



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1076 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 18th September 2019)

BARNABUS MUNYINYI MWAI.....CLAIMANT

VERSUS

DIRECTLINE ASSURANCE COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant commenced this cause on 23rd June 2015 to challenge the termination of his employment. He seeks the following prayers-

a. A declaration that the Claimant's termination was unfair, wrongful and unlawful;

b. General damages for wrongful dismissal;

c. The sum of KShs. 325,000.00 computed as follows:

i. 12 months' salary in compensation for unfair termination (KShs. 25,000 x 12) in the sum of KShs. 300,000.00.

ii. Service pay (25,000/30 x 15 x 2) in the sum of KShs. 25,000.00.

d. Certificate of service.

e. Cost of this claim.

f. Interest on b and c above at court rates.

g. Any other relief that this Honourable Court may deem fit.

2. The Claimant's case is that he was employed vide the agreement of 1st February 2013, as an office assistant earning a monthly salary of KShs. 25,000.00.

3. On 2nd February 2015, he was involved in a road accident and fractured his right clavicle. The incident was communicated to the Assistant Human Resource Officer, Hilder Karimi, who requested for a medical report and which was availed by the Claimant. He fell ill and took a medical leave on 7th February 2015 as recommended by the doctor, which lapsed on 15th February 2015 and he resumed work on 16th February 2015 and worked until 24th February 2015. He was admitted in hospital on 25th February 2015, had an operation on the 26th and discharged on 28th February with the instructions that he was to take 4 weeks off duty which was to be increase to 6 weeks later on.

4. In his Witness Statement filed on 22nd January 2018, the Claimant stated that he reported back to work on 30th March 2015 but Gabriel Nyaega advised him to take a further 2 weeks medical leave since he could not perform his tasks with a sling. He took the leave and reported back on 13th April 2015 and performed his duties albeit incapacitated, until the 16th April 2016 when he was summarily dismissed without prior notice.

5. His witness statement was adopted as his evidence. During cross examination, he admitted that by the time he was reporting back to work

after the accident and even after his surgery, he had not fully healed hence it was difficult for him to ride a motor cycle. He admitted to having a conversation with Mr. Nyaega regarding his condition, which culminated into his termination.

6. It was his testimony that Mr. Nyaega told him that he could not appeal the decision. He admitted to being paid the salary earned, leave days owing to him and payment from the Provident Fund. He further admitted to being issued with a certificate of service and being a member of NSSF and the Staff Provident Fund.

7. In his re-examination, he testified that the duty of dispatching correspondence while using a motor cycle was never indicated in his contract. This was introduced when he moved to Nairobi.

8. The Respondents filed their Response on 22nd July 2015 contending that the Claimant's contract was to end on 31st January 2016. Though his official designation was an office assistant, he was engaged as a motor cycle rider whose mandate was to deliver correspondence exchanged between the Respondent and third parties.

9. It is the Respondent's case that due to the extent of the Claimant's injuries; he could not continue dispatching correspondences. The medical reports indicated that his right arm was not supposed to be exposed to stress for the healing period, approximated to be a maximum of 2 years. This exceeded the remaining duration of the Claimant's contract. As such, he was unable to perform his duties for the remainder of that period; which prompted the HR Manager, Mr. Nyaega, to have a meeting with him on 16th April 2015, pursuant to clause 3 of the Driver's Code of Conduct Handbook.

10. At the meeting, it was agreed that the Claimant was no longer medically fit to perform his dispatching duties. Mr. Nyaega also explained him that being right-handed, he could not be redeployed to perform another role as it would aggravate the injury. The Claimant was thus informed in a letter of 16th April 2015, that there was no option but to terminate his services pursuant to clause 15A of the his contract.

11. It is the Respondent's position that at the time of the termination, the Claimant was fully aware that he was incapable of performing his duties and was duly notified of the reasons for the same. The Respondent contends that the Claimant was not summarily dismissed hence the termination was fair and lawful. He was paid his dues and was in the Respondent NSSF Scheme and the Staff Provident Fund. As such, he is not entitled to the prayers sought.

12. In the witness statement of Gabriel Nyaega filed on 31st July 2015, he averred that Prof. Mulimba's medical report indicated that the Claimant was not supposed to use the right arm until it healed and anyone forcing him to do the contrary would be responsible for any failures that may ensue.

13. He further stated that the Claimant was paid his dues in the sum of KShs. 36,364.00 after statutory deductions and which he itemized as follows:-

a. Salary for 16 days worked in April 2015;

b. 1 months' pay in lieu of notice; and

c. 8 accrued leave days.

14. It was his averment that on 12th June 2015, the Claimant was paid KShs. 87,331.80 by Octagon Pension Services Limited, from the Respondent's Directline Assurance Company Limited Staff Provident Fund pursuant to clause 9A of the Claimant's contract of employment. The requirement was that the employee was to be paid 50% of the Respondent's provident fund contribution. He contended that the Claimant was issued with a certificate of service upon clearing with the Respondent.

15. He testified as RW1 and adopted his witness statement and the documents filed by the Respondent, as his evidence. In his cross examination, it was his testimony that the Claimant was employed as an office assistant and issued with his job description which required him to use a motor cycle but admitted that the contract did not expressly state that he was to be a rider. He maintained that the termination was based on the Claimant's medical condition which hindered the performance of his duties. However, he admitted that Clause 15 of the Claimant's required him to be given a notice of 28 days.

