



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT AT NAIROBI**

**CAUSE NUMBER 568 OF 2014**

**BETWEEN**

**MARY JELANGAT RUTTO.....CLAIMANT**

**VERSUS**

**NATIONAL SOCIAL SECURITY FUND [N.S.S.F].....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Kipyator Kibet & Associates, Advocates for the Claimant*

*Federation of Kenya Employers for the Respondent*

**JUDGMENT**

1. The Claimant filed her Statement of Claim on 7<sup>th</sup> May 2014. She states she was employed by the Respondent on 3<sup>rd</sup> November 1997, as Office Assistant [Subordinate 1], earning a monthly salary of Kshs. 4,860.

2. She was diagnosed with infertility and uterine fibroids in 2005. She underwent treatment at various hospitals. She took sick leave with the consent of the Respondent, but her salary was stopped by the Respondent, from 1<sup>st</sup> November 2007 to April 2008. The salary was released upon the advice of a specialist Psychiatrist that the Claimant had depression. She continued being treated by the Psychiatrist. In 2011 she was accosted by thugs and robbed of everything. She was granted 10 days' sick off. She continued being treated. She was in and out of hospital. The Respondent was aware about her ill-health.

3. On 14<sup>th</sup> March 2012, the Respondent issued the Claimant a warning letter for persistent absenteeism. She was interdicted for gross misconduct, through a letter dated 17<sup>th</sup> May 2012. She had visited Mater Hospital on 9<sup>th</sup> May 2012 for check-up. She was summarily dismissed on 29<sup>th</sup> June 2012 for habitual absenteeism. Her salary at the time was Kshs. 70,506 monthly.

4. She prays the Court to find termination was unfair and grant the following orders against the Respondent:-

a) Compensation for unfair termination equivalent of 12 months' salary at Kshs. 846,072.

b) 1 year annual leave.

c) Certificate of Service.

d) Costs.

e) Any other relief.

f) Interest.

5. The Respondent filed its Statement of Response [titled Statement of Defence], on 23<sup>rd</sup> June 2014. It is not disputed that the Claimant was employed by the Respondent on terms and conditions of service enumerated in the Statement of Claim. It is accepted she was warned, interdicted and eventually dismissed by the Respondent for persistent absenteeism. She was heard on 20<sup>th</sup> June 2012, before dismissal in the

company of 2 Shop Stewards, George and Magdalene. She appealed against dismissal decision through her letter dated 10<sup>th</sup> July 2012. She asked the Respondent to reduce summary dismissal to regular termination, as she had served for close to 15 years.

6. The Appeal was considered. The Claimant was advised there was no ground to warrant reversal of the earlier decision. Her repeated absenteeism without permission from the Respondent amounted to acts of gross misconduct under Section 44[4] [a] of the Employment Act 2007. The Respondent did not ignore Claimant's complaints about her ill-health. Her case was referred to the Medical Board in March 2011 who concluded she was fit to work. She was not exempted from work on any account. The Respondent prays the Court to uphold its decision to summarily dismiss the Claimant.

7. The Claimant, and the Acting Head of Employees' Relations N.S.S.F, Regina N. Mua, both gave evidence for the respective Parties during the Court's service week at Nairobi, on 16<sup>th</sup> April 2018. The file was forwarded from the Court at Nairobi to the undersigned Judge in Mombasa for judgment- writing, on 27<sup>th</sup> September 2018.

8. The Claimant repeated in her oral evidence, the contents of her elaborate Statement of Claim. She confirmed her employment details. She explained that she had problems conceiving. She was depressed. She was placed on psychiatric treatment. She was attacked by thugs and injured. Due to these problems she was absent from work. She used to apply for sick leave from the Respondent through her Supervisor. Her Supervisor did not forward her various applications to Management. She was paid nothing after dismissal.

9. Cross-examined, she testified that she appeared before the Medical Board. She was found fit to continue working. She confirmed that she continued being absent the finding of the Medical Board notwithstanding. Her role was important. Her absence would affect her department. She was persistently absent and had occasionally been called upon by the Respondent to show cause, why, she should not be disciplined. She did not have evidence of sick off at the disciplinary hearing, save for documents from Mater Hospital. She admitted that Management had proposed to transfer her to another Branch. She declined and wished to stay in Nairobi, to access quality healthcare. She appealed against dismissal and asked for summary dismissal to be commuted to regular termination. Redirected, she told the Court that the Medical Board did not refer her to any Psychiatrist. The Board relied on medical records supplied by the Claimant. The Union Officials who attended disciplinary hearing were not chosen by the Claimant. She did not wish to be transferred to Respondent's Branch near her rural home, because the rural community would stigmatize her, for being barren.

10. Regina Mua told the Court that the Claimant worked in the administrative department. Her work was crucial to the Respondent. The Respondent has a Medical Scheme for Employees. It has service providers. Psychiatric treatment is provided for under the Scheme. The Claimant did not supply evidence of her treatment to the Respondent, except for one sick sheet from Mater Hospital. She was taken through a proper disciplinary process. She did not give evidence to support her prayer to have summary dismissal commuted to normal termination.

