



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT UASIN GISHU

COURT NAME: ELDORET LAW COURT

CASE NUMBER: ELRC.C/152/2017

CITATION: LAWRENCE NAMBA VS KEN KNIT KENYA LTD

JUDGMENT

REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

ELRC CASE NO 152 OF 2017

LAWRENCE NAMBA.....CLAIMANT

VERSUS

KEN KNIT KENYA LTD.....RESPONDENT

JUDGEMENT

The Claimant pleaded that he was employed by the respondent on 6th September, 1996 and that on or about 25th June, 2015 while on his way to work, he was involved in an accident and sustained injuries.

The Claimant further averred that after the accident he developed convulsive disorder which caused him to collapse while performing dories and on doctor's advice he was to perform light dories and avoid operating any form of machinery.

Upon informing the respondent about his health the respondent's manager on several occasions referred him to save medical attention which he did and provided several medical reports.

On or about 9th December, 2015 the Claimant alleged, the respondent terminated his service unfairly on grounds of being in unstable health. At the time of termination his gross salary was Kshs. 12,398/= per month.

The respondent on its part pleaded that the Claimant was its employee in the Knitting department performing duties as a knitter as from 21st November, 1998 and by the time of leaving employment his monthly salary was kshs. 12,398/=.

Sometimes in June the Claimant was involved in a road accident while out of work for which he underwent treatment and reported back to work after spending one month recuperating.

On 16th November, 2015 the Claimant collapsed in the department and was later taken to Race Course hospital for treatment. The doctors however advised that the Claimant should not be involved in operating any machine.

On 23rd November, 2015 the Claimant sought a 2nd medical opinion at Moi Teaching and Referral hospital and the advice he received was that he should not operate any machine. A copy of the doctors' letter was sent to the respondent and based on the same, the Claimant was advised to seek further medication.

On 17th February, 2016 the respondent held a meeting with the Claimant and the Union representatives whereby all medical reports were tabled and the Claimant's job being that of a machine operator, it was agreed that the Claimant be given more time to recuperate until such

time the medical report shall advise that he was fit to operate a machine.

According to the respondent the Claimant was not terminated as alleged and further that the Claimant was not injured while at or heading to work as alleged hence his injuries had no relation with his employment by the respondent.

In his oral evidence the Claimant stated that he adopted his witness statement recorded on 22nd August, 2016 as his evidence in Chief. According to him, he needs to work for the respondent and that he sought compensation because the respondent told him there was no light duty for him.

In 2014 he got involved in an accident and was admitted for two weeks. In 2015 he collapsed and was taken to hospital and admitted for five days. He later reported to work but was asked to go to MTRH for a scan. He was checked and given a sick leave. Later he was asked to go and get a medical report. When he took it to the respondent, he was told there were no light duties and should just leave.

In cross-examination he stated that he was terminated indirectly and that he was not issued with a termination letter. He was just left hanging. He kept reporting to work but there was no work for him.

The respondent's witness Rebecca Chelegat informed the Court that she worked for the respondent and that she adopted her statement dated 30th July, 2019 as her evidence in Chief. It was her evidence that the Claimant was never dismissed.

It was further her evidence that on 9th December, 2015 the Claimant brought a letter from MTRH which stated that he had epileptic seizures after involvement in a road accident hence he was not to operate any machinery. According to her, the respondent called union representatives to discuss a way forward. This was not a disciplinary issue. A resolution was made to send the Claimant to a medical Board for advice. The results came out on 16th February, 2016. According to the report, the Claimant was found not fit to operate any machinery. On 17th February, 2016 another meeting was called with the Union and it was resolved that the Claimant continues with medication until he gets another report from a medical practitioner that he was fully recovered. According to her the Claimant had not brought any medical report to show he was fit to work. The Claimant was a machine operator working between two huge machines with conveyor belts. No lighter duties could be found for the Claimant and the respondent did not want to endanger the Claimant's life. It was further her evidence that the Claimant was still an employee of the respondent.

In cross-examination she stated that the respondent had no problem reinstating the Claimant if he brought a medical report showing he was now fully recovered and could work normally. She further stated that the Claimant stopped working in February, 2016 but he has been away due to medical reasons.

In re-examination she stated that the only place that the Claimant could have worked was gardening but again using sharp objects was also a danger to him.

This case presents a very unfortunate situation affecting the Claimant. It was common ground that the Claimant sustained injuries during an accident which resulted in epileptic seizures making it dangerous for him to continue working as a machine operator. The doctors advised that if the Claimant was to continue working in his condition, he should be allocated light duties. According to the respondent, they did not have many vacancies and the only light duty which might have been considered for the Claimant was gardening but again using sharp objects was also not safe for him.

The respondent denied terminating the Claimant's service. It indicated its willingness to re-engage the Claimant in his position as machine operator provided the Claimant could produce a medical report showing he was fully recovered.

The Claimant on the other hand considered his service terminated when he kept reporting to work but the respondent did not allocate him lighter work as per the doctors' recommendation.

The Claimant's complaint before the Court was that his service had been terminated by the respondent by reason of the fact that the respondent had not been able to allocate him lighter duties as recommended by the doctor after his injuries.

The Claimant therefore deemed himself constructively dismissed. Constructive dismissal implies the creation and sustenance of an environment that makes it impossible for an employee to continue with their employment leaving them with no option but to consider the relationship terminated. In this particular case the Court is not persuaded that such a situation obtains.

It was common ground that as a result of the injuries sustained during the accident, the Claimant was unable to continue performing duties the respondent hired him to perform. Although the doctors recommended him for lighter duties, the respondent could not find a suitable one. The respondent has further denied terminating the Claimant's service and maintained that it was ready and willing to re-engage the Claimant provided he produces a medical report showing the Claimant is fully recovered.

The Claimant was injured on 25th June, 2014 and had never been to work since 9th December, 2015. That is to say for almost four years when the matter came up for trial. Employment is not servitude. It can be brought to an end through normal termination, dismissal or through natural causes such as death or incapacity or an employee making it impossible for such employee to continue working.

This seems to be the situation before the Court. It does not make business sense to consider the Claimant still as an employee of the respondent yet he is not performing any duties. On the other hand, it would be unreasonable on the part of the Claimant to insist on working for the respondent yet as a result of his injuries the respondent is unable to identify suitable duties for him.

In the circumstances the Court will not make any finding on whether there is any unfair termination of service as sought by the Claimant but

would instead direct that the Claimant and the respondent **with the assistance of Counsel in the matter undertake a joint medical examination of the Claimant** with a view to ascertaining his suitability to continue working for the respondent in the position he was employed . If not suitable, parties are hereby directed to discuss exit arrangements between the parties to the employment contract including payment of appropriate and commensurate terminal dues to the Claimant.

The matter is set for mention 60 day from the date of this judgement (that is to say on the 30th day of September, 2021 for further directions and or recording of final orders.

It is so ordered.

DELIVERED AT ELDORET THIS 11TH DAY OF JUNE, 2021

SIGNED BY: HON. JUSTICE J. N. ABUODHA

THE JUDICIARY OF KENYA.

ELDORET ELRC

EMPLOYMENT AND LABOUR RELATIONS COURT

DATE: 2021-06-11 11:06:32+03