REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 563 OF 2015

BETWEEN

KENYA PLANTATION AND AGRICULTURAL

WORKERS UNION ……..…….
CLAIMANT

VERSUS

1. REA VIPINGO PLANTATIONS LIMITED

2. DR. JJ ASHRAPH……..
RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Meshack Khisa Trade Union Officer, for the Claimant

Ms. Akinyi Opolo Advocate instructed by the Federation of Kenya Employers for the Respondent

---

ISSUE IN DISPUTE: RETIREMENT ON MEDICAL GROUNDS

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed this Claim on behalf of its Member [Grievant], Joseph Ouma Oloo, who was retired by his Employer the 1st Respondent herein, on medical grounds with effect from 30th March 2015. The Claimant's Pleadings are printed in the font style known as Brandley Hand ITC, which looks very informal, and unsuitable for serious judicial proceedings. The Claimant Union is advised to stick to the formal font styles used in our Courts.

2. The Grievant was diagnosed with Hernia. He went through two medical procedures to correct the problem, the first carried out at Kilifi District Hospital on 1st July 2014. The Doctor recommended after the surgery, that the Grievant is placed on light duty. The Grievant claims the 1st Respondent failed to assign him light duty and consequently the Hernia recurred in December 2014, causing the Grievant to be hospitalized at Sayyida Fatimah Hospital for another surgery. Both Hospitals treated the Grievant and recommended he is placed on light duty.

3. The Claimant states in disregard of this medical advice, the 1st Respondent conspired with the 2nd Respondent to terminate the Grievant's contract of employment on medical grounds. The 1st Respondent wrote a letter dated 4th February 2015 to its Doctor the 2nd Respondent, stating that the Grievant had been ailing for some time; he had exhausted his sick leave; and was unable to attend to his duties completely. The 1st Respondent sought medical advice from the 2nd Respondent, concerning the Grievant's ability to work.

4. Dr. Ashraph replied the same day, 4th February 2015, advising that he had examined the Grievant, and it was inadvisable for the Grievant to continue working. *'' I therefore recommend Joseph Ouma to retire on medical grounds after the operation,''* states the Doctor. It is this advice which informed the decision of the 1st Respondent to terminate the Grievant's contract with effect from 30th March 2015.

5. The Claimant prays the Court to:

a. Restrain the 1st Respondent from terminating, dismissing, and/ or retiring the Grievant from employment and from evicting the Grievant from the Company House.

b. Invalidate and set aside the 2nd Respondent's Medical Report recommending the retirement of the Grievant.

c. The 1st Respondent to reinstate the Grievant and deploy him in other duties for 12 months, other than in corona, brush-room and sisal cutting Departments, which are high risk areas in making recurrent the Grievant's medical condition, pending further assessment of the Grievant by the Department of Occupational Safety and Health.

6. The Respondents filed their Statement of Response on the 21st August 2015. The facts with relation to the Grievant's employment and duties are not contested. It is accepted the Grievant suffered Hernia, and was treated at the two Hospitals. The advice from the Doctors in both Hospitals, that the Grievant should not carry or lift heavy objects, is undisputed. The Respondents however state, it was the Grievant himself, who wrote to the 1st Respondent on 2nd February 2015, asking the 1st Respondent to retire him on medical grounds, under Clause 7 [iii] of the Parties' Collective Bargaining Agreement. It was then the 1st Respondent sought the advice of the 2nd Respondent, and the Grievant subsequently retired.

7. Parties continued to engage after termination. On 28th May 2015, they appeared before Dr. Kamau who examined the Grievant. This Doctor too, recommended the Grievant is restored and assigned 'light duty,' as a Security Guard. The 1st Respondent disagreed with Dr. Kamau's perception of light duty. There was no light duty available in the 1st Respondent's Business in any event. The 1st Respondent therefore wrote to the Grievant advising that the decision to retire the Grievant on medical grounds would not be interfered with. It was against this background that the Claim found its way in Court.

8. Parties agreed on 11th August 2015, to have the Grievant continue in employment and continue residing in the Company House pending the disposal of the Claim. They also agreed to have the entire dispute considered and determined on the strength of their Pleadings, Affidavits, Documents, and Submissions on record, under Rule 21 of the Industrial Court [Procedure] Rules 2010.

