



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 167 OF 2016

TIMOTHY MWENDA M'RIMBERIA.....CLAIMANT

-VERSUS-

MERU CENTRAL DAIRY

CO-OPERATIVE UNION LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 5th May, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 03.08.2016 in person. The claimant prayed for judgment against the respondent for:

- a) The termination to be declared null and the claimant to be reinstated unconditionally.
- b) The claimant to be paid in lieu of annual leaves since time he was employed.
- c) The claimant to be paid leave allowances for the said leaves.
- d) The claimant to be paid insurance dues for the injuries caused.
- e) Costs of the suit.

The respondent's defence was filed on 23.09.2016 through Mwenda Mwarania, Akwalu & Company Advocates. The respondent's case is that the suit be dismissed with costs.

At all material times the claimant was employed by the respondent as a driver effective sometimes in July 2005. He worked without a letter of appointment until 04.02.2011 when the letter of appointment was issued. While on duty on 30.03.2014 the claimant was involved in a road traffic accident and was thereafter hospitalised for treatment. The claimant was treated at M.P Shah Hospital including medical operations and later at Chogoria Hospital where he attended clinics.

The respondent, by the letter dated 26.02.2017, conveyed to the claimant that the claimant's employment had been terminated. The letter addressed to the claimant stated as follows:

“RE: TERMINATION OF YOUR EMPLOYMENT CONTRACT

As you are aware, you have been away from work since 30th March 2014 to date after being

involved in a road accident. You were hospitalised in two hospitals i.e M.P SHAH Hospital and Chogoria Hospital for the period between 30th March 2014 and 5th June 2014. Since being discharged from Chogoria Hospital, twenty months (20) have lapsed. In reference to Employment Act 2007 section 30(1), an employee is entitled to a sick leave not less than seven days with full pay and thereafter seven days with half pay. In view of this, we requested that you avail yourself for a medical assessment on 18th February 2016 which was performed on the same date.

Referring to the medical report from the above stated assessment, we deduced the following facts that challenge you resuming to work as a driver or a transfer to other section in the organisation:

i. **Permanent disability on the right lower limb causing you to walk with difficulty and only short distances with the assistance of a walking stick.**

ii. **Poor vision with incapacity to see well at night.**

We therefore regret to inform you that a decision has been reached to terminate your employment effective 1st March 2016, on the grounds of physical incapacity pursuant to Employment Act, section 41(1).

You are therefore advised to clear with the Union as soon as possible to facilitate the payment of one month's salary in lieu of notice and your full and final benefits.

We wish you well in your future endeavours

Signed”

The claimant's case is that he was fit to continue in employment as per the medical report dated 13.05.2016 by M.P.Shah Hospital stating that the claimant had recovered from his injuries and he could commence his normal duties of driving. However, the letter stated that the claimant should not drive long distances.

The respondent's case was that the claimant's employment was based on the medical report dated 18.02.2016 by Meru Teaching and Referral Hospital which stated that the claimant had been having a permanent disability on his legs and eyes whereby he was unable to resume to his normal personal duties and he had problems walking around and problems with his visibility. The report had concluded thus, **“Currently he can walk but with difficulty and only short distances mostly requiring assistance with a walking stick, also his vision is poor, with incapacity to see well at night.”**

The claimant's case was that the report by Meru Teaching and Referral Hospital was invalid as the maker, Dr. Brian Bett did not disclose his speciality and whereas the one by M.P.Shah Hospital was signed by Dr. Neevas Krishna, a consulting Orthopedic, Trauma and Replacement Surgeon. The claimant further submitted that the one by Meru Teaching and Referral Hospital was suspect by stating that he could not see well at night as that was the obvious case for all normal persons as nobody sees well at night unless with assistance of sourced light from electricity, vehicles' head lights, torches and such other sources.

The **1st issue** for determination is whether the termination of the claimant's employment was unfair. First, the procedure for termination on account of ill health is prescribed in section 41 of the Employment Act, 2007. It entails serving a notice and then the employer hearing the employee in presence of the employee's trade union representative or the employee's person of choice. It is clear that the respondent did not comply with that procedure. The respondent's case is that the claimant relies upon the medical report by M.P. Shah Hospital which came after the termination. The court returns that the respondent's line of submission cannot hold because in any event the claimant was not given an opportunity to seek and then provide the report that he subsequently tabled. The claimant was not at any time informed by the

respondent that it was desired that his employment be terminated on account of ill health and therefore required to make representation in that regard. The court returns that the claimant was entitled, in the circumstances, to provide the medical report by M.P. Shah Hospital to certify that he was fit to continue in employment. Second, the court has considered the conflicting medical reports, one dated 18.02.2016 by Meru Teaching and Referral Hospital, and the other one by M.P. Shah Hospital. In view of the two reports, the court returns that it cannot be said that the respondent at the time of terminating the claimant's employment, had a valid reason as envisaged in section 43 of the Employment Act, 2007.

