



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1933 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

DAVID OPONDO ONYANGO

APPLICANT

VERSUS

APEX STEEL LIMITED

RESPONDENT

JUDGEMENT

1. The Claimant commenced this suit by a Memorandum of Claim dated 27th September 2017 filed on 28th September 2017 alleging that his employment was unlawfully terminated by the Respondents and prays for:

- (i) Balance of salary for June 2016 Kshs.8,000/=
- (ii) One month's salary in lieu of notice Kshs.15,000/=
- (iii) Annual leave days in lieu of notice Kshs.15,000/=
- (iv) Certificate of Service
- (v) Cost of and incidental to this suit.
- (vi) Interest in (i)(ii)(iii) and (iv) at Court rates.

2. The Claimant avers that he was an employee of the Respondent along Funzi Road from 16th June 2015 to 30th June 2016, engaged as a general worker earning Kshs.7,500/= every two weeks.

3. That on 28th April 2016, while in the course of discharging his duties he suffered severe spinal injuries while lifting square tubes weighing 200 kg or thereabout. That the injury was occasioned by the Respondent's negligence owing to failure to provide equipment and maintain a safe working environment.

4. It is averred that the Claimant was treated at the Nairobi West Hospital and the doctor recommended light duties for the Claimant for two weeks. That on 29th April 2016 while moving 40 kg bags the Claimant experienced excruciating pain and could not continue working and was referred to the Nairobi West Hospital where he was given 7 days off but returned to work thereafter his incapacity to lift or carry heavy load notwithstanding

5. The Claimant further avers that when the Respondent ascertained that he could no longer carry heavy load, the Human Resource Manager verbally terminated his employment without providing reason, notice or fair hearing as by law required. That the Respondent refused or failed to pay the Claimant's terminal entitlements.

6. Finally, it is averred that termination of the Claimant's employment on the ground of incapacity was cruel, unlawful, unfair, callous, malicious and in bad faith for which he prays for Kshs.208,000/=.

Respondent's Case

7. The Respondent filed a Memorandum of Response on 12th February 2018 admitting that the Claimant joined the Respondent's employment on or about 15th June 2015 but denies that the Claimant's salary was Kshs.7,500/= every two weeks. It also denied the

avertment that the Claimant had been assigned duties of lifting tubes weighing 200 kgs without sufficient machinery.

8. In summary, the Respondents response comprises mere denials of the Claimant's averments. With regard to reliefs, the Respondent avers that none is due to the Claimant as he absconded duty on 15th June 2016 wrongly indicated as 15th June 2017 and had not served for one year to earn annual leave days.

9. The Respondent prays dismissal of the suit with costs.

Claimant's Evidence

10. The Claimant adopted the written statement and testified that after the injury, he was not given light duties which affected his health adversely. He disclosed that he was a labourer and the metal bars he was carrying when he was injured was 20 kgs and later changed the weight to 40 kgs and he had carried 5 pieces. He testified that he was terminated on 30th June 2016 on the ground that he had spent a lot of company money and was not working as required. It was his testimony that he dealt with the Human Resource Officer, one Mariam Matheka and was not given a termination letter or taken through any hearing. The witness further testified that the Respondent did not pay his salary for June 2016 and denied having attended a meeting at the Labour Office on 24th February 2017.

11. On cross-examination, CWI confirmed that he had another case pending in Court against the Respondent for compensation for the injuries sustained at the work place. That he was neither admitted in hospital nor any surgery performed and degree of incapacity was nil. It was his testimony that he was terminated by Mariam Matheka while at work. Strangely, the Claimant denied having reported the dispute to the Labour Office or attended the alleged meeting and denied having absconded duty.

12. RW1 adopted the written statement and testified that the Claimant was employed as a general labourer and worked from 15th June 2015 to 15th June 2016 for one (1) year and absconded duty. The witness further testified that on 23rd December 2016, the Respondent wrote to the Labour Office Industrial Area about employees who had deserted the work place because they had no forwarding address. The Claimant was one of them. It was RWI's testimony that the Claimant attended the meeting at the Labour Office on 24th February 2017 and the Certificate of Service was forwarded to the Labour Officer.

13. On cross examination, the witness confirmed that he was the Respondent's Human Resource Manager and had served the company for 14 years.

14. RWI testified that he met the Claimant at Funzi Road but was unaware of the extent of the injuries. The witness told the Court that the Claimant had not given the employer a postal address and his telephone number was not going through and the Respondent did not write a show cause letter to the Claimant after he allegedly absconded duty. It was his testimony that nothing transpired on 30th June 2016.

