



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

NAIROBI

CAUSE NO. 729 OF 2017

DENIS MWENDA GITONGA.....CLAIMANT

-VERSUS-

ERNEST & YOUNG LLP.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed his Memorandum of Claim on 19th April 2017 contending that he was unfairly dismissed from employment by the respondent on 12.7.2016. The Claimant further contended that his termination was done discriminatively due to his medical and health status. He sought the following reliefs:

- a) An order that the Claimant be paid his dues of Kshs. 3,698,603.80 being service pay and accumulated bonuses.
- b) Damages equivalent to One (1) year's salary as compensation for wrongful termination.
- c) General Damages for discrimination to be assessed by the Court based on legitimate expectation.
- d) Interest on (a), (b) and (c) above at court rate till payment in full.
- e) An order that the Claimant be issued with a Certificate of Service as required under Section 51 of the Employment Act.
- f) Costs of the suit.
- g) Any other relief that this Honourable Court may deem as fit and just to grant.

2. The Respondent filed it Memorandum of Response on the 2nd June 2017 denying the alleged unfair termination and discrimination plus the claim for compensatory damages. She averred the claimant was lawfully and fairly terminated on account of his declining performance and after being accorded a hearing. He therefore prayed for the Claimant's suit to be dismissed with costs contending that he is not entitled to the claim for service pay and bonuses.

3. The suit was heard on 27.9.2017, 6.3.2018 and 12.3.2018 when claimant testified alone but the respondent called 4 witnesses. Thereafter both parties filed written submissions which I have carefully considered herein alongside the pleadings and evidence.

Claimant's case

4. CW1, Denis Mwenda Gitonga, testified that he was employed by the Respondent in 1993 as a

Computer Operator doing data processing and computer support. He produced a contract of employment dated on 24th March 1993 and a confirmation letter dated 27th September 1993 as exhibits. His starting salary was Kshs. 9,000 but it was later increased periodically to Kshs. 313,441. He further testified that his salary increment and promotion, every year, were based on good performance and that by 2015 there was no adverse report against him.

5. The claimant further testified that he worked for the Respondent for 23 years until 12th July 2016 when he was terminated. He testified that he learnt from his wife that the Respondent's CEO had called her and informed her that he was to be discharged. That thereafter the HR manager called him and told him that his services were being terminated and gave him a termination letter. He contended that the termination was abrupt and unfair as a result of which he lost a mortgage for building a family house. He contended that his family lost livelihood because his wife was not employed at that time.

6. The claimant further testified that in September 2009, he was diagnosed with Multiple Sclerosis (MS) which affected his balance. He explained that, the condition got worse in 2010 but, he denied that it affected his ability to work contending that his job was not physical. He further contended that in the 2015 performance appraisal he was rated 3 out of a possible 5 which was good performance. He admitted that he was paid three months' full salary plus his pension after the termination and his medical cover was extended for one year. He further admitted that the claim for bonus was part of his contract.

Respondent's Case

7. The Respondent in her Response avers that the Claimant's performance deteriorated with the progression of his disease but the Respondent out of compassion continued to engage the Claimant by even re-assigning him duties and granting him excessive sick leave.

8. RW1 Professor Kiama Wangai a pathologist testified that he had been instructed to review the medical history of the Claimant from the medical reports and treatment and examination records for the claimant from which he prepared the Report dated 27th February 2018. RW1 observed in his report that the Claimant was diagnosed with Multiple Sclerosis (MS) since 2009 which had rendered him unable to walk without support and had an unsteady gait. That, an assessment of his performance was also done which showed that the work done by the Claimant had to be redone by another person. RW1 concluded by stating that the disease is life long and has no cure but can only be managed.

9. RW2 Gitahi Gachahi stated that he was the Chief Executive Officer of the Respondent. He stated in cross-examination that the Claimant's performance started deteriorating since 2014 due to his medical condition. Further, that it was out of compassion that they had rated the Claimant's performance at 3 out of 5. He further testified that the respondent agreed to let the Claimant go and gave him notice through his Counsellor. That the Respondent also engaged the Claimant's wife due to his emotional status which was as a result of his medical status. However, the RW2 stated that they neither engaged a medical officer to examine the Claimant nor discussed the illness with the Claimant.

10. RW3 Hannah Njeri Njoroge stated that she is an Assistant Director in-charge of Business Development. She testified that the changes in the Claimant's duties were within his contract. She contends that she had had told the Claimant that he needed to improve on arrival time and morning briefs. She further stated that the Claimant never went for medical leave beyond the days allowed.

11. RW4 Polly Wamuyu Mwangi stated that she was the Respondent's Human Resource (HR) Director, which is a similar post to that of Talent Director. She further stated that the Claimant's condition was not good and he was endangering himself by continuing with the employment. She further contended that the claimant's performance had deteriorated but he was being rated 3 out of 5 out of compassion because any lower rating would have meant that he be terminated. She further contended that, the Claimant declined an early retirement and as such, he was terminated due to non-performance.

