



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1787 OF 2015

(Before Hon. Justice Dr. Jacob Gakeri)

STANLEY MUTWASI WANDO.....CLAIMANT

VERSUS

BOB MORGAN SECURITY SERVICES LIMITED.... RESPONDENT

JUDGMENT

1. The Claimant filed a memorandum of claim on 7th October 2015 alleging that he had served the Respondent from 1999 to March 2015. That having served diligently for that long, his terminal dues computed at Kshs.60,622.00 net of statutory deductions were not properly computed since the Respondent did not apply its retirement benefit scheme for persons discharged on medical grounds and was unfairly terminated.

2. The Claimant prays for –

- (a) Untaken leave days at 26 days per year
for 16 years x 17,771.85..... Kshs.284,349.60
- (b) Leave pay at 17,771.85 x 12 months.....Kshs.284,349.60
- (c) Damages for unfair termination
17,771.85 x 12.....Kshs.213,262.00
- (d) Overtime 4 hours per day total 5,008 hours in 16 years
- (e) 17,771.85 x x x 5,008.....Kshs.413,589.77

Total..... Kshs.1,195,551.17

3. The Respondent filed its response to the memorandum of claim and bundle of documents on 8th December 2016. The Respondent admitted that the Claimant was its employee from 11th June 1999 to the date of discharge on 29th April 2015. His salary stood at Kshs.11,808.48 on the date of discharge. The Respondent prays that the claim be dismissed with costs.

Claimant’s Case

4. The Claimant avers that he was employed by the Respondent on 11th June 1999 at a salary of Kshs.3,371.68 per month to 11,808.48 in March 2015. That he served diligently until 27th April 2015 when he was terminated unfairly. (About 16 years).

5. That on 17th January 2015 while heading to the workplace at 5.45 am, he was attacked by thugs causing him severe injuries and the doctor recommended bed rest for purposes of recovery. That while recovering at home and without any warning, he was served with a letter of termination on medical grounds. It was further averred that the Respondent did not seek a doctor’s report on the Claimant’s health before termination. That the dues computed related to 8 years not the 16 years he had served and his pleas to work in other departments of the Respondent fell through.

6. It is also contended that the Claimant was not invited for a meeting or session on his termination which rendered the termination procedurally unfair. The termination letter was delivered by a colleague as opposed to inviting the Claimant. That efforts to resolve the matter amicably failed. That the treatment the Respondent accorded the Claimant after 16 years of service was inhuman and unfair.

Respondent's Case

7. The Respondent avers that the Claimant was its employee from 11th June 1999 to 27th April 2015 where he served as a guard under terms and conditions in the service contract dated 11th June 1999. On 17th January 2015, Claimant was attacked at his residence and the Respondent took him to hospital and was subsequently given sick leave and upon the lapse of 100 days sick leave allowable by the Company, the Claimant was invited to the Respondent's office where it was noted that he was not medically fit to resume duty and was discharged on medical grounds and advised on possible re-engagement on recovery.

8. The Respondent further avers that the Claimant's dues were processed and fully paid after his discharge as required by law and was given a certificate of service. The Respondent denies that the Claimant was unlawfully terminated.

9. On dues, the Respondent avers that it has discharged its obligation to the Claimant in totality. Overtime was at the rate of 33 hours worked for 26 days in a month and the Claimant had taken leave days and pending leave days for 2015 were paid on prorata basis.

Evidence

9. The Claimant testified that he was attacked on his way to work on 17th January 2015 at 5.45 am and was taken to a nearby clinic by good Samaritans and later to the Respondent's clinic and then to Kenyatta National Hospital (KNH) by way of reference. That he paid in cash at KNH since he was terminated on 27th April 2015 and had a salary up to March 2015. That after discharge from KNH he took a letter to the employer to demonstrate that he was still unwell but was terminated on 27th April 2015 without the benefit of a medical doctor's report and no hearing.

