



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 164 OF 2017**

**KENNETH ALARO MBOYA.....CLAIMANT**

**VS**

**KENYA ELECTRICITY GENERATING CO. LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This claim arises from the Claimant's retirement on medical grounds effective May 2015. The Claimant's case is stated in his Memorandum of Claim dated 28<sup>th</sup> February 2017 and filed in court on 3<sup>rd</sup> March 2017.
2. The Respondent's defence is contained in a Statement of Response dated 20<sup>th</sup> April 2017 and filed in court on 18<sup>th</sup> May 2017.
3. At the trial, the Claimant testified on his own behalf and the Respondent called its Assistant Human Resources Manager, Mary Gachuhi.

**The Claimant's Case**

4. The Claimant was employed by the Respondent as an Artisan in July 1981. He was stationed at Kipevu in Mombasa. He states that his employment was regulated by the terms and conditions set out in his employment letter and obtaining Collective Bargaining Agreement (CBA).
5. The Claimant worked for the Respondent until 31<sup>st</sup> May 2015, when he was issued with a notice of termination on medical grounds. At the time he was issued with the retirement notice, the Claimant had two (2) years to normal retirement. He earned a monthly salary of Kshs. 257,576.76.
6. The Claimant states that in the course of his employment with the Respondent, he was diagnosed with high blood pressure and was referred to Aga Khan Hospital in Mombasa for treatment.
7. Upon treatment and review, the doctors at Aga Khan Hospital confirmed that the Claimant was fit to work. The Claimant managed his condition as advised by the doctors and continued to discharge his duties.
8. In the month of March 2015, the Claimant was directed by the Respondent to appear before a Medical Board for medical assessment. He was subsequently served with a retirement notice on medical grounds on 1<sup>st</sup> June 2015. The Claimant was directed to clear with the Respondent and await his retirement dues.
9. The Claimant's case is that his retirement was without reasonable cause or justification and amounted to unlawful and unfair termination of employment for the reasons that:
  - a) The reason relied upon by the Respondent to terminate his employment was not a valid reason relating to the Claimant's conduct, capacity or capability;
  - b) There were no compelling reasons for the Respondent to direct the Claimant to appear before the Medical Board for assessment;
  - c) In subjecting the Claimant to medical assessment, the Respondent failed to follow the agreed policy on sickness stipulated under Clause 5(b)(ii) of the CBA;

- d) The Claimant was not notified of any performance evaluation conducted by the Central Joint Council touching on his inability or incapacity to work and was never accorded an opportunity to respond to such reports (if any);
- e) The Respondent acted contrary to the rules of natural justice by failing to give the Claimant notice of the impending termination;
- f) The Respondent acted contrary to the rules of natural justice by failing to accord the Claimant an opportunity to be heard by making his representations in the presence of a union representative in view of the medical report;
- g) The Respondent failed to avail a copy of the medical report to the Claimant prior to termination of his employment.

10. The Claimant maintains that the recommendation by the Medical Board to retire him on medical grounds was unjust for want of factual basis and was procured in collusion with the Respondent to validate the Respondent's decision to retire the Claimant.

11. The Claimant adds that he was subjected to unfair labour practices by the Respondent in that;

- a) The Respondent failed to pay the Claimant full four (4) months' salary in lieu of notice in accordance with the CBA;
- b) The Respondent failed to pay the Claimant forty (40) days' accrued leave in accordance with the CBA;
- c) The Respondent failed to adjust the Claimant's salary upwards by 6% starting January 2015 in accordance with the CBA;
- d) The Respondent did not disclose to the Claimant the information received from his department, touching on his work performance, thereby prejudicing the Claimant by relying on the said information to direct the Claimant to appear before the Medical Board for medical assessment;
- e) The Respondent failed to take into account the fact that the Claimant had managed his condition and was discharging his duties normally.

12. The Claimant concludes that his retirement on the basis of ill health was discriminatory and in gross violation of his rights guaranteed under Article 27 of the Constitution. He therefore claims the following:

- a) 4 months' salary in lieu of notice.....Kshs. 1,059,010.50
- b) Withheld basic salary.....35,879.40
- c) Withheld house allowance.....10,000.00
- d) Accrued leave (40 days).....353,003.60
- e) 12 months' salary in compensation.....3,177,031.60
- f) Computation and payment of all allowances due under the CBA
- g) Costs plus interest

**The Respondent's Case**

13. In its Statement of Response dated 20<sup>th</sup> April 2017 and filed in court on 18<sup>th</sup> May 2017, the Respondent admits that the Claimant was its employee, holding the position of Snr Artisan II, stationed at Kipevu at the time of leaving employment.