Claimants Submissions

12. The Claimant submits that the Respondent in letter of termination dated the 20th July 2016 did not give any reasons for termination and that the Respondent did not tender any evidence to prove that the Claimant's performance had dwindled as a result of his illness. He further submits that the treatment of the Claimant in the whole exercise was discriminatory and not because he could not perform his work.

13. The Claimant further submits that although the Employment Act recognises ill health as a ground for termination, due process must be followed before the termination. He and relied on the case of **Kennedy Nayanguncha Omanga v Bob Morgan Services Ltd [2013] eKLR** to fortify the foregoing submission. The Claimant further submitted that he was never involved in any discussions with the Respondent on his health and contended that his termination was done without according him a hearing. He therefore prayed for the reliefs sought in his Claim including anticipatory salary and allowance for the 16 years he would have worked before retiring.

Respondent's Submissions

14. The Respondent in its written submissions states that the substantive reason for the Claimant's termination was due to his poor performance. The Claimant's health had deteriorated and that his work had to be re-done by someone else. According to the Respondent, it would be both punitive and unreasonable to expect him to work. She further submitted that the requirements set out under Section 41 of the Employment Act were complied with before terminating the Claimant's contract by informing both the Claimant and his wife of his impending termination.

15. On the alleged discrimination, the Respondent submits that the claimant has not proved any discrimination as the actions described by him as such are not discriminatory. The Respondent further submits that no amount of procedural steps would have salvaged the Claimant's employment. She cited the case of **Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited [2013] eKLR** where the court had the following to say about discrimination:

“Where a person is treated differently from others similarly situated like him, then this amounts to discrimination.”

Analysis and determination

16. There is no dispute from the pleadings, evidence and submission herein that the claimant was employed by the respondent from 1993 to 12.7.2016 when his employment contract was terminated by the employer. The issues for determination are:

- a) Whether the termination of the claimant's contract of employment was unfair and unlawful
- b) Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant was unfairly terminated.

17. Under Section 45(2) of the Employment Act, termination of employment of an employee is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. A reason is fair if it relates to the employees' conduct, capacity and compatibility, or the employer's operational requirements. The procedure is fair if it complies with section 41 and 51 of the Act, which entails, granting of the employee a hearing before termination and issuing him/her with certificate of service.

Reason for termination

18. The termination letter dated 12.7.2016 never cited any reason for discharging the claimant, however, the reason was pleaded in the defence and reiterated by the defence witnesses as non-performance due to his medical condition called Multiple Sclerosis. Although the claimant denied that his performance was affected by the said medical condition, the respondent produced medical reports and other treatment and

examination records as exhibits, to prove that the said medical condition did affect the performance of his normal duties. The claimant produced his performance appraisal report rating him 3 out of 5 but the defence witnesses contended that that was favour done to him to protect him from termination.

19. I have carefully considered the evidence and the submissions presented on this issue. The bottom line is that the claimant suffers from a medical condition which has no known cure. The said condition has not only robbed him of his ability to stand or walk without support but also compromised his ability to do certain things like carrying a cup of tea. As noted herein above, section 45 (2) (b) of the Act permits an employer to terminate the services of his employee on ground of lack capacity to perform his contractual duties. However, in this case I harbour the opinion that the employer has not proved on a balance of probability that the claimant was not performing his duties and had could no longer perform the duties he was hired to do.

20. First, the termination letter issued to the Claimant did not indicate the reasons for termination. Second, the Respondent admitted that during the 2015 and 2016 performance appraisal the Claimant was rated 3 which meant that he had met all expectations and his supervisor's comments on Assessment read as follows:

“In view of the above and the fact that Denis has been facing health challenges I would say he met expectations.....”

21. In the 2016 performance review the supervisor observed following concerning the claimant:

“Denis has been supporting the BD team over the years...been unwell, which has affected his performance of late. I am therefore requesting the Partnership to consider his case to assist/support him.”

22. Third, the claimant was never certified as unfit to continue serving by a qualified medical expert or medical board properly constituted to assess him. RW2 stated that the respondent never engage an Independent Medical officer to examine the Claimant. RW1 admitted that he just reviewed the claimant's medical history from treatment and examination records and further admitted that a Neurologist would have been the best expert to give an opinion in this case and not a pathologist like him. It is appalling that the Respondent only engaged RW1 to provide his medical report from the Claimant's medical history without examining him.

23. The requirements for terminating an employee on account of sickness was laid out in **Kennedy Nyanguncha Omanga v Bob Morgan Services Limited [2013]eKLR**

“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.”

