



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 60 OF 2013

(Formerly Cause No. 1265 of 2010 at Nairobi)

A M M.....CLAIMANT

-VERSUS-

SPIN KNIT LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 4th October, 2013)

JUDGMENT

The claimant is **A M M**. The respondent is **Spin Knit Limited**. The claimant filed the memorandum of claim on 8.10.2010 in person and subsequently appointed B.W. Mathenge & Company Advocates to act on his behalf.

The claimant prayed for judgment against the respondent for:

- a. **4 months wage in respect of notice period at Kshs.7,683.00 making Kshs.30,732.00;**
- b. **16 days annual leave due but not taken being Kshs.11,483.00;**
- c. **6 days due off duty being Kshs.2,206.40;**
- d. **11 years severance pay at 22 days per year being Kshs.96,586.30;**
- e. **Refund of medical bills paid Kshs.1,200.00;**
- f. **Traveling costs on medication Kshs.4,000.00;**
- g. **11 years gratuity at 15 days per year being Kshs.65,854.30;**
- h. **12 months wages for unfair dismissal being Kshs.92,196.00;**

Total quantified claim being Kshs.304,258.00

1. **Costs of the suit; and**
10. **Any other remedy the court may deem fit.**

The claimant also prayed for further orders that the respondent is directed to complete and submit the relevant medical forms to enable the claimant to access compensation of injury incurred.

The respondent filed the memorandum of response on 01.12.2010 through the Federation of Kenya Employers. The case was heard on 24.07.2013. The claimant gave evidence to support his case and K K **(RW)** employed by the respondent as a supervisor gave evidence to support the respondent's case.

The claimant was employed by the respondent on 1.9.1997 as a machine operator at a pay of Kshs.615 per week and as a casual employee. He was confirmed in permanent employment on 1.1.2001 at a

monthly salary of Kshs.3,300.00 and a monthly house allowance of Kshs.800.00.

The claimant testified that he was terminated from employment on 1.7.2009 after unbroken and clean service of 11 years.

The claimant further testified that on 9.12.2005 at about 10.05 pm, he was walking from work to his home when four thugs attacked and seriously injured him. The respondent had not provided transport from work to home that night because, according to the claimant, he stayed at a place called Kaptembwa within Nakuru Town and under the respondent's operational policies, the place was near the claimant's work place and therefore transport was not necessary. Following the attack, the claimant's lower jaw was dismembered and he went comatose. The incident was reported at the Central Police Station in Nakuru and the claimant treated at the Intensive Care Unit of the Provincial Hospital at Nakuru. Throughout the medical attention, the respondent did not take any steps to assist the claimant in view of the serious injuries the claimant suffered.

The claimant was discharged on 27.12.2005 and reported at work a week thereafter about 6th or 7th January, 2006. The doctor had prescribed light duty for the claimant but the respondent assigned heavy duties with the consequence that the claimant's jaw under treatment suffered infection as advised by the doctor at the General Hospital in Nakuru. The claimant was referred for comprehensive medical operation at the Kenyatta National Hospital at a cost of Kshs.120,000.00. He was given a month's sick leave.

Towards end of February 2006, the claimant presented to the respondent's personnel office the medical prescription for light duty and the evidence of the medical costs. He was not assigned light duty and the respondent did not act to meet the medical costs. The respondent refused to complete relevant forms provided by the labour officer to enable the claimant to access the necessary compensation for the injuries sustained.

The respondent deployed the claimant from the automatic to manual machine with the consequence that the claimant's body deteriorated and failed substantially. The respondent, according to the claimant's testimony, refused to act upon the claimant's complaint. Instead, the respondent issued warnings of failure by the claimant to meet the targets. The respondent demanded that the claimant meets the production target of 3 Kg on the manual machine but the claimant failed and requested to see the doctor.

The respondent's doctor confirmed that the claimant was inflicted with bronchitis and the doctor prescribed light duty. The doctor also advised that the claimant should not be deployed to operate the manual machine.

