REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.478 OF 2017

RONALD LITUNYA OMUTITI.....CLAIMANT

VERSUS

ORPOWER 4, INC.....RESPONDENT

JUDGEMENT

The claimant is a male adult. The respondent is a limited liability company.

The claimant was an employee of the respondent as a mechanical technician III and later as a Plant Operator III earning a gross salary of ksh.136,167 per month. He worked for the respondent upon appointment on 25th June, 2009 until his employment was terminated vide notice dated 21st July, 2017. His salaries were graduated over time.

The claim is that the claimant suffered work injury while operating a valve that had not been serviced due to neglect. Upon such injury he was assessed under occupational safety and health authority officer, Naivasha (the Director) and awarded compensation at ksh.5, 078,403.69. the respondent's insurer failed to pay despite several reminders. To avoid to pay, the respondent convoluted reasons for unfair summary dismissal of the claimant vide notice dated 21st July, 2017.

The claim is also that there was no compliance with section 43(1) and 45 of the Employment Act where the employer is required to prove the reasons for termination of employment. The claimant had not been issued with caution or warning and had an exemplary record. This led to unfair termination of employment.

The claim is also that the unfair termination of employment has caused the claimant financial and psychological and emotional stress.

The summary dismissal was unfair for the reasons that there was no due process. On the occurrence of the work injury there was assessment but the respondent has refused to pay the due compensation; there is change of lifestyle due to financial burden resulting from permanent disability due to work injury; before any compensation could be paid the claimant was dismissed from his employment over alleged authorising an unauthorised visitor to the work place despite having been authorised by the supervisor; and that where there was breach to allow the alleged unauthorised visitor then both the claimant and the supervisor should have been taken through disciplinary process.

The claim is for payment of loss, compensation and damages as follows;

a) Notice pay at ksh.136,167 which has been paid;

b) 12 months compensation for unfair termination at ksh.1,634,004;

c) Compensation for termination of employment due to discrimination based on physical disability Ksh.5 million; and

d) General damages.

The claim is also that there was discrimination against the claimant on the grounds of physical disability after he suffered work injury resulting in permanent disability there was assessment and recommendation for compensation but the respondent's doctor he was reallocated duty as plant operator on 6thh August, 2015. Since the reallocation of duty there were several attempts through unsubstantiated allegations to terminate employment and resulting in summary dismissal on 21st July, 2017 over alleged allowing unauthorised female visitor to the plant which was flimsy. The claimant was not involved in ushering the female visitor into the plant yet those who authorised the same were not taken through disciplinary hearing and are still working for the respondent.

There was discrimination against the claimant based on his physical disability.

The claim is further that employment was wrongly terminated on account of discrimination based on the physical disability of the claimant. The respondent acted unreasonably and unconstitutionally and contrary to the rules of natural justice.

The claimant is seeking for a determination that thee was unfair, wrongful and unlawful termination of employment; there be compensations; payment of general and exemplary damages for the violation of constitutional rights; and costs of the suit.

The claimant testified in support of his claims.

Upon employment the claimant worked diligently as Mechanical III but on 28th October, 2014 he suffered work injury and got hospitalised until January, 2015. Upon work resumption there was recommendation for reallocation of duty to plant operator III.

The claimant testified that under his new role he was frustrated in his duties leading to termination of employment. When he followed up on his compensation for work injury he became a target for summary dismissal. He was accused of brining in a female visitor to the plant but he was on night duty when his colleague brought in his female guest and the procedure was to be cleared at the gate which was done and his supervisor was aware and had no objections. The guest was directed to the control room where he did an orientation on safety at the plant as was required.

The termination of employment was on four (4) grounds that;

He was in breach of plant security and safety procedures by bringing an unauthorised female visitor into the plant;

Having a stranger into the control room against plant procedures;

Having an unauthorised stranger remain in the power plant overnight;

Contravening operational plant procedures by allowing a stranger to log in data in the power plant against operational procedures; and

Failing to log the stranger in the plant visitors log book.

That these allegations were false. The female visitor was authorised to enter the respondent premises and plant and the security guards at the gate followed the due process. The claimant had no means of confirming what transpired at the gate but later learnt that there was no record taken in the occurrence book. The visitor's book was not available at the time but when the claimant was doing a headcount he took note of the guest and thus she was authorised into the plant procedurally. To use this reason for termination of employment was wrongful.

