



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT KERICHO

CAUSE NO.57 OF 2019

CALEB KIPKORIR CHERUIYOT.....CLAIMANT

VERSUS

KAISUGU TEA LIMITEDRESPONDENT

JUDGEMENT

The claimant was employed by the respondent on 4th May, 2017 to sort out tea leaves in the factory at Kericho at a wage of Ksh.28, 000 per month.

The claim is that during the course of his employment, the claimant requested for protective gear due to the hazardous nature of his work. These included mouth and nose masks to prevent inhaling the dust particles from the tea leaves and averting the risk of contracting respiratory diseases. Despite the request, the claimant was not provided with protective gear.

During the course of employment, the claimant developed respiratory and cardio-vascular complications due to inhaling dust particles from tea leaves. His health began to deteriorate. The respondent failed to offer quality health care since the factory clinic only prescribed pain killers.

The claim is also that the claimant developed shortness of breath and heavy nose bleeding and frequent fainting.

In September, 2019 the claimant was referred to specialised treatment by the respondent's doctor to Kericho District Hospital. It was established the claimant had congested lungs due to tea leave particles at 29% permanent disability.

The claimant lodged a formal complaint against the respondent with Occupation Safety and Health Kericho office with regard to the poor work conditions. On this report, his employment was terminated.

The claim is that the respondent violated section 43 of the Employment Act (the Act) by failing to provide proper medical care. There was breach of section 46(h) of the Act for terminating employment for lodging a complaint. There was no hearing or notice issued leading to violation of section 41, 45 and 49 of the Act.

At the time the claimant had 45 days of leave. Due to the medical condition the claimant was exposed to, he has been unable to secure new employment and seek compensation and punitive damages and claim the following;

- a) General damages for wrongful termination of employment Ksh.336,000;
- b) Underpayment from May, 2017 to July, 2019 Ksh.413,062;
- c) Unpaid leave for 2 years Ksh.39,200;
- d) Unpaid salary for August, 2019 Ksh.28,000;
- e) Unpaid overtime for 2 years Ksh.988,424;
- f) Notice pay Ksh.28,000;
- g) Aggravated and punitive damages;
- h) Certificate of service;

- i) Payment of NSSF, NHIF, PAYE;
- j) Costs of the suit.

The claimant testified that upon employment by the respondent, in the year 2018 he developed health problems and was attended to at the dispensary but his condition got worse and was referred to the district hospital to a doctor in Nakuru on 29th August, 2018. The respondent did not pay and he opted to go to the public health facility but the respondent still refused to pay for the costs.

He was away for 10 days.

The claimant also testified that he got the DOSH forms which he submitted to the respondent and on 11th September, 2018 when he was to resume duty, Mr Yego for the respondent told him not to report on duty.

The defence that the submitted documents are a forgery is not true since he obtained them from the respondent. If they are forged there is no report to the police.

Defence

The defence comprise mere denials save that the claimant was not an employee of the respondent as alleged and there is a pending report with the police for forgery. There was no binding contract between the parties capable of being breached and the alleged medical conditions and the history thereof is without proof. That the claims made by the claimant are without merit and should be dismissed with costs.

The defence is also that the claim herein is *sub judice* the claimant having filed Kericho CMCC No.357 of 2019 – Caleb Cheruiyot versus Kaisugu Limited.

Leonard Korir Kibet the factory engineer manager and acting human resource for the respondent testified that he worked with the claimant who was employed on 9th July, 2019 as a seasonal worker and worked for less than a month because on 21st August, 2019 he failed to attend work. It is not true that employment commenced on 4th May, 2019.

All the employees of the respondent are issued with protective gear in the section the claimant was working under.

Mr Kibet also testified that the claimant submitted forged documents from Kericho district hospital and he has since been charged with a criminal offence over the same. He forged the managing directors and hospital records and the respondent made a report to the police.

