M'alane v Finalys Horticulture Kenya Ltd (Cause 417 of 2016) [2024] KEELRC 1779 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1779 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE 417 OF 2016

DN NDERITU, J

JULY 11, 2024

BETWEEN

JOHN MWITI M'ALANE ..... CLAIMANT

AND

FINALYS HORTICULTURE KENYA LTD ..... RESPONDENT

JUDGMENT

Introduction

1. In a statement of claim dated 10th October, 2016 filed through Muthanwa & Co. Advocates the claimant prays for -

   i. A declaration that the termination of the claimant was unfair, wrongful, unlawful and illegal.

   ii. Find that the claimant is eligible for payment of:-

      a. One month in lieu of notice7,400 x 1 Kshs7,400

      b. 8 days worked in March 7,400 x 8/26 Kshs2,277

      c. Travelling allowance Kshs1,000

      d. House allowance Kshs2,063

      e. Severance pay 7,400 x 6x 15 Kshs22,200

      f. 12 months compensation

      as per Section 49(c) of *Employment Act* 7,400 x 12 Kshs88,800

   iii. Costs of the suit

2. Alongside the statement of claim was filed a verifying affidavit, a statement by the claimant and a list and a bundle of copies of the listed documents in support of the claim.

3. On 22nd December, 2016 the respondent entered appearance through Odera Osiemo & Co. Advocates and filed a statement of defence to the claim on 7th February, 2017. In the said response the respondent prays that the claimant's cause be dismissed with costs for want of merits.

4. On 20th December, 2022 the claimant filed a further list of documents with a bundle of the listed documents.

5. In addition to the response to the claim the respondent filed a witness statement by Stephen Ngugi (RW1) on 29th March, 2023 who testified as the only witness for the respondent. No documents were filed by the respondent.

6. This cause came up for virtual hearing on 29th March, 2023 when the Claimant (CW1) testified and closed his case. The defence was heard on the same day with RW1 testifying and the respondent's case was closed as well.

7. Counsel for the claimant, Mr. Muthanwa, addressed and summed up his client's case by way of written submissions filed in court on 8th May, 2023. Counsel for the respondent, Mr. Osiemo, did not file any submissions.

II. The Claimant's Case

8. The claimant's case is expressed in the statement of claim, the oral and documentary evidence by the Claimant (CW1), and the written submissions by his Counsel. The same is summarized as hereunder.

9. In his statement of claim, the Claimant pleaded that he was at all material times engaged by the respondent as a crop-sprayer in its farm in Timau area, Laikipia/Meru County.

10. It is pleaded that he was employed on 24th February, 2006 and that his last monthly salary was Kshs7,400/=. The claimant alleges that he was wrongfully, unfairly, and unlawfully terminated on 8th March, 2015. It is pleaded that the termination lacked substance and procedural fairness.

11. In his testimony in court the claimant relied on his filed statement and the documents in the two lists which he produced as exhibits 1 to 5.

12. He stated that on 4th March, 2021 he was assaulted by respondent's security personnel at the gate of the farm as a result of which he was admitted at Nanyuki Cottage Hospital in the full knowledge and assistance from the human resources manager of the respondent. He produced the medical records as exhibit 3.

13. After he was discharged from the hospital he reported back to work on 8th March, 2021. However, he was immediately arrested and charged in Nanyuki CMC Criminal Case No. 282 of 2012. The proceedings in that criminal case were produced as exhibit 4.

14. He stated that on 10th April, 2012 he was served with a letter of dismissal on the basis of absenteeism yet the respondent all along knew his whereabouts from the date of assault, admission in the hospital, and the charges in the criminal case. All the above events, which were allegedly well within the knowledge of the respondent occurred during the period for which he was accused of absconding duty.

15. In cross-examination by counsel for the respondent, the claimant stated that after he was assaulted he was admitted in hospital from 4th to 8th March, 2012, as stated above. He stated that he was dismissed vide a letter dated 10th April, 2012, about a month after he was discharged from the hospital. He stated

that he was arraigned in court on 9th March, 2012 but he remained in custody until 17th March, 2012 when he was able to raise bond/bail for his release. However, he admitted that the proceedings he produced in court did not indicate that he was remanded in custody.

16. He stated that between 17th March, 2012, when he was allegedly released on bail/bond until 10th April, 2012 when he was dismissed he did not report to work on directions from the farm manager which instructions were allegedly given to him over the phone. He confirmed that he was dismissed on grounds of absenteeism.

17. He stated that he did not visit the respondent to collect his terminal dues as he did not agree with the dismissal. He stated that the management of the respondent all along knew whereabouts and the reason why he was absent from duty yet the respondent purported to dismiss him based on alleged absenteeism which was well explained and documented.