10. On cross examination, the Claimant confirmed that he took leave on 21st January 2015 and had not fully recovered after the 100 days of sick leave. He took the letter from KNH to the Human Resource Department. That he was a paid full salary during the 100 days. That he did not take annual leave in its entirety. Payslips had standard time for overtime and finally that he would tabulate his accrued leave days if given a chance.

11. RW1 testified that the Claimant's NHIF deduction for April 2015 was forwarded to the NHIF. That the Claimant served the Respondent for 16 years and 8 years on one year fixed term contracts and 8 years on permanent terms. He also confirmed that as a security company, the Respondent had no alternative employment for the Claimant. That the Claimant attended the Respondent's clinic and obtained sick sheets. He also confirmed that the Claimant was attacked on his way to the work place not in his house.

Claimant's Submissions

12. The Claimant's Counsel submitted that this was a case of unfair termination and relied on Section 45 of the Employment Act contending that whereas a valid reason may have existed, the Respondent employed a wrong procedure. It is contended that the termination on medical grounds without the opinion of a medical doctor was an unfair termination. Reliance is made on Rule 30 of the Employment (General) Rules, 2014 on employer's duty to ensure that employees who are injured or fell ill had access to medical treatment at the employer's expense. That the Respondent failed in its duty to ensure that the Claimant accessed medical treatment yet it was deducting Kshs.200 from the Claimant's salary for medical insurance from 1999 to October 2013.

13. It was further submitted that the Respondent failed to accommodate the Claimant during his lowest moment by refusing to offer him alternative employment after 16 years of service. Reliance was made on the decision in **Kenya Plantation and Agricultural Workers Union v Rea Vipingo Plantations Limited & another [2015] eKLR** on the various way an employer could accommodate an injured or sick employee to sustain their employment. That the Respondent opted for the easy way out of terminating the Claimant after he had exhausted the sick leave days.

14. On due process, Counsel submitted that the Claimant's termination violated the provisions of Section 41 of the Employment Act, on the obligation of the employer to –

- (i) explain to the employee, in a language the employee understands, the reason for which the employer is considering termination.
- (ii) Inform the employee of his right to have another employee or shop floor representative of his choice present during this explanation.
- (iii) Hear and consider any representations which the employee and the person, if any, chosen by the employee may make. Counsel submitted that the Respondent acted in contravention of the foregoing procedural requirements.

15. Counsel assailed the irregular proceedings leading to the decision to terminate the Claimant. Reliance was made on the decision in **AM v Spin Knit Limited [2013] eKLR**.

16. Relatedly, Counsel relied on the persuasive decision in **Kennedy Nyanguacha Omanga v Bob Morgan Services Ltd [2013] eKLR** on the procedural requirements in the termination of an employee on medical grounds. Counsel faults the Respondent for not applying the safeguards. The Court was urged to award maximum compensation for the unfair termination of the Claimant.

17. On terminal dues, Counsel submitted that the Respondent was still holding the Claimant's terminal dues in the form of co-operative shares to the tune of Kshs.87,000. Similarly, the deduction of Kshs.200 as medical fee was not put into good use and should be released to the Claimant a sum of Kshs.31,279.

18. On unpaid overtime, Counsel submitted that since the Claimant's contract provided for work from 6 am to 6 pm or 6 pm to 6 am, the Court should order payment of 4 hours daily for 16 years. Reliance was made on Section 6 of the Labour Institutions Act. It was also submitted that the payment of standard overtime of Kshs.3,589.65 was an underpayment since 1999 to October 2013 and urges the Court to award the sum of Kshs.719,746.56.

Untaken – unpaid leave

19. Counsel submitted that annual leave record produced by the Respondent showing that the grievant proceeded on leave was intended to misdirect the Court since it is the Respondent's document generated by it, that its contents are fabricated. It is further submitted that the Respondent did not produce any leave forms.

20. That the computer generated record that the grievant had taken leave was untrue since the grievant denied it. Reliance was made in Scion 74 of the Employment on the responsibility of the employer to keep records.