The respondent has a CBA with the union and Agricultural Association and clause 25 allow for dismissal from employment by summary dismissal where the employee is absent without permission. The claimant was hence issued with a letter of summary dismissal for absenteeism.

There was no underpayment as alleged. The claims for dues for 2 years lack foundation and the claimant worked for less than a month and he was paid all his dues through his bank account. The union was informed of the summary dismissal.

In the year 2017 the respondent had different system of employees and since the claimant was not an employee, there are no work records to be filed.

The medical documents filed by the claimant are from *Kaisugu Tea Dispensary* or *Kaisugu Tea Limited* which does not belong to the respondent who is registered at Kaisugu Ltd.

The claimant failed to attend work on 22nd August, 2019 without due cause and continued to be absent and notice of summary dismissal was issued. The documents produced as medical records are forged a matter which has been reported to Kericho police station as they are stamped with *Kaisugu Tea Ltd* which is a different company from the respondent. The rubber stamp used by the claimant does not belong to the respondent.

At the close of the hearing, both parties filed written submissions.

The claimant submitted that he was an employee of the respondent as evidenced by the NSSF and NHIF statements. In the DOSH forms, it is noted the respondent was the employer.

The claimant was not able to attend work as he was seeking medical attention for respiratory infection treatment after working for the respondent and was exposed to dust from tea leaves. He was attended to by Dr. Judith at Kericho district hospital and there is an independent report by Dr Darius Kiema and courts have found it unfair to terminate employment on medical grounds for a condition contracted while in employment as held in **Kennedy Nyaguncha Omanga versus Bob Morgan Services Limited Cause No. 1983 of 2011**.

The claimant also submitted the criminal proceedings alleged by the respondent are not a bar to these proceedings.

There was termination of employment unfairly as there was no notice, hearing or reasons given and under section 45 of the Act, the claimant should be compensated as held in **William Kiaritha Gacheru versus East African Packaging Industries Ltd Cause No.797 of 2013**. There were no reasons given for determination of employment. The claims made should be allowed.

The respondent submitted that the claim is lodged against a non-existent entity *Kaisugu Tea Limited* whereas the respondent is *Kaisugu Limited*. The non-joinder of the correct party renders the suit mute as held in **George Orita Kuya versus Vegi Vegi Restaurant Cause No.656 of 2012**.

The respondent also submitted that the non-joinder of the proper party addressed, there was no employment with the claimant as alleged, the claimant was employed in July to 21st August, 2019. The documents filed from NSSF and NHIF do not testify to employment. The respondent only paid the claimant in July, 2019 through his bank account. The claims made should be dismissed with costs.

Determination

The claimant asserts that he was employed by the respondent, *Kaisugu Tea Limited*. The respondent denied having employed the claimant and that the entity sued is not the respondent as they are *Kaisugu Limited*.

Upon the alleged termination of employment the claimant made demand against the respondent, *Human Resource Manager, Kaisugu Tea Limited* and there was a reply dated 30th September, 2019 and the respondent under the name, *Kaisugu Limited*.

The claimant proceeded to file suit against *Kaisugu Tea Limited*. In defence the respondent denied ever employing the claimant under such name.

In the case of **William Kiprono Towett & 1597 Others versus Farmland Aviation Ltd & 2 Others [2016] eKLR** the court held that;

Order 1 Rule 9 of the **Civil Procedure Rules (2010)** makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. We reproduce the same hereunder:-

“9 No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it”.

The respondent has since filed defence and the matter proceeded to full trial. The court shall address the merits of the issues in dispute.

The claimant testified that he developed health problems while in the service of the respondent and sought for medical treatment at the clinic but was only given pain killers forcing him to seek further medical assistance at own cost. He was absent for 10 days for this reason and when he returned to work he was sent away.

The respondent confirmed the claimant was dismissed from his employment due to absenteeism and following the terms of the CBA which allowed for summary dismissal for absence from duty without good cause, permission or approval of the respondent. The union was informed and the claimant paid his dues through his bank account.

