



**Ngolo v Western Seed Company Ltd (Cause E008 of 2023)
[2023] KEELRC 2348 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2348 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE
CAUSE E008 OF 2023
MA ONYANGO, J
SEPTEMBER 28, 2023**

BETWEEN

PHILIP A NGOLO CLAIMANT

AND

WESTERN SEED COMPANY LTD RESPONDENT

RULING

1. The suit herein was instituted by the Claimant vide his memorandum of claim dated 8th January, 2020 in which he seeks the following reliefs:-
 - a. A declaration that the dismissal of the Claimant from the employment was illegal, unprocedural and unfair.
 - b. A declaration that the Respondents' action throughout the Claimant's employment was illegal and unjust.
 - c. Reliefs as per paragraph 26 above.
 - d. Costs and interests
 - e. Any other relief this court may deem fit and just to grant.
2. The itemised claim at paragraph 26 of the Memorandum of claim is as set out below:-
 - a. November salary to-date since the Claimant was orally dismissed on 19th August, 2019 = 55,000/=.
 - b. 3 months salary in lieu notice- 55,000/= x 3= 165,000
 - c. Severance pay 55,000/= (salary) x 11 years worked x 15/ 30 = 302,500
 - d. 12months salary for unprocedural dismissal (@55,000 worked x 12 months= 660,000/=.



- e. Salary for the remaining years of the Claimant contract 5 years plus 1 month plus 1 month
 $12 \times 55,000 \times 5 \text{ years plus 1 month} = 3,355,000/=$.
- f. NSSF deductions for the remaining 5 years and 1 month = $400(\text{per month}) \times 12(\text{months}) \times 5$
 $(\text{years}) + 1 \text{ month} = 24,000/=$.
- g. NHIF Deductions for the remaining 5 years and 1 month $320(\text{per month}) \times 12(\text{months}) \times 5$
 $(\text{years}) + 1 \text{ month deduction} = 19,520/=$.
- h. Gratuity for the remaining 5 years $55,000 \times 15/30 \times 5 = 137,500/=$.
- i. Car Ownership Plan (COP) equivalent of Motor vehicle Reg No. KAR 587U the Claimant was using during that time of the contract or alternatively I 1,600,000/= per the contract 21st June 2014.
- j. Ksh 3000/= per month for the use of the Claimant car for whole year for the Respondent Business for the year 2018, $3000 \times 30 \times 12 = 1,080,000/=$.
- k. The Claimant pending loan for his Car Reg No. KCK 683J that the Respondent Guaranteed him while he was at work which was to be serviced through the contract.

K) Certificate of service

Total = 7,398,920

3. The Respondent filed a Response to the statement of Claim in which it denies that it dismissed the Claimant. The Respondent avers that on the contrary, it is the Claimant who absconded duty. The Respondent avers that the Claimant was paid his terminal dues including gratuity and salary to the last day worked.
4. At the hearing of the suit the Claimant testified on his behalf while the Respondent called Doreen Namaemba Wafubwa, its Human Resource Officer (RW1) and Ernest Okoth Lang'o, its security Agent (PW2). The parties thereafter filed written submissions.

Claimants case

5. It was the Claimant's case that he was first employed by the Respondent in 2009 but left in 2012. He was re-engaged by the Respondent in 2013 and worked until 2019 when his employment was terminated.
6. The Claimant testified that on 10th November, 2019 at about 6.30 am he was involved in a road accident while driving the Respondent's motor vehicle registration No. KCT 335H make Toyota Probox. That the accident occurred around Taj Mall area along Outer-Ring Road Nairobi, after a tyre burst that caused him to lose control and hit the pavement. The vehicle was as a result damaged on the Bonnet and headlights.
7. The Claimant reported the accident to Embakasi Police Station and was issued with OB No. 113/11/11/2019.
8. The Claimant avers that he reported the accident to the Respondent and was directed not to leave the vehicle at the police station. The Respondent sent an employee who arranged for the vehicle to be towed to Langata Motor Care Garage for insurance inspection and repairs.
9. It was the Claimant's averment that he requested for the towing charges of Ksh.13,500 but the Respondent sent him only Ksh.10,000.



