



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2531 of 2016

ERICK MUHALIA.....CLAIMANT

VERSUS

KEROCHE BREWERIES LIMITED.....RESPONDENT

JUDGMENT

The Memorandum of Claim was filed on 8th December 2016.

The respondent entered appearance on 11th January, 2017. Defence was filed on 21st March, 2017.

The claimant attended for taking hearing directions where the respondent was invited but opted to remain absent. There is evidence of service.

On 15th December, 2020 both parties attended and hearing adjourned on the grounds that the respondent's advocates was indisposed and a hearing date allocated for 2nd February, 2021. Present for the respondent was Ibrahim Advocate holding brief.

On the hearing date, the respondent was absent. The claimant was heard on his case.

Claim

On 19th January, 2015 the claimant was employed by the respondent as stores and distribution manager and issued with letter of appointment. The monthly salary was ksh.100, 000.

On 7th October, 2015 the claimant reported to work after his night shift when he noticed that there was no proper handing over as was the practice and he called his supervisor, On's manager who informed him there was a problem and he had been suspended to report back after a week. This was verbal.

On 12th October, 2015 the claimant was issued with letter of suspension for 7 days to allow for investigations following alleged fraud in the company. Upon return on 21st October, 2015 suspension was extended and on 23rd October, 2015 he was invited to write a statement. He was asked to apply for annual leave until 28th October, 2015 and upon return on 2nd November, 2015 leave was extended.

On 9th November, 2015 the suspension was extended for an indefinite period.

In February, 2016 the claimant and two other colleagues went to work to seek clarification on their employment following the continued suspension and non-payment of salaries but advised to keep away until investigations completed.

On 16th June, 2016 the claimant wrote to the respondent with regard to his employment upon which he was issued with letter terminating his employment. The letter was sent via email communication. The respondent alleged that there was fraud.

The Claim is that the termination of employment was illegal and unfair and in breach of the provisions of the Employment Act as no substantive reason was given. Aggrieved by the decision to terminate his employment, the claimant filed this instant claim seeking the following reliefs:

- a) A declaration that the summary dismissal of the claimant by the Respondent was unlawful*
- b) one month's salary in lieu of notice Kshs. 100,000*
- c) Unpaid salary for nine months Kshs900,000*
- d) Damages for unfair termination Kshs 1,200,000*
- e) Leave pay for the year 2015 Kshs 100,000*
- f) Leave pay for the year 2016 Kshs 100,000*

The claimant in his witness statement dated 7th December 2016 avers that he was employed by the respondent as a stores and Distribution manager via a contract dated 19th January 2015 with a starting salary of Kshs 100,000 and on a permanent and pensionable contract.

The Claimant testified in support of his case that during the pendency of the employment contract, he executed his obligations diligently until October 2015 after reporting to work for the night shift, he noticed that there was no handing over as required and immediately called the operations manager who instructed him to go home and report after one week. After the one week, he reported to work only to be served with a suspension letter over alleged on-going investigations over fraud. He received two more suspension letters before being served with an indefinite suspension on 9th November 2015.

The claimant testified that on 13th June, 2016, when he sent an email to the Respondent enquiring about his employment status, he was informed that his contract had already been terminated.

Response

The defence is that the claimant worked in the dispatch section of the distribution department and was part of an on-going fraud case he together with other employees were suspected of being involved for the loss of a considerable amount of money and property of the respondent.

The letter terminating employment was sent via post to the last known address given by the claimant. Termination of employment was fair and lawful and the claims made should be dismissed with costs.

No evidence was called in defence.

The claimant filed his written submissions that the indefinite suspension was unreasonable and amounted to breach of articles 25, 28 and 50 of the constitution as held in **Lilian Maina v Llyod Masika Limited (2016) eKLR** and **Roselyne Atieno Ogolla versus Kibos Sugar Industries & Allied Industries Limited (2017) eKLR**. He was entitled to receive his full salary during the period of suspension as he was never found culpable of any wrong doing and should thus be fully compensated as held in **Grace Gacheri Muriithi versus Kenya Literature Bureau (2012) EKL**R.

