



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

CAUSE NO. 449 OF 2017

(Before Hon. Justice Ocharo Kebira)

RAUSTUS AYUA ODIOKO.....CLAIMANT

VERSUS

CHINA WU YI COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. Through a statement of claim dated 6th March 2017, the Claimant herein has sued the Respondent seeking the following reliefs and orders.

- (i) A declaration that the Claimant's termination from his employment was unlawful and unfair.
- (ii) The Claimant be paid his terminal benefits as set out in paragraph of the statement of claim, Kshs.449,263.30.
- (iii) The Respondent to be ordered to compensate the Claimant for wrongful termination at the equivalent of (12) twelve months gross salary.
- (iv) The Respondent be condemned to issue the Claimant with a certificate of service in accordance with the provisions of section 51 of the employment Act 2007.
- (v) The Respondent to pay costs of this claim.
- (vi) Interest on the above at court rates.

2. The statement of claim was filed contemporaneously with a witness statement dated 6th March 2017, and a list of documents of the even date under which the documents that the Claimant was to place reliance is in support of his claim were filed.

3. Upon being served with summons to enter appearance, the Respondent did enter appearance to the summons, and filed a response to the Claimant's claim, dated 6th June 2017.

4. At the close of pleadings, there was a joinder of issues and the matter got destined for hearing on merit.

5. On or about the 6th September 2021, the Respondent filed a witness statement of one Winnie Wanjiru, and a bundle of documents.

The Claimant's case.

6. The Claimant averred that he came into the employment of the Respondent as a labourer, on or about January 2021 at a monthly salary of Kshs. 12,880. He further stated that he was not paid any house allowance or housed by the Respondent.

7. He stated that he worked for the Respondent with due diligence and faithfulness until on or about 10th September, 2014 when he in the course of employment, got injured at the workplace and taken to hospital. A machine cut his two fingers.

8. That he was treated at Coptic Hospital. The Respondent footed the treatment costs. He tendered as evidence the receipts and a discharge

note dated 18th July 2014 and a medical form dated 22nd August, 2014.

9. The claimant contended that he was discharged from hospital on the 18th day of July 2014. He had sustained injuries on the 17th July 2014. After he was discharged, he was constrained to be getting back to hospital for dressing.
10. On 10th September 2014, when he got back to the workplace, he was not allowed back. He was told that there was no work for him.
11. He contended that before the termination he was not given any notice or reasons for termination of his employment. The Claimant further stated that the Respondent never made any contributions for him to the NHIF.
12. The Claimant alleged that he routinely worked from 7.00 a.m. to 6.00 p.m. He worked from Monday through to Sunday.
13. The Claimant asserted that he never absconded duty, as alleged by the Respondent.
14. Under cross examination, by counsel Ochieng for the Respondent, he reiterated that he was employed in January 2012, at a salary of Kshs. 12,880.
15. He further testified that he was in hospital for one day before he was discharged. Owing to the nature of his injuries which included a total chopping of one finger, he had to continue going back to the hospital for dressing. The doctor would not estimate the period for recovery.
16. The Claimant asserted that every time he went to hospital, he would pass through the place of work with medical documents to show that he was still attending hospital. He never reported back for duty because he had not fully recovered. For this reason, he did not report for duty for the entire of the month of August.
17. One Mr. Wang was his supervisor. They reported to him. He is the one who told him that there was no work for him at the Respondent's any more.
18. The Claimant states that the subsequent medical bills were settled by him. He spent approximately Kshs. 3,000.
19. Being re-examined by his counsel, the Claimant stated that in his pleadings (paragraph 4) the Respondent has not disputed what his salary was, Kshs. 12,880. That the Respondent's document, titled workers' salary, is a document alien to him. It was never brought to his attention while working with the Respondent. The signature thereon is not his.

The Respondent's case.