21. Counsel urges the Court to omit the Respondent's record on leave owing to the absence of particulars of sick leave record and absence of leave forms and submits that the Court should award the sum of Kshs.284,349.60.

22. Finally, Counsel urges the Court to award the maximum compensation for unfair termination of Kshs.213,26.20.

Respondent's Submissions

23. Counsel for the Respondent submitted that the Section 45(2) of the Employment Act applied to this case because it requires the employer to demonstrate that the reason for termination was fair and related to the employee's conduct, capacity or compatibility. He submits that the attack by thugs incapacitated the Claimant who could therefore not carry out guarding duties as he admitted on cross examination and evidence in chief. It was further submitted that as a security provider, the Respondent had no other engagements the Claimant could have been deployed. That the Claimant did not demonstrate in what other area he could have rendered services to the employer. That the Claimant had confirmed on termination that he had not fully recovered. That he termination on the ground of physical infirmity was fair.

24. On termination procedure, it was submitted that Sections 35 and 36 of the Employment Act were complied with in that the Respondent paid the Claimant one month's salary in lieu of notice.

25. On support to the Claimant, Counsel submitted that the employer was very considerate in that it gave the Claimant 100 days' sick leave as opposed to the ordinary 14 days provided by Section 30 of the Employment Act. In addition, the Claimant had access to the Respondent's clinic during the sick leave and had transported the Claimant to KNH on the day of the attack. Similarly, the Claimant had an NHIF card to access outpatient medical services.

26. On remedies, it was submitted that parties are bound by their pleadings, that paragraph 24D of the memorandum of claim on untaken leave pay and overtime damages aptly captured the Claimant's claim. That the claim for shares and sick fund in the submission was neither pleaded nor proved and should be disregarded. On untaken leave days and leave pay. Counsel contended that the same were not substantiated at all.

27. That the employee's leave record Appendix 7 demonstrated the dates when leave was taken and the Claimant so confirmed on cross examination save for the period 1999 to 2003. That pay slips for July 2008, August 2020, July 2011, August 2012, July 2013 and June 2014 show that leave pay was paid, and finally terminal benefits included leave pay for 20 days and the Claimant had no outstanding leave days.

28. Counsel submitted that the Claimant was seeking payment for untaken leave days and leave pay simultaneously. That leave pay is only due when leave days are not taken and the Claimant confirmed on cross examination, he took his leave days.

29. On overtime, Counsel submitted that the claim had not been proved at all. That the claim for overtime has metamorphosed from Kshs.413,589.77 to Kshs.959,662 in the submissions. That parties are bound by their pleadings and submissions were not pleadings or evidence. That the Claimant's attempt to amend the claim for underpayment of overtime is not part of the original claim which the Respondent had already responded to by the evidence of the payslip on record. Counsel submits that any evidence which does not support the averments in the pleadings must be disregarded. That the payslips show that the Claimant was paid standard overtime. Counsel urges the Court to disallow the claim.

30. On compensation Counsel relied on the decision in **D. K. Njagi Marete v Teachers Service Commission [2013] eKLR** for the proposition that –

“The purpose of compensatory awards is not to punish errant employers, however egregious their decisions against their employees be, the objective is to ensure economic injury suffered by the employee is adequately redressed.”

31. Reliance was also made on Section 49 of the Employment Act on the factors to be taken into consideration when making an award. It is submitted that the 8 months' gratuity and one month's notice was an ex gratia payment, since in the case of the former, the Claimant was a member of the NSSF and thus exempted from gratuity.

32. Finally, it is submitted that the Claimant received a generous send-off package equivalent to 9 months' pay.

Analysis and Determination

33. After careful consideration of the pleadings, evidence and submissions of Counsel, the issues for determination are: -

(i) Whether the Claimant's termination for medical grounds was lawful and fair;

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

34. Under Section 45(2) of the Employment Act, a termination of employment is only fair if the reason relied upon by the employer is not only valid but fair and a fair procedure is employed. This Section underpins the position that a termination of employment must be substantively and procedurally fair as stated in **Walter Ogal Onuro v Teachers Service Commission [2013] eKLR**. As the Court of Appeal held in **Kenafic Industries Limited v John Gitonga Njeru [2016] eKLR** –

“Three things must therefore be satisfied; there must be reason(s) given for the termination, the reason(s) must be fair and the procedure followed too must be fair. These three conditions are designed to cater for all cases in which an employer instigates the termination of employment.”

