



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 1375 OF 2014

SIMON GITAU GICHURU.....CLAIMANT

VERSUS

PACKAGE INSURANCE BROKERS LTD.....RESPONDENT

JUDGMENT

Introduction

1. Simon Gitau Gichuru, the Claimant in this case, worked for Package Insurance Brokers Limited, in the position of Operations Manager. He brought this claim pursuant to the termination of his employment on 1st August 2014. The claim is contained in a Statement of Claim dated 18th August 2014 and filed in court on even date. The Respondent filed a Statement of Response on 11th September 2014.

2. When the matter came up for trial, the Claimant testified on his own behalf and the Respondent called its Managing Director, Salome Mwangi.

The Claimant's Case

3. The Claimant was employed by the Respondent on 1st January 2010. In the month of November 2013, he was diagnosed with a spinal cord tumor and was referred for specialized treatment in India. He was hospitalized at Max Health Clinic are from 16th November 2013 until 17th January 2014.

4. The Claimant resumed duty on 10th February 2014 and on 18th February 2014, he was awarded a salary raise to Kshs. 198,675. On 14th April 2014, the Respondent wrote to the Claimant asking him not to report to work until he had fully recovered. The Respondent also asked the Claimant to provide a medical appraisal of condition.

5. The Claimant presented himself to Dr. Kiboi Julius Githinji who did not submit his report until 27th May 2014. In the meantime, the Respondent had written to the Claimant on 22nd May 2014, complaining of delay in submission of the medical report and notifying him of its intention to suspend his employment.

6. In his report, which was submitted to the Respondent on 28th May 2014, Dr. Kiboi Julius Githinji recommended that Claimant resumes work in 2 months' time.

7. On 24th June 2014, the Respondent, through its Managing Director, wrote to the Claimant informing him that his employment had been suspended with immediate effect on health grounds. On 7th July 2014, the Claimant's Advocates wrote to the Respondent challenging the Claimant's suspension as a disguised unlawful and unfair termination, an assertion denied by the Respondent's Advocates by letter dated 11th

8. By letter dated 1st August 2014, the Respondent summarily dismissed the Claimant on the ground of gross misconduct.

9. The Claimant states that his summary dismissal was an afterthought and a feeble attempt by the Respondent to justify the earlier constructive termination. He adds that he was not given an opportunity to be heard and that the decision to terminate his employment was motivated by his need to be aided to walk around. He claims discrimination on this account.

10. In his initial claim, the Claimant had made averments and sought prayers regarding two motor vehicles purchased in the course of his employment being Motor Vehicles Registration No KBJ 278P and KAN 429N. This part of the claim was however abandoned in the course of the trial. The claim for pension was also abandoned. In light of this, the Respondent's counterclaim was also abandoned.

11. The Claimant now claims the following:

- a) A declaration that the Respondent's conduct towards him was discriminatory;
- b) Damages for discrimination and mental anguish;
- c) A declaration that the termination of his employment was wrongful, malicious and unfair;
- d) An award of Kshs. 198,675 being unpaid salary for the month of July 2014;
- e) An award of Kshs. 198,675 being 1 month's salary in lieu of notice;
- f) An award of Kshs. 1,639,068.75 being unpaid house allowance for 55 months;
- g) An award of Kshs. 447,318.75 being gratuity/service pay for 4 years and 6 months;
- h) An award of Kshs. 2,384,100 being 12 months' salary as damages for wrongful termination;
- i) Certificate of service.

The Respondent's Case

12. In its Statement of Response dated 11th September 2014 and filed in court on even date, the Respondent admits having employed the Claimant on 1st January 2010, in the position of Operations Manager. His position was later re-designated as Operations and Human Resource Manager.

13. The Respondent claims that the Claimant used forged certificates to secure employment. The Respondent further states that the Claimant had been issued with previous warning letters.

14. The Respondent avers that prior to the termination of the Claimant's employment, the Respondent had, on 16th June 2014, issued a letter to the Claimant requiring him to respond to various matters constituting breaches of his employment. Having failed to respond, the Claimant should not turn around and state that he was not heard.

15. In addition, prior to the dismissal, the Respondent carried out investigations into some accounts and established that the Claimant had collected company money on behalf of his employer, which he failed to account for.

16. It is the Respondent's case that the Claimant's dismissal had to do with breaches of the terms of his employment and not the state of his health. The Respondent affirms that the Claimant was diagnosed with a spinal cord tumor on 29th October 2013 in respect of which he traveled to India for surgery in

17. The Respondent states that it was sympathetic to the Claimant's situation and did everything within its power to support him and facilitate his treatment. In this regard, the Respondent paid the Claimant his full salary from November 2013 until June 2014, although he was unable to discharge the duties of his office.