Subsequently, the respondent's management demanded that the claimant goes for a mandatory HIV-AIDS testing. The respondent objected because the respondent's doctor had already given the relevant medical report and prescribed light duties. The claimant was forced to go for the mandatory HIV-AIDS testing by the respondent's administrative manager and nurse. At the Voluntary Counseling and Testing (VCT), the claimant testified that the VCT officials objected to the forced testing. The respondent's nurse and administrative officer left the claimant and the claimant's workmate called Fredrick (also made to attend the forced HIV-AIDS testing) with the VCT officers who subsequently declined to forcefully test them as demanded by the respondent.

The following day, the claimant reported for duty. It was a weekend. The security personnel at the gate locked the claimant out on account that the management had given instructions that he should not be allowed in unless he produced his HIV-AIDS status test by the VCT. Since that event and date, he never went to work again.

On 1.9.2009, he received a termination letter on account of absence without permission or reasonable cause. The respondent had forced the claimant and three other employees to go for HIV-AIDS testing and all of them had initially suffered injuries. The claimant testified that one of the three was persuaded to resume duty but he soon thereafter died of the consequences of the heavy duty in 2009. His name was

Mitei. The letter for summary dismissal dated 1.9.2009 addressed to the claimant stated as follows:

“RE: SUMMARY DISMISSAL

It has come to the notice of Management that after a medical investigation report dated 19th August 2009 by the Company Doctor, you were advised to report for light duty at your respective place of work but you declined even after several attempts by the Management to convince you on the same.

On 28th August 2009, a meeting was held between you, the chief Shop steward and the Management it was agreed that you report for duty as stated before.

At your place of work, you were asked to start working but you declined and matched away – thus disobeying to follow the lawful and proper command from the person in authority. Since then you have absented yourself from duty to date.

As per the Employment Act 2007 Clause No.44 – (4) a & e the offences committed are considered very serious and by your conduct you have breached your obligations arising under the contract of service.

In the circumstances and in view of the above, the management has considered the same as gross misconduct.

Consequently, you are hereby dismissed from the services of the company effective from the date of this letter. However, you will be paid your final dues if any after clearing with the company.

Yours faithfully,

Signed

D. W

ADMINISTRATION MANAGER”

RW stated that the claimant failed in August, 2009 to attain the 3.8 Kg of production. Further, he stated that the claimant gave the excuse of being medically unfit for the low production. RW stated that the respondent was willing to accommodate the claimant at his low production rate. His testimony was that he was not one of the respondent’s officers involved in the forced HIV-AIDS testing. RW also testified that after the termination, the claimant was invited to attend occupational medical assessment but he failed to do so.

The claimant filed submissions on 05.08.2013 and the respondent’s submissions were filed on 13.09.2013.

The court has considered the pleadings, the evidence and the submissions. The court sets out the following issues for determination:

- a. Whether the respondent unfairly invaded the claimant’s right to privacy.**
- b. Whether the respondent has established a fair reason for the termination of the claimant’s employment.**
- c. Whether the claimant was accorded due process or fairness.**
- d. Whether the claimant is entitled to the remedies as prayed for.**

For the 1st issue the claimant, at paragraph 9 of the memorandum of claim, has pleaded that in disregard to the advice by the doctor the respondent disregarded the advice and instead attempted to cajole the claimant to a HIV test. He has further pleaded that by innuendo, the respondent insinuated that the

claimant was HIV positive. In his testimony, the claimant has vividly narrated how the respondent's nurse and administrative officer forcefully bundled him up and drove him for VCT for a mandatory HIV-AIDS testing. The claimant was saved from the testing by the VCT officials.

In view of the evidence and pleading, it has been submitted for the claimant that in as much as the case before the court is not that of a constitutional reference, it is trite law that one cannot be sacked from his place of employment on grounds of race, tribe, financial status, HIV status or disabling reference as per section 46 (g) of the Employment Act, 2007. It was further submitted that it was therefore unfair for the respondent to have forced the claimant to undergo the HIV-AIDS testing.

