



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 60 OF 2014

(Formerly Civil Suit No. 57 of 2006 in the High Court at Nyeri)

JOHN NJIRAINI MWANIKI.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED.....DEFENDANT

(Before Hon. Justice Byram Ongaya on Friday, 13th May, 2016)

JUDGMENT

The plaintiff filed the plaint on 19.10.2006 through C.M. King'ori Advocate. The defendant filed the statement of defence on 15.11.2006 through Wahome Gikonyo & Company Advocates.

The amended plaint was dated 24.03.2015. The plaintiff prayed for judgment against the defendant for:

- a. A declaration that his dismissal with the defendant company was unlawful or unfair and general damages thereof.
- b. Kshs. 722, 472.00 being damages for the unfair termination.
- c. Kshs. 511, 751.00 being severance pay.
- d. Costs of the suit.
- e. Interest on (a) and (b) above at court rates.
- f. Any further or better relief.

The amended statement of defence was filed on 07.04.2015. The defendant prayed that the plaintiff's suit be dismissed with costs.

The defendant employed the plaintiff in August 1985 to serve in the position of Clerk Grade IV. The plaintiff was promoted to Clerk Grade IIB, job group J effective 01.06.1997.

The medical evidence shows that in the course of his employment, the plaintiff developed a hypertensive condition characterized with the plaintiff's involuntary incapacity to control his actions. Haunted by that medical condition, the plaintiff involuntarily and unconsciously wrote the letter of 07.02.2003 addressed to the defendant's regional human resources officer for Mt. Kenya thus,

“RE: RESIGNATION

I would like to resign from my job as from the date above. This is for my own personal reasons.

John N. Mwaniki

Signed”

On 09.02.2003 the plaintiff wrote another letter to the defendant’s regional human resources officer thus,

“RE: WITHDRAWAL OF MY FORMER RESIGNATION LETTER

I am now recovering at Hospital and almost feeling well. Now this is to withdraw my former letter (above) which I gave to you while I wasn’t actually knowing what I was doing as that day I was feeling very confused and things were going very fast. I can’t recall the things I did on that particular day. So, please treat that resignation letter as null and void. Thanks.

Yours faithfully,

John N. Mwaniki

Signed”

The defendant addressed to the plaintiff the letter dated 14.02.2003 thus,

“RESIGNATION

We are in receipt of your letter dated 7th February, 2003 tendering your resignation and advise that this has been accepted with regret.

You will, therefore, be paid your dues up to and including 7th February, 2003 your last working day plus 10 days (5 days for 2002 and 5 days for 2003) being your terminal leave. As you did not give the Company three months’ notice as required, we will recover an equivalent of your three months’ basic salary from your final benefits in lieu of notice to the Company.

The Employee Benefits Manager will advise you under a separate cover as regards your Final Benefits. Please forward to him a duly completed clearance certificate to enable him prepare your benefits.

I take this opportunity on behalf of the Management to thank you for the 17 years and 5 months service you have rendered to the Company and wish you success in all your future endeavours.

Yours faithfully,

For: THE KENYA POWER AND LIGHTING CO. LTD

Signed

ROSEMARY H. GITONGA (MRS.)

REGIONAL MANAGER, MT. KENYA”

By the letter dated 17.02.2003 the plaintiff raised a dispute with the regional manager. The plaintiff explained that on 7.02.2003 he had a mental confusion which led him to make many abnormal decisions one of which was to write the resignation letter. The security personnel had evicted him from the respondent’s business premises without the officers attempting to understand his predicament. On Sunday 09.02.2003 colleagues had visited him at hospital and upon learning about his abnormal and not intended resignation letter, he wrote the letter withdrawing the resignation. The plaintiff had handed that letter of withdrawal of resignation to one Jospat Wachira Kagwengo for purposes of the delivery. The plaintiff

lamented that the acceptance had come as a big surprise to him because he was still under medical duty-off until Wednesday, 19.02.2003. The plaintiff therefore looked forward to hear from the regional manager.

By the letter dated 24.02.2003 the plaintiff's doctor one Dr. I.L.M. Muturi wrote to confirm that the plaintiff was hypertensive, he had seen him 4 times in an emotional situation since 1986 and he had observed the plaintiff on 2 occasions with highly elevated blood pressure which could cause any behavioral changes including disinhibition and violence. On 08.02.2003 workmates and the plaintiff's wife had taken the plaintiff to the doctor and the plaintiff had a highly elevated blood pressure of 270/140 and he was delirious, disoriented and incoherent and it was 24 hours after the office episode (of 07.02.2003 at which the plaintiff had written the resignation letter). On 18.01.2003 the doctor wrote that he had seen the plaintiff who had not taken his medicines since January 2001. He recommended that the plaintiff needed to take his medications seriously as that would be compatible with working to full and mature retirement in his employment. The doctor wrote that as at time of his writing, the plaintiff was medically fit to continue his normal duties.

The defendant's regional human resources and administration officer one Elizabeth Kalei (also being the respondent's witness RW) wrote an email to the doctor referring to the doctor's letter of 24.02.2003 and seeking clarification whether it was the plaintiff's negligence not to have taken medicines since January 2001 and whether on 07.02.2003 the plaintiff's hypertension might have been triggered by voluntary intoxication such as taking of alcohol or narcotics. The clarifications were required to enable the defendant to further handle the plaintiff's case.

