



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 896 OF 2016

JOSPHAT MUKUNA AMASA.....CLAIMANT

VERSUS

COMPLETE SOLUTIONS INSURANCE BROKERS LIMITED...RESPONDENT

J U D G M E N T

1. The dispute before the court arises from termination of employment contract between the parties. By memorandum of claim dated 22nd April 2016 the Claimant sought the following reliefs:-

- a. A declaration that the summary dismissal was wrongful, unfair and discriminatory.
- b. One month's salary in lieu of notice – Kshs. 44,000/-.
- c. The equivalent of twelve months (12) salary being damages for wrongful dismissal– Kshs. 528,000.00.
- d. Leave for two years -Kshs. 154,001.40/-.
- e. Severance two years...Kshs110,001.00.
- f. Certificate of service .
- g. Costs of the claim.

2. The Claimant together with the claim filed his list of witnesses, witness statement and bundle of documents of the same date of 22nd April 2016. The Claimant filed reply to response dated 26th July 2016.

3. The Respondent entered appearance and response to the claim on the 21st July 2016.

4. The case was heard ex parte on the 3rd August 2021 with the Respondent absent. An affidavit of service was filed as proof of service of the hearing date on the Respondent's advocates on record CK. Nyoro and Co. Advocates. The court was satisfied that the Respondent's advocates on record were served with the hearing notice.

5. The Claimant testified in his case and was the only witness. The Claimant adopted his witness statement dated 22nd April 2016 as his evidence in chief.

6. The Claimant's submissions are dated 4th August 2021. The matter was mentioned before the Deputy Registrar on the 2nd September 2021 for confirmation of the filing of the submissions. The record indicates only the Claimant's submissions are on record.

The Claimant's case

7. The Claimant states that he was employed by the Respondent as a senior underwriter on 1st October 2013. He claims that he was terminated on the 23rd June 2015 without warning. The letter of termination dated 23rd June 2015 is produced as no. 1 on the list of documents dated 22nd April 2016. The Claimant alleges that that the Respondent illegally and unlawfully terminated his services without any

warning and justifiable reasons save for what he states were false and unfounded allegation of poor performance as stated in the termination letter. The termination was with immediate effect. No hearing took place.

The Claimant states that at around March 2015 he got ill and was diagnosed with paranoid psychosis by Dr. Kigamwa. Dr. Kigamwa's examination note dated 5th January 2016 produced being no. 4 on the list of claimant's list of documents dated 22nd April 2016. He testified that he was admitted at the hospital for two weeks for treatment and on discharge given 2 weeks for rest while on medication. The Claimant produced the discharge summary from Avenue Hospital dated 26th March 2015 as evidence of treatment and off duty for 2 weeks. The Claimant testified that the Respondent's Managing Director opposed the off duty for 2 weeks and insisted he must work at least half day. The Claimant states that the work environment was hostile with the MD being abusive to him and citing poor working and deteriorating performance. The Claimant states that the illness recurred and he sought treatment at Aga Khan hospital where he was advised to continue with his medication. A medical report produced in the list of documents by Claimant no.4. The Claimant's advocates issued a demand letter dated 16th July 2015 which is produced as no.5 in the list of documents by the Claimant.

The Claimant produced his last payslip of June 2015 and other previous payslips as No. 6 on the list of documents by the Claimant. The Claimant was earning a salary of Kshs. 44,000/- as at time of termination. There was a deduction for NSSF.

The Claimant stated that he had no evidence on the claim for unpaid leave he has sought.

The Claimant filed reply dated 26th July 2016 to the Respondent's response. He denied the response and stated that he had disclosed the medical condition and denied absconding duty. The Claimant in response reiterated the contents of his memorandum of claim

The Respondent's case.

8. The Respondent did not attend the hearing. Return of service of the hearing date was placed before the court by way of affidavit of service. The Respondent filed response to the statement of claim dated 21st July 2016. In a nutshell the defense is that the Claimant never disclosed the medical condition he had if at all he had such a condition, that he always absconded duty and could later fill leave forms giving other reasons for such leave like spouse sick, taking kid to school. The response states that the termination was justifiable and valid and hence do damages payable. That he was fully paid all his dues and that he took his absent days as leave days. The Respondent did not file any documents or affidavits.