Section 34 of the Act allow an employee to take medical attention and section 30 allow the employee to take medical leave on short notice or where the circumstances do not allow, a third party is allowed to give the employer notice on condition that the employee should submit a medical certificate upon return to work as evidence of sickness.

In the case of **Moses Daniel Kyalo versus Treadsetters Tyres Limited [2019] eKLR** the court held that;

*The failure by the claimant to notify the employer that he was sick and incapacitated in good time amounted to absconding from work which is a repudiatory breach of the contract of service. Section 44 (4) (a) of the Employment Act entitles the employer to dismiss his employee summarily if without leave or other lawful cause, he absents himself from the place appointed for the performance of his work. ... in **Banking, Insurance & Finance Union (Kenya) –vs- Barclays Bank of Kenya Ltd [2014]eKLR** and return that the respondent had a valid reason for terminating the services of the claimant.*

Absence from work without permission of the employer attract summary dismissal pursuant to section 44(4) (a) of the Act as held in **Moses Daniel Kyalo versus Treadsetters Tyres Limited [2019] eKLR**. The employer is allowed to dismiss an employee who fails to report to work as required.

There is no evidence that the claimant obtained permission to be absent from duty for 10 days to seek medical attention. Even where the claimant may have been unwell and required urgent medical attention and to be absent from duty, the DOSH forms filed with the Memorandum of Claim are not similar to the medical certificate contemplated under section 34 of the Act. Such records cannot excuse the claimant for being absent from duty without permission.

The court finds the termination of employment by summary dismissal was justified pursuant to section 44 and 41 of the Act as the claimant was absent from work; he was issued with notice and the union and shop steward were informed. There was good cause to justify termination of employment.

On the claims made, that there were underpayments from May, 2017 to July, 2019 the basis is that the claimant was employed from 4th May, 2017 to July, 2019 with a wage of Ksh.28,000 per month. The claimant has relied on the NSSF and NHIF and PAYE statements to assert that he was employed from 4th May, 2017.

NSSF and NHIF statements are not evidence of employment. The NSSF Act and the NHIF Act require the employer to submit the statutory

deductions and on the statement, the last employer is noted. For the entire period of employment, only the last employer is noted. It is therefore not correct that the last employer is the one responsible and the only employer for purposes of meeting terminal dues. In any event, the statement filed is not similar to an employment contract and does not confer employment status.

The employer is the custodian of work records pursuant to section 10(6) and (7) of the Act. Where there is a dispute as to employment status, the records of the employer are the primary evidence.

The claimant filed his payment statement at page 6 of the Memorandum of Claim.

This relates to the month of July, 2019 and where the basic wage is Ksh.12, 113.

There is no other statement filed.

This evidence coupled with the defence that employment was for less than a month is taken as correct.

The claim for underpayment for two years and at the rate of Ksh.28, 000 per month is an exaggeration and not justified.

Similarly the claim for leave days for two years for 42 days is not justified. Pursuant to section 28 of the Act, where the claimant worked for less than a month, to claim for leave pay for 42 days is contrary to the provisions of the law and not justified.

The claimant was paid through his bank account. This evidence that the pay for 21 days worked before he was absent for no good cause is not challenged in any material way.

Notice pay, compensation of general damages are not payable to an employee whose employment was terminated for a good cause save for the duration of service, the claimant is entitled to receive a Certificate of Service pursuant to the provisions of section 51 of the Act.

The payment for NSSF, NHIF and PAYE is regulated in law.

In the payment statement filed by the claimant for the month of July, 2019 there is evidence that the respondent in paying the claimant his wages complied with the law and deducted statutory dues.

Accordingly, the claim herein is found without merit and is hereby dismissed save the respondent shall issue the claimant with a Certificate of Service pursuant to section 51 of the Employment Act, 2007. Each party shall bear own costs.

DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF JANUARY, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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