14. In explaining the circumstances leading to the Claimant's separation from its employment, the Respondent states that sometime in 2015, information was received through the Claimant's department that for a year, the Claimant had had challenges performing his duties due to an illness that greatly affected his ability to discharge his delegated role effectively.

15. The Respondent therefore requested the Claimant to undergo a medical assessment to assess his ability to discharge his role effectively.

16. The Respondent states that the Claimant willingly consented to the Respondent's request and consequently appeared before the Medical Review Board constituted by the Respondent.

17. Following the medical assessment, the Medical Review Board recommended that the Claimant be retired on medical grounds. Pursuant to this recommendation, the Respondent served the Claimant with a retirement notice on medical grounds. The Respondent maintains that the retirement notice was in consonance with Clause 22 of the CBA between the Respondent and the Claimant's Union.

18. The Respondent concludes that the Claimant's retirement on medical grounds was lawful and fair. Further, the Claimant was paid all his terminal dues.

## Findings and Determination

19. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case of unlawful termination;
- b) Whether the Claimant is entitled to the remedies sought.

## Unlawful Termination?

20. On 19<sup>th</sup> May 2015, the Respondent wrote to the Claimant as follows:

*“Dear Kenneth,*

### **RETIREMENT ON MEDICAL GROUNDS**

*Further to your medical assessment on 12<sup>th</sup> March, 2015 by the National Medical Board, we wish to advise you that the company has decided to retire you on medical grounds with effect from 1<sup>st</sup> June, 2015.*

*Your last working day will be 31<sup>st</sup> May, 2015 and you will be paid your dues up to and including 31<sup>st</sup> May, 2015 less any applicable statutory deductions. You will also be paid your 40 accrued leave days and 4 months salary in lieu of notice.*

*As regards your interest in the Staff Retirement Benefits Scheme you will be advised under a separate cover and for this purpose, you are requested to submit your forwarding address to the Human Resources Manager. However, please note that payment of the above dues will be subject to completion of the clearance certificate which is hereby enclosed.*

*I take this opportunity to express the management’s appreciation to you for the services you rendered to this company since 11<sup>th</sup> August, 1981 and wish you success in your future endeavors.*

*Yours Faithfully,*

**For: KENYA ELECTRICITY GENERATING COMPANY LIMITED**

*(Signed)*

**B.M. SOY (MRS)**

**HUMAN RESOURCES AND ADMINISTRATION DIRECTOR”**

21. This letter, which is in sync with the parties’ pleadings, confirms the mode of the Claimant’s exit from the Respondent’s employment, as retirement on medical grounds.

22. The Respondent filed a record of the proceedings of the National Medical Board with the following conclusion on the Claimant:

*“He suffers from medical condition which has a chronic course. He is unlikely to engage in gainful employment and we recommend retirement on medical grounds.”*

23. The Claimant faults his retirement on two fronts; first, he states that the recommendation by the National Medical Board was inconsistent with previous reports by his attending doctors and second, he was not allowed to see the report by the Medical Board, prior to issuance of the retirement notice.

24. The Claimant filed his certificates of fitness under Occupational Safety and Health Regulations dated 12<sup>th</sup> April 2013, 5<sup>th</sup> June 2014 and 7<sup>th</sup> July 2015. He also filed a medical certificate from the Aga Khan Hospital, Mombasa dated 20<sup>th</sup> October 2015. Significantly, his medical fitness examination certificate dated 7<sup>th</sup> July 2015 returned the result that he had well controlled blood pressure while in the examination for the previous year 2014, recommendation for re-deployment had been made.

25. Further, on 28<sup>th</sup> October 2015, the Aga Khan Hospital, Mombasa issued the following certificate:

*“He has been diagnosed with Hypertensive Heart Disease.*

*If he stays on his anti-hypertensive medications he can lead a normal and active lifestyle and is deemed fit for work.”*

26. Evidently, the results of the Claimants’ medical examination under Occupational Safety and Health Regulations as well as the medical

certificate from the Agha Khan Hospital differ diametrically with the recommendation by the National Medical Board which returned the verdict that the Claimant was unlikely to engage in gainful employment and recommended his retirement on medical grounds.

27. The Claimant accuses the National Medical Board of collusion with his former employer to get him out of employment. The Court did not find any justification for this stinging indictment against the Medical Board, which was made up of Medical Doctors of repute.

