



Kitheka v Safaricom Limited (Cause 892 of 2018)
[2024] KEELRC 13263 (KLR) (28 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 13263 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 892 OF 2018
L NDOLO, J
NOVEMBER 28, 2024

BETWEEN
CHRISTINE MWIKALI KITHEKA CLAIMANT
AND
SAFARICOM LIMITED RESPONDENT

JUDGMENT

Introduction

1. Christine Mwikali Kitheka, the Claimant in this case, was a long serving employee of Safaricom Limited, a premier telco company registered in Kenya. Kitheka brought this claim following the termination of her employment on 30th August 2017.
2. By her claim as contained in a Memorandum of Claim dated 27th April 2018 and amended on 3rd July 2019, the Claimant seeks compensation for unlawful and unfair termination of employment as well as damages for discrimination on account of her health condition. The Respondent opposes the Claimant's claim by a Memorandum of Reply dated 19th September 2019.
3. At the trial, the Claimant testified on her own behalf and the Respondent called its Senior Manager, Employee and Labour Relations, Odhiambo Ooko. Both parties also filed written submissions.

The Claimant's Case

4. By a letter dated 30th August 2007, the Respondent employed the Claimant in the position of Customer Care Representative. The Claimant worked in various other positions within the Customer Care Department and on 17th June 2014, she was moved from this Department.
5. The Claimant claims to have suffered severe injury to her ears, nose and throat as a result of continuous use of headsets. She adds that she was given medical leave sometime in the year 2016, which leave is said



to have continued for over one year. On 21st August 2017, the Claimant was recalled back to work and informed that she would be redeployed.

6. The Claimant asked for time to think about the offer for redeployment.

It would however appear that the redeployment did not materialise and on 30th August 2017, the Claimant was issued with a termination letter, stating that she had declined redeployment.

7. The Claimant accuses the Respondent of unlawfully and unfairly terminating her employment. She maintains that the termination of her employment was discriminatory based on her medical history.

8. The Claimant sets out her claim as follows:

- a. Kshs. 1,103,545.20 being 12 months' salary in compensation;
- b. Punitive and aggravated damages;
- c. Costs plus interest.

The Respondent's Case

9. In its Memorandum of Reply dated 19th September 2019, the Respondent admits that the Claimant was its employee, having been employed as a Customer Care Representative by a letter of appointment dated 7th November 2007.
10. The Respondent admits being aware that the Claimant had been diagnosed with an ear, nose and throat ailment. The Respondent states that the Claimant was granted medical leave on 25th August 2016, after which she was taken through a redeployment process.
11. The Respondent avers that by a letter dated 18th August 2017, the Claimant was asked to report for duty at the Respondent's Jambo Contact Centre on 21st August 2017. The Claimant is said to have declined the offer of redeployment, upon which she was issued with a termination notice dated 30th August 2017.
12. The Respondent maintains that it had a valid reason for terminating the Claimant's employment and that a meeting was held on 21st August 2017 to allow the Claimant an opportunity to be heard.

Findings and Determination

13. There are three (3) issues for determination in this case:
 - a. Whether the termination of the Claimant's employment was lawful and fair;
 - b. Whether the Claimant has proved a case of discrimination;
 - c. Whether the Claimant is entitled to the remedies sought.

The Termination

14. On 30th August 2017, the Respondent wrote to the Claimant as follows:

“Dear Christine,

RE: NOTICE OF TERMINATION OF EMPLOYMENT

We refer to the above matter.



Following the meeting held on 21st August, 2017 between yourself and the Human Resources and Customer Operations (COPS) Departments, you were offered redeployment to a new role within COPS.

Upon deliberation, you respectfully declined the offer for redeployment.

Safaricom respects your decision and we hereby notify you of the termination of your employment with effect from 2 September 2017.

You shall be paid final dues as follows:

1. Terminal Dues

Your terminal dues in accordance with relevant Kenya labour laws and the terms of your contract of employment dated 8 November, 2007 (the “contract”) are as follows:

1. One month’s salary in lieu of notice amounting to Kshs. 91,962.10
2. Payment for accrued leave. As at 31 August 2017 you will have 10 accrued leave days for which you will be paid Kshs. 38,317.54
3. One (1) Day worked in the month of September, 2017 amounting to Kshs. 4,379.15.

2. Total Payment

Based on the above workings, your total payment before statutory deduction is Kshs. 134,658.79.

Please note that all the above payments are subject to the usual statutory deductions (PAYE, NSSF and NHIF).

3. Effective Date

The termination of your employment takes effect from 2 September, 2017.

4. Continuing Obligations and Restrictions

You are and shall continue to be bound by the provisions of your contract which expressly state or by implication are expected to survive termination of your employment including, without limitation, the confidentiality obligations contained in your contract of employment.

You shall also be required to sign a Discharge and Release Form when you collect your final dues and Certificate of Service from HR Operations and upon handing over all of the Company’s property in your possession.

Please acknowledge and sign this letter in duplicate, retain one original and return the other to us for our records.

We thank you for your service and wish you well in your future endeavors.