35. The Court further held that –

“It is trite law that where termination of employment is contested and alleged to be unfair, the burden of proving that unfairness rests on the employee while the burden of justifying the grounds of termination or dismissal rests with the employer.”

36. The obligation of the employer to prove that the reason(s) in support of the termination is ordained by Section 43 of the Employment Act.

37. Finally Section 41 requires the communication of the reason(s) of the employee. In **Naima Khamis v Oxford University Press (EA) Ltd [2017] eKLR**, the Court of Appeal held that –

“... termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required.”

Reason for termination

38. Applying these principles in the instant case, it is common ground that the Respondent discharged or terminated the Claimant's employment on account of incapacity. The Claimant was attacked by thugs on the morning of 17th January 2015 while on his way to work and was severely injured. He was subsequently treated at a local clinic, the Respondent's clinic and at the KNH on referral by the Respondent's clinic. Owing to the nature of the injuries, the Respondent gave the Claimant 100 days of fully paid sick leave during which time he visited the Respondent's clinic.

39. After the 100 days of sick leave, the Respondent discharged the Claimant on medical grounds by a letter dated 29th April 2015 effective on 27th April 2015. The letter stated by the Claimant would be paid salary in lieu of notice and other benefits as provided by the contract of employment at the Employment Act, 2007. Finally the letter informed the Claimant that *“Once you are certified okay, report to the undersigned for re-engagement consideration.”* It is important to note that by the time the 100 days of sick leave lapsed, the Claimant was still unwell to resume duty. He confirmed so on cross examination. It is unclear whether the Claimant reported as advised.

Did the Respondent have a valid and fair reason to terminate the Claimant?

40. The Claimant alleged and submitted that the discharge on medical grounds was an unfair termination because he was not referred to any medical professional for a progress or medical report before the decision was made. That it was arbitrary. That the Respondent refused to accommodate the Claimant since it did not re-deploy him or give him lighter duties. That it should have done more for the Claimant whereas the decision in **Kenya Plantation and Agricultural Workers Union v Rea Vipingo Plantations Limited & another [2015] eKLR** is relevant, reasonable accommodation by an employer is dependent on the facts of the case. Whereas some employers by the very nature of their services or products have sufficient room to redeploy and modify positions to suit a stricken employee, others have limited or no capacity at all. As a security provider, the Respondent had limited options to redeploy the Claimant.

41. The Claimant's submissions concede that the Respondent had a reason to discharge the Claimant and the Court finds that the reason was valid and fair.

Procedure

42. On due process, Counsel for the Claimant argued that the requirements of Section 41 of the Employment Act were not complied with in that the Claimant was not allowed to respond to the reason relied upon by the Respondent and there was no hearing before the decision to terminate was made.

43. The decision in **AM v Spin Knit Ltd [2013] eKLR** relied upon by the Claimant captures the essence of compliance with Section 41 of the Employment Act, namely notice of the intended termination, requiring that the employee presents him/herself before a panel, accompanied by a representative of his/her choice, hearing of the employee's representation and the decision should be made taking into account the employee's representations. The decision in **Kennedy Nyanguncha Omanga v Bob Morgan Services Limited [2013] eKLR** is also relevant to the extent although the termination on medical grounds was found to be a valid reason for termination, the procedure used was defective and the termination was held to have been unfair. The Respondent led no evidence that it notified the Claimant its intention to terminate employment on medical grounds nor did it conduct any hearing on the reason, or require the Claimant be accompanied by a colleague or other person of his choice. He was confronted with a *fiat accompli*.

