



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1737 OF 2013

PROTUS WANJALA SIMIYU..... CLAIMANT

VERSUS

WELLS FARGO LIMITED..... RESPONDENT

JUDGMENT

Introduction

1. This action is brought by Protus Wanjala Simiyu against his former employer, Wells Fargo Limited. The claim is documented by a Memorandum of Claim dated 16th October 2013 and filed in court on 28th October 2013. The Respondent filed a Memorandum of Reply on 21st November 2013.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resources Manager, Stephen Kang’ethe and Human Resources Officer, Benjamin Munyao.

The Claimant’s Case

3. The Claimant was employed by the Respondent on 14th January 2009 in the position of Driver. On 28th October 2011, the Claimant was involved in a road traffic accident, for which he was charged in the traffic court. On 26th November 2011 he was suspended pending the outcome of the traffic case.

4. The Claimant was subsequently acquitted of the traffic charges after which he asked to be reinstated back to work. After several inquiries, the Claimant was asked to write a letter stating that he had no claims to make with respect to the period he was on suspension, as a condition to his restatement. The Claimant declined to write the letter and he was not reinstated. He now seeks the following:

- a) 12 months’ salary in compensation..... Kshs. 270,804
- b) One month’s salary in lieu of notice..... 22,567
- c) 5 years’ leave..... 43,050
- d) Severance pay for 5 years..... 30,750
- e) Amount during suspension..... 436,655
- f) Risk allowance for 2 years @ Kshs. 750 per month.....18,000

- g) Motor vehicle allowance for 5 months @ Kshs. 1,000.....5,000
- h) Relieve allowance for 2 months @ Kshs. 9,000.....18,000
- i) Certificate of service
- j) Costs

The Respondent's Case

5. By its Memorandum of Reply and Counterclaim dated 18th November 2013 and filed in court on 21st November 2013, the Respondent admits having employed the Claimant. The Respondent however disowns the employment effective date of 14th January 2009 as pleaded by the Claimant.

6. The Respondent states that the Claimant was suspended to allow for investigations into an accident caused by him, while driving the Respondent's motor vehicle registration number KBA 544T. In the said accident, five occupants sustained various injuries. The Claimant was blamed for the accident leading to criminal and civil proceedings.

7. The Respondent avers that the Claimant declined to participate in the civil proceedings to defend the Respondent. This led the Respondent to believe that there was collusion between the plaintiffs in the civil proceedings and the Claimant to extort money from the Respondent.

8. The Respondent further states that upon conclusion of the investigations, the Claimant was invited to resume duty but he declined. The Respondent therefore denies the Claimant's claim for unlawful and unfair termination of employment.

9. By way of counterclaim, the Respondent claims from the Claimant one month's salary in lieu of notice.

Findings and Determination

10. There are three (3) issues for determination in this case:

- a) Whether the Claimant has proved a case for unlawful termination of employment;
- b) Whether the Claimant is entitled to the remedies sought;
- c) Whether the Respondent has made out a proper counterclaim against the Claimant.

Unlawful Termination?

11. On 25th November 2011, the Respondent issued the Claimant with a suspension letter stating as follows:

"Dear Mr. Wanjala,

RE: SUSPENSION

This letter serves to inform you that you are suspended from duty with effect from November 26, 2011 following the incident of October 28, 2011 whereby while driving Company vehicle KBA 544T (K6) you had a self-involved injury road accident for which you are personally liable.

This suspension is in force until the case that is before the Traffic Court at the Nakuru Law Courts is heard and determined.

During this period of suspension you will not be entitled to pay.

Yours faithfully

Wells Fargo Limited

(Signed)

S.K. KANG'ETHE

HUMAN RESOURCES MANAGER”

12. The Claimant told the Court that following his acquittal by the traffic court, he sought reinstatement but the Respondent gave the condition that he would not be paid his salary for the period he was on suspension. This condition was confirmed by the Respondent's letter to the Claimant dated 1st January 2013 stating as follows:

“Dear Mr. Wanjala,

RE: SUSPENSION

In reference to your suspension letter dated 25th November 2011, following the incident of 28th October 2011, we would wish to inform you that the suspension has been lifted w.e.f 1st January 2013. However you will not be entitled to any pay for the duration you were suspended and it will be treated as unpaid leave.

Kindly sign the attached copy of this letter as a sign of acknowledgement of this communication.

Yours faithfully,

Wells Fargo Limited

(Signed)

S.K. KANG'ETHE

HUMAN RESOURCES MANAGER”

13. The question to ask is whether it was lawful for the Respondent to attach this condition to the Claimant's reinstatement. In its final submissions filed on 11th October 2017, the Respondent states:

“While it is conceded that the Claimant is entitled to be paid for the period when he was under suspension, the Respondent submits that it does not amount to Kshs. 436,655 as claimed. The Claimant was under suspension for only one year. He is therefore only entitled to payment for one year amounting to Kshs. 225,670.”

14. It seems to me therefore that the Respondent was all along aware that the condition attached to the Claimant's reinstatement was unlawful. This unlawful condition prevented the Claimant from resuming duty and the emerging situation had all the marks of constructive termination or discharge.

15. **Black's Law Dictionary (Ninth Edition)** defines constructive termination or discharge as:

“a termination of employment brought about by the employer making the employee's working conditions so intolerable that the employee feels compelled to leave.”

16. By asking the Claimant to accede to an unlawful condition of employment, the Respondent effectively forced him out of employment. In light of this finding, it is not necessary to go into the merits of the administrative charges facing the Claimant, which were spent when the decision to reinstate the Claimant was made.

Remedies

17. Pursuant to the foregoing, I award the Claimant eight (8) months' salary in compensation for unlawful termination of employment. In making this award, I have taken into account the Claimant's length of service and the Respondent's conduct in the termination process. I further award the Claimant one (1) month's salary in lieu of notice.

18. The Claimant claims leave pay for five (5) years and the Respondent did not adduce any evidence to show that the Claimant took his leave. This claim therefore succeeds and is allowed. Additionally, I award the Claimant his full salary from the date he was sent on suspension until the date he was notified of his conditional reinstatement.

19. The claims for severance pay, risk allowance, motor vehicle allowance and reliever allowance were not proved and are dismissed.

20. Before making the final award in this matter, I need to dispense with the issue of the Claimant's salary as at the time he left employment. The Claimant himself pleaded the figure of Kshs.22, 567 which the Respondent disputed without offering any counter evidence. I therefore invoke Section 10(7) of the Employment Act, 2007 and adopt the figure of Kshs. 22,567 as the Claimant's monthly salary for purposes of this claim.

The Respondent's Counterclaim

21. In light of the above findings, the Respondent's counterclaim against the Claimant is without basis and is dismissed.

Final Orders

22. In the end, I enter judgment in favour of the Claimant in the following terms:

- a) 8 months' salary in compensation.....Kshs. 180,536
 - b) 1 month's salary in lieu of notice.....22,567
 - c) Leave pay for 4 years (22,567/30x26x4).....78,232
 - d) Salary during suspension (22,567x13 months).....293,371
- Total.....574,706**

23. This amount will attract interest at court rates from the date of delivery of this judgment until payment in full.

24. The Claimant is also entitled to a certificate of service and the costs of the case.

25. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF JANUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI

THIS 9TH DAY OF FEBRUARY, 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Kulecho for the Claimant

Mr. Omino for the Respondent