



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 395 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

PETER GICHINA MUGI.....CLAIMANT

VERSUS

PIPE MANUFACTURERS LIMITED..... RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by way of a memorandum of claim dated 24th February 2017 and filed on 27th February 2017 alleging that he was injured at the workplace owing to the Respondent's negligence and breach of statutory duty. The Claimant prays for –

- a. General damages for breach of contract.
- b. Payment of sick off days as provided in the terms of the contract.
- c. Compensation for the injuries sustained at the workplace.
- d. Payment of the difference of the salary paid as a Grade 3 instead of salary of Grade 2.
- e. Interest on the above from the time the arrears accrued.
- f. Costs of this claim.

Claimant's Case

2. The Claimant avers that he was an employee of the Respondent as a Turner/Fitter from 1st July 2015 to 30th June 2016. That on or about 6th March 2015 while on duty working on a machine, he felt some sharp pain on his shoulder and did not realise the magnitude of the injuries sustained. That the said accident was occasioned by a breach of statutory duty on the part of the Respondent, its servants and/or agent.

3. That he visited Embakasi Health Centre the following day (7th March 2015) and reported the incident at the work place and was accorded leave. That when he resumed duty, the problem persisted and sought treatment at the Mama Lucy Hospital where the doctors realised that he had a fracture on his head on the left humerus.

4. That the Respondent breached its statutory duty by: -

- a. Failing to make or keep the Claimant's place of work safe.
- b. Failing to provide or maintain safe means of access to the Claimant's place of work.
- c. Failing to instruct the Claimant on the dangers likely to arise in connection with his work or training him or supervising him adequately.
- d. Failing to provide a safe system of work.

5. That in the alternative, the Respondent was negligent by failing to take precautions for the Claimant's safety exposing him to risk or danger in injury.
6. It is further averred that the Claimant was granted sick off for two weeks with pay and leave without pay thereafter in December 2015 and January 2016.
7. That the Respondent's failure to grant three days sick off with pay violated the terms of the contract of employment between the parties and 30 days on half pay due which was ran to 23rd February 2016.
8. That the Claimant was not granted annual leave in 2015 nor paid for the days and was not compensated for the injuries sustained at the work place.
9. That he was employed at Grade 3 instead of Grade 2 to avoid remunerating him compared to others with similar qualifications thus discriminating the Claimant.
10. It is further averred that the Claimant's contract was terminated six months before the due date without payment for the remaining period.

Respondent's Case

11. The Respondent filed its memorandum of reply on 10th July 2017 praying for dismissal of the suit with costs.
12. It avers that since the memorandum of claim comprises a claim in negligence and or damages arising out of the alleged injuries which is a distinct and separate causes of action, the same is impotent.
13. The Respondent further avers that the Claimant was employed as a Turner/Fitter but employment was terminated on 31st January 2016 and not 31st June 2016 as alleged.
14. It denies that it breached any of its statutory duties as alleged by the Claimant.
15. The Respondent also avers that the Claimant's work did not involve the use of a hammed and the injuries were not sustained at his place of work and thus had no cause of action against the Respondent.
16. The Respondent denies the alleged accident and the allegations of negligence in paragraph 12 of the memorandum of claim. It also denies the allegation that it contravened the terms of the contract of employment or discriminated the Claimant or engaged in unfair labour practices.

Evidence

17. The Claimant adopted the written statement and produced the other documents on record as exhibits.
18. The Claimant testified that he was employed by the Respondent as a Turner/Fitter from 1st July 2015 to 30th June 2016. That it was an implied term of the contract of employment or duty of the Respondent to take all reasonable precautions to ensure the Claimant's safety at the workplace and not expose him to risk of danger or injury and provide proper system of travelling while and in the course of employment.
19. That on or about 6th March 2015 while on duty working on a machine, he felt a sharp pain on his shoulder and did not realise the magnitude of the injury but while at home, the pain worsened and he visited Embakasi Health Centre on 7th March 2015.
20. That he reported the incident at the work place and was granted leave but on resuming duty, the problem persisted and he visited the Mama Lucy Hospital for treatment where the doctors released that he had a fracture on the head of the left humerus in October 2015.
21. The Respondent was represented by Counsel on 15th July 2019 but Counsel did not appear on 12th July 2021, 11th August 201 before the Deputy Registrar or for the hearing on 6th October 2021 which was adjourned to 15th November 2021. However, its Counsel was present on 16th December 2021 for mention to confirm the filing of submissions. Counsel indicated that the Respondent would rely on the record before the Court.
22. The Respondent tendered neither oral evidence nor submissions. Its counsel prayed for a judgment date.

Claimant's Submissions

23. The Claimant isolated five issues for determination as follows, whether or not the parties had a valid contract of employment as well as its commencement and end date, whether the Respondent's work environment was safe, whether the injuries sustained by the Claimant resulted from unbearable working environment at the Respondent, whether or not the Respondent terminated the Claimant's services on medical grounds and reliefs.

24. As regards the contract of employment, it is submitted that the Claimant executed the contract on 1st July 2015 and produced the same as an exhibit. Relatedly, the Respondent admitted that the Claimant was its employee.