The Claimant also submitted that employment was unfairly terminated as no valid reason was given and the claimant was never afforded a chance to defend himself as held in **Paul Ngeno versus Pyrethrum Board of Kenya ltd (2013) eKLR** and submits that the Claimant is entitled to the remedies as prayed.

Determination

On the pleadings, evidence, submissions and authorities cited, the issues for determination are summarised as following;

Whether the termination of the claimant's employment by the Respondent was wrongful, unfair and unlawful and

Whether the claimant is entitled to the reliefs sought.

Suspension from employment is just but an administrative measure taken by the employer to remove the employee from the shop floor for a given purpose. In this case the claimant was suspended on the grounds that there were on-going investigations with regard to fraud in the company.

At the end of the investigations, the due process of the law requires that the employee be recalled back to work to answer to any allegations and be given a hearing or where not culpable be allowed to resume duty. The suspension must be addressed one way or the other. The claimant be called to answer to any charges/allegations or be returned to work.

In **Kisumu ELRC Cause 295 of 2015 Gregory Otieno Owuoth v Mumias Sugar Company** the Court held that;

The Respondent cannot put an employee on indefinite suspension against the provisions of its own regulations. If the Respondent was not ready to conclude the process within the prescribed period of 21 days it should have carried out its investigations and finalised them before sending the Claimant on suspension. Although it was not a formal punishment, an employee on suspension is saddled with the uncertainty of not knowing his fate. His self-esteem is punctured and his right to work is interfered with. Any disciplinary action must take the shortest time possible, otherwise it turns into punishment.

In **Grace Gacheri Muriithi v Kenya Literature Bureau (2012) eKLR** the court held that;

The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable.

In **Francis Okumu Oketho v Buzeki Enterprises Limited [2019] eKLR** the court held that;

Ordinarily, suspension is a neutral action aimed at achieving unfettered investigations into allegations against an employee; it is not a disciplinary action. This means that an employee on suspension is entitled to full salary unless withholding of salary is sanctioned by a statute or internal disciplinary rules ...

In this case, the claimant was sent on indefinite suspension and by letter dated 13th June, 2016 sent via email, his employment was terminated. This was without being invited for a hearing to urge his defence or know the outcome of the alleged on-going investigations into fraud.

On the evidence before court, termination of employment was without due process. Section 41 of the Employment Act, 2007 required the claimant be issued with notice setting out any allegations made against him and be given time to respond. Section 43 of the Act required there be a valid reason resulting in the termination of employment.

The investigations leading to suspension of the claimant from duty was not addressed with him. No report is filed in defence. there was no call of any evidence with regard to misconduct, performance or any other matter which led to termination of employment as held in **Walter Ogal Anuro versus Teachers Service Commission Cause 955 of 2011** the court stated that;

... For termination to pass the fairness test, it ought to be shown that there was not only substantive justification for the termination but also procedural fairness. Further that section 43 of the Employment Act obligated an employer to prove the reasons for termination of employment and where the employer failed to do so, the termination was deemed to have been unfair.

The court finds employment terminated unfairly and the claimant is entitled to remedies under section 49 of the Employment Act, 2007.

Notice pay is due for one month all at ksh.100, 000.

The claimant was an employee of the respondent from 19th January, 2015 to 8th April, 2016 when letter terminating employment issued. Compensation for three (3) months gross salary is found appropriate in this case all at Ksh.300, 000.

For the period the claimant was on suspension from October, 2015 to April, 2016 when employment terminated, the salary should have been paid. The respondent kept the claimant on suspension without recalling him back to work or undertaking any disciplinary proceedings against him. Salary due is awarded for 6 months is Ksh.600, 000.

On the claim for damages, upon payment of compensation for unfair termination of employment, such is addressed under section 49 of the Employment Act, 2007. Leave pay is due for the period of service at basic salary of Ksh.100, 000.

Costs are due as the claimant is successful in his claims.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

- a) Compensation Ksh300,000;**
- b) Notice pay Ksh.100,000;**
- c) Unpaid salary Ksh.600,000;**
- d) Leave pay Ksh.100, 000; and**
- e) Costs of the suit.**

Delivered in open court at Nairobi this 18th day of February, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and