



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 55 OF 2017

JECINTA WAITHIEGENI WAMBUGU.....CLAIMANT

VERSUS

EVEREST ENTERPRISES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant's suit against the Respondent is one seeking relief for her alleged unlawful termination. The Claimant averred that she was employed by the Respondent as a general worker from the year 2004 till 26th October 2016 when her services were unlawfully terminated. The Claimant averred that the Respondent through its servants/agents through propaganda and other modes conspired to create unfounded and misplaced grounds to be the basis of terminating her from employment. She averred that the Respondent never gave adequate reasons for the termination. The Claimant averred that she had sustained a fracture of the left metacarpal bone and an injury to the right leg while working at the Respondent's farm and at the time of termination was undergoing treatment for the injury sustained. The Claimant averred that she was unlawfully terminated from service without any just cause and without being given a chance to be heard. She thus seeks for compensation pursuant to the Work Injury Benefits Act and prayed for judgment against the Respondent for :-

- a. A declaration order that the termination of her employment was unlawful and against the rules of natural justice and contrary to the provisions of the Employment Act and the Constitution.
- b. A declaration that she is entitled to full salary for the remaining part of her service with the Respondent until retirement age.
- c. General and punitive damages for unlawful and wrongful termination from employment.
- d. Salary in lieu of notice of Kshs. 8,100/-, unpaid leave days -Kshs. 17,010/-, compensation for wrongful termination from employment Kshs. 97,200/-, severance pay Kshs. 48,600/-, deducted and unremitted NHIF contributions Kshs. 57,600/-.
- e. General damages for pain, suffering, loss of amenities, future medical expenses and compensation under WIBA.
- f. Costs and interests of the suit.

2. The Respondent filed a response to the claim in which it denied every allegation and put the Claimant to strict proof thereof. The Respondent denied ever terminating the Claimant's services and averred that the Claimant was paid salary for October, the alleged month of termination as well as the month of November despite the fact that she had willfully abandoned her duties. The Respondent averred that had the Claimant not abandoned her duties, the Respondent would still have her as an employee to date. The Respondent contended that this honourable court does not have powers to determine issues of injury during work. The Respondent averred that the Claimant has never held a position of a supervisor and that her salary of Kshs. 8,100/- was subjected to statutory deductions. For the foregoing reasons, the Respondent prayed that the entire claim be dismissed with costs as it lacks merit.

3. The Claimant testified that she was injured whilst working with the Respondent. She stated that when she gave a letter seeking light duties the Human Resource told her that she was no longer needed. She testified that she worked from 2004 to 2016 and that she never got leave during that duration and her NSSF dues were not paid in full. The Respondent was not present in court and did not avail a witness in support of their case.

4. The Claimant submitted that she was dismissed from employment without a warning or being invited to a disciplinary proceeding where she would have defended herself if at all she had indeed abandoned her duties. The Claimant submitted that there was nothing on record to show that she absconded duty and that if indeed she did, she would have been served with several warning letters. She submitted that however, this was not the case here as no such letters were adduced in evidence. The Claimant submitted that even though she got injured,

she worked diligently till her services were unfairly terminated. She submitted that since the nature of her injury required that she be allocated light tasks as recommended by the doctor, the Respondent saw her as a liability and opted to terminate her services. The Claimant submitted that the termination was therefore unfair as the Respondent failed to prove a reason for the termination as required by Section 43 of the Employment Act and she was also not afforded an opportunity to defend herself contrary to Section 41 of the Employment Act. The Claimant submitted that no evidence was adduced to show that Section 40 of the Employment Act was complied with. She submitted that unfair termination involves breach of statutory law and even where there is a fair reason for termination but the employer does it using a procedure that does not conform with the provisions of statute, that still amounts to unfair dismissal. The Claimant submitted that she was thus unfairly terminated without notice, hearing or even payment of her dues and the court should award her compensation for unfair termination as provided for by Section 49 of the Employment Act. The Claimant submitted that she was dismissed in a callous manner and the Respondent filled her position with another person. The Claimant submitted that she has had difficulties securing a new job and due to the foregoing, this is a fit case for a maximum compensation of 12 months. The Claimant further submitted that the Respondent was under a common law obligation to provide a safe working environment, and it is therefore a breach of its duty if an employee suffers injury due to lack of safe working conditions. The Claimant submitted that the Respondent did not tender any evidence to controvert her testimony and as such it is guilty of negligence and liable to compensate the claimant for the injuries sustained. She relied on the case of **Uneek Electrical Company Limited v Joseph Fanuel Alela [2005] eKLR** and urged the court to find the Respondent 100% liable and award her Kshs. 500,000 as general damages. The Claimant in her submissions abandoned prayer (b) and (c) as contained in the amended memorandum of claim dated 10th July 2017. The Claimant submitted that she had proved all the averments set out in her amended claim and since she issued a notice of intention to sue to the Respondent, she is entitled and should be awarded the costs of this suit. The Claimant urged the court to find that she had proved her case on a balance of probabilities and the same should be allowed as prayed in the memorandum of claim.

5. The claim is in the nature of a work injury claim. As this area has been under a great deal of focus and due to the averments in the Respondent's reply that this honourable court lacks jurisdiction to hear the case, it is imperative that the court disposes the issue of jurisdiction. In the case of **Attorney General v Law Society of Kenya & Another [2017] eKLR** the Court of Appeal acquitted itself thus:-

Regarding legal remedies in respect of occupational accident, the Act provides at section 16 that;

“No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee’s employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death”. (Our emphasis).