25. As to whether Respondent provided a safe working environment for the Claimant, it is submitted that the Respondent did not create a conducive working environment for the Claimant. That the Respondent's machines were defective and the Claimant complained severally about it. It is submitted that if they had been maintained, the injuries to the Claimant would have been avoided.

26. It is further submitted that the protective equipment and work gear issued to the Claimant such as safety glasses safety shoes, gloves overall and others were insufficient since the Claimant's work involved operation of heavy and dangerous machines. That it was incumbent upon the Respondent to maintain, service and repair its machines and additionally employ qualified manpower. It was the Respondent's duty not to expose the Claimant to dangerous machines. Reliance was made on the decision in **Otieno Nalwoyo v Mumias Sugar Company Limited [2014] eKLR** for the proposition that an employer is obligated to provide a safe working system for its employees.

27. On whether the injuries sustained by the Claimant were occasioned by the unbearable working conditions of the Respondent, it is submitted that the sharp pain the Claimant felt was as a result of straining his muscles and he sought treatment the following day and subsequently was treated at the Mama Lucy Kibaki Hospital and the fracture on the head of the left humerus was discovered.

28. As to whether the Respondent terminated the Claimant's services on medical grounds, it is submitted that the Respondent gave the Claimant unpaid sick leave only and thereafter terminated his services on medical grounds. That sustaining injuries at the workplace was not one of the grounds of termination of employment contracts.

29. Reliance was made on Section 41 of the Employment Act, 2007 to demonstrate that there was no hearing and conclusion that the termination was unfair. Section 44 of the Employment Act was also relied upon to urge that the employer did not have a blanket right to terminate the services of an employee.

30. Finally, it is submitted that although the Claimant pleaded general damages for breach of contract and there is no prayer for payment of salary from the date of termination to the end of the contract period, the Court is urged to fashion a remedy appropriate to the circumstances as a court of equity. The decisions in **LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgesellschaft ('Deg') & Others v Pratul Kemraj Shah [2011] eKLR** and **Daniel Kaminja & 3 Others (suing as Westland Environmental Caretaker Group) v County Government of Nairobi [2019] eKLR** were relied upon to reinforce the submission.

Determination

31. The issues for determination are: -

- a. Whether the Claimant was injured at the workplace on 6th March 2015;
- b. Whether the Respondent breached the terms of the contract of employment with the Claimant;
- c. Whether the Claimant is entitled to the reliefs sought.

32. As regards the alleged injury at the workplace, documents on record show that on 6th March 2015, the Claimant requested for permission to seek treatment for an aching shoulder.

33. On 25th March 2015, the Claimant sought leave to seek medical attention for nausea and headache. On 3rd July 2015, he requested for leave to attend the burial of his aunt slated for 4th July 2015.

34. On 14th September 2015, the Claimant sought leave to seek medical attention due to continuous headache. On 7th December 2015 he obtained a two weeks sick off from Mama Lucy Kibaki Hospital.

35. On 21st January 2016, the Claimant reported that he stated feeling pain on the left shoulder. On Wednesday, 11th November 2015 and was treated at Pipeline Nursing Home from where he was referred to the Mama Lucy Kibaki Hospital where it was confirmed that he had a fracture on the left shoulder. The Hospital confirmed the visitation on 12th November 2015, the discovery of a fracture and treatment given.

36. The Respondent denies that the Claimant was injured at the workplace, thereby shifting the burden of proof to the Claimant. Section 107 of the Evidence Act provide that the party making an allegation of fact is duty bound to establish the same.

37. The Claimant testified that he felt a sharp pain on his shoulder on 6th March 2015 and thought that it was a result of straining his muscles and then refers to it as an accident in paragraph 4 of the written statement. The Claimant makes no allegation of how alleged accident happened including what failed or did not work whether he was alone and to whom he reported the said accident and what action the Respondent took. The letter dated 6th March 2015 makes no reference to an accident or injury. It is explicit that the Claimant was seeking leave to seek treatment for an aching shoulder.

38. Subsequent requests for leave related to other reasons until November 2015 when doctors at the Mama Lucy Kibaki Hospital diagnosed the problem and treated it.

39. Regrettably, the Claimant lead no evidence of what his work entailed and how the alleged negligence or breach of statutory duty by the Respondent could have contributed the pain on the left shoulder. Attempts by the Claimant's counsel to fill in the gaps in his submissions could not ameliorate the situation. Evidence on record show that the Claimant had been issued with safety glasses, safety shoes, gloves, vernier caliper etc.

40. Relatedly, the Claimant does not allege that he was unqualified for the job or had not been supplied with the necessary paraphernalia for the particular activity.

41. Finally, neither the particulars of the alleged breach of duty nor the particulars of negligence set forth in paragraphs 10 and 12 of the memorandum of claim are supported by any evidence to demonstrate how the Respondent failed to create a conducive work environment for the Claimant.

42. For the above reason, it is finding of the Court that the Claimant has on a balance of probabilities not established that he was injured at the workplace on 6th March 2015.

