



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Cause 976 of 2010

MICHAEL KIBOI GATUMIA.....CLAIMANT

VERSUS

MASTERMIND TOBACCO (K) LIMITED.....RESPONDENT

JUDGEMENT

The claimant Mr. Michael Kiboi Gatumia claim is for wrongful and unfair termination by the respondent, Mastermind Tobacco (K) Limited. That the claimant was an employee of the respondent under a written contract of employment commencing 1st April 2009 running for one year thus ending 31st March 2010. This followed a long relationship of employer employee between the claimant and the respondent who had served the respondent since 1st February 1994 until the time of termination in 30th June 2009. The claimant was last engaged as the Manufacturing Manager, his last salary being Kshs. 203,300.00. That from 5th March 2009 he was deployed to work at the respondent's branch in the Sudan where he got ill later moved to Nairobi where he got more treatment which was paid for by the respondent.

While recuperating from his illness his employment was terminated on medical grounds. He now claims that this termination was with malice, it was unlawful and unfair termination against the Labour Institutions Act and the Employment Act. He further claims a reinstatement without loss of benefits or seniority, one month salary in lieu of notice, Kshs.2, 439,600.00 being damages for the unlawful and unfair termination this being 12 months equivalent of what was the claimants salary and any other relief the court may deem fit to grant.

The claim is opposed by the respondent stating that the respondent had been ailing since 2009 and was severally confined in hospital breaking and interrupting the expected dedicated service to the respondent. That the claimant was on various occasions absent from duty without lawful excuse or explanation. That the termination was lawful as the claimant was absent from work without the necessary explanations and was paid for the leave days and salary up to and including June 2009. That the respondent was severally informed that his service to the respondent was wanting which warnings were not heeded and that the termination does not violate provisions of sections 41(1) and 35(5) of the Employment Act since the same was justified and in accordance with the law.

The matter proceeded for hearing on 1st December 2011 with the claimant's case since the respondent was absent. The hearing date had been taken in court in the presence of Mr Ataka for the Respondent and Mr. Bwire for the Claimant.

In evidence the claimant testified that he worked for the respondent for 15 years, he never received any disciplinary letter until the termination. That on 1st February 2009 his contract was renewed for one (1) year with effect from 1st April 2009 to 31st March 2010 having retired. He was sent to Khartoum, Sudan

and while there he became ill and was admitted in hospital and later needed chemotherapy which caused him to confer with respondent and it was agreed that he move to Nairobi for treatment at Mater hospital. The respondent paid the bill of Kshs.200, 000.00 the limit to claimant's medical entitlement and he paid the balance of Kshs.100, 000.00

While at home recuperating on doctor's advice, he received letter of termination dated 8th June 2009. There was no notice or a hearing before the termination.

In submission, the respondent avers that the claimant was at the time of termination of his employment under a fixed term contract of one year, he had served for three months and there remained nine more months. That under such a contract the respondent was not required to issue a termination notice to the claimant as the parties were clear in their mind as to when the contract would be terminated. That according to the respondent what was in dispute was the issue of fairness of termination of claimant's employment.

Court Notes that in the response to the claim, the Respondent asserts that the claimant started ailing in early 2009 and was severely confirmed in hospital breaking his and interrupting the expected dedicated service to the respondent. However, this notwithstanding, the respondent renewed the claimant's contract in early 200y, located him outside the country where he fell unwell and had it not been for this illness, he would have continued serving the respondent in the same capacity. There is no evidence that has been made available to court that claimants services were wanting or warning were given for poor performance that would have necessitated the respondent to take remedial measures.

Court notes that under Section 10 of the Employment Act, in a contract as between the parties herein there are specific details that must be incorporated. Thus the employment particulars;

A written contract ... shall state particulars of the employment ... shall contain particulars as at a specified date ... [stating] any terms and conditions relating to any of the following –

(i) Entitlement to annual leave, including public holidays, and holiday pay, (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated);

(ii) Incapacity to work due to illness or injury, including any provision for sick pay; and

(iii) Pension and pension schemes.

(b) The length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment.

Neither of the parties herein provided the Court with the Contract under reference. The Court is only guided by the applicable law, the evidence before it and the submissions in court and the written statements. However the respondent letter to the claimant dated 25th May 2007, the letter dated 17th February 2009 attached to the claim as appendix 1 are quite instructive into the relationship envisaged by the parties herein. Further in the absence of a contract between eh parties to explain as to the mode of communication between the parties when an employee is serving outside the country, the mode chosen by the claimant to communicate his medical status that is covered under the two letters under reference is reasonable under the circumstances.

In the circumstance, the Court rejects the respondent assertion that they were not aware of the email contents from the claimant notifying that he was unwell and that he had been admitted in hospital. Even though there is a general denial of the particulars of that email, the respondent does not deny that indeed the claimant was unwell and required admission in hospital for which they had to be called and pay the bill. Court finds that the claimant acted in a reasonable manner in the circumstance of his illness having been away on duty in a foreign country and requiring immediate attention in a hospital where he was immediately admitted upon returning home to Nairobi.

