



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 301 OF 2016**

**OLIVER ODADI NYALESO .....CLAIMANT**

**VERSUS**

**SHEIKH ZAYED CHILDRENS WELFARE CENTRE .....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 or about 8/2/2015. It is the claimant's case that he got injured while on duty and due to the severity of the injuries the respondent gave him a letter for an indefinite sick leave without pay. The claimant interpreted the said leave to mean unfair, lawful and wrongful termination of his services.

2. The respondent has admitted that due to the severity of the injuries sustained by the claimant she gave him an indefinite sick off without pay. She has therefore denied liability for unfair termination of the claimant's services and averred that the claimant is welcome back to work as soon as he is certified medically and physically fit to work.

3. The issues for determination are:

- a. Whether the claimant has been constructively dismissed from work by the respondent
- b. If (a) is affirmed, whether the termination was unfair and unjust.
- c. Whether the claimant is entitled to the reliefs sought.

**CLAIMANT'S CASE**

4. The claimant testified as CW1. He told the court that he was employed by the respondent as a mechanic/ Maintenance Artisan for a 3 months contract beginning 3/6/2014. On 17/9/2014, the contract was extended for one year till 17/9/2015. The contract was further extended for 2 years from 1/9/2015 to 30/8/2017. He produced copies for the said contracts plus payslips showing that his gross pay was ksh.18000 per month.

5. He explained that on 21/9/2015, while repairing a leaking tank, he was electrocuted, fell down from a height and suffered serious injuries to the head and right hand. As a result, the employer rushed him to

the hospital where he was admitted for 90 days and the employer paid his hospital bills.

6. On 8/2/2015, he was served with a letter sending him to indefinite sick leave without pay. Thereafter he demanded for medical examination through his lawyer and the respondent referred him to Dr. Abdulaziz. The said doctor examined him and prepared a medical report which was forwarded to the respondent. Thereafter, he received no word from the respondent and he brought this suit seeking terminal dues plus compensation for constructive dismissal. He also prayed for salary for the remainder of his contract term. He concluded by stating that he never took any leave during his employment by the respondent.

7. On cross examination, he admitted that he was paid his full salary for period he was in hospital and also for January 2016. He further explained that on 7/3/2016 he was referred for examination at Mewa Hospital where the respondent's employees are treated. He further admitted that the medical report by the hospital never certified him fit to resume work. He further admitted that he was still sick with persistent headaches and his hand cannot do his duties until his contused hand is repaired.

#### DEFENCE CASE

8. The respondent's director Mr. Mir Khan testified as RW1. He admitted that the claimant was employed by the respondent from 4/6/2014 as motor mechanic/Maintenance Artisan on fixed term contract which were renewed consecutively the last one being 2 years from 1/9/2017 to 31/8/2017.

9. He further admitted that the claimant had an accident while on duty and suffered severe injuries and had to be admitted in hospital for 3 months. He further explained how the respondent paid the medical bills for the claimant and retained him in the payroll until 31/1/2016 with full salary. However from 8/2/2016, he gave the claimant a letter for an unpaid leave until such a time that he will be certified fit to work by a qualified medical practitioner.

10. On 7/3/2016, he referred the claimant for medical examination at Mewa Hospital and a medical report was prepared by Dr. Zein Abdulaziz stating the medical condition of the claimant but it never certified him fit to resume work. Ever since, the claimant never reported back to him with a medical report certifying that he was fit to work.

11. RW1 maintained that the claimant was still welcome back to work but should first be certified fit to work again. He further contended that the respondent is however willing to pay his terminal dues in accordance with the law if certified unfit to work. He concluded by stating that the claimant went for leave in September 2014 and the only leave outstanding is for 2015.

#### ANALYSIS AND DETERMINATION

12. There is no dispute that the claimant was employed by the respondent but since 8/2/2016 he was sent to an indefinite sick leave without pay following severe bodily injuries he suffered on 21/9/2015 while in the course of his employment. After careful consideration of the pleadings, evidence and submissions, I now proceed to answer the three issues for determination framed herein above.

#### **Constructive termination of employment**

13. The claimant contended that the indefinite sick leave given to him from 8/2/2016 was unlawful and it amounted to constructive termination of his contract of service. The respondent has on the other hand maintained that the claimant is only on sick leave and he is very much welcome to resume work once a qualified medical practitioner certified him fit to work. She is also ready to terminate the claimant's services and pay him his lawful benefits if he is certified unfit to work again by a qualified medical practitioner.

14. Constructive termination of contract of service refers to a case whereby the conduct of employer makes the employee to deem that his services have been terminated. The said conduct must be one which

fundamentally breaches the terms of the contract of service or the law as to be considered a repudiatory breach. In this case the contract of employment provided as follows:

***“4. You will be entitled to sick leave of not less than twenty one(21) days at full pay and thereafter to a sick leave of twenty one(21) days at half pay in each period of twelve months of continuous service subject to production of certificate from a duly qualified medical practitioner.*”**

15. On the other hand the relevant provision of the law to consider in relation to sick leave is Section 30 of the employment Act and Regulations 12 of the Regulations of Wages (General) Order. The Order provides that:

***“12. After two months’ continuous service with an employer, an employee shall be entitled to a maximum of thirty one days sick leave with full pay and thereafter to a maximum of fifteen days sick leave with half pay in each period of twelve months’ consecutive service....”***

16. The Act provides that:

***“30(1) after two consecutive months of service with his employer, an employee shall be entitled to a sick leave of not less than 7 days of full pay and thereafter to sick leave of seven days with half pay in each period of twelve consecutive months of service, subject to production of a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting for the practitioner’s behalf in charge of a dispensary or medical Centre”.***

17. The provision of Section 30 above, is very much in harmony with the contract of service herein in that the two do not give the maximum periods for sick leave with full pay but only limits the period with half pay. Under Section 26 of the Act, the parties to employment contract can negotiate better terms for the employee and as such the agreed maximum under the contract of service that the claimant is entitled to 21 days’ sick leave with half pay is not in conflict with Section 30 of the Act. Likewise the provision for 15 days as maximum sick leave with half pay under Regulation 12 of the Order is not in conflict with the provision for 7 days sick leave with half pay under Section 30 of the Act and the 21 days sick leave under the contract due to the same provision of Section 26 of the Act.