43. As to whether the Respondent breached the terms of the contract, the evidence on record show that the Claimant entered into a one (1) year contract with the Respondent from 1st July 2015 to 30th June 2016. He was employed as a Turner/Fitter Grade 3 at a monthly salary of Kshs.21,500/- inclusive of house allowance. He was entitled to two (2) days' leave on completion of a month's service and paternity leave of 14 days after service for one (1) year. The contract was terminable by one (1) month's notice by either party. Terminal dues were payable on expiry of the contract.

44. On sick leave the contract provided that: -

“You shall be entitled to a maximum of thirty days sick leave with full pay thereafter to a maximum of thirty days with half pay for each period of one year of consecutive service provided that you provide a certificate of incapacity covering the period of sick leave claimed and signed by a medical practitioner at a reputable medical clinic. You will not be eligible for sick leave under this paragraph in respect of any incapacity due to gross negligence on your part.”

45. Sadly, it is unclear when the Claimant left the Respondent's employment. The certificate of service dated 31st January 2016 states that he served the Respondent until December 2015 and the Claimant has not contradicted its contents. The certificate stated that the Claimant left employment on medical grounds. The Respondent has not contradicted this statement.

46. Intriguingly, the Claimant's letter to the Respondent dated 21st January 2016 is reporting the occurrences in November 2015.

47. This would appear to render credence to the certificate of service that the Claimant left employment in December 2015. Regrettably, none of the parties advert to the fact of termination.

48. It does follow that since the Claimant served the Respondent for about six months, he was entitled to 15 days' sick leave with fully pay and 15 days' sick leave with half pay. The Respondent led no evidence that it honoured the clause on sick leave.

49. It is the finding of the Court that Respondent breached its part of the contract on sick leave and is liable to compensate the Claimant for the breach.

50. Before delving into the issue of the reliefs claimed by the Claimant, it is important to address the issue of separation between the parties to this suit.

51. Incredibly, the Claimant's memorandum of claim makes no mention of how he left employment. Relatedly, there is no allegation of unfair or unlawful termination or dismissal and neither party makes reference to any payments. The contents of the certificate of service dated 31st January 2016 stating that the Claimant was an employee until December 2015 and left employment on medical grounds remain uncontroverted.

52. The Claimant's attempt to include the issue of termination in the submissions dated 6th December 2021 is of no consequence. It is trite law that a party cannot plead its case through submissions. The Claimant's Counsel appreciates this reality and acknowledges the same in the submissions, but urges the Court to fashion a remedy for the Claimant and relies on the Court of Appeal decision in **LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgesellschaft ('Deg') & Others v Pratul Kemraj Shah (supra)**. However, the Claimant does not demonstrate how a court of equity in employment and labour relations matter could fashion a remedy appropriate to the circumstances where the remedies are creations of the law and more so where the alleged unlawful or unfair action or inaction by the Respondent is neither pleaded nor testified about.

53. Since the Claimant has not contested the separation or alleged that it was unfair, the relevant provisions of the Employment Act cited by the Claimant are inapplicable and nothing turns on the issue of termination.

Reliefs

a. General damages for breach of contract

54. The remedy for general damages for breach of contract is not sustainable in contracts of employment. Remedies for breach of

employment contract germane to termination or dismissal are prescribed by statutory provisions.

55. In addition, the claim of the unexpired period of the contract to of employment is a claim for anticipatory earnings, which is not available under the provisions of the Employment Act. The claim is **declined**.

b. Payment of sick off days as provided on the contract

56. Having found that the Respondent violated the clause on sick leave, the Claimant is entitled to payment for the prescribed number of days, namely 15 days on full pay and 15 days on half pay for the duration served.

57. The sum of **Kshs.16,125/-** is awarded.

c. Compensation of the injuries sustained at the work place

58. Having found that the Claimant did not establish that he was injured at the workplace or that the Respondent was indeed negligent or breached any statutory duty, the claim for compensation for the alleged injuries fails.

d. Difference of the salary paid as Grade 3 instead of Grade 2

59. Paragraph 18 of the memorandum of claim stats that: -

“During the employment of the Claimant in the establishment of the Respondent, he was employed as a Grade 3 employee instead of Grade 2 to avoid remunerating him well as compared to others of the same qualification as the Claimant and a method of cutting down costs on the side of the Respondent thus discriminating the Claimant.”

60. It is important to note that the annexure identified as Appendix 4 (copy of certificate of qualification) is not on record of the Respondent’s organisational structure or establishment showing how the positions were graded. The Claimant led no evidence on the allegation of discrimination and provided no proof that those of equal qualifications were in Grade 2 and thus earning more than him.

61. In the absence of evidence of the Respondent’s establishment and placement of position vis-à-vis the qualifications and the attendant salary scales, the allegation that that Claimant was employed at Grade 3 instead of Grade 2 as a cost cutting measure and was thus discriminatory remains unsubstantiated. The prayer **fails**.

Conclusion

62. In the final analysis, judgment is entered for the Claimant for the sum of Kshs.16,125/- with costs.

63. Interest at Court rates from the date of judgment till payment in full.

64. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 10TH DAY OF FEBRUARY 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE