



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

**AT KERICHO**

**CAUSE NO. 23 OF 2014**

***(Before D. K. N. Marete)***

**KENYA PLANTATION & AGRICULTURAL WORKERS UNION.....CLAIMANT**

**VERSUS**

**SOTIK HIGHLANDS TEA ESTATE LIMITED.....RESPONDENT**

**JUDGEMENT**

This matter was originated by way of a Memorandum of Claim dated 25th June, 2013. The issue in dispute is therein cited as;

*a) Unfair termination of the service of Martha Moraa Nyangau*

The Respondent in a Reply to memorandum of claim dated 8th August, 2013 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that the parties have entered into a Collective Bargaining Agreement (CBA) on behalf of her members for the period 1st January, 2010 to 31st December, 2011. This case is on behalf of a grievant who was employed by the respondent in February, 1998 upto the time of termination of his service on 28th August, 2011.

The claimant's further case is that the grievant suffered an accident on 25th April, 2011 at the respondent's premises when she was injured due to a fall as she evaded a tractor. She thereon suffered a fracture on her right ankle and cellulitis after spraining her ankle. She attended the respondent's dispensary and was referred to the main hospital for treatment. She later attended AIC

Litein Cottage Hospital where she was treated and incurred bills of Kshs.44,547.00 upfront and 21,000.00 on a follow up treatment. She was placed on light duties.

It is her other case that on 28th October, 2011, she was issued with a letter of termination on grounds of physical incapacity. Attempts at conciliation failed and a certificate of disagreement was issued on 14th September, 2012. The claimant further presents her case as follows;

*2.12. The claimant was not paid for the period when she was out of work, for six months when recuperating from her surgery to insert a pin on her ankle.*

*3.1. The CBA provides that an employee is eligible for sick leave up to a maximum of 50 days on*

*full pay and 60 days on half pay in each period of 12 months continuous service.*

*3.2. Section 30 (4) of the employment act of 2007 provides “for purposes of subsection (1), the 12 months continuous months of service shall be deemed to commence on the date of the employment of the employee and on such subsequent anniversary dates of employment.*

*3.3. Section 34(1) of the Employment Act provides that an employer shall ensure that he provides sufficient and proper medicine during and illness and if possible medical attention during a serious illness.*

*3.4. Furthermore, the respondent has failed in its responsibilities to its employees as it expects them to collect their travelling allowance after reporting to their new stations.*

She prays as follows;

*4.1. This honorable court do order the Respondent to reinstate the claimant to her duties without any loss of benefits.*

*4.2. This honourable court do order the respondent to pay the claimant her*

*terminal dues in the event that it does not grant Order No. 4.1 above as follows;*

- a) Gratuity*
- b) 6 months unpaid salary*
- c) One months pay in lieu of notice*
- d) Annual leave travelling allowance*
- e) 12 months compensation*

*4.3 This honourable court do order the respondent to reimburse the claimant her medical expenses incurred.*

*4.4 This honourable Court do order the Respondent to pay the costs for this suit.*

The respondent in defence denies that the claimant was her employer and further denies the particulars of employment as claimed. It is her further case that the injuries complained of were not incurred at the workplace or at all and therefore a disclaimer of liability.

It is her further case that the claimant was injured at her home on 25th April, 2011 away from duty, and that the claimant reported for medical treatment in the Respondent’s medical facility on 26th April, 2011. Again, at the period between 22nd and 25th April, 2011, both days inclusive was Easter Holidays and the respondent duly notified the employees of the same vide internal memo dated 14th of March 2011. The Claimant’s allegations of injury within the premises of the respondent are therefore not true.

The respondents other case is that on 26th of April 2011, the claimant signed a statement in confirmation of injury outside duty. Further, the claimant attended the respondent’s medical facility on the 26th April, 2011 and was referred to Kapkatet Hospital, a government medical facility on 29th April, 2011. Further the respondent states that the claimant went against the respondent’s medical personnel’s referral advice and attended Litein Hospital. The claim on medical expenses, if at all, incurred at Litein Cottage Hospital are solely the responsibility of the claimant as this was done in disregard of clear referral instructions at her dispensary.

The respondent’s further case is a denial of the claimant’s allegation of a recommendation of being put on

light duties. This would have been inconsistent with the requirements of the employer to ensure safety of its employees as she still had a pin inserted in her leg and considering that she was a tea plucker, no suitable position could be found for her by the respondent.

