

2026 January | Employment

EMERGING PRINCIPLES; TERMINATION OF EMPLOYMENT ON MEDICAL GROUNDS

Gichuru v Package Insurance Brokers Ltd [2021] KESC 12 (KLR)

Background:

The Appellant was employed by the Respondent in 2010 as an Operations Manager on a permanent and pensionable basis. In November 2013, he was diagnosed with a tumour and travelled to India for spinal surgery, followed by further treatment until January 2014. During this period, the Appellant continued to receive his full salary.

The Appellant resumed duty in February 2014 but experienced mobility challenges arising from his medical condition and was unable to walk without assistance. In April 2014, the Respondent directed the Appellant to proceed on sick leave and requested that he submit a confidential medical appraisal from his doctor to assess his fitness to continue working.

In May 2014, the Respondent wrote to the Appellant raising concern that he had not submitted the requested medical report and indicating its intention to suspend his employment. The Appellant explained that his doctor had been unavailable to provide the report within that timeframe. A short while later, the Appellant's doctor issued the medical report, which recommended that the Appellant resume duty after two months. Notwithstanding this recommendation, the Respondent suspended the Appellant on medical grounds

and discontinued his employment benefits, citing the delayed submission of the medical report.

In August 2014, the Respondent summarily dismissed the Appellant for alleged gross misconduct following investigations into his performance. The Appellant subsequently filed a claim alleging that the summary dismissal was discriminatory, wrongful, malicious, and unfair, in contravention of Article 27 of the Constitution of Kenya, 2010. He further asserted that he was not afforded an opportunity to be heard prior to the termination of his employment.

The Employment and Labour Relations Court found that the Respondent had failed to discharge its statutory and constitutional obligations, had discriminated against the Appellant on account of his illness, and had not followed due process in effecting the termination. The Court awarded the Appellant KES 5,000,000 as damages for discrimination and the equivalent of twelve months' salary as compensation for wrongful termination.

On appeal, the Court of Appeal upheld the finding that the Appellant was entitled to one month's salary in lieu of notice. However, it found that discrimination had not been proved and accordingly set aside the award of KES 5,000,000 for discrimination. The Court of Appeal further substituted the twelve-month

salary award with compensation equivalent to eight months' salary.

Dissatisfied with this outcome, the Appellant appealed to the Supreme Court, which considered and determined the matter as discussed below.

Supreme Court's Analysis:

1. Termination on medical grounds should not be discriminatory

On the issue of discrimination, the Supreme Court held that:

- discrimination against any employee is expressly prohibited under Article 27 of the Constitution of Kenya, 2010 and section 5 of the Employment Act.
- an employer bears the burden of proving that discrimination did not take place as alleged and, where differential treatment is shown, that it was not based on any of the prohibited grounds, namely race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status, or HIV status.
- Discrimination occurs where a person is treated differently from other persons in similar positions on the basis of one of the prohibited grounds.
- The Court distinguished between direct and indirect discrimination. Direct discrimination involves treating a person less favourably because of a protected attribute, such as race, sex, religion, or disability, compared to another person without that attribute in similar circumstances. Indirect discrimination

arises where a condition or requirement is imposed which a significantly smaller proportion of persons with the attribute can comply with, without reasonable justification (*Nyarangi & Others v Attorney General* (2008) KLR 688).

- From its analysis, the Court found that the Respondent subjected the Appellant to different treatment arising from his disability and indirectly discriminated against him by subjecting him to extraneous investigations which other employees were not subjected to. The Court noted that there was no justification for this treatment, particularly in light of the fact that the Appellant had recently been awarded a salary increment. The Court concluded that the Respondent was intent on removing the Appellant from employment and circumvented due process in an attempt to find fault.

2. Duty to investigate the employee's medical condition prior to termination

The Court held that:

- An employer should request an employee to submit a medical report within a reasonable and specified timeline. Once the report is submitted, the employer must consider it before making a decision to terminate employment.
- Alternatively, the employer may conduct its own independent investigations into the employee's medical condition through a qualified independent expert and consider the findings before terminating employment.

3. The Employer has a duty to reasonably accommodate the employee:

- Under section 15 of the Persons with Disabilities Act, No. 14 of 2023, an employer has a duty to reasonably accommodate an employee by devising measures that may ease the employee's movements or performance of work, including the installation of ramps or the provision of flexible working hours. This duty arises once physical incapacity becomes evident.
- The employer is required to demonstrate that accommodating the employee would cause undue hardship to the organisation.

4. Terminations on medical grounds must be lawful and fair

- In this case, the Respondent summarily dismissed the Appellant on grounds of gross incompetence following investigations into his performance, which were prompted by the Appellant's medical condition.
- The Court held that in cases of termination based on incapacity, the employer is required to afford the employee a hearing under section 41 of the Employment Act. The Court further held that section 44(4) of the Employment Act does not grant an employer a blanket right to dismiss an employee at will. Regardless of the gravity of the alleged misconduct, the employee is entitled to be heard before

dismissal. The right to be heard is a cornerstone of fair labour practices, and where a hearing is not held prior to summary dismissal, the employer must justify the circumstances necessitating that omission.

- In light of the above, the Court found that the Appellant's summary dismissal was unfair, unjust, and unlawful for want of due process.

5. Power of the Court to award damages for discrimination

- The Court considered whether the award of damages for discrimination was inordinately excessive and held that damages should not be punitive to either party, but should be sufficient to deter employers from engaging in discriminatory practices.
- In the circumstances, the Court reduced the award of damages for discrimination from KES 5,000,000/- to KES 2,000,000/- and reinstated the trial court's award of twelve months' salary as compensation for unfair dismissal.

Conclusion

The judgment reinforces the principle that illness or disability cannot be used as a basis to circumvent due process, and that employers must act lawfully, fairly, and without discrimination when dealing with employees facing medical incapacity.

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