44. It is the finding of the Court that the Respondent did not comply with the requirements of Sections 41 and 45(2) on the procedure for termination. Consequently the discharge of the Claimant on medical grounds was therefore unfair. The Court is guided by the Court of Appeal decision in **CMC Aviation Ltd v Mohammed Noor [2015] eKLR** where the Court was unequivocal that –

“Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee's service but the employer does it in a procedure that does not conform with the provisions of a statute, that still amounts to unfair termination.”

45. On reliefs, the Claimant prays for –

(a) Untaken leave Kshs.284,349.60

(b) Leave pay Kshs.284,359.60

46. On cross examination, the Claimant confirmed that he had not proceeded on annual leave between 1999 and 2002 and thereafter he went on leave for a few days not the required number of days. He concluded by stating that *“I can tabulate my accrued days.”* First the Claimant did not establish his leave entitlement for the duration 1999 and 2002 or how the days accrued and when.

47. Second, the Claimant led no evidence on how the days used in the memorandum of claim were arrived at. Similarly, he did not establish in what years he proceeded or did not proceed on leave. Noteworthy, some of the payslips on record reflect not only a leave allowance, but leave transport allowance as well. For instance, the payslips for July and August 2008 show that leave allowance was paid twice, August 2009 leave and leave transport allowance was paid, August 2010 leave and leave transport allowance paid, July 2011 leave pay and leave transport allowance paid, August 2012 leave transport allowance paid July 2013 leave pay and leave transport allowance paid. In June 2014 leave transport allowance paid and in 2015 the Claimant was paid for 20 days leave as per the clearance certificate.

48. In the premises, the Court is satisfied that the Claimant has not proved both claim (a) and (b) set out in paragraph 24 of the memorandum of claim. Both claims are disallowed.

(c) Damages for unfair termination Kshs.213,262.20

49. Having found that the Claimant's termination was unfair for want of procedural fairness, the remedies under Section 49(1)(c) of the Employment Act are triggered. Since the remedy is discretionary, the Court has considered the following:–

- (i) In total, the Claimant served the Respondent for about 15 years, 9 months, a considerable length of time and wished to continue;
- (ii) The Claimant was not to blame for the attack which incapacitated him;
- (iii) The Respondent paid the Claimant gratuity for 8 years notwithstanding the fact that he was a member of NSSF; There is no evidence on record to show that the deductions were not being remitted to the NSSF;
- (iv) The Claimant had no disciplinary issues with the employer.

50. Counsel for the Respondent submitted that the Claimant had an *ex-gratia* payment under Section 49(4)(m) since he received gratuity for 8 years as mentioned in (iii) above.

51. Taking into account the above fact in the context of Section 49(1)(c) of the Employment Act, the Court is satisfied that the equivalent of 3 months' salary of **Kshs.53,315.55** is fair.

(d) Overtime pay 4 hours dial for 16 years Kshs.413,589.77

52. In his submissions, the Claimant modified this claim to read Kshs.959,662.08 more than the amount pleaded in the memorandum of claim and as the Respondent's Counsel submitted, it is trite law that parties are bound by their pleadings. The modification is therefore of no consequence in this judgment.

53. Apart from the meticulous computation of figures by the Counsel for the Claimant, the Claimant led no evidence of having worked overtime under the earlier contract or the subsequent one. But more significantly, he confirmed on cross examination that that abbreviation OT in the payslip mean overtime and acknowledged having received the standard overtime since December 1999. From the evidence on record, the standard overtime pay was replaced with *“other allowances”* in November 2013 and was paid until March 2015.

54. The claim on record is based on the erroneous assumption that no overtime allowance was paid to the Claimant and is thus misleading.

The Claimant led no evidence on how the 5,008 hours arose since 1999 and its basis. The claim is disallowed for want of proof.

55. **In conclusion judgment is entered for the Claimant for the sum of Kshs.53,315.55 with costs.**

56. Interest at Court rates from the date of judgement till payment in full.

57. A declaration is hereby made that the Claimant's termination of employment was unfair.

58. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9TH DAY OF NOVEMBER 2021

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