18. Regarding its letter dated 14th April 2014 by which the Claimant was advised to stay away from work, the Respondent states that it relied on medical reports and opinions availed by the Claimant and its own evaluation on the Claimant's recovery vis-a-vis his productive ability. The decision was also informed by the fact that the Claimant could only move around with the aid of a walker and had great difficulty accessing the office via the stairs. The Respondent adds that this state of affairs not only compromised the Claimant's capacity to work but also dented the Respondent's image, by appearing to retain in the office, an employee who was evidently ill.

19. The Respondent avers that in view of the Claimant's serious medical condition, it had by the aforesaid letter, asked the Claimant to avail a current medical appraisal to enable it appreciate the nature and extent of his illness and make an informed decision in relation to him.

20. The Respondent further avers that for a full month, the Claimant failed to avail the appraisal sought, without any justification. In light of the seriousness of the Claimant's illness and considering that the Respondent had continued paying his salary for the previous 7 months, when he did not work, and in the absence of the appraisal, the Respondent was compelled to give him a 30 days' notice of intention to suspend his services.

21. Upon receipt of the letter of intended suspension of services dated 22nd May 2014, the Claimant availed a belated medical report from Dr. Kiboi Julius Githinji dated 27th May 2014. The report observed that the Claimant was still walking with assistance and had lower limb weakness projected to improve within 6 months.

22. As a consequence of the belated medical appraisal, the Respondent, by its letter dated 23rd June 2014, suspended the Claimant on medical grounds. The Respondent states that although it had been sympathetic to the Claimant's situation, it needed to take into account, its business interests in handling the matter. The Respondent denies the Claimant's allegation of discrimination.

23. With regard to the Claimant's summary dismissal, the Respondent relies on the provisions of Section 44(4) of the Employment Act, 2007. The Respondent goes on to state that upon overall review of the Claimant's performance, it was of the view that the general incompetence, negligence and recklessness exhibited by the Claimant, leading to his dismissal warranted a verification of his qualifications, revealing that two of the certificates submitted by the Claimant, were forgeries.

Findings and Determination

24. There are three (3) issues for determination in this case:

- a) Whether the Respondent violated the Claimant's right under Article 27 of the Constitution;
- b) Whether the Claimant's dismissal was lawful and fair;
- c) Whether the Claimant is entitled to the remedies sought.

The Claimant's Right under Article 27

25. The Claimant states that the Respondent's action against him was in violation of his right to equality and freedom from discrimination as guaranteed under Article 27 of the Constitution. In this regard, the Claimant claims that after being diagnosed with a spinal cord tumor, which in the course of time rendered his movement difficult, the Respondent began to discriminate against him. He told the Court that the only

reason the Respondent wanted him out of its employment was because he needed a walking frame to move about.

26. While denying the Claimant's allegations of discrimination, the Respondent states that first, the Claimant's dismissal had nothing to do with his illness and second, that it did everything within its power to support the Claimant during his hour of need.

27. In order to determine the issue of discrimination in this case, I need to examine the Respondent's conduct in totality. The Respondent's letter dated 14th April 2014, by which the Claimant was asked to rest at home states inter alia:

"In the circumstances and until you are able to move around the office unaided, and while you continue to attend physiotherapy clinics, we ask that you rest at home as the office does not have suitable facilities and conditions for your easements."

28. My reading of this letter is that as long as the Claimant could not walk unaided and needed to attend physiotherapy sessions, then he was not free to go to work. Then on 22nd May 2014, the Respondent wrote to the Claimant again as follows:

" Dear Simon,

RE: APPRAISING YOUR HEALTH CONDITION

Following our letter dated 14th April, 2014 and your text message (sms) of 14th May, 2014, we regret to note that this company is not any better in terms of information regarding your health. Lack of a professional advice on your condition as requested in our said letter has really inhibited our decision making.

Needlessly to state (sic), this company has continued to pay your dues for the last 7 months despite your being off duty. In view of our lack of information about your condition, we may not predict of (sic) your condition and the future. You will appreciate that this is not normal anywhere else.

Notwithstanding the above circumstances, this company is in need of productivity. We therefore give notice that we shall have no alternative but to suspend your employment together with all accruing benefits 30 days from the date of this letter. Please be guided accordingly.

We continue to intercede our Lord with prayers for your recovery.

Sincerely,

(Signed)

Mrs. S.N. Mwangi

DIRECTOR"

29. It would appear that in issuing this letter, the Respondent was reacting to a delay in submission of a report on the Claimant's medical condition. The Court was however unable to understand why the delay would be assigned to the Claimant and yet the letter to the Claimant and the one to the doctor both dated 14th April 2014, expressly stated that the medical report was to be submitted to the Respondent in confidence. The Claimant told the Court that he submitted himself for a medical examination by Dr. Kiboi Julius Githinji, immediately upon receipt of the Respondent's letter of 14th April 2014. Having done so and in light of the clear instructions given by the Respondent, the Claimant could not be blamed for any delay by the doctor.