That there were no proper investigations, the heading that was conducted was a sham and the claimant was not allowed to call any witness. This was an act of discrimination against him as he was made to sign the disciplinary minutes so as to be cleared.

On the allegations that he allowed his female guest to log in data at the plant, the claimant testified that his supervisor had made complaints that his handwriting was poor and illegible and therefore asked his guest who was with him in the control room to assist. Some of the overall reports are done by the guest.

This was not the first time he had had a guest. The human resource manager also had brought her son and nephew into the plant and the claimant did orientation for them. the practice was to allow family members at the plant.

With regard to alleged overnight stay of the guest, the claimant admitted that he allowed his visitor overnight stay on the reasons that he had left his key and had no electricity and thus allowed the guest overnight stay where he was for safety. It was the practice to allow spouses at the plant. There was nothing wrong or damage to any machine at the plant. During the hearing the human resource manager alleged that the female guest was planning to be used as *al shabaab* and terrorist activities which was not true. The female guest was driven to the plant in and out by the official driver and did not carry any property of the respondent. while inside the plant he asked the guest to help him record and assist with duties. The security had checked the guest before being allowed at the plant. To use this reasons at the disciplinary hearing was with a motive to terminate employment.

The claimant also testified that he felt victimised and discriminated against by the respondent due to his follow up on his compensation for work injury while with the respondent. from the time he got injured and started the process of seeking compensation he was not treated well culminating with the malicious charges leading to termination of employment.

In cross-examination the claimant admitted that upon employment by the respondent he had a pre-existing condition and disability which was put into account and was allowed accommodations. Upon his injury at work he was assessed by the director and the insurance requested for another assessment. His compensations were being processed with the assistance of the human resource office where he was allowed time away and upon resumption of duty he was accommodated by being allowed work in a different office.

The claimant also testified that he was conversant with the policy requirements on allowing guests into the plant which was highly regulated due to the nature of operations of the respondent business. Every guest into the plant had to go through procedures to be admitted into the plant and taken through orientation on safety and security. All guest had to exit by 3 pm and only staff were allowed at the control room and no overnight stay was allowed.

The claimant also testified that he was invited to a disciplinary hearing and allowed to ask question. His guest was not booked into the visitor's book as this was not available. The visitor was brought to him at the control room by the supervisor who had cleared her at the gate

on the night of 17th and 18th July 2017. He allowed the visitor to help him with his duties in the office and also allowed an overnight stay for security as the living quarters were a distance away, he had left his key and there was no electricity.

The letter terminating employment gave the grounds and right of appeal. He felt discriminated against for following up on his compensation following work injury. He has filed a different suit following the injury at the magistrate's court, naivasha.

defence

The respondent denied all the allegations made, there was no unlawful termination of employment or violation of his rights or discrimination against the claimant.

The claimant's employment was terminated on grounds of gross misconduct for reasons not related to his work injury. Termination of employment as justified in the circumstances and was carried out in accordance with the provisions of the applicable law. the claims made are false, misleading and without good basis and should be dismissed with costs.

The claimant was employed as a mechanical technician on 1st July, 2009 and at the time he walked with a limp on his left leg which he explained was as a result of septic hip arthritis a condition which developed in the year 1994 and prior to his employment.

The defence is also that in the course of employment, the claimant was required to comply with the terms and conditions of his employment contract and the operational plant standard procedures which provided for logging information into the plant logbook and visitors logbook.

The claimant was not placed under unsafe work environment as alleged. While he was injured while on duty, the injury was precipitated by his previous injury and his surgery and subsequent treatment was necessitated by pre-existing injured suffered prior to his employment by the respondent. without prejudice, the defence is that where there was injury to the claimant it arose out of own negligence for failing to take the necessary precautions and for disregard to safety precautions.

The disability or restrictions on the claimant and any other injuries sustained were not caused by the respondent but attributable to pre-existing condition. The award of ksh.5 million by the director was disputed and referred to a panel of doctors who reversed it to zero per cent incapacity on the basis that the claimant had a pre-existing condition since childhood.

The respondent took all reasonable measures to accommodate the claimant and to ensure a safe work environment and guided by his doctor's recommendations re-assigned work to a plant operator, a position that required less movement and where he spent most of his time in the control room. He was provided with an orthopaedic shoes and walking cane to ease movement around the work place.

The defence is also that the claimant wilfully and deliberately misled the court as to the circumstances that led to termination of employment. There was gross misconduct and a breach of the operational procedures where the claimant brought an unauthorised female visitor to the plant; he failed to record the visitor's details; gave the visitor access to the plant control rooms; allowed the visitor overnight stay and allowed the visitor to log in data pertaining to the plant operations into the plant log book.

Upon discovery of the gross misconduct, the claimant was issued with a notice to show cause why his employment should not be terminated on 13th July, 2017 and to explain events of 17th June, 2017 and he replied in writing. The claimant was then invited to a disciplinary hearing on 19th July, 2017 but where he failed to provide satisfactory reasons for his conduct and this led to summary dismissal in accordance with the operational procedures, the applicable law and the terms of his employment contract vide letter dated 21st July, 2017.

The claimant was paid all his terminal dues and issued with a Certificate of Service on 13th September, 2017.

Termination of employment was not related to the claimant's physical disability as alleged. The claimant had worked with the respondent for 5 years without any complaints in this regard. He had been provided with accommodations and reassigned duties taking into account his doctor's recommendations and to claim there was discrimination against him is an afterthought.

The claimant was taken through the due spruces, issued with notice of allegations against him and allowed a reply and a hearing. The claims thus made have no foundation in law or at all.

The claimant has filed Naivasha CMCC No.699 of 2017 against the respondent with regard to alleged work injury and by filing this suit is in abuse of the court process.

Anne Njoroge the Administrative and human Resource Officer with the respondent testified that the claimant was employed by the respondent on 1st July, 2009 while he was walking with a limb as a result of a pre-exiting condition which he said developed in the year 1994 before his employment. The employment was regulated under his employment contract and the respondent's operational plant and standard procedures. The claimant's salary was increased over the years per the practice to review salaries for all employees every year and not based on work performance.

Ms Njoroge also testified that the claimant got injured while at work but unrelated to allocated duties but precipitated by his pre-existing condition. He underwent surgery and treatment which necessitated reassignment of duty and as recommended by his doctor. He was also assessed by the director but a panel of doctors found the injury had occurred due to the pre-existing condition. While the claimant was in the employment of the respondent he was given support as a person with disability at the cost of the respondent and allowed time off to attend to any issue on his pre-existing condition.

Ms Njoroge also testified that on 17th June, 2017 she was informed by the team leader in operations of events at the plant where there was a breach of safety. The shift supervisor noted that the claimant brought in a guest at the plant and kept her overnight and the visitor had not been logged in in the visitor's book and who proceeded to log in data into the plant occurrence book that night. The guest was taken to the control room which was contrary to the regulation of which the claimant was conversant with.

The control room is at the heart of the company and there is a commitment between the respondent and Kenya Power and Lighting Company (KPLC) and with a connection to the national grind in power provision and any lapse at the plant can affect national security. There should be no access to the control room save for the plant manager and supervisor who have to use biometric access. All others are restricted.

On the report of gross breaches the claimant was issued with a notice to show cause why his employment should not be terminated for the same, there was an investigation and the claimant gave his defences and indeed the data entries for the 3 nights the claimant was on duty, one the material night the details and handwritings are different. He admitted he allowed his guest to enter data.

At night, only authorised operators are allowed into the plant. The claimant was in gross breach of operations to allow his guest overnight at the control room and to remain in the plant.

The claimant was invited for a disciplinary hearing and did not challenge the allegations made. He did not ask to be supplied with any documents or witnesses. The shift supervisor, Esther and the plant operator, Janet had noted differences in data entries. Esther used strong language during the hearing and was made to apologise. The claimant admitted that he allowed his guest into the control room and entered data in the occurrence book. This was a serious breach of procedures. He also allowed the guest to stay overnight on the reasons that he had forgotten his keys but this was not permitted under whatever circumstances and there was no permissions. It was a breach of security operations and the subject security guards who allowed access without the due process have since been changed.

Taking into account the misconduct, the disciplinary panel recommended summary dismissal.

The claimant has since been paid his terminal dues including notice pay, ex gratia pay of 15 days' pay for every year worked, untaken leave days and salary for days worked. A certificate of service has since been issued.

The termination of employment was not related to the alleged injury while at work.

The summary dismissal was for lawful cause and following gross misconduct.

At the close of the hearing both parties filed written submissions.