Claimant's Submission

9. The Claimant submits the medical history of the Grievant is not disputed. He was diagnosed with Hernia in May 2014. Dr Nigel of Kilifi Hospital recommended the Grievant is placed on light duty. The 1st Respondent continued to assign the Grievant sisal cutting. He deteriorated and was hospitalized at Kilifi Hospital where the first procedure was carried out. The Doctor recommended after the procedure that the Grievant is placed on light duty. This advice was disregarded by the Employer.

10. The result was that the Hernia recurred. The Grievant was admitted at Sayyida Fatimah Hospital where he was operated on for the second time, on the 26th February 2015. The advice after this second procedure was the same: place the Grievant on light duty. The response from the 1st Respondent was the same: ignore the Doctors.

11. The Grievant exhausted his sick leave. The 1st Respondent stopped paying the Grievant the monthly half salary contrary to the CBA. This placed the Grievant in a pecuniary embarrassment, depression and frustration, which compelled him to write to the 1st Respondent the letter, dated 2nd February 2015 asking to be apportioned light duty, or is retired if there was no light duty. The Claimant submitted this letter from the Grievant to the 1st Respondent was not an act of free will, but was written in reaction to the frustration the Grievant was subjected to by the 1st Respondent. The Parties continued to consult even after the letter of retirement issued.

12. The Parties agreed to have the Grievant examined by Dr. Kamau, who is registered as an Occupational Safety and Health Practitioner based at Mombasa. The Doctor concluded the general medical condition of the Grievant was good. He had recovered from the past operations, but would have a recurrence of the Hernia if he strained in the course of heavy duty. It was recommended the Grievant was unfit to cut sisal. He needed reassignment, and security duty would fit his condition. The 1st Respondent did not agree with the recommendation.

13. The Claimant wrote to the Director of Occupational Safety and Health seeking a further medial opinion. Dr. Yusuf Hussein was assigned the task and upon examining the Grievant advised the Grievant should be redeployed to perform light duty for a period of 6 months, and thereafter, be re-assessed. Further, it was recommended the Grievant be reinstated and issued with a redeployment certificate.

14. The Claimant submits that the 5th Schedule of the Employment [General] Rules 2014 describes 'light duty' as work not exceeding 2 hours in the Agricultural Sector. The Claimant urges the Court to uphold the recommendation made by a series of Doctors to have the Grievant placed on light work. It is submitted for the Claimant that the Report by the 2nd Respondent was unprofessional and should be rejected by the Court. The Claimant prays the Court to assist the Grievant in terms of paragraph 5 above.

Respondents' Submissions

15. The Respondents as suggested earlier, do not contest the medical history of the Grievant. He suffered Hernia, was twice operated on, and variously recommended for light duty. The Grievant requested the 1st Respondent to retire him on medical grounds. The 1st Respondent sought medical advice before doing so, and received advice from the 2nd Respondent, to have the Grievant retired after the Grievant had gone through another operation. The Doctors at Sayyida Fatimah Hospital who conducted the operation recommended the Grievant is allocated light duty. The Grievant was subsequently reviewed by Dr. Kamau as submitted by the Claimant who similarly recommended light duty.

16. After considering the medical evidence and the frequent recurrence of the Grievant's illness, the 1st Respondent determined the only option left was to retire the Grievant on medical ground.

17. Light duty as defined in the 5th Schedule of the Employment [General] Rules 2014, is with reference to employment of Children in the Agricultural and Horticultural Sector. The definition of light duty as comprising work of no more than 2 hours a day, does not extend to Adults. This being so, light duty, with reference to Adults should be seen against the particular individual's state of health. The Grievant had

numerous surgical procedures, and a recurrent condition. No light duty could be performed by him, even if such duty was shown to be available at the 1st Respondent's Business.

18. The Grievant correctly chose to retire, acknowledging there was no light work he could perform. The 1st Respondent consulted a Doctor as required under the CBA, and retired the Grievant. The 1st Respondent acted within the law. The decision to retire the Grievant was proper. Clause 7 [iii] of the CBA provides that: '' *an Employee who has exhausted his sick leave, is entitled to be retired on medical grounds after consultation with the Medical Board or a Doctor.*'' The 2nd Respondent is such a Doctor and his advice was proper and actionable. His Report is valid and cannot be rejected by the Court.