15. RWI further confirmed that the Claimant was paid twice every month and his salary was as provided by the Regulation of Wages Order 2015 a total salary of Kshs.15,000/= and the last salary was paid in May 2016.

16. The witness confirmed having attended the meeting at the Labour Office and that the Claimant attended the meeting. Although the witness testified that payment was made to the Claimant, he had no evidence in support nor was the evidence forwarded to the Labour Office.

17. Finally, RWI confirmed that he was aware of the procedure on how to discharge an employee on the ground of ill-health. On re-examination RWI confirmed that the Respondent had an arrangement with the Nairobi West Hospital to ensure that employees received speedy medical attention. That the Claimant was paid the salary for half of June 2016.

Claimant's Submissions

18. The Claimant isolates several issues for determination whether:

(i) The Claimant sustained injury in the course of employment and nature of injury.

(ii) The Claimant's employment was unlawfully terminated by the Respondent.

(iii) The Respondent's action of terminating the Claimant's employment on grounds of incapacity owing to his health without due process was cruel, unlawful unfair, callous, malicious and in bad faith.

(iv) The Respondent failed to pay the Claimant's terminal dues.

(v) The Respondent failed to issue the Certificate of Service.

19. As regards the injuries, Counsel relies on the evidence adduced by the Claimant and urges that the Respondent did not deny the fact that the Claimant sustained injuries at the workplace and was treated at the Nairobi West Hospital. It is submitted that the Claimant has on a balance of probabilities shown that he sustained serious injuries at the work place.

20. As to whether the Claimant was unlawfully terminated, reliance is made on the Claimant's evidence that the Human Resource Manager

terminated his employment by word of mouth without providing any reasons, notice or giving the Claimant an opportunity to defend himself. That the Human Resource Manager stated that the Claimant had cost the company too much in terms of medical bills.

21. It is further submitted that the Respondent's doctor recommendation dated 17th June 2016 provided the proverbial straw that broke the camel's back. Section 41 of the Employment Act is relied upon to exemplify the submission that termination of the Claimant's employment contract was procedurally flawed. The sentiments of the Court of Appeal in **Kenfreight [EA] Limited v Benson K. Nguti [2016] eKLR** are relied upon to underscore the need to accord an employee an opportunity to defend himself before termination of employment. Section 47(5) of the Act is also relied upon to highlight the burden of proof of the employer and employee as are the sentiments of Makau J. in **Benuel Manera v Awanad Enterprises Limited [2014] eKLR**

22. On the allegation that the Claimant absconded duty Counsel submits that the Respondent's witness had indicated in evidence that the Respondent had no telephone contact of the Claimant yet the DOSH form on record had a cell phone number. Relatedly the Human Resource Manager on duty on 30th June 2016 was Mariam Matheka who did not testify. It is submitted that the Respondent's witness evidence was unreliable, shaky and riddled with inconsistencies.

23. Counsel takes issues with the letter from the Labour Office which the Claimant disowned as well as the evidence that the Claimant's whereabouts remained unknown until the letter from the Labour Office was received by the Respondent. In addition, the meeting at the Labour Office on 24th February 2017 was not pleaded in the Memorandum of response. Section 10(6) and (7) of the Employment Act and the decision in **Abigael Jepkosgei Yator & others v Chira Hanan International Co. Ltd [2018] eKLR** as well as **Gilbert Kasumali Kithi v Nyali Beach Holiday Resort [2015] eKLR** are relied upon to underline the duty of the employer to provide work records to enable the Court determine the issues before it on merit.

24. It is submitted that the documents on pages 5 – 11 of the Respondents bundle of documents were fabrications to mislead the Court that the Claimant absconded duty.

25. As regards the character of the termination of the Claimant's employment on the ground of incapacity, it is submitted that contrary to the doctor's recommendation the Respondent did not allocate the Claimant light duties yet it had the wherewithal to do so thus violating the Claimant's rights to fair labour practice guaranteed by Article 41 of the Constitution of Kenya 2010. That the Respondent's conduct towards the Claimant amounted to unfair treatment. The decision in **Kennedy Nyangucha Omanga v Bob Morgan Services Limited [2013] eKLR** is relied upon to demonstrate what an employer should do prior to terminating an employee on the round of ill health.