Legal analysis and findings

9. The Claimant identified the following as issues for determination:-

- a. Unlawful and illegal summary dismissal
- b. Refusal by the Respondent to pay the Claimant his dues and benefits after dismissing him.
- c. Unlawful discriminatory and malicious dismissal without any valid and justifiable reason.

The Respondent did not file any issues in their response.

After carefully analyzing the Claimant's list of issues and the parties' respective cases it did appear to this court that the issues that had really been placed before it for determination were as follows:-

- i. Whether there were valid and justifiable reasons for termination
- ii. Whether the dismissal was unlawful or discriminatory or malicious or unfair
- iii. Whether Claimant is entitled to reliefs sought.

10. The Court addressed the issues as follows:-

Whether there were valid and justifiable reasons for termination

11. The Claimant told the court that he was issued with a letter of termination of employment dated 23rd June 2015 produced as exhibit no. 1 in the claimant's bundle of documents. The letter disclosed that the Claimant had previously been issued with warning letter for non-performance and stated that the Claimant has no value addition to the overall input of the company. The defence by the Respondent in the response dated 21st July 2016 is that the Claimant absconded duty. No document was produced to support the assertion and the defence of absconding letter remain mere allegations. Indeed the letter of termination is on basis of non-performance which ought to have been supported by performance evaluation or any other evidence to support the defence of non- performance like a report by a supervisor. The alleged warning letter on non- performance was also not produced.

The Claimant submits that his claim is uncontroverted as the Respondent failed to attend the hearing and produce his evidence. To buttress this position the Claimant cited several authorities. In ***Kenya Union of Domestic, Hotels Educational Institutions, Hospitals and Allied Workers v Charles Waitthaka Gogo t/a Apple Bees Pub and Restaurant (2013)eKLR*** wherein Justice Rika held inter alia as follows,-

‘in a situation where the employer keeps away from the proceedings, it becomes much easier for the employee to establish claims such as this one. It is to be noted that in any form of termination, it is the duty of the employer to show that there was a valid reason or there were valid reasons underlying the termination decision and that the process was fair. By keeping away from the proceedings, the employer assist the employee in no small measure, because the presumption is that no valid reason or reasons exist for the termination and that the procedure was not fair. All the employee has to do is show the court that he was employed by the Respondent on certain terms and conditions of employment; that the employer initiated the termination and that remedies comprising compensation and terminal benefits are merited.’

The Claimant further cited the decision of Odunga J in *Linus Nganga Kiongo v Town Council of Kikuyu* where he cited with approval decision of Lessit J in the case of *Motex Knitwear Mills Limited Milimani HCC 834 /2002 Citing Autar Sign Bahra & Another v Raju Govindji HCC 548 of 1998* and stated:-

‘although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff’s case stand unchallenged but also that the claims made by the defendant in his defence and counterclaim are unsubstantiated, in the circumstances the counterclaim must fail...’. Where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged’.

The court agrees with the position taken by Justice Rika and Justice Odunga and adopts the foregoing decisions of the two courts and finds that there was no prove of valid reason for the termination of the Claimant’s contract of employment. The Respondent choose to stay away from the proceeding. There was evidence of service of the hearing notice before the court. The allegations of absconding in the defence remain as mere unsubstantiated statements of facts. On this issue the court finds there was no valid reason for the termination of the employment contract of the Claimant.

Whether the dismissal was unlawful or discriminatory or malicious or unfair

12. The Claimant testified that he was summarily dismissed vide letter of termination dated 23rd June 2015. The Claimant was nevertheless entitled to hearing under section 41(2) of the Employment Act which provides as follows:- **‘Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.’**

This procedure under Section 41 of the Employment Act applies even in the case of summary dismissal like in the instant case. The Respondent failed to comply with the procedure before terminating the employment of the Claimant hence the termination process was unfair and unlawful.