30. The request by the Respondent for an appraisal of the Claimant's medical condition was not an

unusual one. An employer faced with the prospect of an employee suffering a prolonged illness is at liberty to ask for a medical assessment in order to confirm the capacity of the employee to continue discharging their functions. The employer is entitled to go further and consider retirement of such an employee on medical grounds, subject to due procedure, including notification to the employee that the medical report may be relied upon to retire them on medical grounds.

31. In *Kennedy Nyaguncha Omanga v Bob Morgan Limited (Cause No 1983 of 2011)* this Court stated the following:

“While employers are entitled to terminate employment on the ground that an employee is too ill to work, they must exercise 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.....Third, the employer must give specific notice of the impending termination.”

32. In the instant case, there was no such notification to the Claimant. Instead, the Respondent decided to ‘suspend the Claimant’s employment together with all accruing benefits’ and on this basis, the Claimant was not paid any salary after June 2014. The Court was unable to find any backing for this form of suspension, either in law or in the Respondent’s internal rules and procedures. The procedure adopted by the Respondent was evidently unlawful but did it amount to discrimination?

33. The Respondent was at pains to delink the Claimant’s dismissal from his illness but the Court was unconvinced. Testifying before the Court, the Respondent’s Director, Salome Mwangi stated “The basis of the suspension was to allow the company to move on.” While the Respondent retained the right to move on, it was under an obligation to facilitate a decent and humane exit for the Claimant, who was evidently unwell.

34. In its Statement of Response dated 11th September 2014, the Respondent states that its decision to ask the Claimant to stay away from the office, was informed by his inability to move around unaided and the need to protect the Respondent’s image. This was a most unfortunate statement regarding an employee in dire straits.

35. From the medical reports availed to the Court, it is clear that the Claimant had been attacked by a debilitating disease and by the time I took his evidence, he was on a wheel chair. Such a disease, coupled with the loss of a job are as severe as a bereavement and in handling the case of such an employee, the employer must not only follow due process but must also facilitate the employee to come to some form of closure.

36. In my estimation, the Respondent not only failed in discharging its duty but also exhibited discrimination against the Claimant on account of his illness, which had a disabling effect. The Court therefore finds the Respondent guilty of discriminating against the Claimant on account of his health status, contrary to Article 27 of the Constitution.

37. The Court was referred to the decision by **Nduma J in VMK v CUEA [2013] eKLR** where the learned Judge awarded the Claimant Kshs. 5,000,000 as exemplary damages for discrimination. The Court was further referred to the decision by **Mbaru J in James Mulinge v Freight Wings Limited [2016] eKLR** where a similar amount was awarded.

38. The events leading to the Claimant’s dismissal were unusual. First, there was the letter dated 14th April 2014, which instructed him to stay away from work until he was able to move around unaided. The Claimant told the Court and the Respondent did not render any evidence to the contrary, that this letter was left on his desk. Accompanying this letter was a separate one addressed to an unnamed doctor, asking for a medical appraisal on the Claimant. In the Claimant’s words, receipt of these letters left him “lost, emotionally drained and mentally disturbed.”

39. Next was letter dated 22nd May 2014, which put the Claimant on notice that he would be placed on what the Respondent referred to as ‘*suspension of employment.*’ The last nail on the coffin was letter dated 23rd June 2014, which states inter alia:

“Further to our letter of 22nd May, 2014, we regret to advise that your employment with this company has been suspended with effect from the date of this letter on health grounds as earlier advised in our above quoted letter. All benefits arising out of your employment have therefore ceased from today.”

40. If the letter of 14th April 2014, left the Claimant ‘*lost, emotionally drained and mentally disturbed*’, the letter of 23rd June 2014 may have left him crushed. By the stroke of a pen and without any prior preparation, he had lost his source of livelihood, while battling a serious disease.

41. There is more to say about the letter of 23rd June 2014. Although it is titled ‘*Suspension of Employment*’ it was in effect a termination of employment. I say so because it not only forwarded a cheque in payment of the Claimant’s last salary, it also instructed him to submit a repayment plan of some Kshs. 1,095,411 owed by him to the Respondent and return any company property in his possession. Finally, the letter thanked the Claimant for dedicated service and wished him well in his future endeavours.

42. There was no evidence that in reaching the decision to terminate the Claimant’s employment, the Respondent considered either the medical report submitted by Dr. Kiboi Julius Githinji or by any other medical officer. There was also no evidence of any prior discussions held between the Claimant and the Respondent.