Further, the respondent, while admitting the holding of the meeting on 14th September, 2011, denies that the claimant's services were terminated unfairly. She further denies that the claimant was entitled to the demands made and reflected in the certificate of disagreement, SH 8, on the following grounds;

*a) Reinstatement was not practical because the Claimant was still physically incapacitated by the injury and putting her back to work in her state of health would amount to exposing her to possibility of further injury.*

*b) The Claimant was not injured while at work, and/or within the company premises hence the claim for payment of medical expenses incurred will occasion injustice to Respondent.*

*c) Further, payment of medical expenses incurred was not justifiable because the Claimant was referred to Kapkatet, a government medical facility with good medical personnel and facilities for her injuries at lesser costs, but the Claimant attended Litein Hospital against the advice by Respondent's medical Personnel.*

The issues for determination therefore are;

1. Was the termination of the employment of the claimant was wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant in her written submissions dated 19th September, 2017 submits a case of unlawful termination of employment in that the respondent did not comply with the provisions of section 34 of Employment Act, 2007 on provision of medical facilities in times of illness. The claimant therefore posits a case of unlawful termination of employment in that the respondent should not have terminated the employment due to the grievant's non productivity occasioned by ill health.

It is the claimants further submissions that the termination was unlawful for want of substantive and procedural fairness as held in the authority of **Walter Ogal Anuro vs. Teachers Service Commission (2013) eKLR** as follows;

*This court held that for a termination of employment to pass to the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.*

The claimant further submitted a case of unlawful termination on account of physical incapacity and in so doing relied on the authority of **Kenya Plantation & Agricultural Workers Union v Rea Vipingo Plantations Limited & Another (2015) eKLR**, at paragraph 34,35 and 40 observed thus;

*34.Light work is also referred to as limited duty or modified assignment.*

*Where an employee is injured or taken ill during employment the employer has the obligation to reasonably accommodate the employee this goes beyond the grand 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 not necessarily to the 2 hours recommended for children in the Employment (General) Rules. Thirdly*

*the Employer may change the working environment through physical modification of the workplace to suit the affected employee. This may involve the Employer explores the possibility of reassignment of the Employee to a different job within the same enterprise. Alternative work is therefore in the view of this Court not necessarily synonymous with light work. The term 'light duty' is very subjective. Some jobs are sedentary yet require the employee applies all mental energy. Other jobs are physical but do not task the brain....., the term 'light duty' should therefore be left to the parties negotiation and definition in their labour contracts. The Law cannot be expected to define and regulate everything in an employment relationship. Alternative work should be understood as work which reasonably accommodates the medical restrictions of the affected employee. Before the Employer takes the decision to retire on medical grounds it should be demonstrated these steps to reasonably accommodate the employee have been attempted. Reasonable accommodation is not the simple act of extending sick leave to the Employee.*

*35.It is noted that injured or sick Employees do not lose their right to equality of opportunity under section 5 of the Employment Act 2007 and Article 2 of the Constitution on the basis of their being injured or falling sick. The duty of Employers to reasonably accommodate injured or sick Employees is predicated on the right of equal opportunity for all persons.*

*40.It is the conclusion of the Court with regard to the first issue that retirement of the grievant on medical ground considering the advice of the majority of Doctors who examined and treated him was unfair and unlawful. It was rash and ill-advised. Secondly the 1<sup>st</sup> Respondent had an obligation entailed genuine consideration of alternative duty or adjustment of the work environment to accommodate the limitations imposed on the Grievant by the Hernia...*

The respondent in her written submissions dated 20th May, 2017 discounts the claim and submits that the claimant has not proven a case of injury at the work place or during working time. It is therefore not tenable to sustain a case of unlawful termination of employment when the claimant throughout the history of the injury and consequent treatment did not comply with the respondent's policy on reference for treatment. She chose her own course on treatment and dealing with the injury and therefore cannot hold the respondent liable.

This matter calls for a delicate balance between rights and responsibilities of the parties in regard to the injury. From the onset, the claimant is unable to prove that the injuries leading to termination were incurred at the work place. Further, the claimant does not rebut the respondent's evidence of the grievant being a lone ranger and acting in total disregard of the policy on treatment. It would therefore be unfair to lump this on the respondent.

The respondent's case is the more probable of the two. It is concrete and tenable on a preponderance of evidence. I therefore find a case of lawful termination of employment and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment, he is not entitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 15th day of November 2017.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Issa for the claimant union.

2. Mr. Koech instructed by Bett & Company Advocates for the respondent.