



**IN THE REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**ELRC. CAUSE NO. 1633 OF 2016**

**FELIX MUTIE MUSANGO.....CLAIMANT**

**-VERSUS-**

**TIN CAN MANUFACTURERS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant was employed by the respondent from August 2009 to 29.4.2016 when his employment was terminated by the employer. He brought this suit on 16.8.2016 alleging that the termination was unjustified and unlawful and prayed for the following reliefs:

- (a) Declaration that the termination was unlawful
- (b) Compensatory damages plus terminal benefits totalling to Kshs. 1,016,610.28
- (c) General damages for wrongful dismissal
- (d) Costs and interest.

2. The Respondent filed defence on 8.9.2016 admitting that the claimant was her employee but denied that she terminated his employment unlawfully or at all. On the contrary she averred that the claimant absconded duty from 1.9.2015 to 29.4.2016 when he was retired on medical grounds on his own request as communicated by his doctor. She further contended that after the retirement, she paid the claimant all his terminal dues being Kshs. 163,124.49 and prepared a Certificate of Service of which the claimant is yet to collect. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 12.3.2020 when both parties tendered evidence and thereafter filed written submissions.

**CLAIMANT'S CASE**

4. The Claimant testified as CW1. He told the court that he was employed by the Respondent on 1.3.2009 as a Machine Operator. On 22.1.2014 he was injured while on duty as a result of which he was placed on sick off and thereafter given light duties. He continued working until 29.4.2016 when he was dismissed on medical grounds without any prior notice or reason, and despite demand, he was denied his terminal benefits.

5. On cross-examination, he contended that he was re-employed by the Respondent in March 2009 vide the letter dated 21.2.2009. He admitted that his salary was Kshs. 11,700 per month. He admitted that his employment was terminated vide the letter dated 29.4.2016 because of his prolonged absence from duty and also due to the letter from his doctor recommending termination on medical grounds. He admitted that the doctor's letter stated that he was desirous of retirement on medical grounds.

6. He admitted that he was taken to Nairobi Hospital by the company after being injured and thereafter he was treated for about one year. He could not remember how many days he was on sick off but he contended that he continued working as an Operator except the days when he attended hospital. He admitted that, he was allocated light duties. He contended that the company retained all the treatment notes from Nairobi West.

7. He admitted that he was paid all his salary but he was not given certificate of service after the termination. He further admitted that he was paid terminal dues amounting to Kshs. 163,124.49 via cheque but contended that the amount was less notice and compensation for wrongful termination. He admitted that his employer used to deduct NSSF contributions from his salary but he was not certain whether the same was remitted to the Agency.

8. On re-examination he denied that he asked the doctor to write the letter for early retirement. He contended that the letter was written under pressure from the company because it had referred him to the doctor. He maintained that the termination was unfair because he was not accorded any hearing for termination on account of incapacity. He concluded by observing that the same doctor who recommended for light duties is the one who requested for early retirement.

## **DEFENCE CASE**

9. Mr. John Karari is the Respondent's HR Manager and he testified as RW1. He told the court that the claimant absented himself from work from 1.9.2015 to 29.4.2016 without explanation and the company sought advice from the Labour Office. He contended that, during the time of the said absence, the Claimant was calling to demand for his terminal dues which was paid after the company received a letter from the claimant's doctor recommending for early retirement.

10. On cross-examination he admitted that he joined the company after the exit of the Claimant but contended that his testimony is based on the record. He maintained that the Claimant's services were terminated on medical grounds but denied knowledge of whether the injuries were suffered while on duty. He admitted that there was no letter from the claimant requesting for retirement and that there was also no minutes of any hearing where the claimant was called to discuss the doctors recommendations for retirement on medical grounds. He further admitted that the company only relied on the doctors letter that stated that the recovery period could not be ascertained and recommended for retirement on medical grounds.

11. On re-examination RW1 contended that the doctor who recommended for the Claimant's retirement belonged to the Claimant and denied that the company referred the Claimant to the said doctor. He contended further that the doctor wrote the recommendation for an early retirement on request by the Claimant and not the Respondent. He denied that the termination was wrongful since it was done at his request and thereafter he was paid all his dues and for which he signed a discharge Certificate dated 11.5.2016 confirming that he had no other claims.

## **CLAIMANT'S SUBMISSIONS**

12. The Claimant submitted that the termination of his employment was unfair because the reason for the termination was not supported by any credible evidence. In addition he contended that the procedure followed to terminate the contract was in breach of Section 41 of the Employment Act because he was not accorded any prior hearing.

13. He relied on **Mary Chemweno Kiptui v. Kenya Pipeline Company Ltd. [2014]eKLR** where the court held that even in case of serious breaches under Section 44 of the Employment Act, an employee is entitled to a hearing before summary dismissal. He further relied on **Kennedy Nyagucha Omanga v Bob Morgan Ltd. Cause 1983 of 2011** where the court held that an employer is bound to exercise sensitivity while terminating employment of an employee on ground of illness by first supporting the employee to recover and resume duty then subject the employee to medical examination; and finally serve specific notice of the impending termination.

## **RESPONDENTS SUBMISSIONS**

14. The Respondent submitted that the Claimant has not discharged his burden of proving unfair termination as required under Section 47(5) of the Employment Act. She contended that the reason for terminating the Claimant's contract was retirement on medical grounds as stated in the letter dated 29.4.2016. She maintained that the retirement of the Claimant on medical grounds was recommended by his doctor vide the letter dated 15.4.2016 in order for him to pursue treatment.