19. Lastly the Respondents submit that in the absence of light work at the workplace, it is not possible to enforce an order of reinstatement. The Grievant requested he is retired, complaining to the 1st Respondent that he was constantly suffering due to his medical condition. He cannot be reinstated against his wish. His condition is recurrent, and reinstating him would only place him at a greater risk of recurrence. The Respondents pray for dismissal of the Claim with costs to the Respondents.

Issues

The issues as proposed in different ways by the Parties, and as understood by the Court, are:

- Was retirement of the Grievant by his Employer on medical ground, fair and lawful?
- What constitutes 'light duty', and to what extent should an Employer accommodate an Employee who is injured or who falls ill, during employment?
- What is the role of Occupational Safety and Health Doctors at the workplace?
- Is the Claimant entitled to the prayers sought?

The Court Finds:-

20. The Parties agree that: they had a CBA for the period relevant to the dispute; the Grievant was an Employee of the 1st Respondent assigned the role of cutting sisal; he was diagnosed with Hernia on 20th May 2014; and he was consequently unable to discharge his normal duty. He was granted sick leave, sought medical attention, and underwent 2 surgical procedures.

21. There is no dispute the Grievant was first treated at Kilifi Hospital. He went through the first surgical procedure at Kilifi Hospital on 21st July 2014. The Doctors advised he should not carry heavy objects. The Claimant states and this is not disputed by the Respondents, that the Grievant continued to cut sisals on resumption of work. In December 2014, the Hernia recurred necessitating the Grievant is taken through a second surgical procedure at Sayyida Fatimah Hospital, on 26th February 2015. The Doctors at this Institution once again advised against the Grievant being assigned physically exerting duty, such as sisal cutting.

22. Before this second procedure, the Claimant had written to the 1st Respondent a letter dated 2nd February 2015, referenced ' No Pay For a Long Time.' He laments that the Doctor had recommended he is placed on light duty; the 1st Respondent had not availed light duty to him; he was no longer receiving his salary; his entire Family was suffering; and he would rather be retired if there was no light duty available. The Court does not think the Grievant made a voluntary decision through this letter, to be retired on medical grounds. He wrote at a time when the Employer had ceased to pay to him the half monthly salary, and at a time the Employer had not made up its mind, what it should do with the Grievant. This letter was not an act of free-will.

23. Two days later, the 1st Respondent wrote to its Doctor Ashraph, the 2nd Respondent herein,

seeking medical opinion before retiring the Grievant. The 1st Respondent told its Doctor that the Grievant alongside another Employee, had exhausted his Sick Leave, and was unable to attend to his normal work completely. The 2nd Respondent replied the same date, regurgitating what the 1st Respondent had communicated to the 2nd Respondent, in the letter referring the Grievant to the 2nd Respondent for medical evaluation: that the Grievant was working at the 1st Respondent's Plantation; he was cutting sisal; he had recurrent Hernia; he was unable to work for the preceding 6 months; and it was inadvisable he returns to work. The Doctor recommended the Grievant is retired, after the second operation, on medical grounds.

24. It was after the second operation that the 1st Respondent wrote the letter of retirement to the Grievant. The letter, dated 23rd March 2015 advised the Grievant he had been retired, on the strength of the medical opinion from the 2nd Respondent.

25. Upon review of the medical advice generated by different Doctors, the Court finds the decision to retire the Grievant on the sole advice of the 2nd Respondent was neither fair, nor lawful.

26. Firstly, there was the opinion of the Doctors at Kilifi who had recommended the Grievant is placed on light duty. He was not placed on light duty, and the Hernia recurred as a consequence of the Employer's refusal to heed the advice of the Doctors at Kilifi.

27. The Report by Doctor Ashraph was hastily done. It did not refer to the earlier opinion from Kilifi Hospital on placement of the Grievant on light duty. The Report merely recycled the views of the Employer communicated to the 2nd Respondent in the referral letter, and repackaged them as medical advice to justify retirement of the Grievant. The advice was given on the same day it was requested for by the Employer.

