



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 2511 OF 2016**

**SIMON KINYUA M'THAMBURA.....CLAIMANT**

**- VERSUS -**

**CHANDARIA INDUSTRIES LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Thursday 31<sup>st</sup> May, 2018)

**JUDGMENT**

The statement of claim was filed for the claimant on 15.12.2016 through Kurauka & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the termination of employment by the respondent herein was unjust and unfair.
- b. Maximum compensation of 12 months to be paid to the claimant by the respondent hereof.
- c. Pay in lieu of leave.
- d. Pay in lieu of notice (3 months).
- e. Service pay at a month pay for every year of service.
- f. Certificate of service.
- g. Any other or further relief that this Honourable Court may deem fit to grant.
- h. Costs of this claim hereof.

The respondent filed the memorandum of response on 03.03.2017 through Rakoro & Company Advocates. The respondent prayed that the statement of claim aforesaid be dismissed with costs to the respondent.

During the hearing the parties recorded consents thus, the certificate of service to issue in favour of the claimant; the NSSF statutory deductions to be updated; and the statement of claim be amended to show last claimant's monthly salary was Kshs. 32, 127.00.

It is not in dispute that the respondent employed the claimant in 2005 to December 2014.

The respondent addressed to the claimant the letter dated 17.11.2014. The letter stated as follows:

“Dear Sir,

**RE: MEDICAL EXAMINATION**

**We refer to your discussion with the undersigned in the presence of Mr. Maurice Kariuki, the EHS Officer and your complaint that you are unable to perform your duties at work as a result of ill medical condition.**

**In order for the Company to be able to ascertain your condition and suitability in employment, it was decided that you see the Company Doctor for analysis of the Medical Reports you had acquired at Neema Hospital.**

**According to the Company Doctor, he required an x-Ray to be done on you at the Mater Hospital to determine the condition of the chest.**

**You have since declined to visit Mater Hospital as required and continue to demand for relocation at the place of work.**

**This is to inform you that unless you comply with the Company Doctors recommendation you will not be allowed at work.**

**By this copy, your Head of Department is advised to refer you to the undersigned until the issue is resolved.**

**Yours faithfully,**

**CHANDARIA INDUSTRIES LTD**

**Signed**

**J. MBULIKA**

**PERSONEL OFFICER”**

The claimant's case was that in the course of employment he had become sick. At the material time the claimant worked as a machine operator. He was attended to by a doctor. Medical examination including an x-ray was taken at Ruaraka Uhai Neema Hospital. The urgent x-ray was prescribed on 10.12.2013. On 10.01.2014, Sunshine Medical Diagnostic Centre made a chest x-ray report concluding thus, **“Features suggestive of bronchitis”**. In an undated note by Dr. G.S. Marwa of Ruaraka Uhai Neema Hospital headed **“TO WHOM IT MAY CONCERN RE: SIMON KINYUA 30YRS”**, the Doctor stated, **“The above named patient has features of pneumoconiosis due to working in a dusty environment. He should therefore be exempted from any dusting work – henceforth.”**

The claimant testified that he operated a machine used by the respondent to manufacture tissue paper. The claimant also testified that by the respondent's letter dated 17.11.2014 he considered himself terminated because the respondent declined to redeploy him away from the dusty machine operator's job.

The respondent's case was that the claimant was asked to see the respondent's appointed doctor and hospital but he declined to do so. He then decided not to report at work. The respondent's case was that the claimant was never dismissed.

The **1<sup>st</sup> issue** is whether the termination was unfair. The respondent's evidence was clear. The claimant had a medical problem relating the chest cavity. He presented the medical documents from Ruaraka and cited earlier in this judgment. The respondent decided to refer the claimant to Mater Hospital but the claimant declined to do so. The respondent took the view that the claimant deserted duty. That brought the employment contract between the parties to an end.