The doctor made clarifications by his letter dated 06.03.2003. The doctor clarified that negligence was the cause of most human ailments; that the defendant had recently lost another staff to high blood pressure; hypotensive drugs were expensive; and the money the defendant allocated to its staff was inadequate so that most of them failed to buy drugs when their allocation got depleted. The events of 07.02.2003 were bizarre and utterly inappropriate and the doctor believed the plaintiff was not in control as the plaintiff was in a state of autonomism as he was still confused one day after the episode in the office and he had to be restrained in hospital for two days under close watch by the hospital staff.

The plaintiff wrote on 17.06.2003 to appeal against his termination stating that it was unfair for the defendant to sack him on account of ill health and after he had given a service of 17 years. He appealed that the managing director and the deputy managing director intervene on his behalf. The defendant's chief manager, human resources and administration replied the letter by the letter dated 17.06.2003 that the management's decision had been upheld and by a further letter of 03.07.2003 upholding the termination. The management again upheld the termination by the letter dated 26.08.2003.

On 25.11.2004 the union officials met the management and despite showing all the evidence that the resignation letter by the plaintiff had been made when the plaintiff was out of his mind, the management said they had closed the case and nothing could be done about the plaintiff's request for reinstatement.

The court has considered the pleadings, the evidence and the submissions filed for the parties.

The **1st issue** for determination is whether the termination was unfair. There is no doubt that the plaintiff wrote the resignation letter on 07.02.2003 and again wrote on 09.02.2003 to withdraw the same. RW testified that she was aware that the plaintiff had written on 09.02.2003 withdrawing the resignation letter but on the said 09.02.2003 the resignation had already been accepted. RW further testified that the letter of acceptance of the resignation had been made on 14.02.2003. Upon receiving the letter of 09.02.2003, RW remarked thereon that it was belated because she had already forwarded the resignation letter to the defendant's head office at Nairobi.

The court has considered the material on record. First, before the defendant accepted the resignation letter, the plaintiff wrote withdrawing the resignation. Secondly, the writing of the resignation letter was the plaintiff's unilateral decision and its withdrawal was also perfectly his unilateral decision. Thirdly, the plaintiff has established that at all material times he was belaboring under the hypertension condition and

he was not in control of his actions so that there is no doubt that the plaintiff consciously desired and intentionally wished to leave employment by way of resignation. In the circumstances of this case the court returns that there was no valid contract between the parties to terminate the contract of employment; or the plaintiff never resigned from employment unilaterally because at all material times, the plaintiff was not in control of his mental faculty at all material times that he wrote the resignation letter. The court further finds that the defendant's decisions upholding the purported acceptance of the plaintiff's alleged resignation were unfounded as were unjustified in view of the established plaintiff's health predicament at all material times. The court finds that the defendant acted unreasonably in failing to consider the established health status of the plaintiff which at all material times had vitiated the alleged resignation of the plaintiff. Thus to answer the 1st issue for determination the court returns that the termination of the plaintiff's employment was unfair for want of a valid or genuine reason for the termination. It was submitted for the respondent that the idea of unfair termination of the employment contract was introduced in the Employment Act, 2007 which does not apply to the present case. The court holds that all that the Act did was to codify principles of unfair termination of the contract of employment and prior to the Act, nothing precluded the courts from making a finding of unfair termination on account of unreasonableness or want of genuine reasons like it is the case in the present suit, or, unfairness on such other measures or scales of justice in the employment environment.

The **2nd issue** for determination is whether the plaintiff is entitled to the remedies as prayed for. The court makes findings as follows:

- a. The plaintiff has prayed for a declaration that his dismissal with the defendant company was unlawful or unfair and general damages thereof. The court has found that the termination was unfair. Is the plaintiff entitled to general damages? The court has considered the plaintiff's service of 17 years. The court has considered the defendant's unreasonableness in failing to consider the overwhelming medical evidence that supported the plaintiff's case that he acted to write the resignation letter while he was sick and the action was involuntary. The court has considered that the defendant knew that the plaintiff had the recurrent hypertension that required continuous medical support and that the plaintiff was not adequately provided by the defendant to meet the cost of the recurrent medical care. The court considers that at all material times the defendant owed the plaintiff a duty of care and not to negligently remove the plaintiff from employment. The court finds that the defendant breached that duty of care when unreasonably, by not taking into account the plaintiff's health predicament in writing the purported resignation letter, nevertheless decided to purport to accept the resignation letter even after the plaintiff had validly withdrawn the same. The defendant further acted negligently by unreasonably upholding the termination on account of the plaintiff's resignation which had been vitiated by reason of the prevailing plaintiff's mental health status. On account of that unreasonableness and negligence, the plaintiff seriously suffered injuries including loss of his employment. On that account, the plaintiff is awarded **Kshs. 1,000,000.00** being general damages for the unfair negligent and unreasonable termination of the contract of employment between the plaintiff and the defendant.
- b. The plaintiff prayed for Kshs. 722, 472.00 being damages for the unfair termination. The court returns that the plaintiff is not entitled to the prayer which is founded upon section 49(1) (c) of the Employment Act, 2007 which was not in operation at the time of the cause of action.
- c. The plaintiff has prayed for Kshs. 511, 751.00 being severance pay. The court finds that the basis of the claim and prayer has not been established and the same will fail.

In conclusion, judgment is hereby entered for the plaintiff against the defendant for:

- a. The declaration that the termination of the plaintiff's contract of employment with the defendant was unfair as it was negligent and unreasonable.
- b. The defendant to pay the plaintiff a sum of **Kshs. 1,000,000.00** by 01.07.2016 failing interest to be payable thereon from the date of this judgment till full payment.
- c. The defendant to pay the plaintiff's costs of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 13th May, 2016.**

BYRAM ONGAYA

JUDGE