



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 787 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**ONS.....CLAIMANT**

**VERSUS**

**KENYA AIRWAYS LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant filed a Memorandum of Claim on 14<sup>th</sup> May 2014 and an amended memorandum of claim on 17<sup>th</sup> November 2015. He avers that he was employed by the Respondent as a Supplies Officer on 21<sup>st</sup> March 2005. In September 2009 while he was stock taking using a ladder, he was scratched by a loose nail on his left leg which caused him grievous injuries.

He avers that he was immediately rushed to Kenyatta National Hospital where the doctors recommended the immediate amputation of his leg. That the Respondent gave him sick leave of a month and a half after which he returned to work without undergoing counselling. He contends that after reporting back to work, he suffered depression which made him lose interest in his work. He avers that the Respondent wrote him show cause letters asking him to explain why he was underperforming but he could not defend himself as he did not understand what was happening to him. He avers that he sought treatment at two rehabilitation Centres. That on 13<sup>th</sup> June 2011 he was served with a termination notice while still at a rehabilitation centre.

In the memorandum of claim he seeks the following reliefs:

1. A declaration that the Respondent's dismissal of the Claimant from employment was wrongful, unfair, procedural and improper and the Claimant is entitled to damages.
2. Compensatory damages equivalent to 12 months' salary being Kshs.711,595.80 for wrongful, unfair and unprocedural termination.
3. Compensation for amounts deducted in form of tax.
4. An order for the Respondent to pay costs of this suit plus interest thereon.
5. Any other relief as the Court may deem just.

The Respondent filed a Statement of Response on 19<sup>th</sup> November 2014. It denies that the Claimant was injured at its premises. It avers that the allegation on the injury was raised in **Kikuyu Civil Case No. 194 of 2014 Onesmus Ngunga Sumaili v Kenya Airways Limited**.

It avers that the Claimant was put under the care of Dr. Kigamwa a psychiatrist who followed up on his progress and accorded him medical assistance. It avers that the Claimant did not respond to any of the show cause letters before he was terminated. Further, that the Claimant did not inform it of the diagnosis of his depression. That it learned of the claimant's admission at the rehabilitation centre after the show cause letters were issued.

It denies serving the Claimant with a termination notice while at the rehabilitation centre. It avers that the termination letter was issued on 13<sup>th</sup> July 2011 due to the failure by the Claimant to attend a panel hearing scheduled for 27<sup>th</sup> June 2011 and to respond to its previous letters.

**Claimant's Case**

The Claimant, CW1 testified that he was employed by the Respondent in 2005, on a 2 year contract, vide the letter of employment dated 2<sup>nd</sup> February 2005. He was subsequently issued with another letter dated 23<sup>rd</sup> January 2007 giving him a 5 year contract in the position of Supplies Officer.

He testified that in September 2009, he had climbed a ladder while doing stocktaking when he fell and a nail pierced his left leg just below his knee. He testified that he reported to work the following day and visited the company clinic where he was given medication which did not seem to be effective. That within the week, his leg started rotting.

He testified that he later visited Mater Hospital and Kenyatta Hospital where he was admitted for a month. That his leg was later amputated from the thigh. He testified that he went back to work because Dr. Munyi, the respondent's doctor, had threatened to reduce his salary by half. He testified that he was removed from the warehouse and transferred to data taking where he was using a computer.

He testified that he was recommended for counselling but the company ignored this recommendation. It was his testimony that he suffered depression due to the trauma. He testified that he received show cause letters due to his absence from the workplace but did not respond to the letters.

He testified that from that time he continues to suffer from depression and memory loss. He testified that he was called "*one legged man*" which hurt him. That he felt disinterested and more depressed whenever he saw the store and building where he had been injured. He testified that he applied for leave which was denied.

He testified that he became an alcoholic and smoker and his wife organised for him to be taken to a rehabilitation centre, Wonder Peace Rehabilitation Centre, where he was admitted for 3 months. That he was invited to a panel hearing related to his absence and that the letter was delivered to the rehabilitation (rehab) centre by the Supervisor. He testified that he did not attend the hearing on 23<sup>rd</sup> May 2011 as he was still in rehab. It was his testimony that the Respondent was called by the rehab's management and informed of his situation. He testified that he received a letter of termination on 13<sup>th</sup> June 2011.

He testified that he disagreed with the contents of the termination letter. That the termination was not fair because the Respondent ought to have sent someone to assess his situation.

On cross-examination, he testified that he was required to have a medical certificates in order to proceed on sick-off. He stated that he did not get a medical report. He testified that the Respondent's doctor would call on him and warn him that he would be discontinued if he continued being at the hospital. It was his testimony that he reported back to work after a month.