The respondent's submission is that it did not force the claimant to undergo the test. Nevertheless, the respondent did not call witnesses to rebut the claimant's vivid recollection of the events of the respondent's designs that the claimant takes the forced testing. The court finds that the respondent designed schemes targeted at the claimant to undergo a forced HIV-AIDS testing.

Article 31(c) of the Constitution provides that every person has the right to privacy which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed. It is the court's considered opinion that it is unfair for an employer to intrude into the health status of the employee or prospective employee in a manner that does not justify breaches of the doctor-patient confidentiality.

Where health status of the employee or the prospective employee has a bearing on the required qualifications or job specifications, the court holds that it is sufficient for the employer to receive the doctor's certificate of fitness without disclosing the full medical report that infringes the employee's or prospective employee's health status. The court further holds that where the employer needs the employee's medical reports for the employee's benefit such as provision of medical support in exceptional circumstances or to make exceptional human resource decisions, it is vital that the employer highly restricts the disclosure of the medical report and holds it in high confidence that protects the employee's privacy and therefore human dignity. In any event, the court holds that the employer must never force an employee to undergo a medical examination or force the employee to present medical reports that expose the employee's health status that the employee is entitled to hold in his or her privacy. The finding is founded upon the freedom of choice and free will for the employee and employer to enter and continue in the employment relationship.

Section 5(3) of the Employment Act, 2007 provides that no employer shall discriminate directly or indirectly against an employee or prospective employee, amongst other grounds, on the ground of HIV status, and, in respect of recruitment, training, promotion, terms and conditions of employment or other matters arising out of employment. The court finds that the respondent's deliberate design to force the claimant to undergo HIV-AIDS testing was not only unfair intrusion of the claimant's privacy but was also carefully calculated to discriminate the claimant in the respondent's undertaking of the human resource functions in its establishment.

The court finds that the respondent's design for the claimant to undergo a forced HIV-AIDS testing and active implementation of that design was unfair infringement of the claimant's privacy because it amounted to having the claimant to provide information relating to his private health status in circumstances whereby such information was unnecessarily required or to be revealed. The claimant prayed for any other relief the court shall deem fit. The court has considered the pain, suffering and anxiety the claimant underwent in the face of forced HIV status testing, the flagrant breach of the right to privacy and freedom from discrimination and finds that the respondent shall pay the claimant **Kshs.500,000.00** for the liability of breaching the express constitutional and statutory protection of the claimant's privacy and freedom from discrimination. The court holds that the respondent's infringement was unconstitutional and unjustified as unnecessary.

The 2nd issue for determination is whether the respondent has established a fair reason for the termination of the claimant's employment. The Respondent has pleaded that the claimant was dismissed on 1.09.2009 for refusal to work since 19.08.2009 when he was told to handle light dues and refusal to

follow instructions to resume duties since 28.08.2009 after a meeting at which the claimant agreed to work. It is also pleaded for the respondent a show-cause letter had been issued on 29.08.2009 requiring the claimant to explain his absence (paragraphs 19 and 20 of the memorandum of response). The respondent did not call any witness to provide the evidence to establish the allegations as pleaded. There was no evidence that the alleged show-cause letter was served upon the claimant and in circumstances whereby the claimant was expected and alleged to have been absent from duty. It is not clear that the absence commenced on 19.08.2009 and the alleged show-cause letter was issued on 29.08.2009 after lapsing of the unexplained ten days. The court finds the respondent's account not believable and further finds that the claimant has by his evidence established that he was terminated on account of refusal to produce the evidence of the respondent's intended and forced HIV status test's report.

As submitted for the claimant, the reason did not constitute a fair reason for termination or imposition of a penalty under section 46 (g) of the Employment Act, 2007. The court further finds that the claimant had a valid grievance in view of the designs for a forced HIV testing. In the court's opinion, the design as a valid grievance as envisaged in section 46(h) of the Act could not constitute a fair reason for the termination. The court also holds that the claimant was entitled to consider himself constructively terminated when the respondent's security personnel locked him out at the respondent's gate in execution of the respondent's instructions that the claimant was not to be allowed in without the evidence or report of the test. The reason for the termination was unfair.