10. The Claimant averred that on 12th November, 2019 he requested for sick leave of 10 days and salary advance of Ksh.10,000 to allow him undergo medical examination following the accident but the Respondent's Employee Administration Manager Mr. Zack Cheruiyot directed him to report to the Respondent's Head office immediately with all company property in his possession including but not limited to the tent, 509 banner, computer, phone, spare keys for motor vehicle KCT 335H before being advised on the way forward. The Claimant handed over the items on 19th November, 2019.
11. It is the Claimant's case that on his way to the office he met the Respondent's Director Mr. Saleem Esmail who told him to sort out the issues over the accident with the Respondent's Administration Manager Zack Cheruiyot and the Accountant, hand over everything he had as directed then leave and consider himself terminated for careless driving and causing damage to the Respondent's Motor vehicle KCT 335H.
12. The Claimant further averred that the Administration Manager Mr. Zack Cheruiyot and Accounts in-charge Doreen Namaemba told him that whatever the director told him was the final say and the director did not want to see him within the Respondent's premises.

Respondents case

13. The Respondent's case is contained in its response to the Memorandum of Claim, the witness statements of RW1 and RW2 and the evidence adduced by the two witnesses at the hearing.
14. It is the Respondent's case that the Claimant was first employed by the Respondent on 22nd April 2009 and served on several one year contracts until 30th June, 2022 when he left to work with Nestle Kenya Ltd.
15. That the Claimant was re-engaged by the Respondent on a one year contract commencing 21st January, 2013 to 30th June, 2013. On 1st July, 2013 he was issued with another one year contract and a further contract was issued to him on 1st July, 2014. He worked on several contracts, the last of which was to expire on 31st December, 2019.
16. It is the Respondent's case that the Claimant worked as the Sales Representative in Western Region until January, 2019 when he was transferred to Central region.

Analysis and Determination

17. The issues for determination are whether the Claimant's employment was unfairly terminated by the Respondent or he deserted duty.
18. As stated in the Respondent's submission, the root of this issue stems from the accident on 10th November, 2019 and the subsequent events.
19. According to the Respondent, the Claimant did not tell the truth about the accident of 10th November, 2019. The Respondent alleges that the accident did not happen where the Claimant alleges it did and further that the police abstract the Claimant submitted was incomplete as it did not indicate the name, service number and rank of the investigating officer and was also not signed by the person applying for the Abstract.
20. The Respondent further alleges that the Claimant did not suffer any injuries in the accident.
21. The Respondent has further brought up the issue of incompetence on the part of the Claimant.



22. Unfortunately, none of these issues were brought to the attention of the Claimant before he left the Respondent's employment. They can therefore not be used as justification for termination of his employment.
23. Section 41 and 43 of the Employment Act are clear that the reasons for termination of employment must not only be proved, but must be raised with the employee who must be given an opportunity to defend himself against any such allegations.
24. Further, such arguments are incompatible with the Respondents argument that the Claimant absconded duty.
25. The Respondent's allegation that the Claimant was called for a meeting on 16th December, 2019 was not proved at the hearing.
26. According to the evidence adduced by the Claimant, he applied for 10 days sick leave and Ksh. 10,000 to go for medical check-up after the accident. In response he was directed by Zack Cheruiyot, the Administration and Finance Manager, to clear with the security officer Mr. Ernest Lang'o (RW2). This was by email of 12th November, 2019 at 12.23pm. On 13th November 2019 at 8.51am, Mr. Cheruiyot sent another email to the Claimant as follows:-

“ Further to my email of yesterday, this is to advise you to report immediately to the company's Head Office at Kitale with all the Company's property in your possession including but not limited to, the tent, 509 Banner, Computer, Phone, Spare Keys for KCT 335H and all other items taken over from Mr. Njoroge. I will then advise you on the way forward.”

