



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 70 OF 2020

JACKTONE OTOYI OTIENO.....CLAIMANT

VERSUS

PORT FLORENCE COMMUNITY HOSPITAL.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant instituted this claim vide a Memorandum of Claim dated 6th March, 2020, seeking compensation for unlawful termination, payment in lieu of notice, salary arrears, payment of unutilized leave days and gratuitous pay.
2. The Respondent lodged a response to the Claimant's claim on 28th May, 2020, wherein, it wholly denied the claim.
3. The Claimant filed a reply to the Respondent's response to his claim on 12th June, 2020. The matter had been lodged at the Chief Magistrates Court at Kisumu and later transferred to this court by consent of the Parties and thereafter set down for hearing.
4. The Claimant testified in support of his case. He adopted his witness statement dated 6th March, 2020 and produced his bundle of documents.
5. The Respondent did not present any witness in the matter.
6. The Claimant filed submissions, the Respondent did not.

The Claimant's Case

7. The Claimant's case is that he was employed by the Respondent in March, 2015 as an accountant earning a gross salary of Kshs. 35,000/=.
8. The Claimant avers that he was promoted to the position of Finance and Administration Manager and his salary increased to Kshs. 70,000/= and later in April, 2017, to Kshs. 100,000/=
9. It is the Claimant's case that he was transferred from Maseno Hospital to Ganjoni Hospital in Mombasa where he served as a hospital administrator. He states that the Respondent unilaterally reduced his salary in July, 2018 from Kshs. 100,000/= to Kshs. 80,000.
10. The Claimant states that he was again transferred to the Dunga Nursing and Maternity Hospital in Kisumu on 9th November, 2019. It is his case that he was terminated while serving his 3rd posting at Dunga Maternity hospital on 2nd December, 2019, without reason, notice or a hearing.
11. The Claimant states that his termination from the service of the Respondent was without basis, malicious and made in bad faith. He states that the termination is unlawful, unprocedural and a breach of his contract of employment.
12. The Claimant's further case is that he never went on leave in the years 2015 and 2019 and that he only took two weeks of his leave in 2018.
13. The Claimant's prayer to this court, is that he is awarded the reliefs listed in his memorandum of claim.

The Respondent's Case

14. The Respondent in its response to the Claimant's claim, wholly denied the contents of the claim. It states that the Claimant deserted duty upon being issued with a show cause letter for contravening the Respondent's policy.

The Claimant's Submissions

15. It is submitted that the Respondent employed the Claimant in the year 2015 and that he was later promoted and his salary increased from Kshs. 35,000 to Kshs. 100,000. The Claimant submitted that his case against the Respondent, including the evidence adduced was never controverted and the reliefs sought should be allowed as prayed.

16. The Claimant submitted that his salary was unilaterally reduced from Kshs. 100,000 to Kshs. 80,000 without any consultation or consent from him contrary to the law. He submits that he is entitled to the salary difference as pleaded in his memorandum of claim. He sought to rely on the holding in the case of *Kenya County Government Workers Union v Wajir County Government & Another (2020) eKLR* to support his position.

17. It is submitted that the Claimant was unlawfully terminated as he was neither given notice nor reasons for termination. It is further submitted that the Claimant was condemned unheard as he was not granted an opportunity to make representation prior to termination.

18. It is further submitted that the Respondent did not present any witnesses during the hearing to prove their reasons for terminating the Claimant contrary to *Sections 43 and 45 of the Employment Act, 2007*. He sought to rely in the case of **David Gichana Omuya v Mombasa Maize Millers Ltd**

19. It is submitted for the Claimant that he be awarded 12 months salary in compensation, premised on the fact that he had worked for the Respondent from the year 2015 and considering the conditions under which he was terminated.

Determination

20. The issues for determination in this matter are:

- i. Whether the Claimant was unfairly and unlawfully terminated
- ii. Whether the Claimant deserves the reliefs sought
- iii. Who bears the costs of the suit.

Whether the Claimant was unfairly and unlawfully terminated

21. The Respondent's case is that the Claimant deserted duty upon being served with a notice to show cause for contravening its policy. No evidence has been adduced to prove that the Claimant was given a show cause letter and the nature of the misconduct or policy violated.

22. *Section 45 of the Employment Act, 2007*, provides that no employer shall terminate an employee unfairly. The employer must prove both the validity and fairness of reasons for terminating an employee.

23. *Section 41 of the Employment Act* demands that prior to terminating an employee, the employer must explain to the employee in a language he understands, the reasons for which termination is being considered. This provision obligates an employer to hear representation by the employee before making a decision to terminate an employment relationship.

24. Fair hearing is both a statutory and a constitutional requirement and it suffices irrespective of the substantive justification an employer has to terminate the services of an employee. Non-compliance with any of these statutory provisions, renders the disciplinary action outrightly unfair.

25. The Respondent's statement of response to the Claimant's claim, consisted of denials of each of the Claimant's averments, including that the Respondent employed the Claimant, when there were all indications to the contrary.

26. The Respondent failed and/or neglected to present a witness or documentary evidence to disapprove the Claimant's assertion. The court in the circumstances, construes the Respondent's response as a mere denial of the claim, for lack of contrary evidence.

27. For this reason, I conclude that the termination of the Claimant fell short of the Statutory and Constitutional requirements on both procedural fairness and substantive justification, as there was no prove that the Claimant was issued with a show cause letter, given an opportunity to make representation and the reasons for his termination.

28. I find and hold that the termination of the Claimant was procedurally and substantively unfair.

Whether the Claimant deserves the reliefs sought

29. The Claimant sought that this court awards him the following reliefs:

- i. Compensation for unlawful termination;
- ii. Payment in lieu of notice;
- iii. Salary arrears;
- iv. Payment of unutilized leave days; and
- v. Payment of gratuity.