28. Secondly, there was a second surgical procedure pending, at the time Doctor Ashraph gave his opinion with finality. It was not explained by the Doctor why he would recommend retirement after the Grievant was operated at Sayyida Fatimah Hospital. Doctor Ashraph was not carrying out the procedure at this Hospital. He could not impose his views on the Doctors at the Hospital. He would not know what their treatment of the Grievant would yield. He did not know what their opinion would be after the surgery. In short, he did not know if the second procedure would result in an opinion different from that Dr. Ashraph had already communicated to the 1st Respondent.

29. The opinion from Sayyida Fatimah tallied with that from the Kilifi Hospital. It recommended light work. The Parties subsequent to the retirement decision, agreed to have the Grievant reviewed by Dr. Kamau who is an Occupational Safety and Health Practitioner. This resulted again in the opinion that the Grievant should be placed on light duty. The Doctor recommended that sisal cutting was not suitable for the Grievant, but the Grievant could be assigned security duty. This report again contradicted the 2nd Respondent's opinion on the Grievant's ability to continue in employment. Still the 1st Respondent did not accept this opinion. Instead the 1st Respondent changed the justification for refusal to restore the Grievant to work; it now explained there was no light work at the Plantation.

30. Thirdly, the Claimant sought the medical advice of the Directorate of Occupational Safety and Health Services Coast Region. The Grievant was seen by Dr. Yusuf. M. Hussein of the Directorate. He examined the Grievant on the 2nd June 2015. Dr. Hussein offered the opinion that Hernia is not a disease, warranting retirement on medical grounds. Hernia he stated, is congenital in nature, and can be corrected through surgical reconstruction. His recommendation was that the Grievant is reinstated immediately; he is redeployed to perform light duties; and issued redeployment certificate.

31. This last medical examination was sufficient to resolve the dispute, but the 1st Respondent would not budge. The Factories and Other Places of Work [Medical Examination Rules] 2005 do not require the Doctor to recommend light work; the certificate of redeployment requires the Employee to be given *alternative work* in another area, which does not expose him/her to the health risk subject matter

of the enquiry. This would, if termination such as in this case has already occurred, entail re-engagement and not reinstatement. Re-engagement allows the Employer the flexibility to re-employ on different terms and conditions, while reinstatement is rigid, requiring re-employment on the same terms and conditions. It is not easy to determine what is 'light duty' and the law does not define the term, leaving Parties to the employment relationship, to determine what this should mean, in their contractual instruments. The definition contained in the Employment [General] Rules 2014 is not a broad definition to be applied to all Persons; it is a definition specific to employment of Children who have not attained the age of 16 years, in the agricultural Sector. The definition would not apply in the Grievant's case.

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 grant 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 acquiring special equipment to enable the injured or diseased but qualified Employee, continue being productively employed. Fourthly and lastly, reasonable accommodation requires 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 his mental energy. Other jobs are physical, but do not task the brain. Dr. Kamau recommended the Grievant is assigned security duty, but no clear reason is given why such duty was thought to be light, compared to cutting sisal. Was it security duty involving mere collection of visitors' identity cards at the gates of Rea Vipingo, or Night Guard duty, requiring the Grievant to confront sisal thieves? 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 to be 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 27 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.

36. Successive Medical Reports suggested the Grievant could be retained in employment, his Hernia notwithstanding. The Doctors advised this was not a disease as such. It was a condition which could be corrected through reconstructive surgery. The Grievant was assessed to be of general good health. The prognosis was that it would take about 9 months for his Body to repair in full. Why would the 1st Respondent not reasonably accommodate the Grievant for those months? Was the recurrence of the Hernia not due to the 1st Respondent's persistent refusal to place the Grievant on alternative duty?

37. The Court does not think the 1st Respondent adequately explored alternatives outside retirement, in dealing with the Grievant. The Court notes that in the case of ***Juma Mwachidudu Mwazarakwe v. Rea Vipingo Plantations Limited [2015] e-KLR,*** the Claimant therein was injured while working as a sisal cutter at the same Plantation. Injuries were sustained in the same year the current Grievant was diagnosed with, and treated for Hernia, the year 2014. The 1st Respondent held the position then, that it had offered the Claimant Juma, alternative duty of pushing the wagons [zege zege] moving the sisal along the rails at the Plantation. The Claimant then declined the alternative duty, leading to termination. The Court does not think that in the present case, given the similar background with the

previous case, the 1st Respondent endeavoured to avail to the Grievant alternative work for the period it would take him to fully repair. It is difficult to buy the argument that there was absolutely no alternative work the Grievant could perform. The Employer reasonably accommodated Juma. The Grievant herein was in a similar situation as Juma, in his ability or inability to work.