27. It is not contested that the Claimant complied and on 19th November, 2019 handed over to the Respondent. The handing over note dated 19th November, 2019 is annexed to the Claimants bundle of documents as the second last document in the bundle. It is witnessed by Zack Cheruiyot, Doreen Namaemba (RW1) and Ezekiel Juma.
28. On the same day, 19th November, 2019 Doreen Namaemba wrote an email to the 3 employees who were reporting to the Claimant directing them to report to Mr. Joel Bania. The email is reproduced below:-

From:,sccounts@westernseedcompany.com>

Date: Tue, Nov 19,2019,16:29

Subject: Changing in Reporting

To:muriguisaacmurage@gmail.com
amuthoni022@gmail.com

morriasomurithi5@gmail.com

Cc: Joel Bania, Ezekiel Juma

Dear all

I trust you are doing well.

I took time to speak to all the 3 of you separately.

Kindly note that you will be expected to report to Mr. Joel Bania of 0724487371 on your work schedules and reports.

You will be required to email Joel on that and copy to Zack our Administration and Finance Manager.



For any assistance on Finance and the like you have Joel's number as well as the office line 0705505505.

Kindly submit copies of your Riding Licences to the office to enable us send you the Motor Bike.

Should you have any queries, please feel free to contact the undersigned.

Best regards

Doreen Namaemba

Accounts Department,

Western Seed Company Ltd

PO Box 1022,30200,

Kitale

Phone 0724,761,457, 0101761457.

29. The Claimant complained about this to the Respondent through his letter dated 2nd December, 2019 where at the 2nd page he stated:-

“it is clear that my position has already been taken over and my people whom I was working work(sic) have been clearly instructed to report and consult to the other that Joel Bania(sic). It was and it is still so an unfortunate thing and inhumane that I was orally dismissed in such a way with no explanation as if am the one who caused an accident when the car is more important than myself.”

30. From the foregoing, I find that the Respondent dismissed the Claimant on the day he was directed to return his tools of trade and the people previously reporting to him directed to report to another person, whether or not he was told never to step in the Respondent's premises again.

Remedies

31. The Claimant prayed for his November 2019 salary. RW1 stated that the Claimant was paid salary together with gratuity. No evidence was adduced of such payment contrary to section 10(7) of the Employment Act which makes it the burden of the employer to prove any prescribed term of contract including evidence of payment of salary. I award the Claimant salary for 19 days worked in November, 2019. His salary was Ksh.55,000 per month. Salary for 19 days was therefore Ksh.34,834.0.
32. The Claimant prayed for 3 months' salary in lieu of notice. His contract provided for one month termination notice. I therefore award the Claimant Ksh.55,000 on account of pay in lieu of notice of one month.
33. The Claimant prayed for severance pay. Having not been declared redundant, the Claimant is not entitled to severance pay.
34. The Claimant prayed for compensation for unprocedural dismissal. Having found that he was unfairly terminated the Claimant is entitled to compensation. Taking into account his length of service, the circumstance under which his employment was terminated and all relevant factors under section 49(4) of the Employment Act I award the Claimant 6 months salary as compensation in the sum of (55,000x6) Ksh.330,000.



35. The prayers for salary for remaining years of service, NSSF deduction for remaining years of service, NHIF deductions for remaining years of service and gratuity for remaining years of service are not anchored in law nor on the Claimant's contract of employment. The same are declined.
36. The prayer for car ownership plan (COP) was not proved by the Claimant and is declined.
37. The prayer for Ksh.3,000 per month for use of the Claimants car for the Respondents business was not proved. The same is declined.
38. The prayer for pending loan for car registration No. KCK 686J guaranteed by the Respondent is declined as a guarantor does not take over the liability of the borrower to pay the loan.
39. The Claimant is however granted gratuity for any period worked when gratuity was not paid as the same was provided for in his contract.
40. In summary, the Claimant is awarded the following.
 - i. salary for 19 days worked in November, 2019 Ksh. 34,834
 - ii. Pay in lieu of notice Ksh. 55,000
 - iii. compensation for unfair termination Ksh. 330,000
Total Ksh. 419,834
 - iv. The Claimant is further awarded gratuity not paid for any year worked.
 - v. The Respondent shall pay Claimants costs.
 - vi. Interest shall accrue at court rates from date of Judgment until payment is full.
41. It is so ordered.

DATED, DELIVERED AND SIGNED AT KITALE THIS 28TH DAY OF SEPTEMBER, 2023.

M. ONYANGO

JUDGE

