



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 912 OF 2013**

**SHEILA CAROLINE CIIRU.....CLAIMANT**

**VERSUS**

**THE SAROVA STANLEY.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent for her dismissal from employment. She averred that she was a Room Steward Union Grade 3 from 1<sup>st</sup> February 2006 and that she was transferred to various positions during her service to the Respondent. She averred that she suffered an injury on 24<sup>th</sup> September 2007 which resulted in a lengthy convalescence with resultant loss of mobility in her arm. Her services were terminated on 12<sup>th</sup> March 2013 on medical grounds. She averred that she was wrongfully and unlawfully terminated from employment. She thus sought pay for the days worked in March 2012, retirement gratuity for 8 years service Kshs. 198,213.25, 3 months pay in lieu of notice Kshs. 107,365.50, annual leave for 2010 Ksh. 35,788.50, leave travelling allowance for 2010 Kshs. 3,800/-, compensation for occupational injury Kshs. 50,935.10, 12 months compensation for unfair termination Kshs. 429,462/-, general damages emoluments/contingencies at discount of 15% of the total amount Kshs. 1,056,939.80. She also sought the certificate of service, costs of the suit and any other relief the Honourable Court may deem fit to grant.

2. The Respondent filed a Response to the Claim on 24<sup>th</sup> October 2013. In the defence the Respondent averred that there is no legal entity known as The Sarova Stanley capable of being sued. The Respondent denied terminating the Claimant's employment unfairly and avers that the Claimant's employment was terminated in accordance with Clause 27 of the Collective Bargaining Agreement on medical grounds having been incapacitated by illness at work. The Respondent averred that the Claimant was not entitled to the monetary reliefs she seeks save for retirement gratuity as per the Collective Bargaining Agreement and leave travelling allowance of Kshs. 3,500/-. The Respondent averred the salary for March 2012 was paid in full and that the Claimant served her 3 months notice and duly paid for the notice period served. The compensation for occupational injury was stated to be outside the jurisdiction of this Court and time barred. It was further averred that the maximum compensation was untenable as the termination was regular and carried out in accordance with the terms of the employment. The claim on general damages was stated to be misconceived and untenable under the law of contract. The Certificate of service was admitted to be due to the Claimant.

3. The case proceeded to hearing before me and the Claimant testified that she worked for Sarova Stanley and her termination took place in the 8th year. She proceeded on her leave in February 2013 as usual but on coming back on 11th March 2013 she was given a termination on medical grounds.

The letter stated she could not work due to her condition and she took the letter to her doctor. Her doctor told her that was impossible because for somebody to be terminated on medical grounds they needed to have a letter from a medical practitioner and not Human Resources. She thus decided to seek legal redress because she could not understand why she was terminated and yet she could work. She testified that her injury came along while on duty as a laundry operator in September 2007 and later on she had operation in 2009 which was successful because before then she used to have shoulder dislocations but after operation she did not have any dislocation. The operation was done at Spinal Injury hospital. In December 2012, she was removed from her working area and taken to Guest Room attendant. She was working as a public area attendant at the gym. Later in January 2012 she started feeling some pain on right hand shoulder and went for a scan and it showed a break. She testified that when she brought the report to clinical nurse of Respondent, the nurse actually said there was nothing the nurse could do but would help her out when she come back from leave. When the Claimant came back from leave is when she received the termination letter.

4. She testified that she recalled that in 2010 she did not proceed on annual leave because in 2009 she had gone for many sick offs and in 2010 they said it was not possible for the Claimant to go on leave. She stated that according to Memorandum of Agreement between worker and employee as long as injury has occurred while on duty nothing will be stopped. She said that she also went for 3 months unpaid leave the same year. According to the law she understood that for someone to be terminated on medical grounds it can only be on the strength of a letter from medical practitioner and that her termination was unlawful and unfair. After operation she continued to work and did not have any pain or any injury.