He testified that he had quit drinking and smoking but he relapsed due to depression. He further testified that the company did not protect him when his colleagues bullied him. He testified that counselling would have prevented depression. He testified that it is not true that the Respondent received the letter notifying it of his situation after he was terminated. He denied being away from work without permission and stated that he applied for leave.

In re-examination, he testified that the receipt of the letter of termination was acknowledged from Wonder Peace Rehabilitation Centre.

CWK, the Claimant's wife testified as CW2. She testified that after the amputation, the Claimant healed and reported back to work. It was her testimony that the doctor had recommended counselling but she did not know if the claimant attended counselling. She testified that the Claimant started drinking and was out of his mind. That she took him to Amani Counselling Centre where he was given an off from work.

She stated that she looked for an alternative rehab which was wonder Peace Rehabilitation Centre because the Claimant's medical cover had expired. She testified that the Claimant was admitted at the rehab centre and that she reported his admission to the supervisor Mr. Odie who was okay with the admission.

She testified that while at the rehab, the Claimant received the letter inviting him to the hearing. That she took the letter and went to the Respondent where she met Mr. Odie. It was her testimony that Mr. Odie referred her to the Respondent's human resource officer who refused to talk to her on grounds that she only knew the Claimant.

In cross-examination, she testified that prior to 2009 the Claimant did not have any drinking or smoking problem and that he was a pastor. She testified that she did not know if the doctor wrote to the Respondent on counselling. She stated that she went to the Respondent's clinic and was referred to Amani rehab Centre. She testified that they reported at the centre the following day and that the Claimant was given one week off.

She testified that they had not sought the Respondents help earlier and that it could not pay for the rehab as the Claimant had informed her that the medical cover had been exhausted. She testified that Wonder Peace Rehab wrote a letter on 24<sup>th</sup> July 2011 after the termination.

### **Respondent's Case**

DR. JANE NJERI MUNYI, the Respondent's Head of Medical and Occupational Health testified as RW1. She adopted her Witness Statement dated 31<sup>st</sup> October 2018 as her evidence in chief. She testified that the Claimant's contract was terminated effective 13<sup>th</sup> July 2011.

She stated that from the Respondent's Clinic Management System (CMS) there was no report of the Claimant's injury. She stated that the Claimant did not report his injury on 16<sup>th</sup> December 2009 or thereafter. That if he indeed reported the injury he would have filled Form J.

She stated that the records indicate that the Claimant was a known diabetic with poor sugar control and also immunocompromised since 1997. She testified that the Respondent has a policy that any employee who is diagnosed to have a compromised immunity undergoes counselling at Amani Centre. That the claimant was treated at Amani Counselling Centre and put on medication.

She testified that the Claimant's medical record indicates that he had a pre-existing condition of diabetes and compromised immunity dating back to 1997 and that these conditions predispose one to DVT – (Deep Vein Thrombosis) that can lead to gangrene and amputation.

She testified that she had treated the Claimant before and had never issued him with any threats to return to work. She stated that the Respondent provided the Claimant with a prosthetic limb after his amputation. She stated that Wonder Peace Rehabilitation Centre is not on its list of counsellors. She further stated that the Claimant did not inform the Respondent of any difficulties experienced at Amani Counselling Centre which would have enabled it refer him to an alternative counselling centre.

In cross-examination, she testified that according to the respondent's records, the Claimant had been diagnosed with HIV in 1997 and was on medication. She further testified that the Claimant had both HIV and diabetes but she did not have the medical records in court.

She testified that she was aware that the Claimant was treated for psychotic depression caused by immune depression. She however testified that she was not aware that he had an accident. She stated that she knew that his leg was amputated after he developed a clot.

Upon re-examination, she reiterated that there was no evidence that the Claimant reported or was treated as a result of the accident. That the reason for the amputation was his previous illnesses being HIV and diabetic.

GRACE WAMITI, the Respondent's Head of Employee Relations and Staff Welfare testified as RW2. She adopted her Witness Statement dated 20<sup>th</sup> May 2019 as her evidence on chief.

She testified that the Claimant was a frequent absentee from work without any valid reason or permission. That the Claimant was absent from duty from 23<sup>rd</sup> May 2011 until 6<sup>th</sup> June 2011 and during this time he did not communicate his whereabouts.

She testified that the Claimant did not respond to the letters issued to him on 15<sup>th</sup> April 2011 and 21<sup>st</sup> April 2011 on his absenteeism and non-performance thus on 19<sup>th</sup> April 2011, he was issued with a show cause letter. She testified that he did not respond to the show cause letter and was subsequently issued with another show cause letter dated 26<sup>th</sup> April 2011.

