



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1194 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa on 11<sup>th</sup> June, 2018)**

**MOSES NJOKA .....CLAIMANT**

**VERSUS**

**THE SAROVA STANLEY.....RESPONDENT**

**JUDGEMENT**

1. The Claimant filed suit on 9<sup>th</sup> July 2015 and later amended it on 13<sup>th</sup> January 2016 seeking damages for unfair termination by lock-out from employment service.
2. The Claimant avers that he was an employee of the Respondent, employed in the position of a “Guest Room Attendant” and on 1<sup>st</sup> August issued with a confirmation letter. He avers that on 1<sup>st</sup> July 2014, he injured his back from lifting heavy beg load linen material from a linen storeroom after which he visited the Respondent’s clinic. The nurse on duty referred him to Bliss Gvs Clinic for further medical attention and he was admitted upon an injection with assorted drugs/tablets.
3. He further avers that the pain of the injury persisted and the Claimant was referred to Coptic Hospital for a specialized X-ray examination on 9<sup>th</sup> July 2014 but the X-Ray did not reveal much hence referred for an “MRI” specialized examination and the Respondents Dr. Khaushal recommended him to undergo a surgery process and light duty.
4. He then took a further MRI Lumbar Sacral Spine at the Nairobi west Hospital Limited and was declared to be suffering from “Low Back Pain Radiating to the left leg”. Through an MRI scan, on 20<sup>th</sup> December 2014, he went for further treatment at Kikuyu Orthopedic Hospital and after the administration of the treatment, a letter recommending a light duty working performance was issued which he took to the Human Resource Assistant manager for adoption.
5. He states that he was kept under medical observation for a number of days at the Kikuyu Orthopedic Hospital and was administered with an “Epidural Injection” and on 13<sup>th</sup> January 2015 the doctor in attendance recommended for an early retirement procedure to be initiated through the “Medical Board” at Afya House under the mandatory provision of Section 34 of the Employment Act No. 11 of 2007. He further states that, the respondent made an error in law and in fact by not complying fully with the mandatory provisions.
6. He avers that he had the right to work, to free choice of employment, to just and favourable conditions of work and protection against unemployment and therefore, the actions by the Respondent to locking him out from employment service by its implied machination on grounds of its inability to properly cater for the progressive medication on the part of the Claimant and thereby mis-recommending him for an early retirement without due compensation in contravention of Clause 27(a) (ii) paragraph 4 of the Collective Bargaining Agreement is null and void.
7. He avers that the Respondent knowingly and unfairly caused the termination by locking him out from his employment without any colour of right and proper legal backing and also refused, neglected and ignored to comply with mandatory provision of Clause 27 (a) (ii) paragraph 4 of the CBA. He further avers that the respondent’s actions caused and continue to cause grave harm, damage and loss to him.

**Submissions**

8. The Claimant filed his submissions where he submits that he hurt/injured himself while performing his normal duties and was referred for medical treatment and the Kikuyu Orthopedic Hospital recommended him for light duty. This was not received kindly by the Human Resource Department. He was thereafter kept under medical observation and the doctor recommended an early retirement process be initiated through the “Medical Board” hence the Respondent erred in law and in fact by not adhering to the tenets and the procedure

envisioned under Section 41 and 43 of the Employment Act and he therefore asks the Court to be duly guided by the rule of natural justice and find that the termination of his employment service was substantively and procedurally unfair.

9. The Respondent also filed their submissions where they submit that from 13/12/2014 upto 13/01/2015 the Claimant was on sick off. He continued on a further 2 weeks sick off and he failed to report on 28/01/2015. The Respondent sought the Claimant to avail himself at the work place so he could be referred to the Directorate of Occupation Safety and Health for a medical assessment before retirement on medical grounds to no avail. Instead he declined to report at work place, prompting the respondent to terminate his employment on grounds of absenteeism.

10. They aver that the Claimant was not dismissed on medical grounds but rather for absenteeism which grounds he does not challenge in his claim therefore the Respondent denies that the Claimant is entitled to the reliefs he seeks save as provided in the letter of summary dismissal which ought to be paid upon Claimant's clearance with the Respondent and less the statutory deductions.