5. In cross-examination by Mr. Mari for the Respondent she testified that she fell and that the CBA did not give the Respondent the right to terminate. She was referred to the CBA and admitted that the CBA had provision for an employee can be retired on medical grounds prior to attainment of 55 years. She testified that there should be a certificate from medical officer and that she saw a clinical officer at Stanley. She used to have dislocations of right-hand shoulder and when it would be dislocate it would affect her work. She stated that Dr. Kaushal was the company doctor and she saw him before her operation in January 2009. She testified that Dr. Kaushal spoke with her doctor and that they agreed that she be given light duties. She said that she did not know what the company doctor recommended and stated that maybe he had said that she could not work. Her doctor was at the spinal injury. Regarding the termination letter she testified that her termination letter informed her of the grounds of termination which were medical reasons. She stated that the certificate by Dr. Kaushal was not good as it was not from a Government doctor. She conceded that the CBA did not provide that only a Government medical practitioner can give a certificate. She agreed that she received salary for the months of March, April and May and that she was only seeking salary for March 2012. On being shown an exhibit in the Response she admitted that she was paid salary for March 2012. She was shown the leave application form and agreed that she had taken 46 days leave in 2010 & 2011. She confirmed from her letter of employment that she has nothing to show she is entitled to leave travelling allowance. She testified that Dr. Kaushal did not treat her and that her doctor said that she should be given light duties.

6. The Respondent called Susan Wanjiru Ngoiri who stated that she worked with Sarova and specifically Sarova Stanley. She stated that the Respondent is her employer and that she was from Human Resources. She testified that she knew the Claimant and was conversant with her claim. She admitted that the Claimant is entitled to gratuity at 18 days for each year worked. She testified that the Claimant received her last salary as per the payslip exhibited. She also testified that travel allowance of Kshs. 550 is due to the Claimant. She testified that the Claimant's services were terminated as per the CBA on medical grounds and that the Respondent was entitled to do so. Dr. Kaushal's report was the basis. She testified that she was aware that Dr. Kaushal contacted the Claimant's doctor and in conjunction they were of the view that the Claimant should be retired on medical grounds. She testified that the Respondent complied with Clause 2.9 of the Claim which states that an employee can be retired on medical grounds provided there is a medical practitioners opinion. She testified that the Claimant was paid her salary, the notice period and she took leave and thus the Claim was not competent and should be dismissed.

7. In cross examination by the Claimant the witness testified that she saw the medical report by Dr. Kaushal and filed it in the file. She also stated that the Claimant went on leave as per the muster roll and the leave was for 26 days plus 4 off days as well as 16 days for public holidays making a total of 46 days. She conceded that the leave travelling allowance may not have been paid

8. The second witness called was Dr. Rajan Kaushal who testified that he is a general medical practitioner holding an MBBS (Bachelor of Medicine & bachelor of Surgery) degree from Mysore University, India. He testified that he has practiced for 34 years and that he had examined the Claimant severally over 2 or 3 months. He testified that he is the medical advisor of the Respondent. He stated that he was instructed by the HR Manager of Sarova the employer to examine the Claimant. He consulted the orthopedic surgeon at Hurlingham. The orthopedic surgeon is the one who had operated on her. He testified that he advised that the Claimant be relocated as a room attendant as it entailed movement of furniture. He advised relocation and if not possible she be retired and he was advised that she was retired.

9. The Claimant applied to be allowed to call a rebuttal witness and she was permitted to call her orthopedic surgeon Dr. Dennis Otworu.

10. Dr. Dennis Otworu Onsinyo testified that he was a doctor at the National Spinal Injury Hospital and that the Claimant has been his patient. He testified that he saw her on 2009 when she presented with a dislocation of the shoulder joint and she was operated and recovered fully. She was to be on light duties. She stated that she was relieved of duty due to illness and being a doctor who is designated to permit retirement on medical grounds he knew the law was broken. He testified that workers are not just retired by doctors and the process of retiring workers has to involve the Director of Medical Services and that what the employer should have done is write to the Director of Medical Services stating that they did not think the employee can continue working and the DMS will assemble a panel of 5 doctors a surgeon, a psychiatrist, a medical officer and orthopedic surgeon. The Board sits weekly and reviews the patients and then write to specify if the patient should be retired. He communicated the same to the employer through his letter of 14<sup>th</sup> March 2013. He admitted that he spoke with the company doctor and was trying to bring the company doctor to procedure on retirement on medical grounds.