While making that finding the court follows its opinion and holding in Albert Musundi Materu - Versus- Spin Knit Limited [2013]eKLR thus, **"The 3rd issue for determination is whether the claimant was accorded due process or fairness. The court finds that the evidence on record shows that the respondent had issues with, primarily the health capacity of the claimant to remain in employment, and secondarily the declining claimant's productivity in view of the claimant's health. In the opinion of the court, the procedure applicable in event of removal on account of ill-health is section 41 of the Employment Act, 2007. The section states 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.

(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."

In view of the provisions of the section, the court holds that an employer who desires to terminate an employment contract on account of the employee's ill-health must give the affected employee the relevant notice and a hearing. The court holds that the process must uphold due process of fairness entailing the following procedure:

- a) a notice to the employee, in a language that the employee understands, that it is intended to terminate the employee's contract of employment on account of ill-health;
- b) requiring the employee to present himself or herself before a medical professional or board to facilitate a medical certificate for fitness or lack of it for continued employment;
- c) the employer hearing the employee's representations in view of the medical certificate of fitness or unfitness; and
- d) the employer making a decision to terminate the employee or to retain the employee taking into account the medical certificate of fitness or unfitness and the employee's representations at the hearing.

The court's opinion is that the affected employee is entitled under the section to follow the proceedings so that where the employee cannot follow the proceedings because of the ill-health, the employee is entitled to remain in the service of the employer until recovery or regaining capacity to follow the proceedings. The court's opinion applies unless the parties have a prior agreement on the separation arrangements that would apply in event the employee, on account of ill-health, is not able to follow the separation proceedings under section 41. Such prior arrangements, in the opinion of the court, would need to carefully provide for a balancing effect to give the employee the best chance possible to recover and resume employment while at the same time enabling the employer to mitigate productivity concerns in event of the employee's unreasonably long absence from work in view of the illness. In view of section 41 of the Act and in absence of such prior

arrangement, the court holds that due process entitles the employee who for ill-health cannot follow the proceedings to remain in employment till recovery or otherwise; the principle that the employee is entitled to recover or die in the service of the employer in such appropriate cases.”

To answer the 1st issue for determination, the court returns that the termination of the claimant’s contract of employment by the respondent’s letter dated 26.02.2016 was unfair for want of due process as per section 41 and for want of a valid reason per section 43 of the Employment Act, 2007.

The 2nd issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows.

First, the claimant has established that the termination of the contract of employment was unfair. Second, the respondent has not by way of evidence or submissions advanced any reason which would operate as a bar to reinstatement. Third, there was no dispute that the claimant was entitled to be paid in lieu of annual leaves and leave allowances as prayed for; especially that the claim was not specifically denied in the defence and submissions filed for the respondent. Fourth, it is not disputed that the claimant suffered injuries while on duty for which he is entitled to compensation under the Work Injury Benefits Act, 2007. Accordingly, the court returns that the claimant is entitled to all the remedies as prayed for.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the termination of the claimant’s employment by the respondent per the letter dated 26.02.2016 was unfair and therefore null and the claimant is unconditionally reinstated in the respondent’s employment effective 01.03.2016 with full benefits and to continue in that service unless lawfully terminated; and for that purpose the claimant to report to the respondent’s human resource manager not later than 08.05.2017 at 8.30 o’clock in the forenoon for assignment of duty and appropriate deployment.
- b) The claimant to compute, file and serve the salary and allowances due consequential to order (a) above and (c) below within seven days for recording quantum on a convenient mention date.
- c) The declaration that the claimant is entitled to leave allowances and pay in lieu of annual leave effective 01.02.2011 to the date of purported termination, 01.03.2016.
- d) The declaration that the claimant is entitled to payment in view of the injuries suffered on 30.03.2014 and in accordance with the Work Injury Benefits Act, 2007.
- e) The respondent to pay the claimant’s costs of the suit fixed at **Kshs.40,000.00** all inclusive.
- f) The respondent to pay the claimant the judgment sum by 01.07.2017 failing interest to be payable at court rates from the date of this judgment till full payment.

Signed, dated and delivered in court at Nyeri this Friday, 5th May, 2017.

BYRAM ONGAYA

JUDGE