18. In re-examination by his counsel, the claimant reiterated that between 9th and 17th days of March, 2012 he was held in custody in the criminal case and that the respondent was well aware of that fact through the security officer and the human resources manager, one Ms. Irene Wambui.

19. It is on the basis of the foregoing that the claimant is seeking for the reliefs recited above. The submissions by his counsel shall be considered in the succeeding parts of this judgment.

III. The Respondent's Case

20. The respondent's case is expressed in the response to the claim and the oral evidence adduced through RW1, the regional HR manager, as summarized hereunder.

21. RW1 relied on his filed statement confirming that the claimant was dismissed for absenteeism. He stated that the claimant was absent from work without permission from 9th march to 10th April, 2012.

22. In cross-examination by counsel for the claimant, RW1 stated that the claimant was on sick-leave from 4th to 8th March, 2012, but he failed to report back on 9th March, 2012 as expected. He stated the he was not aware of the proceedings in the criminal case and that he did not know the alleged HR manager by the name of Irene Wambui.

23. He stated that he was not aware that the claimant was hospitalized or held in police custody for the periods alleged by the claimant. He stated that the claimant did not go to clear with the claimant and as such his terminal benefits were not paid and no certificate of service was issued to him. He reiterated the foregoing in re-examination.

24. It is on the basis of the foregoing that the respondent has pleaded that this cause be dismissed with costs.

IV. Submissions By Counsel For The Claimant

25. Counsel for the claimant identified two issues for determination by the court – Whether the respondent's act of summary dismissal of the claimant was justified, fair, regular, and legal; and, Whether the claimant is entitled to the prayers sought.

26. On the first issue, it is submitted that the respondent was well aware of the whereabouts of the claimant between 4th and 8th March, 2012 as the claimant was on sick-leave and thereafter arraigned in court in criminal charges wherein the respondent was the complainant. In any event, it is submitted that the respondent did not demonstrate in court any efforts made in tracing the claimant for the alleged period of absenteeism.

27. On the basis of the foregoing, it is submitted that the dismissal lacked substance. Counsel cited Boniface Francis Mwangi V BOM Iyego Secondary School (2019) eKLR; Simon Mbithi Mbone V Inter Security Limited (2018) eKLR; and Joseph Nzioki V Smart Coatings Limited (2017) eKLR, all cited in Julius Kyalo Malonza V Ruth Owolo t/a Erava Catering Services (2021) eKLR.

28. It is submitted that pursuant to the demonstrated and proved unfair, wrongful, and unlawful dismissal the claimant is entitled to the reliefs sought.

29. On procedural fairness, it is submitted that the respondent completely denied the claimant an opportunity to explain and defend his alleged absence from work.

V. Issues For Determination

30. Upon careful examination and consideration of the pleadings filed, the oral and documentary evidence tendered from the claimant and the respondent through RW1, and the submissions by counsel for the claimant, the court identifies the following issues for determination –

    a. Was the claimant unfairly and unlawfully terminated or wrongfully dismissed by the respondent or did he desert duty?

    b. Is the claimant entitled to the reliefs sought in the claim?

    c. Who meets the costs in this cause?

VI. Dismissal/termination

31. The terms of engagement of the claimant by the respondent are not in dispute. The evidence on record is that the claimant was engaged by the respondent as a sprayer on 24th February, 2006, and remained in such employment until 10th April, 2012 when he was summarily dismissed on account of alleged absenteeism. His last gross monthly salary is stated as Kshs7,400/=.

32. However, the parties disagree on the lawfulness of the dismissal. For avoidance of doubt, the letter of summary dismissal stated that –

    FHK/MTK/SRJ/DIS/SRJP03120

    10/04/2012

    JOHN MWITI M'ALAINE

    ID O 20485336

    BOX 73

    MERU

    EMP NO SRJP03120

    Dear John,

    SUMMARY DISMISSAL

    From 09th March 2012 to date, you without leave or any lawful cause have absented yourself from the place proper and appointed for the performance of your duties.

    You are therefore summarily dismissed from the services of the Company from 10th April 2012.

Upon return of all company property in your custody you will be paid your dues as follows:

1. Basic pay from 01st March, 2012 to 08th March, 2012
2. House allowance from 01st Marc 2012 to 08th March 2012
3. Leave pay due.
4. Any overtime
5. One way travelling allowance.

Kindly note that terminal dues will be paid less any outstanding liabilities with the company and relevant statutory deductions.

Pleas clear with your department and collect your dues from accounts office at your earliest convenience.

Yours faithfully

For: Finlays Horticulture(K) Ltd

MICK BARTLETT

REGIONAL GENERAL MANAGER – MT KENYA

Cc District Labour Office

HOF

Accounts

33. The evidence by the claimant is that he was assaulted by security guards working for the respondent on 4th March, 2012 sustaining injuries that required his hospitalization and he was so hospitalized at Nanyuki Cottage Hospital from 5th to 8th days of March, 2012.