11. In cross-examination by Mr. Mari the doctor testified that he saw the Claimant after her termination and examined her and established she had fully recovered. He was not able to cite the law applicable but stated that it is gazetted and an employee cannot be retired by one doctor. He testified that he did not see her terms and conditions of service and that his responsibility as a doctor is not to go through those details. He testified he spoke to the company doctor and advised that the Claimant be put on light duties and later full duties. He testified he did not expect the company doctor to go the way he did. That closed the Claimant and Respondents cases.

12. Parties filed written submissions. The Claimant submitted that the Respondent violated the Claimant's right to work and that the Court should find in her favour as the Respondent had failed to prove the reasons and procedure for termination were valid. She submitted that she is entitled to full compensation as per the Claim. The Respondent submitted that the claim in respect of gratuity was payable as well as leave travelling allowance of 3,500/-. The Respondent submitted that the rest of the Claim was paid.

13. The Court was faced with a suit that combined elements of the compensation due for injury at work. This Court is the appellate Court for such claims and does not therefore have jurisdiction to entertain the claim on this aspect at a court of first instance. This portion of the claim is therefore dismissed. Regarding the gratuity and the leave allowance there was concession that the sums are due. The Claimant based her calculation on the rate of Kshs. 35,788.50 while the Respondent based it on Kshs. 18,222/- which was a combination of house allowance and basic salary. None of the parties annexed the relevant portion of the CBA in force and it is therefore imperative that the provisions of the Employment Act in so far as the formula on gratuity be applied.

14. The gratuity payable is a factor of the monthly salary and not just the basic salary and housing. In the premises it would be calculated based on the sum of 34,788.50. The Claimant would thus be entitled to Kshs. 166,984.80 under this head. She served the notice period of three months and thus no notice is payable.

15. Regarding the termination the Claimant stated that it was not warranted as she had recovered. Dr. Kaushal who was the Respondent's doctor testified that he recommended that the Claimant be given light duties and failing which she could be retired. The Respondent opted to retire her. The Court has had to research on the issue. Apparently there is a Board that sits headed by Dr. Kiima at who is based at Afya House. The Board sits regularly and determines if the incapacity of an employee is sufficient for the employer to declare the employee unfit to work. The Board comprises of 5 doctors drawn from different fields and the panel determines on the strength of medical reports and evaluation of the condition of the employee whether the employee can continue working or of the incapacity is sufficient to permit the employer to terminate on account of the condition. The Respondent was given advice by its own doctor and instead of trying to adhere to it opted to terminate. If the Respondent had involved the Board at Afya House or the other Board that is based at the Ministry of Labour under the Director of Occupational Safety & Health which deals with work injury and illness disability assessment, there would have been no problem. Both these boards are comprised of doctors from different specialties who are mandated to give a verdict that the employer can rely on. The reason for the termination was not proved to have been fair at all. It was therefore unfair within the meaning of Section 45 of the Employment Act 2007. The Claimant had worked for 8 years and her services were abruptly disrupted. This is a case where the maximum 12 months would suffice as compensation. The Claimant would probably have served for a longer period but the limit imposed by statute is compensation up to a maximum of 12 months. She will also have costs of the suit. The Court will not award any general damages on the contract of service. No reason was advanced or case law availed that would cause and entry of judgment for damages for the case before me.

16. In the final result I enter judgment for the Claimant against the Respondent for:-

- a. Kshs. 3,500/- as leave allowance
- b. Kshs. 166,984.80 as gratuity
- c. Kshs. 417,462/-
- d. Costs of the suit.

Orders accordingly

**Dated and Delivered at Nairobi this 18<sup>th</sup> day of July 2014.**

**Nzioki wa Makau**

**JUDGE**