The above scenario notwithstanding; the law on the issue of an employee's medical condition and or situation is already settled thus under Section 30 of the Employment Act;

(1) After two consecutive months of service with his employer, an employee shall be entitled to sick leave of not less than seven days with full pay and thereafter to sick leave of seven days with half pay, in each period of twelve consecutive months of service, subject to production by the employee of a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre.

(2) For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.

Whatever condition befell the claimant and whatever the terms of his contract details, the provisions of Section 30 of the Act were still applicable in his case as this covers all employees. The Court understanding of these provisions of the law in this case is that the claimant having served the respondent for over 15 years, his services were still needed by the employer hence the constant renewal of his contract to undertake work for the respondent.

The claimant was away deployed in the Sudan at the instance of the respondent where he fell ill within the term of his contract. He fell ill on or about the 24th of April 2009. Even though this was a time outside the two months period stated under Section 30 of the Act looking at the commencement of his current contract, this section of the law must be read together with Section 34 of the same Act:

34. (1) ... an employer shall ensure the provision sufficient and of proper medicine for his employees during illness and if possible, medical attendance during serious illness.

(2) An employer shall take all reasonable steps to ensure that he is notified of the illness of an employee as soon as reasonably practicable after the first occurrence of the illness.

(3) It shall be a defence to a prosecution for an offence under subsection (1) if the employer shows that he did not know that the employee was ill and that he took all reasonable steps to ensure that the illness was brought to his notice or that it would have been unreasonable, in all the circumstances of the case, to have required him to know that the employee was ill.

(4) This section shall not apply where—

(a) The illness or injury to the employee was contracted during a period when the employee was absent from his employment without lawful cause or excuse;

(b) The illness or injury is proved to have been self inflicted;

(c) Medical treatment is provided free of charge by the Government or under any insurance scheme established under any written law which covers the employee.

Does this then mean an employer cannot terminate the employment of an employee? Not at all. Under the law the grounds that may justify termination of the employment by the employer and these are misconduct of an employee, physical incapacity, poor performance or an employer's operational requirements/retrenchment. However for an employer to terminate an employee he/she should have a genuine reason as specified in section 45 (2) and section 46. In order for termination to be fair in the eyes of the law it has to be both substantively and procedurally fair. The employer needs to have a valid and fair reason for termination.

Apart from this valid reason of termination the employer must follow fair procedures for termination as provided under the Employment Act, section 45 (2) and section 46). In any form of termination the employer is required to prove the reasons for the termination, otherwise it will be termed as unfair

(section 45 (2). The procedures for termination are different depending on the reason for termination but they all have a common item - the right of an employee to be heard before a termination decision is taken against an employee (section 41 (2)).

Were these requirements followed in the case of the claimant? The Court finds that there was no justification for the termination of the claimant employment with the respondent noting the circumstances and the law applicable. It was therefore the responsibility of the respondent as the employer to ensure the wellbeing of all its employees whether based in Nairobi or in the Sudan. Whether under a fixed term contract or a permanent employee, sections 30 and 34 of the Employment Act remain applicable to all employees whatever their status. An employer *shall* take all reasonable steps to ensure that he is notified of the illness of an employee as soon as reasonably practicable after the first occurrence of the illness. The respondent as the employer does not dispute that the claimant was ill or that the illness was contracted when the claimant got ill when absent from his employment or that the illness was self inflicted.

Court therefore finds that the termination of the claimant's employment with the respondent was wrong and unfair in the circumstances.

The claimant in his prayers is seeking for reinstatement, however there are no compelling reasons adduced that by allowing this prayer, the claimant would be able to effectively resume his duties. Further this remedy is only made in very exceptional circumstances where based on available options this would be the only option that would suit the claimant. It was submitted by both parties that indeed the claimant had served the respondent for over 15 years, but Court noting the circumstances under which the termination took place, including the current medical condition of the claimant, the Court will not award this prayer.

In the circumstances I am persuaded that the claimant is entitled to one month salary in lieu of notice. He is also entitled to damages for unlawful and unfair loss of employment. I find nine months' salary compensation reasonable in the circumstances.

For the above reasons the court enters judgement for the claimant as follows:

- a) That the claimant suffered unlawful loss of employment**
- b) The respondent is directed to pay the claimant the following final dues**
 - 1. One month salary in lieu of notice at Kshs. 203,300.00;**
 - 2. Nine months salary as compensation for unlawful loss of employment amounting to Kshs. 1,829,700.00;**

Total Kshs. 3,862,700.00

- c) Costs of the suit.**

Dated and delivered at Nairobi this 16th day of October 2012

M. W. Mbaru

JUDGE

INDUSTRIAL COURT OF KENYA

In the presence of:

Court clerk.....

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