18. Section 26 of the Act provides that:

***“ (1) The provisions of this part and part VI shall constitute basic minimum terms and conditions of contract of service.***

***(2) Where the terms and conditions of contract of service regulated by a regulation or agreed in any Collective Agreement or Contract between parties or enactment of any written law,decreed by any judgment, award or orders of the Industrial Court are more favourable than the terms provided in this part and part VI, then such favourable terms and conditions of service shall apply”***

19. In view of the foregoing, the court is called upon to interpret terms and conditions of employment contract in such a way that it upholds and enforces the most favourable terms and conditions of service in case of any conflict. Consequently in this case, I will disregard the maximum of 31 days of sick leave with full pay provided under the Regulation 12 of the Regulation of Wages (General) Order in favour of the provision of Section 30 of the Act and the contract of employment which did not erect any ceiling for the maximum number of sick leave days with full pay. However, as regards to the maximum period of sick leave with half pay, I will uphold the contract of employment’s 21 days which is more favourable term to the employee than the Regulation 12 of the Wage Order and Section 30 of the Act.

20. Flowing from the foregoing analysis, the question that arises is whether the employer committed a repudiatory breach of the law and the terms of the contract by sending the claimant to an indefinite sick leave without pay.

21. In my view answer is yes because after giving the claimant a fully paid leave from September 2015 to 31/1/2016, the respondent was bound by Clause 4 of the contract to give the claimant a maximum of 21 days' sick leave with half pay. It only is after the lapse of 21 days sick leave with half pay, was the employer supposed to take action.

22. Both the said provisions of the law and the contract of employment produced are silent on what action is to be taken. However in my considered opinion, the action to be taken must be guided by medical expert opinion and executed through a fair procedure or with the consent of the employee.

23. In this case neither was the consent of the claimant sought nor was a medical expert opinion sought and obtained and the claimant subjected to fair procedure before he was condemned into an indefinite sick leave without pay. The evidence on record is clear that the claimant was send on leave on 8/2/2016 and had to instruct a lawyer to demand that the respondent refers him for medical examination.

24. The claimant having been denied his contractual 21 days sick leave with half pay, and have been again condemned to an indefinite sick leave without pay, in the absence of any medical expert certificate and without according the claimant a hearing, it is my finding that such conduct by the employer was a fundamental breach of the contract of service and the law and it entitled the claimant to repudiate it and sue for constructive termination of the contract. It is therefore my holding that the claimant is not on unpaid sick leave but he has indeed been constructively dismissed.

### **Unfair termination**

25. Under Section 45(2) of the Employment Act, termination of contract of service 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.

26. In this case the reason for termination of the claimant's services was physical incapacity caused by an accident while on duty. As admitted on oath by RW1, there was no certificate of inability signed by a qualified medical practitioner was availed to the respondent to warrant termination of his services. He averred that if such certificate was availed to him he would pay the claimant his terminal dues under the law. That admission of lack of medical certificate to prove that the claimant was either fit or unfit to work renders the constructive termination unfair under Section 43 of the Act. The said Act provided that failure by the employer to prove the reason for termination in a suit like this renders the termination unfair within the meaning of Section 45 of the Act.

27. Even if we were to assume that the claimant was incapacitated totally from working as a result of the accident, the termination would still be unfair because the termination was not done in accordance with the procedure provided by Section 41 of the Act. The said Section provides in mandatory terms that before terminating his employee's contract of service, the employer on ground of physical incapacity he shall first explain to him in a language he understands and in the presence of a fellow employee or shop floor union representative of his choice the reason for the intended termination and thereafter invite him together with his chosen companion to air their defence for consideration before the termination is decided. In this case the respondent never followed that mandatory procedure before the termination. She terminated through indefinite unpaid sick leave.

### **Reliefs**

#### **Declaration**

28. For the reason that the claimant was sent to an indefinite sick leave without pay in breach of the law and his contract of service, I make the declaration that the leave amounted to unfair constructive termination of his employment contract.

#### **Notice and compensation**

29. Under Section 49 of the Act, I award the claimant ksh.18000 being one month salary in lieu of notice plus ksh.216000 being 12 months salary as compensation for unfair termination. The reason for the said compensation is that the claimant does not expect to secure another job in his current ill-health within 12 months. he also with reasonable accommodation had reasonable expectation to continue working until 31/8/2017 when his fixed term contract was to lapse. Finally, I have considered the fact that he never contributed to the termination through misconduct.

### **Leave**

30. The respondent admitted that the claimant is entitled to the leave for 2015. I therefore grant him leave of 24 days as provided under the contract of employment.  $24/26 \times 18000 = \text{ksh.16615.40}$

### **Provident Fund**

31. The above claim is left for claimant to pursue the same under the Provident Fund rules.

### **General Damages**

32. This claim is dismissed for lack of particulars and evidence.

### **DISPOSITION**

For the reason that the claimant was constructively and unfairly terminated, I enter judgment for him in the sum of ksh.250,615.40 plus costs and interest.

**Dated, signed and delivered this 28<sup>th</sup> July 2017**

**O. N. Makau**

**Judge**