Yours sincerely

For: Safaricom Limited

(signed)



Paul Kasimu

Director Resources”

15. This letter gives the reason for the termination of the Claimant’s employment as her having declined to take up an offer of redeployment. It is on record that the Claimant, who was initially deployed at the Respondent’s Call Centre, developed an illness that made it impossible for her to continue working at the Call Centre.
16. The Respondent’s Senior Manager, Employee and Labour Relations, Odhiambo Ooko testified that in January 2014, the Respondent was informed that the Claimant had been diagnosed with an ear, nose and throat ailment, known as Acoustic Shock Syndrome, Laryngopharyngeal Reflux Disease and Chronic Laryngitis. A report of this diagnosis is said to have been made to the Directorate of Occupational Safety and Health Services on 26th March 2014.
17. Ooko further testified that the Claimant’s doctors had recommended her redeployment away from active voice and headset usage. He adds that a meeting was held on 9th June 2014 between the Claimant and the Respondent’s Human Resource Representative, Julius Mwangi Mwaura, where the Claimant’s redeployment procedure was discussed.
18. According to Ooko, two options were placed before the Claimant; one was to explore redeployment opportunities within three months from the date of the medical report; second, retirement on medical grounds if the Claimant did not wish to pursue the first option or where she was unsuccessful in obtaining a redeployment opportunity within the given period.
19. According to the Claimant, the Respondent did not make any real effort to redeploy her as recommended by her doctors. She states that when she showed up on 21st August 2017, she was referred for medical examination by the company doctor. She maintains that the redeployment process could not have been completed before submission of a report from the company doctor.
20. There is evidence that the Claimant went to see the company doctor on 22nd August 2017. According to the medical report emanating from this examination, a review on the Claimant’s health status was to be conducted within three weeks.
21. The Claimant was however issued with a letter dated 18th August 2017, instructing her to report for duty at Jambo Contact Centre, effective 21st August 2017. The terse letter stated as follows:

“Dear Christine,

RE: REPORT TO DUTY

We refer to the above matter.

You are required to report for duty at Jambo Contact Centre (JCC) on 21st August, 2017. The Head of Department-Customer Operations will provide you with further instructions on the day.

Please acknowledge receipt of this letter by returning a signed copy to the Human Resources Department.

If you require any clarification, please contact June O’Bonyo on 0798404448, email jobonyo@safaricom.co.ke OR Caroline Chamwada on 0721666592, email cchamwada@safaricom.co.ke

Yours sincerely



For: Safaricom Limited
Paul Kasimu
Director, Resources”

22. Significantly, this letter made no mention of the Claimant’s medical report at the time nor the actual job she was to do at Jambo Contact Centre. More importantly, there was no indication as to whether reasonable accommodation had been made.
23. In *Kenya Plantation and Agricultural Workers Union v Rea Vipingo Plantations Limited & another* (2015] eKLR, it was held that:
- “reasonable accommodation calls on the employer to genuinely explore ways through which the job performed by the affected employee can be temporarily modified to suit the medical restrictions and...may change the working environment through physical modification of the workplace to suit the affected employee.”
24. Paragraph 7 of the witness statement of Ooko Odhiambo caught the attention of the Court; it states as follows:
- “Further, it was made clear and emphasized to the Claimant that she was free to make applications for any job vacancies occurring within the Respondent organization to which she had met the criteria set. In addition to this, the Claimant was informed that the selection and placement would follow the normal recruitment processes and procedures as stipulated in the Company Recruitment Policy.” [Emphasis added]
25. This paragraph, summarises the Respondent’s attitude in addressing the Claimant’s health challenge. The Claimant was to literally scout for positions within the organisation and there was no guarantee that she would be placed because any placement would be subject to normal recruitment processes and procedures. This did not disclose an employer willing to support an ailing employee.
26. Further, the Respondent did not even wait for the period given by the company doctor, within which the Claimant’s condition was to be reviewed. Additionally, if the Claimant had declined redeployment, she ought to have been subjected to a disciplinary process within the confines of Section 41 of the *Employment Act*, which did not happen. In its decision in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, this Court held that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness.
27. With the foregoing in view, I must agree with the Claimant that the Respondent had reached a premeditated decision to get rid of her and the failed attempt at redeployment was a smokescreen. In the result, I find and hold that the termination of the Claimant’s employment was unlawful and unfair and she is entitled to compensation.
28. I therefore award her twelve (12) months’ salary in compensation. In arriving at this award, I have taken into account the Claimant’s long service and the finding that she did not contribute to the termination. I have further considered the mishandling of her case by the Respondent, including failure to accommodate her and avail her due process prior to termination of her employment.

Discrimination

29. As part of her claim, the Claimant alleges that the Respondent discriminated against her on account of her health condition.



30. Article 27 of the Constitution of Kenya, 2010 outlaws discrimination in the following terms:

27.

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
6. To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
7. Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
8. In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two thirds of the members of elective or appointive bodies shall be of the same gender.

31. In similar fashion, Section 5(3) of the Employment Act provides that:

- (3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee-
 - a. on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status;
 - b. in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.

32. Black's Law Dictionary (Tenth Edition) defines discrimination as:

“The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion or disability.”

33. Although the Claimant accuses the Respondent of discriminating against her on account of her health status, she did not adduce any evidence to support her claim in this regard. The claim for punitive and aggravated damages therefore fails and is disallowed.



Final Orders

34. Finally, I enter judgment in favour of the Claimant in the sum of Kshs. 1,103,545 being 12 months' salary in compensation for unlawful and unfair termination of employment.
35. This amount will be subject to statutory deductions and will attract interest at court rates from the date of judgment until payment in full.
36. The Claimant will have the costs of the case.
37. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF NOVEMBER 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Ondabu for the Claimant

Mr. Cherono for the Respondent