26. It is submitted that the Court should make a similar finding and award the Claimant the equivalent of 12 months' salary as compensation as well as notice pay and other reliefs as pleaded.

Respondent's Submissions

27. The Respondent identifies three (3) issues for determination, namely, whether:

(i) The reason for termination was fair and valid.

(ii) Constructive dismissal arises

(iii) The Claimant is entitled to any of the reliefs sought.

28. As to whether the reason for termination was fair and valid, reliance is made on the sentiments of Nderi Nduma J. in **Kennedy Maina Mirera v Barclays Bank of Kenya Limited [2018] eKLR** to underscore the duties of the employee and employer in a claim for termination of employment to urge that in the instant case the Claimant has not proven that he was unfairly terminated for the burden to shift to the Respondent to demonstrate the validity and fairness of the reason for termination. According to the Respondent the evidence and documents on record clearly show that this is a case of absenteeism and absconding of duty by the Claimant.

29. It is urged that the Claimant absented himself from duty for 6 months and his whereabouts were unknown until 2nd February 2017 when the Respondent received a letter from the County Labour Officer.

30. The Court is urged to note the inconsistent evidence on the date of termination which is not pleaded in the Memorandum of Claim. The Respondent submits that the medical report dated 5th June 2016 indicated that the degree/percentage of incapacity was nil. That the Respondent did not discriminate the Claimant in any way.

31. As regards fair hearing reliance is made on the decision in **Kenya Revenue Authority v Menainya Salim Murgani** where the Court held that under Section 41 of the Employment Act the hearing contemplated by the section is not necessarily oral and may be determined on a case by case basis.

32. It is urged that in this case, the Claimant absconded duty and the Respondent notified the Labour Officer on December on 23rd December 2016 hence the Claimant's fell case under Section 44(3)(4)(a) of the Employment Act 2007 and as a consequence, there was no unfair termination. That the Respondent had a fair reason to terminate the services of the Claimant.

33. Finally, it is urged that the Claimant committed gross misconduct by absenting himself from the place of work. The decision in **Stanbic Bank Ltd v Danson Mwashako Mwakuwoma [2015] eKLR** is relied upon in support of the submission.

34. As regards constructive dismissal, the decision in **Dr. Peterson Guto Ondieki v Kisii University Cause [No. 10 of 2019]** is relied upon to urge that Claimant did not demonstrate how constructive dismissal arose.

35. As to whether the Claimant is entitled to the reliefs sought, it is submitted as follows:

36. The Claim for the month of June of Kshs.8,000/= is unfounded since he was paid all dues and the Claimant did **not work from 15th June 2016**.

37. In relation to one month pay in lieu of notice, the amount is not due because the Claimant absconded duty for 6 months.

38. As regards leave pay it is urged that the Claimant did not serve for a period of one year and is thus not entitled to leave pay.

39. On compensation, it is submitted that the Claimant's termination was conducted in strict compliance with Sections 44(1),(3) and (4) of the Employment Act,.

40. The Court of Appeal decision in **United States International University v Eric Rading Outa [2016] eKLR** is relied upon to urge that since the termination was lawful, the claim is not entitled to compensation.

41. As regards the Certificate of Service, it is submitted that it was ready for collection at the Claimant's convenience.

42. On costs, it is urged that the Claimant should be held liable as was the case in **Frances Ndirangu Githua v Software Group Ke Ltd [2019] eKLR** where the Court awarded Kshs.30,000/= to the employer.

Analysis and Determination

43. After careful consideration of the evidence on record, submissions by counsel and the authorities cited, the issues that command themselves for determination are:

(i) Whether the Claimant was unlawfully terminated or absconded duty;

(ii) Whether the Claimant is entitled to the reliefs sought.

44. Before delving into the issues identified above, it is essential to state that although the Claimant's counsel submitted extensively on the nature of injuries sustained by the Court at the workplace, a fact the Respondent did not contest, the same is the subject matter in Chief Magistrate's Court Civil Suit No. 2569 of 2017 pending in Court. Although it is a relevant consideration in this case, nothing turns on it.

45. As to whether the Claimant was unlawfully terminated, the Claimant submitted that he was unlawfully terminated on the ground of ill-health because he could not lift heavy items as he was used to and vehemently denied having absconded duty. He testified that he was terminated by the Human Resource Manager, one Mariam Matheka, though he was non-committal of the actual date. The Respondent on the other hand submits that it had a valid and fair reason to terminate the Claimant for having absconded duty from 15th June 2016, and his whereabouts remained unknown until the Labour Office wrote to the Respondent about a complaint by the Claimant by which time it had already notified the Commissioner about the desertion.