20. The Respondent presented Ms. Winnie Wanjiru its assistant administrator to testify on its defence to the Claimant's case. The witness adopted the contents of her witness statement dated 3rd September 2021 as part of her evidence in chief.
21. The witness stated that the Claimant was engaged in the employment of the Respondent as a labourer on or around January 2012, at a basic salary of Kshs. 12,880.
22. She further stated that on 10th September 2014 in the course of his employment the Claimant was injured. He was rushed to Coptic Hospital, where the Respondent met all the medical costs.
23. The witness asserted that the Claimant never reported to the workplace after the injury incident, for no good reason. His whereabouts remained unknown to the Respondent.
24. The witness further stated that the Claimant absconded duties and his services were summarily terminated by operation of the law when he demanded payment of his terminal dues thereby evincing his intention not to return to the Respondent's workplace.
25. She asserted that by all accounts, the Claimant's position still existed and he was expected to continue working for the Respondent in the same capacity.
26. The Claimant is not entitled to those reliefs he has sought, she asserted.
27. In her testimony in Court, the witness testified that the Claimant got injured on 17th July 2014. After discharge he was recovering from home. Whenever he required treatment, the Respondent would take him to hospital. Whenever he was required to visit the hospital they took him there.
28. Under cross examination by Ms. Wavinya, the witness stated that in paragraph 6 & 7 of her statement, she has stated that the claimant absconded from duty. However, she had no evidence to demonstrate that they tried to reach him.
29. The witness stated that since the Claimant was a casual labourer he was not entitled to leave. Pressed, she expressed that she is aware that one is supposed to be a casual labourer for 3 (three) months. The claimant had worked for the Respondent for one year and nine months. His work was not continuous.

30. The witness admitted that she did not present to court any document from which the court or anyone can garner, the information that the Claimant's work was not continuous.
31. The witness contended that whenever the Claimant worked during public holidays, he was compensated. She did not have a document to prove this.
32. That in paragraph 15 of her witness statement she has stated that the Respondent used to pay NHIF & NSSF for the Claimant.
33. The witness further stated under cross examination that the only reason why the Respondent catered for the medical bill is because what happened was a workplace injury.
34. That though the Respondent filed a list of documents. The documents themselves were not filed. In court she had no documents to demonstrate that the Claimant was paid for overtime worked and that he was not entitled to house allowance.
35. Under re-examination, the witness stated that the claimant was a cleaner. That during times of the project, there would be times when there would be less work in the Claimant's section of work.

The Claimant's submissions.

36. Through his written submissions, counsel for the Claimant identified four issues that she holds are for determination by this court thus;
- (a) Whether the Respondent had a valid reason to terminate the claimant from his employment.
 - (b) Whether the Respondent observed procedural fairness and principles of natural justice in terminating the Claimant's services.
 - (c) Whether the Claimant is entitled to the terminal benefits sought in the statement of claim.
 - (d) Who should pay the costs of the suit?
37. It was submitted that the Claimant's employment was terminated after he was injured at his place of work. That there is no contention that his medical bill was met by the Respondent. He was admitted in hospital on the 17th July 2014, and discharged on 18th July 2014. It is clear from the discharge summary that he was given an appointment by the doctor for a follow up for 22nd July 2014. His evidence that he was recovering from home found fortification in the evidence of the Respondent's own witness. To terminate the Claimant's employment in the circumstances was unfair. To buttress this, counsel placed reliance on the decision in **Banking Insurance and Finance Union (Kenya) vs Barclays Bank of Kenya Limited** [2014] eKLR where Justice Mbaru held;
- “The aspect of being ill is not a wrong in itself. What is wrong is not bringing the same to the attention of the employer and further being away from work without authorization or sharing information as to where the employer was. This amounts to absconding duty and a serious labour sanction follows as this is tantamount to negation of a contract of employment. An employee is taken to have abandoned his contract of service without notice to the employer. In the South Africa Labour Court in SACWU vs Dyasi [2001] 7 BLLR 731 (LAC), the court held that desertion amounts to repudiation of the contract of employment which the employer is entitled to accept or reject. The acceptance of repudiation amounts to dismissal of the employee fails to render services. Failing to contact the Respondent constitutes unexplained absence for the period the grievant was away, and cannot compute his sick off days and consolidate them and state he had 51 days that he was entitled to out of the total due of 120 days as those sick off days were to be authorised and or approved by an officer of the Respondent. If the grievant needed to utilise his sick off days up to a minimum of 51 days, he had the choice of making an application in compliance with the Respondent's operational requirements and failure to do so and continued absence establish the fact of desertion. Absence from work without a justifiable reason or permission and authorization and notice to the employer is a subject of summary dismissal under section 44 of the Act.”*
38. The material before court clearly demonstrates the fact that the Respondent knew of the Claimant's illness and continued treatment.
39. On whether the termination of the Claimant's employment was fair procedurally, counsel submitted that the law relating to termination procedure is coached in mandatory terms and in this submission, counsel puts reliance on the decision in **Kenya Commercial Food and Allied Workers vs Meru North Farmers Sacco Limited** [2014] eKLR.
40. It was further submitted that the Claimant was candid in his explanation as regards the manner in which the termination occurred. That assuming the Respondent terminated the Claimant's employment, for absconding from duty, it was still a duty upon it to inform him of the intention and accord him the opportunity to be heard. Counsel cited the court's holding in **Godfrey Anjere vs Unique Supplier Limited** [2015] eKLR, thus;

