



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1596 OF 2014

(Before D. K. N. Marete)

GERALD KAAI MUREITHI.....CLAIMANT

VERSUS

SUNRIPE (1976) LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by a Memorandum of Claim dated 22nd September, 2014. It does not display any issue in dispute on its face.

The respondent in a Statement of Reply dated 4th December, 2014 denies the claim and prays that this be dismissed with costs.

The claimant in turn filed a Response to Statement of Reply dated 16th January, 2015 in answer.

The claimant's case is that sometimes in 2003, he was employed by the respondent in the position of Assistant Welder. He offered and was always willing to offer diligent and honest service throughout his stint in office. He was later confirmed with a monthly salary of Kshs.12,000.00 by a letter dated 12th August, 2005.

The claimant's further case is that he continued in employment for eight (8) years and this was all blemish free.

The claimant's other case is that on 9th August, 2013 he was involved in a road traffic accident at Runyejes along the Nairobi-Embu road. He was hospitalized and discharged on 25th August, 2013 and this was communicated and known to the respondent.

He puts it thus;

7. On 9th December 2013 the Claimant reported to his place of work and requested the Respondent Human Resource Manager for his annual leave since he had recovered but was attending physiotherapy sessions. Leave was granted and the Claimant was asked to report to duty on 10th January 2014.

8. On 23rd December 2013 the Claimant received a telephone call from the Respondent Human Resource Manager who asked the Claimant to report to his office on 24th December, 2013.

9. On 24th December 2014 the Claimant attended a meeting in the Respondent's Human Resource Manager's office where the Human Resource Manager informed the Claimant that the Respondent management had directed that the Claimant was on unpaid leave. The Respondent (claimant?) was issued with the letter dated 24th December 2013 which indicated that the Claimant was serving on unpaid leave with effect from 1st December 2013.

10. The claimant reported to duty on 10th January 2014 and when he reported to the Respondent Human Resource Manager's office instead of him being put back to the pay roll the claimant was asked to avail medical report from the doctor.

11. On 14th January 2014 the Claimant obtained the medical report from P.C.E.A Kikuyu Hospital which he presented to the Respondent on 15th January 2014. Upon presentation of the medical report the Claimant asked to leave and wait for further communication from the Respondent Directors.

12. On 27th January 2014 the Claimant received a call from the Respondent when he was asked to report to the Respondent Human Resource Manager's Office on 28th January 2014.

13. The claimant on 28th January 2014 reported to the Respondent Human Resource Manager's office only to be issued with a termination letter which was written on 10th January 2014 long before the Claimant could present his medical report to the Respondent.

14. The claimant avers that the termination was effected maliciously and without any due regard to the Claimant's welfare rights accruing to him as provided for under the Employment Act.

PARTICULARS OF MALICE

- a) *Failing to give the Claimant any notice of the intended termination.*
- b) *Failing to give the Claimant a fair hearing.*
- c) *Terminating the services of the Claimant without any basis or justification for so doing.*

He also enlists the following as particulars of special damage inflicted on him by the respondent's action;

PARTICULARS OF SPECIAL DAMAGE

a) <i>One month salary in lieu of Notice</i>	<i>Kshs.12,000.00</i>
b) <i>Gratuity pays (Kshs.400.00 x 15 x 11)</i>	<i>Kshs.66,000.00</i>
c) <i>Accrued leave (23.5 days)</i>	<i>Kshs.13,000.00</i>
d) <i>Public/Rest days worked (6 days x 2)</i>	<i>Kshs.4,800.00</i>
e) <i>Compensation for unlawful termination</i>	
<i>(12 months)</i>	<i><u>Kshs.132,000.00</u></i>
<i>Total</i>	<i><u>Kshs.227,800.00</u></i>

He prays as follows;

- i) *Kshs.222,800.00 as stated in paragraph 17 above.*
- ii) *General damages.*
- iii) *Costs of this suit and interest therein in court rates.*
- iv) *Such further or other relief as this Honourable court may deem just.*

The respondent's case is a denial of the claim.

The respondent's case is that the claimant dutifully worked for her until 9th August, 2013 when he was involved in a road traffic accident while on off duty. He was hospitalized and reported back to work on 9th December, 2013. He had however been paid for months to August to November though he was not capable of resuming duty as required.

The respondent's further case is that on the 9th December, 2013, the claimant reported to apply for leave despite the fact that he had been out of work from the date of the road traffic accident. He was asked to attend a meeting with the respondent for a determination of his capacity to work.