28. There however appears to have been something wrong with the way the Respondent as an employer, handled the Claimant's case. On 5<sup>th</sup> March 2015, the Respondent wrote to the Claimant as follows:

*“Dear Kenneth,*

*RE: MEDICAL ASSESSMENT*

*We have received information from your department that for over 1 (one) year, you have had challenges performing your duties due to an illness that has greatly affected your ability to discharge your delegated role effectively.*

*As a result of this, the company has considered granting you an opportunity to undergo a medical assessment to assess your ability to discharge your role effectively. This therefore, is to request you to present yourself to the Medical Review Board scheduled for Thursday 12<sup>th</sup> March, 2015 at 8 am at KenGen Stima Plaza, 8<sup>th</sup> floor.*

*Please bring the following documents with you:*

- 1. A copy as well as your original I.D. card*
- 2. All your medical reports up to date.*
- 3. Any x-rays or scans.*
- 4. Any other treatment documents related to the accident.*
- 5. A copy of Police abstract if for a road accident related case.*

*Yours Faithfully,*

*FOR: KENYA ELECTRICITY GENERATING CO. LTD*

*(Signed)*

*J.M. MAINA*

*HUMAN RESOURCES MANAGER”*

29. In the final submissions filed on behalf of the Claimant on 7<sup>th</sup> March 2019, reference was made to the decision in ***Kennedy Nyanguncha Omanga v Bob Morgan Services Limited [2013] eKLR*** where this Court rendered itself as follows:

***“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 duty in the foreseeable future.....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.”***

30. The Claimant told the Court that although he had been diagnosed with high blood pressure in 2014, the condition did not prevent him from working. He added that by the time he was referred to the National Medical Board, he was performing his duties normally. The Claimant's testimony was in consonance with the Muster Roll for January 2014 to May 2015 recording that the Claimant was at work during this period.

31. Within the same period, the Claimant had been promoted to the position of Senior Artisan I Level 7 Grade 7L by letter dated 22<sup>nd</sup> December 2014 and given additional responsibilities by letter dated 13<sup>th</sup> March 2015. The Respondent's actions in this regard were not consistent with an employee who was incapable of handling his duties.

32. What is more, there was no evidence of any opportunity offered to the Claimant to discuss his alleged incapacity prior to the decision to convene the Medical Board. Additionally, the Respondent made no effort to re-deploy the Claimant as recommended in the medical fitness examination certificate for 2014.

33. In *Samuel Langat Tanui v Director General, National Intelligence Service & another [2017] eKLR* my brother, **Radido J** held that an employer contemplating termination of employment on account of ill health is required to subject the target employee to the procedural fairness requirements set under Section 41 of the Employment Act. The learned Judge went further to state that appearance before the Medical Board, which serves a technical purpose, does not translate to the statutory fair hearing under Section 41.

34. Affirming this position in *Sospeter Bangoya Oyange v Bob Morgan Services Limited [2018] eKLR* **Makau J**, went further to state that the procedural fairness requirements of Section 41 of the Employment cannot be ousted by provisions in a contract of employment.

35. Clause 22 (c) of the CBA between the Claimant's Union and the Respondent provides for retirement on medical grounds upon recommendation by a recognised medical practitioner. This provision must however be read together with the mandatory provisions of Section 41 of the Employment Act

36. Even assuming that the Claimant was too ill work, the Respondent, as an employer was under statutory duty to hear him, before making the decision to refer him to the Medical Board. The Respondent was further required to present and explain to the Claimant the findings and recommendations of the Medical Board, before making the decision to terminate his employment on medical grounds.

37. In her testimony before the Court, the Respondent's Assistant Human Resources Manager, Mary Gachuhi appeared to suggest that the Respondent's hands were tied by the conclusion and recommendation by the National Medical Board. That may well be so but the question remains whether in handling this case, the Respondent observed the mandatory procedural fairness requirements of Section 41 of the Employment Act. In my estimation, this did not happen.

38. In these circumstances, the Court finds and holds that the termination of the Claimant's employment was unfair within the meaning of Section 45 of the Employment Act and he is entitled to compensation.

### **Remedies**

39. I therefore award the Claimant twelve (12) months' salary in compensation. In arriving at this award. I have taken into account the Claimant's long service as well as the Respondent's failure to observe due procedure.

40. The claims for 4 months' salary in notice pay and 40 days' leave pay are admitted and are payable.

41. The claims for withheld salary and allowances were not proved and are dismissed.

42. Ultimately, I enter judgment in favour of the Claimant in the following terms:

a) 12 months' salary in compensation.....	Kshs. 1,969,176
b) 4 months' salary in lieu of notice.....	656,392
c) 40 days' leave pay (164,098/30x40).....	<u>218,797</u>
<b>Total.....</b>	<b>2,844,365</b>

43. This amount will attract interest at court rates from the date of judgment until payment in full.

44. The Claimant will have the costs of the case.

45. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF OCTOBER 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Otinga for the Claimant

Mr. Mugambi for the Respondent