30. To warrant the award of the reliefs sought, the Claimant is under obligation to prove his claim.

Compensation for unlawful termination

31. The Claimant was without a doubt unfairly terminated as has been declared herein. The manner of an employee's termination is relevant in determining the quantum of damages.

32. *Section 49 of the Employment Act* empowers the court to award damages, but does not give a detailed criterion for assessing the quantum of damages for unfair termination and this is largely left to the discretion of the court.

33. In exercising this discretion, the consequences of the termination, circumstances surrounding the termination, the length of service and the difficulty with which to secure another job, are key factors that the court will consider. (*See Gabriel Ngugi Ndumbu v Gaichanjiru Catholic Hospital (2013) eKLR*)

34. Compensation awarded for unfair termination is not for loss of remuneration but a form of solatium for a wrong perpetrated. An employee is required to mitigate his damages in ways such as taking steps to find another job and which factors comes into play when considering quantum of damages. (*George Ogembo (2014) Employment Law Guide for Employers, Law Africa page.21*)

35. The Claimant's termination letter refers to his work performance and relationship with his team members. It does not proceed to say whether his performance was below expectation or what the issue was with his team members. The circumstances and the reasons given for the termination of the Claimant were unsubstantiated and may have left the Claimant with more questions than answers.

36. The Claimant was in the service of the Respondent for about 5 years; from the year 2015 to 2019. Taking into consideration his length of service and the circumstances under which he was terminated and guided by the thirteen (13) grounds provided under Section 49 (4) of the Employment Act, 2007, I award the Claimant 8 months' salary as compensation for unfair termination. (*See Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR*).

Payment in lieu of notice

37. The Respondent's letter dated 30th November, 2019 terminating the service of the Claimant, states that the termination is effective 2nd December, 2019. There are only two days between the date of the termination letter and the date the termination was said to take effect. The Claimant was evidently not given notice prior to termination.

38. The termination violates the provisions of Section 35(1)(c) of the Employment Act, 2007 on termination notice.

39. The Claimant's claim is for payment of 5 months' salary in lieu of notice. His contract of employment expressly provides for a one month notice period, similar to the statutory notice period.

40. The claim for 5 months' pay in lieu of notice is without basis. The Claimant is awarded a one-month salary in lieu of notice for failure of the Respondent to issue him the requisite notice prior to the termination.

Salary arrears

41. The Claimant's letter of employment indicates that his salary at employment was Kshs. 35,000 per month. The Claimant has produced pay advises that support his position that his salary was increased from Kshs. 35,000 to Kshs. 100,000.

42. The Respondent's letter dated 19th November, 2018 transferring the Claimant to Dunga Maternity Hospital, indicates his position as administrator and his salary as Kshs. 80,000 per month. His letter of appointment indicates that his position as that of an accountant and the salary attached to the position being Kshs. 35,000.

43. The pay slips produced show the Claimant's salary to be Kshs.100,000. The pay slips are however not credible for reason that the persons approving the payment of salaries are the people being paid and the pay slips did not bear statutory deductions which are supposed to be made against the salaries as indicated in the Claimant's letter of appointment. Further, if the Respondent wrote a letter informing the Claimant that his salary was Kshs. 80,000 and not the Kshs. 35,000 provided in his letter of appointment, I do not see why they did not write informing him when the salary increased to Kshs. 100,000.

44. Having cast doubts on the Claimant's evidence in respect to his monthly salary, I find and hold that the Claimant's monthly salary was

Kshs. 80,000. I further find and hold that the Claimant is not entitled to the claim of salary arrears and the claim fails and is dismissed.

Payment of unutilized leave days

45. The Claimant's case is that he did not take his leave in the years 2015, 2019 and part of 2018. This claim was filed on 9th March, 2020. Leave is an employee's statutory entitlement and the Respondent/employer bearing the obligation to keep staff records per Section 74 of the Employment, ought to have produced these records to prove that the Claimant utilized his leave days. The Respondent did not defend the claim.

46. The Claim for payment of leave not utilized in the year 2015 is time barred by virtue of Section 90 of the Employment Act. The Respondent was under obligation to disapprove the Claimant's assertion as required under Section 10 (7) of the Employment Act, 2007.

47. The Respondent did not discharge this burden and for this reason, the Claimant is awarded payment for unutilized leave for the year 2018 and 2019 as per claim.

Payment of gratuity

48. The Claimant employment agreement did not provide for payment of gratuity. The same letter, refers to a staff pension scheme for the Respondent's members. The appointment letter also indicates that NSSF deductions would be made from the Claimant's salary and a contribution from the Respondent as required by statute. The claim for gratuity is not merited and is dismissed.

Certificate of Service

49. A certificate of service is a statutory obligation that an employer owes an employee per *Section 51 of the Employment*, except in instances where employment continued for less than 4 weeks.

50. This obligation is mandatory notwithstanding the reasons for separation. The prayer is allowed.

51. In conclusion, Judgment is entered for the Claimant against the Respondent in the following terms:

- i. One month's salary in lieu of notice at Kshs. 80,000/=
- ii. Payment of unutilized leave days for 2018 and 2019 at Kshs.120,000/-(40,000 + 80,000)
- iii. 8 months' salary equivalent as compensation for unfair termination at Kshs.640,000/=
- iv. Certificate of service
- v. Costs of the suit and interest at court's rate until payment in full

52. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 20TH DAY OF JANUARY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Onyango present for the Claimant

N/A for the Respondent

Christine Omollo- C/A