38. The CBA between the Claimant and the 1st Respondent, under Clause 7, states:

a. After 2 months' continuous work attendance with the Employer, an Employee shall be entitled to sick leave with full pay up to a maximum of 45 days.

b. Thereafter, to sick leave of up to a maximum of 50 days with half pay in each period of 12 months continuous work attendance.

c. The Employee is required to produce a certificate of incapacity covering each period of sick leave, signed by a Medical Practitioner.

d. An Employee is not eligible for such leave in respect of any incapacity caused by his/ her own gross neglect.

e. An Employee's absence from duty on account of illness shall not be taken as a reason for his discharge.

f. An Employee who has exhausted his sick leave entitlement is retired on medical ground after consultation with the Medical Board or Doctor.

39. The Court understood this Clause as not inevitably leading to retirement on medical grounds, where sick leave is exhausted. Discernible in this Clause, is the intention of the Parties to have injured or sick Employees reasonably accommodated. The Employer must seek the opinion of the Board or Doctor. The 1st Respondent as seen above consulted the 2nd Respondent. The opinion of the 2nd Respondent was flawed, for reasons discussed above. Parties acknowledged the flaws, by engaging other qualified Occupational Safety and Health Practitioners subsequent to Dr. Ashraph's advice. These Doctors confirmed the opinion given after the first operation at Kilifi Hospital. They contradicted the 2nd Respondent overwhelmingly, and in the view of the Court, theirs, and not the 2nd Respondent's opinion, should have guided the 1st Respondent in its decision against the Grievant. Where a succession of Doctors' advice, discount that of their single Colleague, with regard to the same Patient, common sense would have it that the Employer goes by the advice of the majority of the Experts.

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 1st Respondent had an obligation to reasonably accommodate the Grievant, beyond according him sick leave. The 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 1st Respondent just sought to have its decision validated by its Doctor's medical advice, and gave little or no thought about the other Doctors' opinions. Thirdly the 2nd Respondent appears not to have acted in accordance with his role as an Occupational Safety and Health Practitioner. He just told the Employer what the Employer wanted to hear, and aided the Employer in retiring the Claimant unfairly on medical grounds. He did not adequately consider the professional views of his Colleagues. Occupational Safety and Health Practitioners must endeavour to give honest advice to Employers and Employees, and not just validate, at the stroke of a pen, positions held by the Employers and Employees. Where a Doctor differs with his Colleagues, there should be a professional explanation justifying the divergence of opinion. Lastly the Court is of the view that the Claim is merited.

41. There is however no reason to set aside the Report prepared by Dr. Ashraph. Doctors and other Experts do their work; give their opinions which may be correct or incorrect. The opinion is not to be

invalidated or set aside by the Court, as prayed by the Claimant. It is not the business of the Courts to set aside Doctors' Reports. The role of the Court or the Employer in considering the Reports would be to gauge their probative value in arriving at a decision. While the Court or the Parties could reject such opinion, it is difficult to see in what way the Report can be set aside. Indeed the Court does not see why Doctor Ashraph was made a Party to the Claim. He is not an Employer, just a Medic, who gave advice to the Employer. The Employer was not bound to go by his advice. IT IS ORDERED:-

[a] The 1st Respondent's decision to retire the Grievant on medical grounds was unfair and unlawful.

[b] The Grievant shall be re-engaged, and assigned alternative duty for a period of 9 months from the date of this Award.

[c] During this period he shall be re-assessed periodically by a Doctor to be agreed upon by the Parties, with the concurrence of the Directorate of Occupational Safety and Health Services Coast Region.

[d] The 1st Respondent may decide whether to retire the Grievant on medical grounds, after the expiry of the 9 months, or to fully reinstate him, upon consideration of the last medical assessment report made by the said Doctor.

[e] The Grievant shall retain residence of the 1st Respondent's House for as long as he is in employment at the 1st Respondent's workplace.

[f] Other prayers are rejected.

Dated and delivered at Mombasa this 4th day of December 2015

James Rika

Judge