The 3rd issue for determination is whether the claimant was accorded due process or fairness. The court finds that the evidence on record shows that the respondent had issues with, primarily the health capacity of the claimant to remain in employment, and secondarily the declining claimant's productivity in view of the claimant's health. In the opinion of the court, the procedure applicable in event of removal on account of ill-health is section 41 of the Employment Act, 2007. The section states as follows:

“41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

In view of the provisions of the section, the court holds that an employer who desires to terminate an employment contract on account of the employee's ill-health must give the affected employee the relevant notice and a hearing. The court holds that the process must uphold due process of fairness entailing the following procedure:

- a. **a notice to the employee, in a language that the employee understands, that it is intended to terminate the employee's contract of employment on account of ill-health;**
- b. **requiring the employee to present himself or herself before a medical professional or board to facilitate a medical certificate for fitness or lack of it for continued employment;**
- c. **the employer hearing the employee's representations in view of the medical certificate of fitness or unfitness; and**
- d. **the employer making a decision to terminate the employee or to retain the employee taking into account the medical certificate of fitness or unfitness and the employee's representations at the hearing.**

The court's opinion is that the affected employee is entitled under the section to follow the proceedings so that where the employee cannot follow the proceedings because of the ill-health, the employee is entitled

to remain in the service of the employer until recovery or regaining capacity to follow the proceedings. The court's opinion applies unless the parties have a prior agreement on the separation arrangements that would apply in event the employee, on account of ill-health, is not able to follow the separation proceedings under section 41. Such prior arrangements, in the opinion of the court, would need to carefully provide for a balancing effect to give the employee the best chance possible to recover and resume employment while at the same time enabling the employer to mitigate productivity concerns in event of the employee's unreasonably long absence from work in view of the illness. In view of section 41 of the Act and in absence of such prior arrangement, the court holds that due process entitles the employee who for ill-health cannot follow the proceedings to remain in employment till recovery or otherwise; the principle that the employee is entitled to recover or die in the service of the employer in such appropriate cases.

In the instant case, the respondent decided not to follow the clear provisions of section 41 of the Act and instead opted to victimize the claimant and designed to infringe upon the claimant's privacy by designing the claimant's forced HIV testing. The court finds the termination was unfair for want of due process as provided for in section 41 of the Act. The court further finds that the respondent's breach of the prescribed procedure and unfair management of the claimant in the circumstances subsequently culminated into the claimant's constructive and unfair termination.

The final issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes the following findings:

1. The court has considered the prayer for pay in lieu of the termination notice and finds that in absence of any specific agreement, the claimant is entitled to one month pay being **Kshs.7683.00** in view of section 35 of the Act.
2. The respondent did not by evidence object to the claim for due annual leave being **Kshs.11,483.00** and 6 off days due being **Kshs.2,206.40** and the claimant is entitled as prayed.
3. The court finds the claimant is not entitled to severance pay as prayed for because this was not a case of redundancy as envisaged in section 40 of the Act.
4. The court finds that the claimant is entitled to refund of medical bills and travel costs during medication as prayed for making **Kshs.5,200.00**.
5. The claimant's August, 2009 pay slip shows that he was a member of the National Social Security Fund and the court finds that he is not entitled to gratuity as prayed for in view of the provisions of section 35 (6) the Act.
6. In view of the unfair termination, the court finds that the claimant is entitled to 12 gross salaries at Kshs.9,583.00 as per August, 2009 pay slip being **Kshs.114,996.00**.
7. The court finds that the claimant is entitled to an order directing the respondent to complete and submit relevant medical occupational assessment forms to enable the claimant access compensation for the injuries sustained.

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

1. The respondent to pay the claimant **Kshs.641,568.40** by 1.12.2013, failing interest at court rates to be payable from the date of the judgment till full payment.
2. An order that the respondent to complete and submit relevant medical occupational assessment forms to enable the claimant access compensation for the injuries sustained.
3. The respondent to pay costs of the case.

Signed, dated and delivered in court at **Nakuru** this **Friday, 4th October, 2013**.

BYRAM ONGAYA

JUDGE