15. For emphasis, she relied on **Frank J. Mahinga v. Trustees of Arya Samaj Education Board [2014]eKLR** where the Court held that the termination was not unfair because there was no evidence to support that the retirement on medical grounds was initiated by the employer. As regards the reliefs sought, the Respondent submitted that the Claimant was paid all his dues and accepted the same by signing a settlement agreement discharging the employer from any other claims.

## **ISSUES FOR DETERMINATION AND ANALYSIS**

16. Having considered the pleadings, evidence and submission on record, the issues for determination are:

- (a) Whether the retirement on medical grounds amounted to unfair and unlawful termination.
- (b) Whether reliefs sought should be granted.

### **Was the retirement unfair termination**

17. Under Section 47(5) of the Employment Act, the employee has the burden of proving that termination of his employment was unfair while the employer's burden is to justify the reason for the termination. It is now trite that termination of employment contract is unfair and therefore unlawful if it is not grounded on a valid and fair reason and if the procedure followed is not fair. A reason is valid and fair if it relates to the employee's conduct, capacity and capacity, or based on the employer's operational requirement. Procedure is fair, if the employee is accorded a chance to be heard.

18. In this case the Claimant contends that the reason cited for terminating his employment was not valid. He denied that he absented himself from work due to physical incapacity except when he went for doctor's appointment. He denied that he asked his doctor to write a request for early retirement on medical grounds. In his view the doctor wrote the letter under pressure from the Respondent.

19. The Respondent produced the letter dated 15.4.2016 by Dr. A. Faizel of Nairobi Spine and Orthopaedic Centre which stated as follows:-

**“RE: FELIX MUSANGO MUTIE**

***This is to inform you that Mr. Mutei is a patient of mine. He suffers from lower back pain of ( R) leg numbness. This is due to herniated disc at L4-L5. I have advised him to have a L4-L5 laminectomy. He would like to retire on medical grounds so that he may be able to pursue his treatment. Kindly grant him the request and retire him on medical grounds.***

***Sincerely***

***Dr. A. Faizal***

***Spine Surgeon”***

20. The said letter was in response to earlier request from the Respondent for the doctor to advise whether the Claimant was physically fit to continue working and whether the injury being treated was work related so that the company’s insurer could be updated. In the several letters by the Respondent to Kenyatta National Hospital, the Respondent was consistent that the Claimant had continuously missed work for many days.

21. The termination letter dated 29.4.2016 cited the reason for the termination as retirement on medical grounds as recommended by the Claimant’s doctor. The letter also noted that the Claimant had been absent from work for 1.9.2015 to 29.4.2016. As stated above, physical incapacity is a just cause for terminating an employee’s employment contract. In this case the reason was not cited by the employer but the employee through his doctor. I, therefore, find that the Respondent has proved by medical documents that the reason for retiring the Claimant on 29.4.2016 was valid and fair within the meaning of Section 43 and 45 of the Employment Act.

22. On the other hand, the court finds that the Respondent has not proved that the early retirement was at the request of the Claimant. Although Dr. A. Faizal recommended for the Claimant to be retired on medical grounds, he did not attach any evidence of any request for retirement from the Claimant. He also never copied the letter dated 15.4.2016 to the Claimant. Although RW1 alleged that Claimant persistently stopped attending work and kept on demanding for terminal dues, no written evidence was produced to prove that allegation.

23. It is therefore obvious that the Claimant was caught by surprise when he received the termination letter dated 29.4.2016.

24. Section 41 of the Act provides that before terminating the employment contract of an employee for misconduct, poor performance or physical incapacity, the employee is entitled to a hearing in the presence of fellow employee or shop floor union representative of his choice and the two shall be entitled to air their representations which must be considered before termination is decided.

25. In this case the Claimant was never accorded any fair hearing as contemplated under Section 41 but the termination letter was copied to the Chief Shop Steward. It means therefore that even the Claimant’s union was not consulted before the termination. Consequently, I find and hold that the Claimant has proved on a balance of probability that his retirement on medical grounds was procedurally unfair and unlawful within the meaning of Section 45 of the Employment Act.

## **RELIEFS**

26. In view of the foregoing, I make declaration that the retirement of the Claimant on 29.4.2016 was unlawful. However, I decline to award him any monetary compensation because he bound himself not to make any further claims against the respondent by the Discharge Certificate dated 11.5.2016 which he signed to acknowledge receipt of Kshs. 163,124.49 as his final terminal dues.

27. It is now trite law that a settlement agreement like the said Discharge Certificate is binding contract between the parties involved and the court cannot interfere with it unless it is vitiated by any relevant factors that vitiates an ordinary contract at Common Law. In this case the Claimant did not plead and prove that the Discharge Certificate was signed through duress, fraud or undue influence. I gather support from the Court of Appeal decision **Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR.**

28. In conclusion save for the finding that the retirement on medical grounds was procedurally unfair, the Claimant gets no remedy and the suit is therefore dismissed. Each party shall bear its own costs.

**Dated, Signed and delivered in Nairobi this 27th day of November, 2020.**

**ONESMUS N.MAKAU**

**JUDGE**

**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 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

ONESMUS N. MAKAU

JUDGE