



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE 212 OF 2016

ERICK MAGAI NATEMINYACLAIMANT

VERSUS

ALPHA LOGISTICS SERVICES [EPZ].....RESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's contract of service by the respondent on 9/1/2016. The respondent has denied the alleged unfair termination and avers that she fairly retired the claimant on medical grounds. The issues agreed by the parties for determination are:

- (a) Whether the claimant was fit to work
- (b) Whether it was proper for the respondent to retire the claimant on medical ground
- (c) Whether the respondent followed fair procedure in terminating the services of the claimant on medical grounds.
- (d) Whether the claimant is entitled to the reliefs sought.

The suit was disposed of by written submissions on the basis of the pleadings, witness statements and documentary evidence filed.

CLAIMANT'S CASE

2. The claimant filed a written statement on 23/3/2016. He stated that he was employed by the respondent as a helper on 2/1/2013 on contract basis. His last contract begun on 1/5/2014 and it was to end on 30/4/21016. His salary was ksh.14412 plus house allowance of ksh.4000.

3. In November 2015, he fell ill as a result of his work environment and he was admitted in hospital for 3 days. After discharge he proceeded to his annual leave. Before the end of the leave the HR manager telephoned him and told him to report to him before resuming duty.

4. He reported back to work on 6/1/2016 and went to see the HR manager as instructed. On meeting the HR manager, he was told that he should retire on medical grounds effective 9/1/2016 but he was

aggrieved. He considered the retirement on medical grounds to be malicious and unfair because it was without prior notice and second the respondent had alternative work environment which was suitable for him to work.

5. He produced the report by Dr. A.S Modi which advised the respondent to change the claimant's work environment where there was no dust or oil or retire him on medical grounds if he can't get the environment suitable to him in order to keep him away from repeated Asthma attack and save him from getting pulmonary disease in future. He never the less felt that the said medical report was biased against him.

DEFENCE CASE

6. The respondent's HR Manager, Mr. Tobias Bob Omwai filed a written statement on 7/10/2016. He confirmed that the claimant was employed by the respondent as a helper in her team project section. In November 2015, the claimant fell ill and was admitted in hospital for 3 days and went home after discharge. Before resuming duty, the claimant was referred to Dr. S.K. Modi for medical examination to verify whether he was fit to continue with his work.

7. The doctor made his report recommending that the claimant be given an alternative working environment preferably dust free, and in the absence of such alternative environment, the claimant be retired on medical grounds. The respondent looked for the recommended suitable working environment for the claimant and when she found none, she opted to retiring the claimant on medical grounds. She first wrote to the claimant letter dated 6/1/2016 notifying him of the intended retirement on medical grounds and inviting him to make written reservations by 8/1/2016. The claimant wrote his representation vide letter dated 8/1/2016.

8. Although the claimant contended by his letter that he was fit to continue with his work, it was impossible to accept the claimant's desire in the face of the doctor's advice. She therefore called for a meeting to discuss the claimant's persistence health problem and the doctor's recommendations. The claimant was invited to attend with a colleague of his choice and he came with Mr. Dennis Njeru Muchangi. After the hearing, it was resolved that the second option recommended by the doctor of retiring the claimant on medical grounds be taken. The decision was communicated to the claimant vide the retirement letter dated 11/1/2016. Thereafter the final dues for the claimant were computed but he never went to collect the same. Mr. Omwai therefore denied that the retirement was unfair and contended that it was properly guided by recommendations of a medical practitioner Dr. S.K. Modi for the claimant's better health.

ANALYSIS AND DETERMINATION

9. There is no dispute that the claimant was employed by the respondent for 3 years and that he was retired on medical grounds on 11/1/2016. I therefore proceed to determine the issues agreed by the parties outlined herein above.

Whether the claimant was fit to work

10. There is no dispute that the claimant fell ill and was admitted in hospital for 3 days. There is also no dispute that the respondent referred the claimant to Dr. S.K. Modi for examination and the doctor confirmed that he had Asthma. There is also no dispute that the doctor never found him unfit to continue working but had issue with the work environment and recommended for an alternative work environment where the claimant had no contact with dust or oil. Consequently the answer to the first question is in the affirmative.

