries in compensation for the unfair termination. Taking into account that the claimant did not voluntarily contribute to his termination, he had a long clean record of service, he desired to continue in employment, but the respondent had made the stated mitigating payments, the Court considers that 6 months' salaries in compensation for the unfair termination will balance justice for the parties making **Kshs.84, 804.00**. While making that award, the Court has considered that the failure to follow the due procedure had denied the claimant the chance for consultations including considerations of the possibility of healing from the sickness and possibly the alternative deployment or workplace rehabilitation, in that regard.

6) The claimant alleged discrimination on account of disability. However, the Court finds that the evidence is that the claimant was sick and as at termination, in a continuum of recovery. The evidence was that the persisting illness was inconsistent with his continued service as a security officer. He did not allege and testify that he had been registered as a person with disability with the statutory National Council for Persons with Disability. The claimant by his own evidence stated that he expected that the respondent would, prior to the termination, consult him on his path to recovery and consideration for appropriate redeployment. The claimant knew he was sick and the sickness had persisted but it was a temporary situation. He indeed looked forward to recovery and continued gainful employment. The Court has considered that there can be a thin line between sickness and disability but in the instant case the circumstances and evidence reveal that the claimant was a person with sickness as opposed to a person with disability. Thus the Court returns that the claims of discrimination on account of disability do not even begin to emerge in the instant case and the prayer for exemplary damages in that regard is declined as unjustified.

7) As submitted for the respondent the claimant was a member of NSSF as per his exhibited pay slips and service pay was not available per section 35 of the Employment Act, 2007. Again, exhibit R1 on final dues shows that service pay was computed and paid at Kshs. 70, 562.00 and the prayer is found unjustified.

8) The claimant has prayed for pay of Kshs.3, 561, 768.00 for the remainder of the alleged period of service of 21 years. As urged for the respondent, the Court finds that the claimant has not established the contractual or other basis of the alleged remainder of service period. Further, the Court finds that as testified by the claimant, his sickness had not been caused by himself or the respondent and therefore the Court finds that any impairment in the future earnings by the claimant could not conceivably be attributable to the respondent – and by the claimant's own evidence, it appears that the ailment was an act of God. In any event the claimant did not urge that by reason of the termination he had thereby lost his capacity to engage in alternative gainful activities, one way or the other. His evidence was that he could do some compatible work other than the work of a security officer. The claim and prayer will therefore collapse as unjustified.

9) As testified by RW, exhibit R1 shows that the claimant was paid in lieu of termination notice Kshs.12, 221.00 and the claim and prayer in that regard is declined.

The Court has considered the respondent's reasonable willingness to compromise the suit and further considered the claimant's belated filing of final submissions. Taking all factors into consideration, the claimant is awarded partial costs of the suit fixed at **Kshs. 20, 000.00** only.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- 1) The declaration the termination was unfair for want of due procedure for termination on account of medical grounds or ill health.
- 2) The respondent to pay the claimant a sum of **Kshs.104, 804.00** by 01.07.2021 failing interest to run thereon at Court rates from the date of this judgment till full payment.

Signed, dated and delivered by video-link and in court at Mombasa this Friday 30th April, 2021.

BYRAM ONGAYA

JUDGE