The

Dismissal

43. Then on 1st August 2014, the Respondent wrote to the Claimant as follows:

“Dear

Simon,

RE: TERMINATION OF EMPLOYMENT CONTRACT

Following review of your performance while in employment and our clients complaints, we have carried out an in depth investigation of customer’s accounts in the company’s books and we are satisfied that while handling some of the company client’s accounts, you did not act in the company’s interest. As a result, the company has lost money with some of the customers alleging that they paid their debts albeit through yourself. We are further satisfied that in your supervisory role, you continuously asked the brokers in charge of accounts to renew policies that you knew very well had issues which you personally was aware of and indeed it was your responsibility to resolve or account for. We are satisfied that you continuously covered up for nonperformance of the accounts contrary to the company policy.

Some of the accounts cited inter alia are:-

1.	Abdirazak	Hussein	Farah	shs.	28,318/=
2.	Jane	Muthoni		shs.	20,000/=
3.	Kamau	Nyoike		shs.	22,947/=
4.	Charles	Mungai	Gakuo	shs.	22,385/=
5.	Stanley	Gatonye	Kagimbi	shs.	12,194/=
6.	Francis	Nganga		shs.	16,052/=

In addition, over your employment period, you have miserably failed to reconcile the underwriter accounts which was one of your key responsibilities, indeed the main reason of your employment, details of which are well known to you. You have continuously misled the board of directors to cover up for your underperformance. This is tantamount to gross incompetence.

In the circumstances, we are satisfied that you acted in breach of clause 11 of your employment contract dated 1st December, 2009 and accordingly dismiss your employment (sic) summarily.

Your pension to date stands at shs. 636,063.00 which is payable immediately.

Purely on humanitarian grounds, the company will allow the existing medical cover to run until expiry next March. Should it be required, kindly let us know as soon as possible.

Please let us have your proposal in the next 7 days to repay the existing loans owed to the company. Should we fail to receive a suitable proposal within this period, we reserve the right to take appropriate action without further reference to you. Please also return the following company property; laptop, Ipad, keys to the main door, keys to your desk drawers and the Operations office door.

Kindly acknowledge receipt of this letter by signing and returning a copy to us.

We thank you for the period you served in this company and wish you well in your future endeavors.

Yours

sincerely,

(Signed)

Mrs.

Mwangi

DIRECTOR”

44. From this letter, the reasons given for the Claimant’s summary dismissal bordered on poor performance and misconduct. The Claimant testified and the Respondent did not adduce any evidence to the contrary, that he was not given any opportunity to respond to the charges made against him in the letter of dismissal letter.

45. He added that if he had been given any such opportunity, he would have demonstrated that the clients’ accounts said to be in arrears had in fact been liquidated. The Claimant’s testimony receives credence from the admission by Respondent’s Director, Salome Mwangi that in the end, the Respondent could not tell how much had been lost through the Claimant’s negligence.

46. Whether the Claimant was guilty of poor performance or misconduct was a matter that could only be determined pursuant to due process at the work place. In the absence of any such process, the accusations made against the Claimant remain mere allegations that cannot meet the threshold of valid reason set by Section 43 of the Employment Act, 2007.

47. More significantly, as already established in the foregoing parts of this judgment, by the time the letter of dismissal was issued, the Respondent had, by its letter dated 23rd June 2014, effectively terminated the Claimant’s employment. The letter of 1st August 2014 was therefore a feeble attempt to cover up an illegal fait accompli.

Remedies

48. Flowing from the above findings, I award the Claimant Kshs. 5,000,000 (read Five Million Kenya Shillings) as damages for discrimination. I also award him 12 months’ salary in compensation for unlawful and unfair termination of employment. In making the compensation award, I have considered the fact that the Claimant, who is now confined to a wheel chair, has very slim chances of securing alternative employment. I have also taken into account, the Respondent’s callous behaviour, in handling the Claimant’s case, including a belated attempt to discredit the Claimant’s qualifications post

termination. I further award the Claimant one (1) month's salary in lieu of notice as well as salary for the month of July 2014.

49. With regard to the claim for house allowance, the Claimant's offer of appointment expressly provided for a consolidated salary, which in my view, included house allowance. This claim is therefore disallowed. Having been a contributing member of a registered pension scheme, the Claimant is not entitled to service pay.

50. Finally, I enter judgment in favour of the Claimant in the following terms:

a)	Damages for discrimination.....Kshs.	5,000,000
b)	12 months' salary in compensation.....	2,384,100
c)	1 month's salary in lieu of notice.....	198,675
d)	Salary for July 2014.....	198,675
Total.....		7,781,450

51. This amount will attract interest from the date of judgment until payment in full.

52. The Claimant is also entitled to a certificate of service and the costs of this case.

53. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROB THIS 19TH DAY OF OCTOBER 2017

LINNET

NDOLO

JUDGE

Appearance:

Mr. Mogeni for the Claimant

Mr. Oonge for the Respondent