46. According to **Blacks Law Dictionary 10th Edition, page 540** desertion means:

“The wilful and unjustified abandonment of a person's duties or obligations.”

47. In the South African decision in **Seabolo v Belgravia Hotel [1997] 6 BLLR 829 (CCMA)**, the Court distinguished desertion from absence without leave in the following terms:

“... desertion is distinguished from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning or having left his or her own post subsequently formulates the intention not to return.”

48. Under Section 45(2) of the Employment Act, 2007 a termination will only pass the fairness test if it is shown that the employer had a valid and fair reason for the termination of employment and the termination was conducted in accordance with a fair procedure. Under Section 47(5) the employer must prove that the ground for termination of employment was justifiable while the employee must demonstrate that the termination of employment was unfair. See **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**, **Naima Khamis v Oxford University Press (EA) Limited [2017] eKLR** and **Kenafric Industries Limited v John Gitonga Njeru [2016] eKLR**.

49. Section 41 of the Employment Act prescribes the procedural precepts to be complied for a termination to pass the procedural fairness test.

50. In **Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR** the Court of Appeal summarised the requirements of Section 41 of the Act as follows:

“Four elements must thus be discernible for the procedure to pass muster: -

(i) An explanation of the grounds of termination in a language understood by the employee.

(ii) The reason for which the employer is considering termination.

(iii) Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made hearing and considering any representation made by the employee and the person chosen by the employee.”

51. From the evidence on record, the Claimant alleges that he was unfairly terminated by the Human Resource Manager, Mariam Matheka by word of mouth on 30th June 2016 without a notice or disciplinary hearing. On the other hand, the Respondent contends that the Claimant absconded duty on 15th June 2016. Evidently, the Claimant worked part of the month of June 2016 and was in fact paid although his bank statement does not show what transpired in the month of June 2016. This is discernible from the fact that the Claimant is only claiming Kshs.8,000/= for the month of June 2016. It is noteworthy that the Respondent led no evidence to contradict the Claimant’s testimony on termination by Mariam Matheka.

52. The Respondent’s allegation of desertion is based on the letter dated 23rd December 2016 to the County Labour Officer under the reference “*Presumption of termination of service*” explaining that some listed (identified) employees had not been reporting to work along Funzi Road – Nairobi without authority and efforts to contact them had been fruitless. The letter stated that the employees would be taken through a formal disciplinary hearing to explain the absenteeism and none had left any postal address with the Respondent.

53. Several things are notable from the letter:

(i) The alleged list has 34 names including the Claimant.

(ii) The Respondent alleges that it had no forwarding postal address for any of them.

(iii) The list is silent on when the employees on the list were employed by the Respondent and for how long they had served.

(iv) The letter is silent on how the Respondent attempted to contact the 34 employees and who made the attempts and when since the alleged desertion occurred at different time.

(v) The letter states that “***we can conclude that they have since terminated their services without notice.***”

(vi) The letter cites section 44(3)8(4)(a) of the Employment Act, which rendered the Claimant liable to termination. What begs the question is how the Respondent terminated the Claimant’s employment contract.

54. Section 44(3) provides that:

Subject to the provisions of this Act an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

55. Section 44(4) on the other hand exemplifies what could amount to gross misconduct. the Respondent relies on paragraph (a) which states that:

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—

(a) without leave another lawful cause an employee absents himself from the place appointed for the performance of his work.

56. The Respondent’s contention is that since it had a valid and fair reason to terminate the Claimant’s contract of employment, it was entitled to assume that the Claimant terminated the contract without notice (presumption of termination).

57. It is however, imperative for the Court to satisfy itself that the Respondent acted in consonance with the law. In **Felistus Acheha Ikatwa v Charles Peter Otieno [2018] eKLR**, the Court expressed itself as follows:

“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”

58. In **Nzioka v Smart Coatings Ltd [2017] eKLR** Nduma J. expressed himself as follows:

“Dismissal on account of absconding duty must be preceded by evidence showing that reasonable attempt was made to contact the employee concerned and that a show cause letter was issued to such employee calling up the employee to show cause why his services should not be terminated on account of absconding duties.”

59. Similar sentiments were expressed in **Boniface Mwangi v B.O.M. Iyego Secondary School [2019] eKLR** as well as **Simon Mbithi Mbane v Inter Security Services Ltd [2018] eKLR**.