She testified that the Claimant was issued with a letter dated 13<sup>th</sup> June 2011 inviting him to a panel hearing on 27<sup>th</sup> June 2011. That he neither gave an explanation nor attended the panel hearing and that by letter dated 13<sup>th</sup> July 2011 he was dismissed from employment.

She testified that upon being served with the panel hearing letter dated 16<sup>th</sup> June 2011, the Respondent received a letter from Wonder Peace Rehabilitation Centre that the Claimant was admitted there for 90 days. She denied that the claimant as injured while at work and further testified that there was no application for leave from work.

In cross-examination, she testified that she did not know when the Claimant was under the care of a doctor but was aware that he was under a doctor's supervision because he had immunodeficiency.

She testified that she did not have documents relating to the Claimant's illnesses as they were confidential records. She confirmed that the Claimant was suffering from depression. She testified that on 13<sup>th</sup> June 2011, they invited him for a panel hearing that was scheduled for 27<sup>th</sup> June 2011. She testified that the Claimant responded to the letter vide his letter dated 24<sup>th</sup> July 2011 in which he stated that he had been admitted to a rehabilitation centre.

She testified as at that time, the Claimant had absconded duty. She testified that the Respondent knew of his admission at the rehab centre. She stated that the provisions of incapacity under clause 15 of the Claimant's offer of employment were not followed. She contended that the panel hearing did not take place because the Claimant was absent but he had on 3 occasions been given an opportunity to be heard. She stated that although the panel did not sit, it considered the claimant's letters.

In re-examination, she stated that prior to the letter dated 27<sup>th</sup> July 2011, there was no evidence that the Claimant was unwell and had been admitted to the rehab centre. She stated that the letter from Amani Counselling Centre indicated that the claimant had been taken ill but did not state the nature of his illness.

### **Claimant's Submissions**

The Claimant submits that he suffered depression as a result of the amputation which led him to become an alcoholic. He submits that the Respondent was fully aware of his mental instability through the letters dated 9<sup>th</sup> June 2011 and 24<sup>th</sup> July 2011 from Amani Counselling Centre and Wonder Peace Rehabilitation Centre respectively, that he had been suffering from alcohol induced depression thus was undergoing counselling.

He submits that despite being aware of his instability, the Respondent chose to terminate his services contrary to the provisions of Section 34 of the Employment Act and Clause 15 of the contract of employment.

Relying on section 41 of the Employment Act he submits that though he was served with a notice to show cause and a hearing conducted, the Respondent was aware that he was not in a proper state of mind to respond to the allegations and represent himself at the hearing.

## Respondent's Submissions

The Respondent submits that while the Claimant avers that it unfairly terminated his employment by failing to consider that he was not mentally sound to attend the hearing and comprehend a notice to show cause, it has the requisite burden to show that the Claimant was fairly dismissed based on a valid reason and the correct procedure.

It relies on the case of **Moses Kaunda Moro v C.M.C. Motors Group Ltd [2013] eKLR** which was cited in the case of **Water Ogal Anuro v Teachers Service Commission [2013] eKLR** where the Court held that a fair termination will occur where there is a valid and fair reason for terminating the employee and due process is followed.

It submits that the reason for terminating the Claimant was his frequent absenteeism from duty without permission. That the reason given for termination is valid as provided under Section 44(4)(a) of the Employment Act on absenteeism.

It submitted that it is uncontroverted that the Claimant failed to communicate to the Respondent his depression or alcoholism. That even after being served with the show cause letters dated 19<sup>th</sup> April 2011, 26<sup>th</sup> April 2011, 6<sup>th</sup> May 2011 and 9<sup>th</sup> May 2011, the claimant failed to respond to the said letters and did nothing to improve his behaviour.

It relied on the case of **Banking, Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd [2014] eKLR** where the court held that it is wrong not to bring to the attention of the employer ones illness and to be absent from work without authorisation or sharing information on where an employee is.

In respect of procedure, it submits that the Court in **Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR** held that a court of law cannot import into a written contract of service rules of natural justice and institutional provisions relating to the right of hearing. It submits that the termination provided by section 41 of the Employment Act coupled with principles of natural justice were adhered to in terminating the Claimants employment.

It submits that the Claimant did not attend the panel hearing slated for 27<sup>th</sup> June 2011 yet an employee is bound to attend a disciplinary hearing once instituted. It relies on the case of **Banking Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd [2014] eKLR**, where the Court held that the employer could not be faulted as the grievant had failed to attend his disciplinary hearing to give explanation on the condition he suffered from.