On the pleadings, the evidence and written submissions, the issues which emerge for the court determination can be summarised as follows;

Whether there was discrimination against the claimant;

Whether there was unfair termination of employment;

Whether the remedies sought should issue; and

Who should pay costs.

On the issue as to whether there was unfair termination of employment, as correctly submitted by the claimant, for a termination of employment to pass the fairness test, it must be shown that there was not only the substantive justification but also that there was procedural fairness as held in the case of **Walter Ogal Anuro versus Teachers Service Commission [2013] eKLR.** also in the case of **Gibson D Mwanjala versus KRA [2015] eKLR** the court outlined the principles of substantive fairness that;

> *Pursuant to section 43 of the Employment Act, 2007, an employer has a duty to prove the reasons for dismissing an employee. But the statute does not leave it at that. Under section 45 of the Act, the employer has the added burden of showing that the reasons were fair and valid.*
>
> *The burden on the employer is an onerous one and it is unlike what obtains under the Civil procedure regime and/ or normal evidential provisions where defendants do not have to do so much. In fact so onerous is the burden, that by dint of section 45(4) of the Act, an employer should demonstrate its action to dismiss an employee was in accord with justice and equity, considering the circumstances of the particular case*

Therefore save from having the reasons for dismissing an employee, the employer is required to demonstrate its action to dismiss the employee is in accord with justice and equity putting into account the circumstances to the particular case.

To ensure procedural fairness the employer should ensure that the employee is informed of the charges the employer is contemplating as grounds for dismissal and the employee is given a fair chance to urge his defence. As correctly submitted by the respondent in the case of **Anthony Mkala Chitavi versus Malindi Water & Sewerage Co. Ltd, Industrial Court Cause No. 66 of 2012** where the court observed as follows;

> *(i) That the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee.*

This gives a concomitant statutory right to be informed to the employee.

(ii) Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defense/state his case in person, writing or through a representative or shop floor union representative if possible.

(iii) Thirdly, if it is a case of termination, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.

In this case, the claimant was issued with a notice dated 13th July, 2017 to show cause why his employment should not be terminated on the grounds that;

… on 17th June, 2017 while working on the night duty you breached the power plant security and safety procedures, by allowing an unauthorised female visitor into the power plant. You further let her into the control room against plaint procedures and had her stay the entire night at the power plant. In addition you failed to follow the plant operational procedures and allowed the stranger to log in data and information in our power plant occurrence book against the plant procedures. You also did not log the stranger in the plant visitors log book available in the power plant control room.

The above allegations are a demonstration of wilful neglect of your duty. You were careless in the execution of your duty putting the power plant under serious security and safety exposure. This amounts to gross misconduct and accordingly, you are hereby required to show cause within 48 hours as to why disciplinary action should not be taken against you. …

Thus the matters leading to the directions to show good cause why employment should not be terminated were outlined. These related to what related to breach of security and safety measures and gross misconduct.

The claimant was allowed a written reply and on the allegations that he allowed a female guest into the control room overnight he replied that;

… I was on duty when my friend arrived at the village and realised that the key for the house was not there. Since I was on duty with the keys I requested the shift supervisor for permissions to have the guest come pick the key at appreciation of the plant theory and back home. The supervisor agreed and thus I made arrangement for the guest to be brought to the plant by Amos Murule. … owing to the vigil operation procedure, the guest requested to stay by on vigil for the night and leave with us in the morning.

With regard to allowing the guest log in data and information into the power plant occurrence book the claimant replied that;

… since the operations manager has been having an issued with my handwriting in the report books, I have been logging on rough paper and finally requesting a shift mate to transfer the notes to the log book. I take responsibility for the information as it is transferred for clear visualisation by the team mates … for I believe the most important aspect of the logs is correct and verifiable information. In this case I had written the entire occurrence and in the morning hours as the lead supervisor was making rounds I requested the guest just to transfer.

The claimant does not explain other matters with regard to;

- A breach of the power plant security and safety procedures, by allowing an unauthorised female visitor into the power plant;
- Allowing his guest into the control room against plaint procedures and had her stay the entire night at the power plant;
- Failing to log the stranger in the plant visitors log book available in the power plant control room.

On the matters the claimant responded to with regard to allowing the guest into the control room overnight, there is admission of the same save to give an explanation that the supervisor was aware.