60. The Court is in agreement with these sentiments.

61. Strangely, although the Respondent’s letter dated 23rd December 2016 to the County Labour Officer states that efforts to contact the listed employees had been unsuccessful, the letter is reticent on the efforts made and by whom. Relatedly, on cross examination, RW1 confirmed that the Claimant had not given the Respondent a phone number or postal address and thus it could not contact him. Suffice it to note that the DOSHI Form completed by the Respondent for purposes of compensation for the Claimant’s injuries and dated 25th May 2016 had the Claimant’s telephone number 0715xxxxxx.

62. When confronted with this evidence, the witness changed his testimony stating that calls could not go through and the Claimant’s contacts were unable to trace him. RW1, however conceded that he had no evidence in support of the allegation.

63. From the evidence on record, it is clear that the Respondent made no effort to contact the Claimant to understand why he was not reporting to the workplace, if indeed that was the case. Similarly, the Respondent did not notify the Claimant that the question of his termination was being considered for the alleged desertion or at least issue a notice to show cause.

64. The contention that the Claimant had not furnished a postal address is not only hollow, but untenable in light of the requirements of the law. The Claimant had been employed for a year and the Respondent had his bank account number. Was this the only information it obtained from the Claimant to when it employed him? The Court is not persuaded that this was the case.

65. Finally, on the issue of fair procedure, the Court is guided by the sentiments of Onyango J. in **Judith Otieno Owuor v Sameer Agriculture and Livestock Ltd [2020] eKLR** as follows:

“Further, even if she had absconded duty, she is by law entitled to a fair disciplinary process as set out in Section 41 of the Employment Act 2007. No evidence was availed to the Court to support there having been a disciplinary process or notice issued before termination. It is the duty of the Respondent to show this Court it did accorded the Claimant a fair hearing prior to termination.”

65. The Respondent adduced no evidence of a disciplinary process.

66. For the foregoing reasons, it is the finding of the Court that termination of the Claimant’s employment contract by the Respondent was defective for non-compliance with the provisions of section 41 of the Employment Act and thus is unfair in the context of section 45 of the Act.

Reliefs:

67. I will now proceed to address the reliefs sought by the Claimant.

(a) Balance of salary for the month of June 2016 Kshs.8,000/=

68. As adverted to elsewhere in this judgement, the Claimant was non-committal in the actual date of termination. Relatedly, his bank statements did not show any payment for the month of June. Finally, the Claimant termed the Respondent’s lists of the employees sent to the Labour Officer as well as the list of payments for June 2016 as fabricated evidence and cannot rely on it on matters relief. The claim is **declined**.

(b) One month salary in lieu of notice Kshs.15,000/=

69. Since the Respondent did not accord the Claimant a notice of termination, the Claimant is awarded the sum of **Kshs.15,000/=** as ordained by Section 49(1)(a) of the Employment Act.

(c) Annual leave days

70. The Claimant led no evidence on leave entitlement, number of days taken or pending and how the sum of Kshs.15,000/= was arrived at. The prayer is **declined**.

(d) 12 months’ salary as damages for unfair termination

71. Having found that termination of the Claimant’s employment contract was unfair for want of procedural propriety, the Claimant is entitled to the discretionary relief provided by **Section 49(1)(c)** of the Employment Act. In arriving at the level of compensation, the Court has taken the following into consideration:

(i) The Claimant made no effort to appeal the decision by the Human Resource Manager. He led no evidence that he attempted to or consulted any other person at the Respondent's place of work. He must have been aware that the company had other senior officials.

(ii) The Claimant was an employee of the Respondent for about one (1) year and wished to continue.

(iii) The Claimant has another suit against the Respondent – Chief Magistrate's Court Milimani Civil Suit No. 2869 of 2017 pending in Court.

(iv) The Claimant was injured at the workplace.

71. In the circumstances the equivalent of three (3) months' salary is fair, **Kshs.45,000/=**.

(e) Certificate of Service

72. The Claimant is entitled to a certificate of service as ordained by Section 51(1) of the Employment Act.

Conclusion

72. In the final analysis, judgement is entered for the Claimant **against the Respondent as follows:**

(a) One month salary in lieu of notice Kshs.15,000/=

(b) 3 months' salary as compensation for unfair termination Kshs.45,000/=

(c) Certificate of Service

Total award is Kshs.60,000/= with costs.

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

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28TH DAY OF MARCH 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