On 24th December, 2014, he was asked to obtain a medical report and present this before 6th January, 2014 with a view to establishing his capacity to work or resume duty. He, however, reported back on 10th January, 2014 without a medical report and was instructed to obtain one before he would be allowed to resume duty.

The respondent's penultimate case is that thereafter, she made a decision to terminate employment of the claimant as he was not fit to resume duty. His terminal dues were computed but utilized to offset his outstanding loan with Sunripe Sacco amounting to Kshs.185,714.00.

The claimant in response to the respondent's case denies the same and avers that he reported on duty on 10th January, 2014 when the Human Resource Managers Office asked him to avail the medical report before he was put back on the payroll. This contradicts paragraphs 9 and 10

the Reply.

His other case is that on 14th January, 2014 he obtained a medical report from the PCEA, Kikuyu hospital which he presented to respondent on the following day. He was then asked to leave and wait for further communication from the respondent's directors. On 27th January, 2014 he was called and asked to report to the respondent's Human Resource Managers Office on the following day. He did and was issued with a letter of termination dated 10th January, 2014 long before he had tendered his medical report to the respondent.

He further denies any owings to Sunripe Sacco and avers that this was a different entity from the respondent and therefore should not have benefited from his terminal benefits.

The matter came to court variously until the 17th October, 2018 when it was heard *inter partes*.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
2. Whether the respondent's deduction of the claimant's alleged loan was lawful?
3. Whether the claimant is entitled to the relief sought?
4. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant in his written submissions dated 29th October, 2018 submits a case of unlawful termination for violation of due process in his termination of employment. On this he seeks to rely on the authority of **Kennedy Nyaguncha Omanga vs Bob Morgan Services Limited, Industrial Court Cause No 1983 of 2011**, where the court observed as follows;

“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.

Further, the claimant sought to buttress his case by relying on the authority of **Kenya Plantation and Agricultural Workers Union v Rea Vipingo Plantations Limited & another [2015] eKLR** where the court observed thus;

Where an employee is injured or taken ill during employment, the employer has the obligation to reasonably accommodate the employee. This goes beyond the grant and exhaustion of sick leave. Reasonable accommodation calls on the employer to genuinely explore ways through which the job performed by the stricken employee can be temporarily modified to suit the medical restrictions of the employee. The employer could limit the working hours for the employee in the same job. The employer may also change the working environment through physical modification of the workplace to suit the affected employee. This may involve the employer acquiring special equipment to enable the injured or diseased but qualified employee, continue being productively employed. Reasonable accommodation also requires the employer explore the possibility of reassignment of the employee, to a different job within the same enterprise.

This was not observed in the circumstances of this case and therefore the claimant's submission of unlawful termination of employment.

I would agree with the claimant, the respondent went out of his way to terminate his employment without due recourse to the law and procedure. She did not pursue the appropriate processes in a case of termination on medical grounds.

The respondent's in her written submissions dated 30th October, 2018 submits that there was no outstanding leave for the claimant. Again, the claimant's terminal dues were computed at Kshs.44,145.20 which was used to offset the claimant's loan with the sacco.

The claimant was not involved or even given a hearing on the outcome of his employment. He was not subjected to any medical examination to form the basis of a decision to terminate, retain or reassign his duties and employment. This is clearly a case of unlawful termination of employment and I find as such.

The 2nd issue for determination is whether the respondent's deduction of the claimant's alleged loan was lawful. All this time, the claimant denies and disputes owing any money to Sunripe Sacco. The loan has not in any way been demonstrated by the evidence of the respondent. It merely remains an allegation. I hold that it was always the burden of the respondent to adduce evidence in support of the respondent's loan with the Sacco. Secondly, the respondent was also duty bound to establish the authority she utilized to offset the loan from the claimant's terminal benefits. In the absence of any evidence to this extent, like is the case here, I hold that the loan offset by the respondent was unlawful.

The 3rd issue for determination is whether the claimant is entitled to the relief sought. He is. Having won on a case unlawful termination of employment, he becomes entitled to the relief sought.

I am therefore inclined to allow the claim and order relief as follows;

i. One (1) months salary in lieu of notice.....Kshs.12,000.00

ii. 12 months compensation for unlawful termination

of employment Ksh.12,000.00 x 12=.....Kshs.144,000.00

Total of claim.....Kshs.156,000.00

iii. The costs of the claim shall be borne by the respondent.

Dated and signed this 29th day of November 2018.

D.K. Njagi Marete

JUDGE

Delivered and signed this 3rd day of December 2018.

Maureen Onyango

PRINCIPAL JUDGE

Appearances

1. Mr. Nyakiangana Instructed by Julius Nyakiangana & Company Advocates for the claimant.
2. No appearance for the respondent.