24. In view of the finding herein above that the respondent has not proved on a balance of probability that the claimant was not capable of performing his duties due to a terminal illness, I return that she has failed to discharge her burden of proving and justifying the reason for terminating the claimant's contract of employment as required by section 43 (1), 45 (2), and 47(5) of the Employment Act.

The procedure followed

25. In Kenya, it is now settled that before terminating the services of an employee for a cause, the

employer must follow due process which extends to post termination rights like right to appeals, payment of any accrued benefits and certificate of service. Section 41 of the Employment Act provides:

“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

26. The Respondent never informed the claimant the reason for his termination even though the termination letter dated 12th July 2016. The letter just referred to purported discussions between him and the respondent’s Talent director one Polly Mwangi (RW4) about termination of his employment. However, the letter never gave any details about the said discussions and especially the date, and whether the subject was about his performance or his health. Surprisingly, during her cross examination, Rw4 stated that the alleged discussions were held between the claimant and his supervisor (Rw3). On the other hand Rw3 denied ever discussing termination with the claimant or ever participating in his termination exercise. Rw2 also admitted that he never discussed termination with the claimant but with his wife. Strangely enough, the Respondent was able to submit that no amount of procedural steps would have salvaged the Claimant’s job.

27. Flowing from the foregoing analysis it is clear that the claimant was never accorded the mandatory hearing prescribed by the said section 41 before his termination and he was also not accorded the procedure described in ***Kennedy Nyangundha Omanga Vs B, M. Security aforesaid***. I therefore return that the respondent has also failed to prove that she followed a fair procedure before terminating the claimant’s services on account of poor or non-performance.

28. In ***Simon Gitau Gichuru v Package Insurance Brokers Ltd [2017] eKLR***, which involved almost similar to the case at hand the Court held;

“In its Statement of Response dated 11th September 2014, the Respondent states that its decision to ask the Claimant to stay away from the office, was informed by his inability to move around unaided and the need to protect the Respondent’s image...From the medical reports availed to the Court, it is clear that the Claimant had been attacked by a debilitating disease and by the time I took his evidence, he was on a wheel chair. Such a disease, coupled with the loss of a job are as severe as a bereavement and in handling the case of such an employee, the employer must not only follow due process but must also facilitate the employee to come to some form of closure... There was no evidence that in reaching the decision to terminate the Claimant’s employment, the Respondent considered either the medical report submitted by Dr. Kiboi Julius Githinji or by any other medical officer. There was also no evidence of any prior discussions held between the Claimant and the Respondent.”

Discrimination

29. Section 5 of the Employment Act prohibits discrimination against an employee. In ***Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited [2013]eKLR*** the court had the following to say about discrimination:

“Where a person is treated differently from others similarly situated like him, then this amounts to discrimination.”

30. However, after agonizing about this issue, it became clear in my mind that the employer terminated

the claimant on account of poor or non-performance and not the medical condition he was diagnosed with. That the employer had a performance appraisal ratings which applied to all her employees including the claimant. The fact that he was terminated after scoring 3 out 5 did not mean that he was discriminated against. To the contrary, that contention should be applied to urge that there no was valid reason for the termination. I therefore dismiss the alleged discriminatory treatment of the claimant by the respondent and return that this dispute must remain narrowed down to a claim for unfair termination of the claimant's contract of service.

31. In any event and without prejudice to the earlier findings herein above, it is my considered view that the employer gave the claimant some soft landing by retaining the Claimant and his three dependents in her medical scheme until 30th June 2017 and paid him an additional one month salary as a token of appreciation for long service of 23 years.

Whether the Claimant is entitle to the relief's sought

32. The foregoing compliment notwithstanding, under section 49(1) (c) of the Employment act, I award the claimant Kshs. 3,761,292 being 12 months' gross salary for the unfair termination of his contract of employment. In awarding the said compensation, I have considered the claimant's long service of 23 years and the fact that he did not contribute to his termination through misconduct.

33. The prayer for bonuses must fail because there is no legal basis or contractual justification for such payment.

34. The prayer for service pay must also fail because the claimant was a member of the respondent's pension scheme and the NSSF and for that reason he was disqualified by section 35 (6) of the Employment Act from claiming service pay.

35. Finally, the claim for general damages for discrimination is dismissed for the reasons stated herein above but the will have, a certificate of service as prayed.

Conclusion and disposition

36. I have found that the termination of the claimant's employment contract on 12.7.2016 was substantively and procedurally unfair because the inability to perform due to illness was not determined by a qualified medical expert or Medical Board, and the procedure of fair hearing under section 41 of the Employment Act was not followed. I have however found that the claimant was not discriminated against. I have further found that his claims for service pay and accumulated bonuses have not been substantiated and are therefore declined. Consequently, I enter judgment for the claimant in the sum of **Kshs. 3,761,292 plus costs and interest at court rates** from the date hereof. The sum awarded shall be paid subject to statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 23rd day of November 2018

ONESMUS N. MAKAU

JUDGE