11. I have examined all the evidence and submissions of the parties. The issues for determination are as follows:-

**1) Whether the Respondent had a valid reason for dismissal of the Claimant.**

**2) Whether the Respondent followed due process before Claimant's dismissal.**

**3) What remedies are available in the circumstances?**

12. On the 1<sup>st</sup> issue, the Claimant has narrated in his evidence how he injured his back while on duty and the resultant treatment he went through. The Claimant produced his medical treatment records showing the diagnosis he was given on 21.8.2014 when the doctor at PCEA Kikuyu Hospital prescribed light duty for him to aid in his recovery.

13. He contends that in all these processes he kept the Respondents informed of his progress and that his HOD was well aware of what was happening.

14. It is his contention that the Respondent's doctor had recommended he undergoes a surgery which he was reluctant to do and when he informed the Respondent's nurse, she insisted he should go through the operation or tender his resignation.

15. Even with the recommendation by the Doctor from Kikuyu Hospital for light duty, he informed the Human Resource Department who insisted that they don't have light duties in the Department. He consulted the Doctor again who wrote him another letter to take to work on 28/1/2013 explaining his condition. He talked to one Charity their work representative and explained to her what was happening and he went back home as his condition was still not good. He attempted to talk to Human Resource but the Human Resource refused to talk to him.

16. On 10.3.2013 he tried to go back to work but was barred from entering by security personnel.

17. In cross examination the Claimant admitted he had been on sick off upto 12.1.2015 and another 14 days sick off and was to report on 28.1.2015. He contends that he reported at 11 am after his therapy session and was not in a position to work. His services were finally terminated on 24.2.2015.

18. The dismissal letter dated 24.2.105 indicates that the Claimant was dismissed for absenteeism.

19. In this regard, the Claimant has admitted that he was sick and missed work on several days and that the Respondents were aware that he was unwell. He admits he was not on sick off despite the fact that he was unwell.

20. In this case, the Respondents exercised their right to dismiss the Claimant summarily under Section 44 of Employment Act. Section 44 (4)(a) of the Employment Act states that any of the following amount to gross misconduct so as to justify summary dismissal:-

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

**b) .....**"

21. It is my finding that the Respondents acted with valid reasons in dismissing the Claimant.

22. On the 2<sup>nd</sup> issue, the issue of due process is called into play. The Claimant has contended that he was not accorded any hearing. He avers that he never received any letter asking him to come to work from a staff member. The Claimant has insisted that he was unwell which position the Respondents were well aware of. The Claimant had even been examined by Respondent's own Doctor who confirmed that the Claimant had injury on his back. In this case the medical condition of the Claimant was within the Respondent's knowledge.

23. The least the Respondents should have done is to have the Claimant examined again to ascertain his medical position and give him the last opportunity to present his case as envisaged under Section 41 of the Employment Act 2007.

24. The Respondents have submitted that they sent him several letters asking him to come to work. No such letters were exhibited before Court.

25. It is my finding that the Claimant was therefore dismissed without due process and without considering his health condition as known to the Respondents. It is therefore my finding that the dismissal was unfair.

26. The Claimant suffered injury while at work. This position has not been contested by the Respondent in their defence or evidence. The Claimant exhibited evidence that he suffered injury at work and the Doctor's reports have been presented before me.

27. In this case, I find for the Claimant and I award him as follows:-

*1. 1 month salary in lieu of notice = 29,912/=*

*2. Salary for February not paid =  $24/30 \times 29,912 = 23,929.6/=$*

*3. 8 months' salary as damages for unfair termination =  $8 \times 29,912 = 239,296/=$*

*4. Damages for injury suffered at work = 300,000/=*

*Total = 593,137/=*

*5. Issuance of Certificate of Service.*

*6. The Respondents will pay costs of this suit plus interest at Court rate with effect from the date of this judgement.*

Dated and delivered in open Court this 11<sup>th</sup> day of June, 2018.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Claimant in person – Present

No appearance for Respondent