Whether it was proper to retire the claimant on medical ground

11. The claimant has contended that the retirement on medical ground was not proper because he was fit to continue working in the new workshop which unlike the old one it was away from the sandblasting

yard. The respondent has not denied that she had relocated to the said new workshop. All what she contended was that she looked for a suitable place for the claimant to work but found none and therefore opted to retire him on medical grounds as advised by the doctor.

12. I have considered the evidence adduced and especially the medical report by Dr. Modi, shoddy as it appears and formed the opinion that the doctor was not for the retirement of the claimant. My reading of the said report reveals that retirement on medical ground was a last resort after alternatives failed. In view of the said medical report by Dr. S.K. Modi, he was therefore fit to work and medical ground was not a valid and fair reason for his termination.

13. Faced with similar case. Rika J, in *Kenya Plantations and Agricultural Workers Union vs Rea Vipingo and Another [2015] e KLR* held that:

“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 extension 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”.

14. The judge then went on to discuss the meaning of reasonable accommodation including limiting the working hours, changing the working environment through physical modification of the workplace to suit the affected employee, and finally reassigning the affected employee to an alternative job which reasonably accommodates the medical restrictions. The judge then observed that:

“before the employer takes the decision to retire on medical grounds, it should be demonstrated that these steps to reasonably accommodate the employee have been attempted”.

15. I agree with the foregoing opinion by Rika J, and find that in this case the respondent has not demonstrated that she attempted to accord any reasonable accommodation to the claimant. The whole process was rushed through and the purported hearing was merely to fulfil legal procedure. She never allowed the claimant to work from the new workshop. She also never reassigned him any other job away from dust or oil. She just went for the retirement. That was unfair and against the recommendations by Dr. S.K. Modi in his medical report.

16. If retirement was the best option by the doctor, he would have straight away recommended for same. He however recommended for change of work environment where the claimant was not to be in contact with dust and oil because such contact with dust or oil could cause the claimant to get chronic pulmonary disease in future. Consequently it is my holding that the retirement of the claimant on medical grounds was improper, unjustified and unfair.

Fair procedure

17. The respondent contended that the procedure followed was fair because she gave a hearing to the claimant in the presence of a fellow employee of his choice. The claimant on the other hand contended that the procedure followed was unfair because he was not given prior notice of one month and the respondent had already decided his fate even before the hearing on 9/1/2016.

18. Under Section 41 of the Employment Act, before employer terminates services of his employee on ground of misconduct, poor performance and physical incapacity like in this case, he must first explain the reason to the employee in a language he understands and in the presence of a fellow employee or shop floor representative of his choice and thereafter invite the employee and his chosen companion to air their representations for consideration before the decision to terminate his services are made. In this case the said procedure was followed but as already held herein above, the retirement was without a valid and fair reason and therefore improper, unfair and unjustified in the face of an express advice from a medical practitioner which recommended for reasonable accommodation for the claimant to facilitate him to continue working.

Reliefs

19. Under Section 49 of the Employment Act, I award the claimant ksh.14,412 being one month salary in lieu of notice plus ksh.57648 being 4 months salary as compensation for the unjust and unfair termination of his contract of service. In awarding the said compensation, I have considered the fact that the remainder of his fixed term contract was only 4 months and the claimant had reasonable expectation to continue working and earning until 30/4/2016.

20. The prayer for salary for the remainder of the contract term is dismissed because the claimant has been adequately compensated for the breach of his contract by the compensation with 4 months salary above.

21. Finally the claim for severance pay is dismissed because as submitted by the defence, the termination was not through redundancy under Section 40 of the Act.

DISPOSITION

22. For the reason that the termination of the claimant's services was unfair and unjustified, I enter judgment for him in the sum of ksh.72060 plus costs and interest.

Dated, signed and delivered this 28th July 2017

O. N. Makau

Judge