34. The assault was allegedly inflicted on the claimant on allegations that he in company of others had stolen the property of the respondent. For ease of reference RW1 stated as follows in his written statement filed in court –

WITNESS STATEMENT FOR STEPHEN NGUGI

1. John was employed on the 21st day of September 2006.
2. On the 4th day of March 2012 at around 2020 hours as intruder (John Mwiti) was found at Siraji farm in possession of 20 metres of Flex cable. He was armed with a panga.
3. The security team managed to take him to Timau police station and thereafter he was taken to Cottage hospital.
4. As per the records he last reported to work o 8th of March 2012 and failed to report to work thereafter. He was subsequently summarily dismissed on the 10th day of April, 2012 as a result of his absenteeism.

SIGNED AT NAIROBI ON THIS DAY OF MARCH 2023

SIGNED

STAPHEN NGUGI

DRAWN AND FILED BY:

ODERO OSIEMO & COMPANY ADVOCATES

ACK GARDENS, BLOCK C 6TH FLOOR

1ST NGONG AVENUE,

BOX 41878-00100

NAIROBI

info@oderoosiemo.co.ke

TO BE SERVED UPON

MUTHANWA & COMPANY ADVOCATES

KIJABE ROW

PO BOX 1333351-00100

NAKURU

muthanwaj@yahoo.com

35. The above statement is categorical that the claimant reported back to work on 8th March, 2012.

36. The claimant produced proceedings in Nanyuki CMC Criminal Case No. 282 of 2012 indicating that he was arraigned on 9th March, 2012 charged with the offence of stealing by servant. The charges related to the events of 4th March, 2012 as narrated above. The respondent was the complainant in that case.

37. Although the record indicates that the accused was released on a bond of Kshs20,000/= with one surety of similar amount or in the alternative a cash bail of Kshs10,000/=, it is not clear when the claimant was actually released from custody.

38. In a judgment delivered on 30th April, 2013 the claimant was acquitted of the charges. Legally, this acquittal is conclusive evidence that the claimant did not engage in the alleged misconduct. This also, of necessity, implies that the alleged theft could not have been a ground to found a disciplinary action and probably that explains why the respondent kept off any allegations of theft against the claimant.

39. The claimant was terminated for alleged absenteeism from work. The evidence by RW1 indicates that the claimant reported back to work on 8th March, 2012 ostensibly upon discharge from hospital. It is conceded that the respondent was up to that point aware of the condition of the claimant following the assault and hospitalization.

40. It is the respondent's case that from 9th March to 10th April, 2012 the claimant did not show-up at work. What is evidently clear though is that the respondent was aware that the claimant was attending to a criminal trial in which the respondent was the complainant. In a move of pure dishonesty and or perjury, RW1 alleged that the respondent was not aware of the criminal case.

41. Although the criminal proceedings do not indicate when the claimant secured his release on bail/bond, the court is inclined to believe the evidence by the claimant that he was not able to raise bond/bail until 17th March, 2012. The claimant stated that he did not report back to work after his release from custody as he was informed by the HR manager to wait for further communication from the employer. The communication that the claimant received next is the letter of dismissal dated 10th April, 2012.

42. The jurisprudence on what constitutes or does not constitute fair and lawful termination or dismissal is now somehow settled -

> Mary Chemweno V Kenya Pipeline Company Limited (2017) eKLR, Loice Otieno V Kenya Commercial Bank Limited (2013) eKLR, and Walter Ogal Anuro V Teachers Service Commission (2012) eKLR.

43. While the respondent may have had a ground for suspending the claimant from duty and taking disciplinary action against him following the criminal charges in court, no such suspension or disciplinary action was administered as far as the record and evidence show.

44. Astonishingly, the claimant was ruthlessly denied any hearing or due process. No notice was issued to the claimant to show-cause why action should not be taken for his alleged absenteeism, no hearing was called for and or held, and no efforts whatsoever were made in attempting to trace him and inquire why he had failed to return to work after hospitalization resulting from an assault inflicted by the respondent's own security guards.

45. The court may wish to pose this rhetorical question - could it be that the respondent deliberately failed to contact the claimant and proceeded to dismiss him in order to avoid liability for the alleged assault? While the court shall not speculate on this valid concern, the conduct of the respondent towards their injured and hospitalized employee, who was, in any event, injured by respondent's security guards was, to say the least, contemptuous.

46. The court has said enough this far in demonstrating that while the respondent may have had some ground for taking disciplinary action against the claimant following his arraignment in court on criminal charges relating to stealing of his employer's property – See Section 44(4)(g) of the *Employment Act* (the Act) – the respondent denied the claimant due process in regard to the allegations of absenteeism that formed the basis for his dismissal.