The Court has considered the evidence. The letter dated 17.11.2014 was clear that the claimant had a grievance that he be assigned duties away from dust. The letter then stated that if he did not comply to go to Mater Hospital for further examination, then he would not report at work.

The court returns that the claimant had a genuine grievance. He had medical evidence and prescription that he be exempted from dusty environment. The respondent has not argued that it had any ground to doubt that the claimant was sick and the doctor's recommended redeployment was appropriate. The respondent did not resolve the grievance by redeploying the claimant accordingly. Even if the respondent desired to medically confirm the claimant's grievance, it was not necessary to impose a lock out on the ground, unless the claimant went to Mater Hospital. In the opinion of the Court, the lockout amounted to unfair harassment especially that the ensuing medical problem was related to the claimant's adverse environment at the place of work. Nothing stopped the respondent from, in the meantime, redeploying the claimant and exempting him from dusty environment, pending the confirmation of the claimant's medical condition. The grievance that he be redeployed away from the dusty machine was therefore valid and well founded.

The court holds that the initiation of the complaint by the claimant was responsible and with good foundation. The initiation of the grievance would not constitute a fair reason for dismissal or imposition of other disciplinary penalty as envisaged in section 46 (h) of the Employment Act, 2007. On that account the dismissal was unfair as read with section 43 of the Employment Act, 2007 and the Court returns that the reason was invalid. The Court holds that the lockout as imposed in the letter of 17.11.2014 amounted to unfair termination of the contract of employment between the parties. The court further considers that even if the respondent desired to terminate the claimant's employment on account of ill health, then the procedure involving a notice and hearing as prescribed under section 41 of the Act ought to have been invoked but that was not the case.

If the claimant had deserted duty as was urged for the respondent, then it would have been necessary that the respondent initiates due process for dismissal on account of absence without due leave but which was not the case.

The Court considers that the respondent's failure to amicably resolve the claimant's grievance for deployment to dust free environment and then the lock out as per the letter of 17.11.2014 amounted to unfair constructive dismissal or termination. It was not in dispute that the claimant had previously served in other areas or sections other than as a machine operator. Thus, the Court returns that it should have been possible to redeploy the claimant as was medically prescribed.

The claimant had a clean record of service. He had been in the respondent's service for about ten years. He was about 30 years of age and he had a legitimate expectation to continue in employment. The Court reckons that the claimant did not contribute to his predicament. The Court

considers the aggravating factor that the claimant's ill health related to the dusty work environment. The Court has considered the further aggravating factor that by reason of the ensuing termination, the respondent thereby abdicated the employer's duty under section 34 of the Act to accord the claimant due medical attention. Under section 49 of the Act, the Court returns that the claimant is awarded **Kshs. 385, 524.00** at Kshs. 32, 127.00 per month being 12 months' gross salaries for compensation in view of the unfair termination.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the other reliefs as prayed for. The Court makes findings as follows:

- a. The pay slips on record show that the claimant was a member of NSSF and indeed the parties recorded consent on remission of all due NSSF contributions for the claimant. Thus as per section 35(6) of the Act, the claimant is not entitled to service pay under section 35(5) of the Act. The prayer for service pay will therefore fail.
- b. There was no contractual term for 3 months' pay in lieu of termination notice as prayed for. The claimant will be awarded only one month pay in lieu of the notice at **Kshs. 32, 127.00** and under the provisions of section 35 (1) (c).
- c. The claimant testified that he had not taken leave and he is awarded **Kshs. 32, 127.00** as submitted.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

1. The declaration that the termination of employment by the respondent herein was unjust and unfair.
2. The respondent to pay the claimant a sum of **Kshs. 449,778.00** by 01.08.2018 failing interest at Court rates to be payable thereon from the date of this judgment till full payment.
3. The respondent to pay costs of the suit.

**Signed, dated and delivered** in court at **Nairobi** this **Thursday 31<sup>st</sup> May, 2018**.

**BYRAM ONGAYA**

**JUDGE**