The Claimant told the court he was discriminated against by the Respondent. The court is convinced that nothing in the letter of termination discloses any type of discrimination as the medical condition is not cited as the ground for the termination and no further evidence has been placed before the court to prove the alleged discrimination. This finding also applies to the claim that the termination was malicious.

In conclusion, on this issue, the Court finds that the termination of the Claimant’s employment contract by the Respondent was unfair and unlawful for non-compliance with the provisions of section 41 of the Employment Act.

Is the Claimant entitled to the relief sought?

12. In view of the foregoing holding, I make declaration that the Respondent’s action of terminating the Claimant’s employment contract vide the letter dated 23rd June 2015 was unfair and unlawful. The termination violated the provisions of section 41 of the Employment Act

13. I decline to make a declaration that the Respondent violated the Claimant’s freedom from discrimination because the Claimant never pleaded as to how he was discriminated against neither was any evidential material placed before the court to prove discrimination.

14. With respect to the compensation for unfair termination, I have already made a finding that the termination was unfair and as such by dint of section 49(1)(c) of the employment Act the Claimant is entitled to compensation. The Claimant told the court his gross salary was Kshs. 44,000/- as at time of termination. The same amount of Kshs. 44,000/- is reflected in his payslip of June 2015 when his employment was terminated. The Claimant submits he is entitled to 12 months salary compensation and cites the authority in *Johnson Kaingu v breeze Point (2013)eKLR* and case of *Mark Wafula v Board of Management Friends Secondary School Kibisi(2018)eKLR*. In the *Johnson Kaingu case* the employee served from 17th April 2009 to 2012 when he was terminated serving approximately 4 years. In the *Mark Wafula Case* the employee served from 1998 to 2017 being over 12 years of service. Considering the two authorities and the law I find compensation of 6 months gross salary compensation to be fair and reasonable taking into consideration the short period of service of approximately 2 years by the Claimant. The Claimant told the court that he is an insurance claims officer and in his Memorandum of Claim he is described as working. He did not disclose to the court whether he was in employment. Considering the foregoing the court finds 6 months’ salary compensation to the Claimant to be fair. The computation is 6 X Kshs. 44,000/- total sum of Kshs. 264,000/-

15. The Claimant has sought for leave for two years in his claim. In his demand letter the Claimant sought for nine and half unpaid leave days. During the hearing the Claimant claimed 19 as unpaid leave days. The Claimant was inconsistent on the claim for unpaid leave days. The Respondent denied any pending leave days in its statement of defence. The court finds that the Claimant has failed to prove the claim for unpaid leave. The claim for accrued leave is dismissed.

16. The Claimant has sought for severance pay for 2 years. Severance pay arises as a result of redundancy under section 40 of the Employment Act. The facts of the instant case do not constitute a termination by redundancy. The claim for payment of severance pay for 2 years is dismissed.

17. Notice period—The Claimant prayed for 1 months' notice pay in view of lack of notice. The Claimant having been dismissed without notice is entitled to the notice pay as prayed being one month's salary for the sum of Kshs. 44,000/-.

CONCLUSION AND DISPOSITION

18. I have found that the termination of the Claimant's employment contract by the Respondent was unfair and unlawful. I further found that the Claimant is entitled to compensatory damages the equivalent of 6 months gross salary and notice pay for 1 month gross salary. I have dismissed the claim for severance pay and accrued leave. Consequently I enter judgment for the Claimant against the Respondent in the following terms:-

a. Compensatory damages for 6 months (6 x Kshs. 44,000/-) total sum of Kshs. 264,000/-

b. Notice pay of Kshs. 44,000/-

The award in (a) and (b) above is subject to statutory deductions.

c. I also award the Claimant interest on the sum at court rates from the date of judgment until payment in full.

d. Issuance of certificate of service under section 51 of the employment act.

e. Costs of this suit shall be borne by the defendant.

WRITTEN AND DATED THE 14TH DAY OF OCTOBER 2021 AT BUNGOMA

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J.W. KELI

JUDGE

DELIVERED AND DATED THIS 14TH DAY OF OCTOBER 2021 AT NAIROBI

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JUDGE

In the presence of.....