



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 53 OF 2015

R M K.....CLAIMANT

VERSUS

M T N.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday, 14th April, 2016)

JUDGMENT

The claimant filed the memorandum of claim on 31.02.2015 through Kimunya and Company Advocate. The claimant prayed for judgment against the respondent for:

- a) A declaration that the termination of the claimant was unlawful.
- b) Damages for wrongful dismissal and discrimination.
- c) Unpaid salary for the month of February, 2015.
- d) Gratuity for 3 years worked.
- e) One month salary in lieu of notice.
- f) Salary underpayments for the period worked.
- g) Costs of the claim.
- h) Interest at court rates.

The respondent filed the memorandum of response on 10.06.2015 through Karingu & Company Advocate. The respondent prayed for dismissal of the suit with costs.

It is not disputed that the respondent employed the claimant as a guard or general worker by the contract dated 1.03.2012 and the claimant worked until 11.02.2015, the last day the claimant was at work.

The **1st issue** for determination is whether the termination was unfair. The claimant left employment following the events of 11.02.2015. The respondent's account is that the claimant was assigned to sweep the compound but he declined and refused to do so because it was his view that sweeping was outside his scope of duties. The respondent's position was that sweeping was in line with a general worker's job-description and it was not proper for the claimant to refuse to sweep as he was assigned to do. Upon

refusal to work as assigned, the respondent's account was that the claimant resigned verbally and deserted duty, refusing to hand in a written resignation despite numerous reminders.

On the other hand, the claimant's account is that he was assigned to sweep but in view of his asthmatic condition, he explained that he could not sweep due to the associated allergy to dust. The claimant's testimony was that he was HIV-AIDS positive and overtime his health deteriorated. In his initial days of the service with the respondent he used to work as a night guard from 6.00pm to 6.00am and upon checking out he would sweep the compound. He had delivered to the respondent's director one J A a letter dated 04.09.2014 by Dr. Gloria Kirimi of Mt. Kenya Hospital. The letter stated that the claimant had been seen on a follow-up due to asthmatic allergy associated with dust, cold, perfumes, and the claimant needed support to prevent recurrent asthmatic attacks. It stated that the claimant be assisted where necessary in his work to avoid areas that were dusty, cold and with perfumes. The respondent denied receiving that letter but the director who the claimant said he had handed the original letter to, was not called to testify. RW was Dr. Peter Macharia who confirmed that the claimant was their patient at Mt. Kenya Hospital and Gloria Kirimi was a clinical officer at the hospital and not a doctor. He admitted that the content of the letter of 04.09.2014 were substantially correct save that the date was supposed to be on 09.04.2015 and that Gloria was not a doctor as indicated.

The claimant's case was that on 11.02.2015 he was asked to acknowledge a warning letter about refusal to sweep but he declined in view of his health and the doctor's letter of 04.09.2014. He was told to meet the directors and he met the directors J and J A as scheduled on 13.02.2015. The directors asked the claimant to hand in the resignation letter but he decline to do so and at that meeting, the claimant testified that Jason admitted that he had received the letter of 04.09.2014 from the claimant about the claimant's reported asthmatic allergies. The claimant then did a demand letter of 25.02.2015 through his Advocates demanding a termination letter.

The respondent addressed to the claimant the memorandum of 26.02.2015. The memorandum denied that the respondent was aware of the claimant's medical situation. It is important to note that an internal memorandum and not a letter was addressed to the claimant by the respondent; suggesting that the claimant was still in the respondent's employment. The memorandum conveyed to the claimant that the demand letter dated 25.02.2015 had been treated by the respondent as gross misconduct and the claimant was thereby dismissed with immediate effect without pay in lieu of notice.

The court has considered the evidence on record and finds that there is no reason to doubt the account by the claimant. The court finds that the respondent was aware that the claimant was sick and prone to asthmatic allergies. There is no material on record to discredit the claimant's evidence that the director J A received the letter of 04.09.2014, that J knew the claimant well including his peer review assignments at Mt. Kenya Hospital prior to employment by the respondent and also knew about the claimant's medical status. The court further finds that if the claimant had deserted duty without permission then the claimant would have initiated a disciplinary process on that account but which never happened. If the claimant had verbally resigned on 11.02.2015, then the respondent would have upheld that position without having to dismiss him in the manner it was done in the memorandum of 25.02.2015 on account of matters in the demand letter by the claimant's advocates' letter of 25.02.2015. The court finds that the dismissal as conveyed in the memorandum of 25.02.2015 was unfair because it was on account of a valid grievance by the claimant and which could not be a fair reason for termination as per section 46 (h) of the Employment Act, 2007. The dismissal was accordingly unfair for want of a genuine reason as per section 43 of the Act. The court returns that the claimant is entitled to the declaration as prayed for.

The **2nd issue** is to determine whether the claimant is entitled to the 12 months compensation for unfair termination. The claimant had served for about 3 years. He was willing to continue in employment. The court has considered the aggravating circumstances that the respondent disregarded the claimant's genuine grievance about the claimant's medical status, and, pushing the claimant to resign instead of fairly resolving the grievance. The court returns that the claimant is entitled to the 12 months' gross salaries at Kshs.11, 633.00 per month making Kshs. **139,596.00** under section 49(1) (c) of the employment Act, 2007.

The **3rd issue** is whether the claimant is entitled to the other remedies as prayed for. The court makes findings as follows:

- a) The claimant submitted that the court awards Kshs. 1,000,000.00 in damages for discrimination. It has been submitted that it was discriminatory for the claimant to have left work on account of his health status. The court considers that the valid grievance the claimant raised was not resolved, the grievance being the matters raised in his advocates' demand letter of 25.02.2015. One of the grievances was that the claimant had been required to sweep a dusty compound while the respondent was aware of the asthmatic allergy associated with dust and which afflicted the claimant. There is no evidence that prior to the termination, the claimant had disclosed to the respondent about the HIV-AIDS status. The court has considered the grievances as urged for the claimant as an aggravating factor in awarding maximum compensation under section 49(1) (c) of the Act and the court returns that the award meets the ends of justice in the circumstances of this case. While making that return, the court finds that the unfair reason for the termination were the grievances in the demand letter and not the claimant's medical status which in this case is a remote collateral consideration and not a direct cause of the termination.
- b) The court finds that the termination was on 25.02.2015 and the claimant is entitled to unpaid salary for the month of February, 2015 up to 25.02.2015 making **Kshs.9, 694.20**.
- c) The claimant was a member of the N.S.S.F and is not entitled to gratuity for 3 years worked as per section 35(6) (d) of the Employment Act, 2007.
- d) The claimant is entitled to **Kshs. 11, 633.00** being one month salary in lieu of notice.
- e) No specific pleadings and submissions were made for salary underpayments for the period worked and the prayer will therefore fail as the special damages were not specifically pleaded.
- f) The claimant admitted owing the respondent Kshs. 12,000.00 and the court finds that in the interests of justice the same is deductible from the final dues payable and the amount in the final orders reflects the sum due after effecting the deduction.

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

- a) A declaration that the termination of the claimant's employment by the respondent was unfair and unlawful.
- b) The respondent to pay the claimant a sum of **Kshs.148, 923.20** by 01.06.2016 failing interest at court rates to be payable thereon from the date of this judgment till full payment.
- c) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Thursday, 14th April, 2016**.

BYRAM ONGAYA

JUDGE