“In a dismissal on account of absconding duties, the employer is required to show what steps it took to inform the employee that his or her dismissal would result if they did not report back to work. This is necessary to avoid any injustice to an employee who may be away from work for lawful or reasonable excuse such as illness or circumstances beyond their control and yet unable to communicate to the employer in good time.”

This the Respondent did not do.

41. It was submitted that the Claimant is entitled to all those reliefs he sought in his statement of claim and as brought forth hereinbefore. That he is entitled to one month's salary in lieu of notice. He was entitled to a notice prior to his termination pursuant to section 35 of the Employment Act, 2007. In absence of the notice he gets entitled to one month's salary in lieu of notice Kshs. 11,500.

42. Counsel submitted that the Claimant's evidence that he never proceeded for leave as entitled to, and that he all through worked during public holidays, without compensation therefor, was not challenged sufficiently by the Respondent, and urged this court to award compensation for the same, Kshs. 32,160 and Kshs. 23,778.5, respectively.

43. It was further submitted that the Claimant's case that he worked for all days in a year without an off was not controverted, and consequently he is to Kshs. 7,924.8, under this head.

44. From the evidence of the Claimant, it emerged that he was not a member of NSSF and NHIF. He is therefore entitled to service pay at Kshs. 14,812.

45. Counsel submitted that section 31 of the Employment Act states in mandatory terms that it is the responsibility of an employer to give an employee house allowance or accommodation while working with the employer. This was not the case in the instant matter. the Claimant is entitled to Kshs. 107,760 being 15% of his basic salary for the period worked.

46. It was further submitted that, the Claimant's evidence that he worked for extra hours for which he was not paid for remained un rebutted. The Respondent is in custody of duty attendance documents of all its employees, they were never placed before court.

47. That following the unfair termination the Claimant should be compensated pursuant to the provisions of section 49 of the Act. Upon basis that there was no valid reason for the termination, the claimant should be granted the maximum compensation contemplated in the provision, 12 months' gross salary, Kshs. 177,774.

48. Costs follow the event. Costs should be in favour of the Claimant.

Analysis and determination.

49. Considering the pleadings herein, the evidence and the submissions on record, the following issues commend themselves to me as the issues for determination thus;

- (a) Whether the termination of the Claimant's employment was substantively fair.
- (b) Whether the termination of the Claimant's employment was procedurally fair.
- (c) What reliefs are available to the Claimant if any?
- (d) Who should shoulder costs of this suit?

Whether the termination of the Claimant's employment was substantively fair.

50. Section 43 of Employment Act, 2007 is trite on the burden bestowed upon an employer in a dispute emanating from his/her decision to terminate an employee's contract of employment. It provides:

"1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45."

51. The provision foretasted cannot be read therefore in isolation from the provisions of section 45 of the Act, which provides:

"1. No employer shall terminate the employment of an employee unfairly.

2. A termination of employment by an employer is unfair if the employer fails to prove –

- (a) That the reason for the termination is valid.**
- (b) That the reason for termination is a fair reason**
 - (i) Related to the employee's conduct, capacity or compatibility or,**
 - (ii) Based on the operational requirements of the employer; and**
- (c)**

52. It is clear therefore that the reason(s) for the termination should be one relating to the employee's conduct, capacity or compatibility, or

operational requirements of the employer. However, it is not enough for the employer to just state to court that the reason(s) for termination was reason X, Y or Z that falls within the fields identified under section 45 (b) (i) and (ii). It must be further demonstrated that the reason(s) were valid and fair.

53. The Claimant asserted that he was not terminated for abscondment from duty as the Respondent was asserting. His position was that he was dismissed because of the injuries he suffered at the place of work. In essence there were two competing reasons advanced by the parties as the reasons for the termination. In the circumstances it became incumbent upon the Respondent as the employer to prove that the alleged reason was the main one.