With regard to allowing the guest to log in data and information into the power plant occurrence book, the claimant also admitted that he allowed the guest to do so and gave his reason as that his supervisor had complained about his handwriting.

These on their own are serious breaches of the workplace policy. Under clause 3.2.5.2 of the *Plant Log Book* the claimant was required to log all occurrences in the occurrence book and hand over the same at the end of his shift. By allowing a guest into the control room and failing to record such an occurrence and further allowing the guest to do his work, this was neglect of duty and contrary to section 44(3) and 4(c) that;

(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

such conduct is defined as gross misconduct and subject to summary dismissal. The claimant testified he was conversant with the workplace policies. These policies were tailor made to take the specific business needs of the respondent which is allowed as a best practice as held in the case on **Agnes Kavata Mbiti versus Housing Finance Company Limited [2017] eKLR.**

The respondent opted to invite the claimant for a disciplinary hearing vie notice dated 17th July, 2017 for the 19th July, 2017. There were five (5) grounds upon which the disciplinary hearing was to be conducts that;

1. He was in breach of plant security and safety procedures by bringing an unauthorised female visitor into the plant;

2. Having a stranger into the control room against plant procedures;

3. Having an unauthorised stranger remain in the power plant overnight;

4. Contravening operational plant procedures by allowing a stranger to log in data in the power plant against operational procedures; and

5. Failing to log the stranger in the plant visitors log book.

The court reading of section 41(2) of the Employment Act, 2007 the respondent followed the due process of the law by allowing the claimant to urge his defence on serious breaches of his employment contract and the subsequent sanction of termination of employment was justified. The defences given by the claimant cannot justify his conduct and breaches of the work place policy and the law.

The court finds no case of wrongful, unlawful or unfair termination of employment. There were substantive grounds leading to termination of employment and the claimant was accorded the due process outlined under section 35, 41 and 43 of the Employment Act, 2007.

The claimant has also made out a case that he was discriminated against on the grounds of his physical disability. Indeed Article 27 of the Constitution, 2010 read together with section 5 of the Employment Act, 2007 outlaw direct or indirect discrimination against any person or an employee on any grounds and including disability.

To proof there is discrimination against a claimant, the principles attendant thereto are set out by the Supreme Court in the case of **Law Society of Kenya versus the Attorney General & COTU Petition No.4 of 2019** where the court quotes the Court of Appeal in **Barclays Bank of Kenya LTD & Another versus Gladys Muthoni & 20 Others [2018] eKLR** held as follows;

> **…** *Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions… whereby persons of one such description are subjected to … restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description….*
>
> *Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex … a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.*

It is not sufficient to cite there is discrimination against the claimant. There must be a purposive contradistinction of differential treatment, privileges or advantages which are not accorded to other persons and where there is unfair treatment or denial of a privilege on a given ground including that on disability.

The claimant's case is that due to his following up on his injury claims following work injury he was targeted for victimisation and discrimination against him by the respondent. that this led to the unfair termination of employment. However as set out above, termination of employment related to work place misconduct unrelated to the claimant's disability and where there was work injury, he has since filed Naivasha CMCC No.699 of 2017 without any victimisation by the respondent. where such suit is already filed, the issue being work injury, the subject court shall address the same on the merits.

To thus claim there was discrimination against the claimant on the grounds of his physical disability and that this led to termination of employment is far-fetched. The two matters are unrelated. The question of work injury is presently in court under Naivasha CMCC No.699 of 2017 and the issue of alleged unfair termination of employment is addressed as above.

With regard to the claims made for compensation, general and exemplary damages, compensation for constitutional violations these are hereby found without a foundation.

In conclusion, I do find that the claimant was not unfairly terminated from his employment, there were substantive reasons and he was taken through the due process of the law.

Costs to parties in employment and labour relations disputes are regulated under section 12 of the Employment and Labour Relations Court Act, 2011. Whether to order for the payment of costs or not is discretionary. In the circumstances of this case, the claims set out above having failed, employment of the claimant by the respondent having terminated, only fair for each party to bear own costs.

The claimant has since been paid in lieu of notice even where this was not due; his leave days were paid together with issuance of Certificate of service.

Accordingly, the claims made are found without merit and are hereby terminated in their entirety. Each party shall bear own costs.

Delivered at Nakuru this 13th day of February, 2020.

M. MBARU

JUDGE

In the presence of:

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