11. On cross-examination, Regina told the Court that in 2007, the Claimant had been sick without leave. The Respondent did not summarily dismiss her then. She was given opportunity to mend her ways. The Respondent was not aware that the Claimant had medical issues when she was employed. She was heard in the presence of the Chief Shop Steward and his Deputy. The Medical Board is independent. She was invited before the Board. Redirected, Regina stated the best place for the Claimant to work would have been near her home. She was offered a soft landing. The Disciplinary Committee is composed in accordance with the CBA in place between the Respondent and Claimant's Union. The Board is availed all medical records before convening.

#### **The Court Finds:-**

12. It is not contested that the Claimant was employed by the Respondent Corporation as an Office Assistant, on 3<sup>rd</sup> November 1997. Her terms and conditions of service, and the fact that she was dismissed by the Respondent for persistent absenteeism, are not in dispute.

13. There is evidence that the Claimant suffered ill-health. There are medical records from various hospitals showing she endured infertility and uterine fibroids since the year 2005. She was depressed because of her inability to conceive. She suffered psychiatric problems. She was seen by Specialist Psychiatrist Dr. J.K. Mutiso as shown in his letter to the Respondent dated 19<sup>th</sup> December 2009. The Doctor was of the opinion that the Claimant had made good progress, although the original issue of infertility had not been resolved. She was fit to continue working at any station.

14. There is evidence that the Medical Board similarly found the Claimant fit to continue working.

15. Nonetheless as noted in the Psychiatrist's Report, she was prone to relapse, as her underlying problem remained unresolved. She was subsequent to these medical evaluations persistently absent from work. The Court does not doubt that she was unwell and sought treatment at various times.

16. The problem is that she did not seek leave of the Respondent in being absent for whatever ailment. She was on many days absent without leave. She was before dismissal, called upon to show cause why, she should not face disciplinary action. Her fault was not in being sick, being attacked by thugs or seeking treatment; her fault was in her failure to seek permission from the Respondent to be away on treatment.

17. The CBA concluded between her Union and the Respondent regulated sick leave. Clause 9.4 stated that Employees would be granted 150 days consecutive days of absence on full pay, and thereafter up to 150 consecutive days on half pay, subject to production of a medical certificate authorizing such leave, signed by an approved medical practitioner. Clause 10 provided for medical treatment.

18. There is nothing produced by the Claimant under Clause 9.4 and 10 of the CBA, to justify her prolonged and persistent absenteeism. There was a mechanism available to her, under the CBA, to seek leave from her Employer, to be treated. She ignored this. She had as many as 300 days of sick off available to her under the CBA. She could have applied personally or with the aid of her Union, if her psychiatric problems did not allow her to apply personally. She, instead of making a regular application for sick leave under this clause opted to sneak

out at will. She went on unauthorized sick leave on many occasions. The Court does not believe her when she says she used to apply for sick leave through her Supervisor, who failed to deliver her applications to the Respondent. She did not bring copies of these applications to Court. She did not seek to have the Supervisor testify.

19. The Respondent had valid reason, as required under Section 43 and 45 of the Employment Act, in terminating the Claimant's contract. She has not asked the Court to consider commuting summary dismissal to regular termination, as proposed by the Claimant when she appealed against summary dismissal. She asks the Court to find termination was unfair and award to her compensation.

20. Procedure was fair and in conformity with the minimum statutory standards under Section 41 and 45 of the Employment Act. She was presented with charges, notified of disciplinary hearing, and was accompanied to the hearing by her Union's Chief Shop Steward and his Deputy. She was heard and a decision taken to summarily dismiss her. She appealed against the decision. Her appeal was considered. The Claimant asked for summary dismissal to be reduced to normal termination. The Appeal was declined. Throughout, she had the benefit of representation of her Trade Union. The Respondent offered to reasonably accommodate the Claimant by transferring her to a Branch near home. She declined this on the ground that her community would stigmatize her for being unable to conceive. The Court does not find this ground advanced by the Claimant persuasive. Were there no Members of her community at Nairobi, and at her workplace? Did they stigmatize her? Was she never going to go back to her rural home for fear of stigmatization? Her ground for refusing to work at a Branch near her rural home is unconvincing. She was equally unconvincing in her assertion that she wished to stay at Nairobi, to access superior medical care. The Respondent provided her with a Medical Scheme with various service providers, which would enable the Claimant access Doctors of her choice at any County, irrespective of her place of residence. She was not precluded from being treated at Nairobi, by her being resident outside of Nairobi.

21. The Claimant has not shown she was owed any annual leave days, as of the date of termination. She was absent without leave on many days. She has no justification in seeking annual leave pay.

22. *The Respondent shall release to the Claimant her Certificate of Service forthwith, under Section 51 of the Employment Act 2007.*

23. *The rest of the Claim has no merit. It is dismissed with no order on the costs.*

IN SUM, IT IS ORDERED:-

*a) The Respondent shall release to the Claimant her Certificate of Service forthwith.*

*b) The rest of the Claim is dismissed with no order on the costs.*

**Dated and signed at Mombasa this 3<sup>rd</sup> day of October, 2018.**

**James Rika**

**Judge**

**Dated, signed and delivered at Nairobi this 10<sup>th</sup> day of October, 2018.**

**Maureen Onyango**

**Principal Judge**