16. During re-examination, he stated that the Claimant was away on sick leave for a period exceeding the normal sick leave period.

17. The parties filed their written submissions with the Claimant filing his on 28th May 2019 and the Respondent on 20th June 2019.

18. The Claimant submits that when he reported back to work on 13th April 2015, his arm had healed well and he was able to carry out and discharge his duties. It is also his submissions that the Respondent has not controverted the circumstances and the procedure for terminating his employment.

19. He avers that he was never informed that he had exhausted his sick leave and there was no medical ground to terminate his employment. As such, the termination was unfair and unlawful. He relies on the cases of **Kennedy Nyanguncha Omanga vs. Bob Morgan Services Limited [2013] eKLR**, **Kenya Plantation and Agricultural Workers Union vs. Rea Vipingo Plantations Limited & Another [2015] eKLR** and **Nicholas Otinyu Muruka vs. Equity Bank Limited [2013] eKLR**.

20. The Claimant submits that he has discharged his burden of proof hence entitled to the reliefs sought and costs of the suit.

21. On their part, the Respondent submits that they adduced medical reports to justify the Claimant's termination. They rely on the case of **Kennedy Nyanguncha Omanga vs. Bob Morgan Services Limited [SUPRA] and Martin Mutwiri Njeru vs. Equity Bank of Kenya Limited [2018] eKLR**, in submitting that they followed due procedure in terminating the Claimant's employment. The Claimant has not disputed that he was called to a meeting to be informed of the reasons for the termination of his employment.

22. The Respondent submits that the Claimant is not entitled to any of the reliefs sought because he admitted to receiving a salary for the days worked, 1 months' salary in lieu of notice, his accrued leave days pay and a certificate of service.

23. Further, the Claimant did not dispute executing the discharge voucher or that it was executed under duress or misrepresentation. The Respondent relies on the case of **Moses Daniel Kyalo vs. Treadsetters Tyres Limited [2019] eKLR**.

24. I have examined all the evidence and submissions of both Parties. From the Respondent's case, the Claimant was no longer able to discharge his duties as at the time of dismissal on 16.4.2015. This was after the accident the Claimant had been involved in where he broke his hand and so could no longer ride a motor cycle.

25. The Claimant has submitted that as at 13th April 2015 when Claimant resumed duty, he had healed enough to discharge his duties and this is evidenced by the medical report from Dr. Mulimba, his discharge summary which indicated as follows:-

".....he was discharged on 28/2/2015 with off duty for four weeks to be increased later to a total of 6 weeks. He can resume duty at 4 weeks but only one not involving straining the clavicle. I will review him on 24th March 2015" .

26. The Claimant insists that he was well when he resumed duty on 13th April 2015.

27. The Respondent has insisted that the Claimant was not able to discharge his duties and so had to terminate him.

28. Clause 15A of the Claimant's contract provides as follows:-

"Sick leave

(A) The officer shall continue to be paid during any period of absence due to incapacity for a period of a total of up to fifteen (15) days in any twelve (12) continuous months of employment under this contract and thereafter the office shall continue to hold officer for fifteen (15) unpaid days and if such absence shall aggregate in any 12 (twelve) months, the company may terminate this contract by giving the officer a notice on a date not more than 28 days after the end of the 5th week of such incapacity".

29. There is no indication that the Claimant was issued with any such notice as per his employment contract. There is also no indication that there was a contrary medical report to show that the Claimant could not perform his duties except the one by Dr. Mulimba.

30. My learned sister Ndolo J in **Kennedy Nyanguncha Omanga & Bob Morgan Services Limited (2013) eKLR** pronounced herself as follows:-

"16. While employers are entitled to terminate employment on the ground that an employee is too ill to work, they must exercise due care and sensitivity. First, the employer must show support to the employee to recover and resume duty. Second, once the employer begins to consider termination, they must subject the employee to a specific medical examination aimed at establishing the employee's ability to resume work in the foreseeable future. Treatment notes and sick off sheets do not qualify as medical reports for purposes of termination of employment on medical grounds. Third, the employer must give the employee specific notice of the impending termination. Failure to follow this procedure even where there is overwhelming evidence of an employee's inability to work amounts to unfair termination for want of procedural fairness."

31. I do entirely agree with my sister and add that where an employee is too sick to work, it is inhumane and callous for an employer to terminate the said employee without showing support to the employee to enable full recovery. In a case where an employee may be ill but can do alternative work or lighter work, that would also be considered an option.

32. In the case of the Claimant, the Respondent decided to terminate the Claimant because he had a fracture on his hand which had not fully healed according to them without any medical report, without any notice and without considering whether he could still discharge his office administration duties without riding a motor bike.

33. In this Court's view, the Respondent acted irresponsibly and unlawfully and I therefore find the termination of the Claimant unfair and unjustified.

34. In terms of remedies, I award Claimant a maximum of 12 months' salary as compensation for the unlawful termination = 12 x 25,000= 300,000/=

35. He should also be issued with a certificate of service.

36. The Respondent to pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this **18th day of September, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Elington holding brief Githogrori for Applicant

Milimo holding brief Mbugua for Respondent – Present