It submits that this Court should not allow the Claimant to impeach his dismissal on grounds of failure to follow a fair procedure.

It submits that since it has demonstrated that the termination was in accordance with the law, the Claimant is not entitled to compensatory damages. It further urged the Court to take into account that contract was terminated on 13<sup>th</sup> July 2011 being 5 months to its expiry.

It submits that the Persons with Disabilities (Income Tax Deductions and Exemptions) Order, 2010 provides for the process of exemption from income tax payment for persons with disabilities. It submits that the failure by the claimant to produce a Tax Exemption Certificate to the Respondent left the respondent with no other choice but to adhere to what the law provides.

In conclusion, it submits that the fairness test threshold had been met and the reliefs sought by the Claimant do fail as proven.

## Determination

I have considered the pleadings, the evidence and submissions of parties together with the authorities cited. The issues for determination are:

- a) Whether the Claimant was injured while at the work place
- b) Whether the Claimant was unfairly terminated
- c) Whether the Claimant is entitled to the reliefs sought.

### a) Whether the claimant was injured while at the work place

The Claimant avers that on 16<sup>th</sup> September 2009 he was injured while stock taking and that the injury resulted to his leg being amputated. The Claimant testified that after his injury, he went back to work the following day and visited the company clinic where he was given medication which did not seem to work.

The Respondent denies that the Claimant was injured while at the work place. It states the alleged injury was the subject of proceedings in Kikuyu **Civil Case No. 194 of 2014**. CW1 testified that the Respondent's medical records did not have any report of the Claimant's injury. While it is admitted that the Claimant's leg had been amputated, it is the respondent's position that the amputation was as a result of the Claimant's pre-existing conditions.

The Claimant at paragraph 7 of this Memorandum of Claim avers that after the injury, he was immediately rushed to Kenyatta Hospital where the doctors informed him that his leg was rotting. The Claimant's pleadings contradict his testimony that he reported the incident at the respondent's clinic and that the medication was not effective. RW1 stated that there was no record of the Claimant having visited the Respondent's clinic for such injury. Further, RW1 testified that the amputation of the claimant's leg was as a result for a clot due to his pre-

existing medical condition. The court notes that the claimant did not file any medical report or treatment notes to prove that the amputation was as a result of injury at work. It further notes that in his evidence the claimant was inconsistent on what transpired immediately after the injury. On the one hand he stated he was treated at the respondent's clinic while on the other hand he states he was taken to hospital immediately after the injury. I find that on a balance of probabilities, the claimant has not proved that he sustained an injury at work.

**b) Whether the Claimant was unfairly terminated**

Clause 15 of the Letter of Offer of Employment dated 23<sup>rd</sup> January 2007 provided:

*“Incapacity*

*You will be entitled to full salary and benefits during the period of absence on account of sickness subject to production of a medical certificate signed by a registered medical practitioner certifying that you are unfit for your duties, provided should you at any time be incapacitated or prevented by illness, injury or accident or any circumstance beyond your control from discharging your duties for more than twenty-eight consecutive days or an aggregate period exceeding twenty-eight (28) days in a period of twelve (12) consecutive calendar months, you will submit to an examination by a medical practitioner or specialist appointed by Kenya Airways. If this practitioner or specialist certifies in writing that in his opinion you are unable to perform and discharge your duties, Kenya Airways may if the incapacity continues:*

- a) Either discontinues payment in whole or part of your total remuneration from the date when you are notified of this decision until your incapacity ceased; or*
- b) Whether or not payment shall already have been discontinued as aforesaid determines your employment forthwith or on such later date as the Company may specify.”*

The Claimant testified that he did not have a medical report which would have entitled him to 28 days leave. RW2 testified that clause 15 was not followed.

In **Banking, Insurance and Finance Union (Kenya) v Barclays Bank of Kenya Limited [2014] eKLR** the Court held:

*“Therefore where an employee is sick, the employer is to provide sufficient and proper medicine and take steps to ensure the notification of the illness of an employee as soon as practically possible. Failure to bring to the attention of the employer of one's sickness and illness gives such an employer a good defence that the sickness and illness had not been brought to their attention in good time and especially where the employee contributes to such illness of sickness such as overindulgence in alcohol intake or self-injury.”*

In respect of the hearing, the Respondent stated that the panel hearing did not take place because he was not present.