54. The Respondent's witness alleged at paragraph 5 of her statement turned evidence in chief, that the Claimant never reported back to work after being discharged from Coptic Hospital and that his whereabouts have been unknown.

55. In her testimony in chief the witness stated that they (the employer) used to take the Claimant to hospital whenever he was required to visit. I find this piece of testimony not in harmony with the evidence of the Respondent's witness contained in her witness statement. It clearly demonstrates that after the discharge from hospital the employer knew the whereabouts of the Claimant. Otherwise, how would they be able to pick him for hospital visits whenever he was required?

56. The Respondent did not put anything before this court to demonstrate that it did try to call the Claimant back to job, if indeed one were to be convinced that he absconded duty.

57. A fair reason, would mean a reason life with good faith and anchored on genuine facts. By reason of the above premises, one cannot see these in the Respondent's reason for the termination.

58. This court is unable to find that the Respondent had a fair and valid reason to summarily dismiss the Claimant as it alleged. The dismissal/termination of the Claimant's employment was therefore bereft of substantive fairness.

Whether the termination was procedurally fair.

59. There has been much judicial consideration on the aspect, procedural fairness. In addition to having a valid substantive reason to terminate an employee's contract of service, for a termination or summary dismissal to be legal, the employer should be able to show that the procedure to terminate or dismiss was fair.

60. Procedural fairness has a statutory basis. Section 41 of the Employment Act forms the foundation of procedural fairness. The provision is couched in mandatory terms, the procedure therein must be adhered to, in the defaulting the default implication under section 45 of the Act sets in. The termination or dismissal gets deemed unfair.

61. The Respondent's witness just stated that the Claimant was summarily dismissed on account of absconding from duty. Her evidence does not touch on the procedural aspect of the alleged dismissal. The Claimant was not at all informed of the Respondent's intention to summarily dismiss him, and the grounds forming basis for the contemplation, he was not given any chance to make a representation against the Respondent's contemplated action and the grounds forming basis thereof, and the decision to terminate does not appear to flow after any consideration of a representation by the Claimant.

62. In the upshot I find the termination of the Claimant's employment procedurally unfair.

Of the reliefs.

63. In the circumstances of the matter and having found that the reason for the termination of the Claimant's employment was without a fair and valid reason, and therefore the Respondent's alleged summary dismissal being without basis, I find that the Claimant was entitled to a notice or salary in lieu thereof. He is hereby awarded one month's salary in lieu of notice, Kshs. 12,880.

64. Annual leave for employees is a legal entitlement under the Employment Act. The Respondent who is the custodian of documents relating to employees did not place any evidence to controvert the Claimant's evidence that he never proceeded for leave at any time and that that notwithstanding, he was never compensated for the work done for those days he was entitled to be on leave. I award him Kshs. 32,160 as sought.

65. The claimant claimed compensation to an extent of Kshs. 23,778.5 for public holidays worked but compensation not paid for. The evidence and material placed before the court are in the nature that one is not able to pick which public holidays. Specificity was required here. It is absent. This court is unwilling to venture into the realm of speculation as invited by the Claimant. I consequently decline to make any award under this head.

66. For lack of sufficient evidence, I decline to make any award under the heading overtime.

67. It is clear that the claimant was not a member of any of those entities or schemes mentioned in section 35(b) of the Act. He is therefore entitled to service pay as sought Kshs. 14,812.

68. I have considered the circumstances under which the Claimant's employment with the Respondent came to an end, including the the impression I garner is that the Respondent has not been candid on why and how the termination occurred, the want of procedural fairness, and that the genesis of the Claimant's woes was a workplace injury, and come to a conclusion that the Claimant is entitled to a compensation under section 49 (1) [c] of the Employment Act. He is hereby awarded 7 months' gross salary, KSHS. 90,160.

69. The Claimant is awarded costs this suit as costs follow the event.

70. In the upshot, judgment is hereby entered for the Claimant in the following terms;

(a) One month's salary in lieu of notice, Kshs. 12,880.

(b) Unpaid leave compensation, Kshs. 32,160.

(c) Service pay, Kshs. 14,812.

(d) Compensation under section 49 (1) (c), Kshs. 90,160.

(e) Costs of the suit.

(f) Interest at court rates from the date of filing this suit till full payment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2021

OCHARO KEBIRA

JUDGE

DELIVERED IN PRESENCE OF;

MS. WAVINYA FOR NYABENA FOR THE CLAIMANT.

OCHIENG FOR THE RESPONDENT.