



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

CASE NO. 40 OF 2018

(Formerly Nyeri ELRC Case No. 275 of 2011)

MARTIN MUTWIRI NJERU.....CLAIMANT

VERSUS

EQUITY BANK OF KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent his erstwhile employer after an injury that he asserts precipitated his dismissal. He avers that he was employed in 2011 as a clerical staff and he served the Respondent in various capacities – teller, account opening receptionist, brokerage/custodial services earning a salary of Kshs. 30,000/- which rose over the years to Kshs. 51,865/-. He averred that the Respondent arbitrarily and without lawful cause dismissed him from employment purportedly on medical grounds and converted his staff-friendly loan to commercial rates. The Claimant sought a declaration that his dismissal was discriminatory and unlawful, payment of gross biennial salary, three calendar months’ in lieu of notice, service pay for 6 years served, general damages for distress, mental anguish and agony, interest on the sums above as well as costs of the suit plus interest.

2. The Respondent in its response averred that the Claimant’s services were terminated on medical grounds but denied that the retirement was arbitrary or without lawful cause, reason or excuse and that the procedure followed in the termination was fair. The Respondent averred that the conversion of the Claimant’s loan to an ordinary loan and the listing with the Credit Reference Bureau was based purely on the lending contract between the parties. It was asserted that the Claimant persistently defaulted in loan repayments prompting the Respondent to share the information on lean performance with other stakeholders as statutorily required by the Credit Reference Bureau Regulations 2013. The Respondent averred that the medical cover enjoyed by the Claimant ceased with immediate effect upon the Claimant’s retirement on medical grounds and that the Respondent had no obligation to extend the same. The Respondent averred that it requested the Claimant to present himself for medical examination to determine his fitness to discharge his duties but the Claimant declined to present himself without justifiable cause whatsoever, itself an act of insubordination. The Respondent averred that the procedural requirements were followed to the letter in the retirement for medical reasons and a fair hearing was provided to the Claimant. The Respondent averred that the Claimant was required to clear with the relevant departments to enable him obtain payment of the leave days, as well as one month’s salary in lieu of notice. It averred that the claim for damages was too remote and unconnected to the Claimant’s contract of employment and that no claim based on gross biennial salary or service pay was available as the Claimant was a contributor to NSSF and would receive his pension in accordance with the Retirement Benefits Act.

3. The Claimant and the Respondent’s witness Leah Chepkoech testified and parties filed written submissions thereafter. The Claimant submitted that he was unaware of the expectation by the Respondent to be examined by the Respondent’s doctor. He stated in his testimony that he was a member of ESOP (employee share ownership programme). He was stated to owe the Respondent some Kshs. 473,479/- as the outstanding loan. He submitted that he was subjected to unfair labour practices and placed reliance on the case of **Ephantus Githuku Ndungu v Kenol Kobil Limited [2017] eKLR**.

4. The Respondent submitted that the Claimant’s failure to complete the clearance with the Respondent had delayed payment of his notice and leave days. The Respondent’s witness had testified that the Claimant was, upon the accident occurring and recovery afterwards, given light duties as the Respondent showed the Claimant immense sympathy and support. The Respondent submitted that the Claimant was holding the Respondent hostage as he declined to be examined by a doctor to establish capacity to continue serving the Respondent. The case of **Ephantus Githuku Ndungu v Kenol Kobil Limited (supra)** which cited the South African decision in **Standard Bank of South Africa v Commission for Conciliation, Mediation & Arbitration and Others (JR 662/06) (2007) ZALC 94; 4 BLLR 356 (LC); (2008) 29 ILJ 1239 (LC)** which held in part

An enquiry to justify an incapacity dismissal may take a few days or years, depending mainly on the prognosis for the employee’s recovery, whether any adjustments work and whether accommodating the employee becomes an unjustified hardship for the employer. To justify incapacity, the employer has to “investigate the extent of the incapacity or the injury... (and)... all the possible

alternatives short of dismissal.

The Respondent submitted that the retirement on medical grounds was justified and not discriminatory as the Claimant's doctor as well as the Respondent's doctor recommended retirement on medical grounds. The Respondent submitted that the conversion of the loan to commercial rates was in terms of the letter of offer of employment and that upon leaving the employ of the Respondent the loan converted to interest at prevailing commercial rates and that because of default in payment the Respondent in exercise of its statutory obligations reported the non-performance to the Credit Reference Bureau. On medical cover, the Respondent submitted that the cover ceased to apply and was not extended upon retirement of the Claimant on medical grounds. The Respondent submitted that save for the sums due for notice and leave there was no other claim due to the Claimant.

5. The Claimant was dismissed for medical reasons. Under the Employment Act, there is no express provision for retirement on medical grounds. The reasons for the termination of service for medical reasons therefore falls in the category of performance as provided for in Section 41. For that, the employer is required to show that medical examinations were conducted which revealed the incapacity to perform the contract. The Respondent in the letter of 24th February 2017 under the hand of the HR Manager – Employee Relations Mr. Raimond Molenje was to the effect that the Claimant has failed to attend a medical examination on 18th January 2017 and because the Claimant had been away from work from 13th October 2015 on medical grounds, a decision had been taken to retire the Claimant on medical grounds. He was required to clear with the Respondent to enable him obtain his dues. He had a staff loan which later converted to commercial rates upon his termination on 24th February 2017. Dr. Koome Guantai's letter states that the Claimant's incapacitation is maim with permanent disability at 30%. The doctor's report alluded to by the Respondent was not availed and was not therefore available for scrutiny. Whereas the Claimant was visibly injured, the degree of suffering he has undergone was not of the Respondent's making to warrant the grant of damages against the Respondent. The remoteness of damage is therefore not grounds for the Claimant to obtain relief under the head of damages for distress, suffering and agony. That relief lies elsewhere. In regard to the dismissal proper, in cases of incapacity, the Respondent is required to have a hearing under Section 41. Section 41(1) of the Employment Act provides as follows:-

41.(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.

No hearing was demonstrated to have been had and the only inference one can draw is that the dismissal was unfair and unlawful for failing to accord the Claimant that safeguard. The Respondent was required to facilitate the exit in terms of Section 41(1) of the Employment Act in order to come within the ambit of fairness. The Claimant was not entitled to emoluments under the gross biennial salary. His contract of employment provided for 1 month notice and therefore the claim for three calendar months' in lieu of notice does not lie. He is entitled to only 1 month's salary in lieu of notice. He was a member of the Staff Contributory Pension Scheme. His letter of offer of employment contained a provision on staff loans. The said letter did not indicate the conversion of the interest rate would be automatically adjusted to commercial rates upon the termination of the Claimant's services. The Respondent however exhibited the loan facility letters dated 26th July 2014 and 20th September 2014. The letters indicate the loan terms and the Claimant took the loan knowing full well the terms of the offer. In the premises, it was not unconscionable for the Respondent to charge the commercial rates of interest as per the base lending rate Rules of the Central Bank. The Claimant therefore only succeeds in part as against the Respondent. I enter judgment for the Claimant as against the Respondent for:-

- a) One month's salary in lieu of notice – Kshs. 51,865/-
- b) Damages for unlawful dismissal which I cap at 4 months Kshs. 207,460/-
- c) Costs of the suit
- d) Interest on the sum in a), above at court rates from date of filing suit till payment in full
- e) Interest on the sum in b), above at court rates from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 10th day of December 2018

Nzioki wa Makau

JUDGE