The Termination letter dated 13<sup>th</sup> July 2011 states:

*“Re: Termination of Employment Contract*

*On 16<sup>th</sup> June 2011, you were served with a letter requiring you to attend a panel hearing on 27<sup>th</sup> June 2011 regarding your frequent absenteeism from duty.*

*The Company later received a report from Wonderpeace Rehabilitation Centre dated 18<sup>th</sup> June 2011 stating that you were admitted for 90 days for alcoholism.*

*You did not get a referral from KQ Clinic for the rehabilitation and neither did you inform your manager before the admission of your intention to be admitted for the rehabilitation.*

*The Company still has no explanation from you regarding your absenteeism from duty on the days mentioned in the panel hearing letter....”*

[Emphasis added]

From the above letter, it is clear that prior to the scheduled panel hearing the Respondent was aware that the Claimant had been unwell. Having known that the Claimant had been ailing, it was prudent for it to ensure that the panel hearing was conducted after he had recovered. CW2 testified that the panel hearing did not take place as the claimant did not appear. It was thus apparent that the claimant was not in a position to attend the panel hearing as he was admitted at the Rehab.

Section 44(4) of the Employment Act provides that –

**(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving**

**rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—**

**(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;**

Section 44(4)(a) makes absenteeism a ground for summary dismissal only where the absence is –

(i) Without leave, or

(ii) Without other lawful cause.

In this case there was no leave but there was other lawful cause which the respondent was aware about. It was aware that the claimant was unwell and by the letter dated 18<sup>th</sup> June 2011, from the rehab, that the claimant was admitted at the rehab undergoing treatment.

The fact that the rehab was not an approved facility according to the respondent's medical scheme does not mean that there was no valid reason for absence from work. That would only have affected its liability to pay for the treatment. The least that the respondent could do was find out why the claimant was at the Rehab and not at one of its approved facilities. Had it made the inquiry, it would have understood that this was because the claimant's medical scheme had been exhausted.

This was a case that required assistance and not punishment as the respondent was aware of the claimant's medical status including his immunosuppression condition, his amputation and his depression.

There was thus no valid reason for termination of the claimant's employment on grounds of absenteeism as he was absent for lawful cause.

On the procedure for termination, RW2 testified that no hearing took place. If there was no hearing, then there could be no valid termination. The fact that the claimant was absent did not justify doing away with the hearing. What should have been done was to conduct the hearing in the claimant's absence and make a determination. The procedure for the hearing was thus also not complied with.

From the foregoing I find that the termination was unfair for want of both valid and fair reason and for want of fair procedure.

### **c) Whether the claimant is entitled to the reliefs sought**

#### **(i) Damages**

The Claimant seeks 12 months' compensation for unfair termination. The Respondent submits that in determining whether to award 12 months' compensation, the Court should consider that the Claimant's contract of employment was to expire in 5 months' time.

Section 49(4)(e) and (f) provide:

**(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—**

**(a) ...**

**(e) the employee's length of service with the employer;**

**(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;**

Taking into account that the Claimant was to exit the Respondent in 5 months, I award him 5 months' salary as compensation in the sum of  $(59,268 \times 5) = \text{Kshs.296,340}$ .

I further award him **Kshs.59,268** as he would have been entitled to pay in lieu of notice.

#### **(ii) Compensation for deducted tax**

The Claimant seeks to be compensated for his tax deduction as he had a disability. The Respondent has submitted that the Claimant failed to present a Tax Exemption Certificate. The Claimant annexed a Disability card issued on 12<sup>th</sup> May 2014.

Section 12(3) of the Persons with Disabilities Act entitles an employee with a disability to exemption from tax on all income accruing from his employment. In respect of the process to attain such exemption, Section 35 (1) of the Act provides:

**(1) All persons with disabilities who are in receipt of an income may apply to the Minister responsible for finance for exemption from income tax and any other levies on such income.**

(2) ...

Paragraph 3 of the Persons with Disabilities (Income Tax Deductions and Exemptions) Order, 2010 provides:

**A person with disability shall not be eligible to apply for tax exemption unless he or she is registered with the Council.**

During his employment, the Claimant was not registered with the National Council for Persons with Disabilities thus he could not be eligible to apply for tax exemption. As rightfully submitted by the Respondent, it was not in a position to have the Claimant's tax liability exempted since he did not provide his registration details to the respondent. In any event once tax has been deducted and remitted to Kenya Revenue Authority, the claimant cannot demand it from the employer but can seek a refund from the Authority to which the money the money had been remitted.

This prayer consequently fails and is dismissed.

**In the end I enter judgment for the claimant in the sum of Kshs.355,608/=, interest at court rates from date of judgment and costs.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23<sup>RD</sup> DAY OF APRIL 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 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 has 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.

**MAUREEN ONYANGO**

**JUDGE**