47. As stated above, the respondent all along knew, or ought to have known, the whereabouts of the claimant during the entire material period from 4th March to 10th April, 2012.

48. For all the foregoing reasons, the court finds and holds that the respondent denied the claimant both substantive and procedural fairness.

49. In a situation such as the one obtaining in this cause, wherein an employee is purported to have been dismissed on the basis of absenteeism, an employer needs to demonstrate the following if the court is to find in its favour – that the employee was absent without leave or permission; that reasonable efforts were made to reach the employee through all means to no avail; that the period of absenteeism is long as to give rise to the presumption that the employee is unwilling or unintending to return to work; and that due process has been duly administered.

50. In this cause, no efforts were made by the respondent in tracing the claimant; the absence of the claimant from work was for a short period of about a month yet the claimant had been an employee since 2006; besides, it has been demonstrated in evidence that the respondent knew or ought to have known the whereabouts of the claimant during the entire period.

51. It is hereby held and declared that the dismissal of the claimant by the respondent was wrongful, unfair, and unlawful.

VI. Reliefs

52. Having held that the Claimant was wrongfully, unfairly, and unlawfully dismissed for lack of notice, substantive, and procedural fairness, this court shall now consider each of the reliefs sought as hereunder.

53. Prayer (i) is for a declaration that the dismissal was wrongful, unfair, and unlawful. The court has found so in the foregoing part of this judgment and it is hereby so proclaimed and declared.

54. Prayer (ii) has several items from (a) to (g). Item (a) is for one month's pay in lieu of notice at Kshs7,400/= which is hereby allowed. Item (b) is for eight (8) days worked in March, 2012 in the sum of Kshs2,277/=. However, the court notes that the claimant remained in employment of the respondent until he was dismissed on 10th April, 2012. The claimant is therefore entitled to a full salary for March and ten (10) of April, 2012. The combined salary arrears are Kshs9,677/= which is hereby awarded to the claimant.

55. Item (c) is for travelling allowance of Kshs1,000/=. No evidence was availed on how and when the claimant was entitled to such allowance. The claim is thus denied.

56. Item (d) is for house allowance in the sum of Kshs2,063/=. Again, no evidence or particulars have been given on how this amount is arrived at. This claim is hence denied.

57. Item (e) is for severance pay in the sum of Kshs22,200/=. Again, no particulars or evidence was adduced in support of this claim. Ordinarily, severance pay is paid on account of termination on redundancy under Section 40 of the Act. Employees terminated otherwise are paid gratuity based on the terms of the contract or at the discretion of the employer. For this reason, this claim is denied as the claimant was not terminated on redundancy.

58. On compensation, item (f), this court has carefully considered the factors provided for under Section 49(1)(c) of the Act. The claimant worked for the respondent for over six years yet he was not given a hearing to defend himself. It must have been very painful and frustrating for him to be wrongfully, unfairly, and unlawfully dismissed in the manner that it happened without any terminal benefits or pension. It is sad that after serving the respondent for that long the respondent did not deem it fit to voluntarily pay to the claimant his terminal dues without the respondent tagging such settlement to the usually so meaningless clearance process. Now, over ten years since his dismissal there is nothing left between the parties for the claimant to clear. The parties have not expressed intentions or desire to re-engage. It is unfortunate that the claimant was injured by security personnel of his employer yet the employer offered no compensation.

59. For all the above reasons this court takes and holds the view that this is an appropriate case for award of the maximum compensation under Section 49(1)(c) of the Act. The claimant is awarded as follows – Kshs7,400/= * 12= Kshs88,800/=. This amount is subject to statutory deductions.

60. Item (g) is for a certificate of service which is a right for an employee under Section 51 of the Act. The respondent shall issue and deliver to the claimant a certificate of service.

IV. Costs

61. Costs follow the event and therefore the claimant is awarded costs of this cause.

V. Disposal

62. In disposal of this cause, the court issues the following orders: -

a) A declaration be and is hereby issued that the dismissal of the claimant by the respondent was wrongful, unfair, and unlawful.

b) The claimant is awarded a total of Kshs105,646/= made up as follows –

i. One month's salary in lieu of notice ....Kshs7,400/=

ii. Salary arrears for March and ten (10) days of April, 2012.....Kshs10,246/=

iii. Compensation for wrongful, unfair, and unlawful dismissal....Kshs88,800/=

Total .....Kshs105,646/=

d. The respondent shall issue and deliver to the claimant a certificate of service within 30 days of this judgment.

e) Costs of the cause to the claimant.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 11TH DAY OF JULY, 2024.

.....

DAVID NDERITU

JUDGE