Although the Director has many overarching functions under the Act, in section 23(1) he is required;

“23(1) After having received notice of an accident or having learned that an employee has been injured in an accident the Director shall make such inquiries as are necessary to decide upon any claim or liability in accordance with this Act.” (Our emphasis).

Section 25(1) and (3) on medical examination provides that;

“25(1) An employee who claims compensation or to whom compensation has been paid or is payable, shall when required by the Director or the employer as the case may be, after reasonable notice, submit himself at the time and place mentioned in the notice to an examination by the medical practitioner designated by the Director or the employer with the approval of the Director.

.....

(3) An employee shall be entitled at his own expense, to have a medical practitioner of his choice present at an examination by a designated medical practitioner”. (Our emphasis).

We reproduce finally sections 52(1) (2) and 58(2).

1. (1) The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.

(2) An objector may, within thirty days of the Director’s reply being received by him, appeal to the Industrial Court against such decision”. (Our emphasis).

.....

“58 (1) Any regulation or other instrument made or issued under the Workmen’s Compensation Act and having effect before the commencement of this Act shall continue to have effect as if such regulation or other instrument were made or issued under this Act.

(2) Any claim in respect of an accident or disease occurring before the commencement of this Act shall be deemed to have been lodged under this Act”. (Our emphasis).

Section 7(1) (2) above makes it mandatory for an employer to take out an insurance policy; that the policy provider must be one

approved by the Minister, unless the employer provides and maintains a security consisting of an undertaking by a surety approved by the Minister to make good any failure by the employer to discharge any liability which the employer may incur under the Act to any of its employees up to an amount approved by the Minister. Looked at from an economic point we think it is innovative and a good idea for the employer to take out insurance policy in respect of any liability that the employer may incur to employees for work-related injuries and diseases. It is beneficial to both the employers and employees. Such a policy is intended to cushion the employer against loss that an employer may incur in the event of a liability that might threaten the risk of insolvency or bankruptcy. These can be avoided by making annual premium payments for coverage and have a predictable cost for handling the risk. It also protects the employer from potential compensation lawsuits and obligations, which might take years to resolve.

Further it ensures that employers are legally obligated to take reasonable care to assure that their workplaces are safe. And when accidents happen the insurance makes it easy for the injured employees to get medical care and compensation. If a worker is killed in the course of work, the insurance provides death benefits for the worker's dependents. All these find their place today in **Articles 43(1) (e)** (the right to social security and **Article 46 (1) (c) and (d)** (the right to the protection of health, safety and economic interests; right to compensation for loss or injury arising from defects in goods and services).

.....

Similarly in terms of section 23 of the Interpretation and General Provisions Act, it is clear that where a written law partially or wholly repeals another written law, unless a contrary intention appears, the repeal cannot revive anything not in force or existing before the repeal or affect the previous operation of a repealed law in relation to interests, rights and or obligations enshrined under such law.

In the end, we allow the appeal to the extent that we set aside the learned Judge's orders declaring **sections 4, 16, 21 (1), 23(1), 25 (1) (3), 52 (1) (2) and 58(2)** to be inconsistent with the former Constitution. The result is that only **sections 7** (in so far as it provides for the Minister's approval or exemption) and **10 (4)** are inconsistent with the former and current Constitution.

6. The learned Judges of Appeal were quite correct in their surmise of the law and in the determination they came to. This position is what the Act intended as the reading of the Act reveals. However, there has been confusion generated by various decisions of Courts of concurrent status as this one. It is the intention of Parliament that the Director Occupational Safety and Health investigates the occurrence of an alleged injury at the workplace and prepare an assessment of the injury and upon an employer not compensating the employee as directed by the company as directed the matter is referred to this Court after an appeal to the Director if the appeal does not elicit a change in determination. The Claimant had a claim quite distinct from the claim under WIBA and that is the claim I will address. After injury the LD 104 Form is to be filled and the employer is bound to bring matter to attention of the Director of Occupational Safety and Health Act. A licenced medical practitioner assesses the injury and this forms the basis of any award that could be made or any demand for payment from the insurer of the employer or from the reserve of funds held by the company for such purpose. If there is a requirement for additional medical examination the employer may seek that and if there is a dispute the panel of doctors from the Director of Occupational Safety and Health makes a determination on the extent of the injury and this determination is pretty conclusive. I have taken the effort to indicate this in this Judgment as there is confusion which needs to be cleared, confusion that has permitted courts, advocates, employees and employers to completely misapprehend the law relating to Work Injury Benefits Act. That is what the Claimant was required to do in respect to her injury.

7. To the matters pertinent for my determination, the Claimant sought a declaration that the termination of her employment was unlawful and against the rules of natural justice and contrary to the provisions of the Employment Act and the Constitution; a declaration that she is entitled to full salary for the remaining part of her service with the Respondent until retirement age; salary in lieu of notice of Kshs. 8,100/-, unpaid leave days -Kshs. 17,010/-, compensation for wrongful termination from employment Kshs. 97,200/-, severance pay Kshs. 48,600/-, deducted and unremitted NHIF contributions Kshs. 57,600/- as well as costs and interests of the suit. She was able to demonstrate that she was not heard before the termination. Whereas the employer asserts the Claimant absconded her duties, this was the period she was nursing injuries sustained at the workplace. She would be entitled to the safeguards under Section 41(1) of the Employment Act prior to dismissal. The employer was required to before terminating the employment of the Claimant on the grounds of misconduct (absenteeism), poor performance or physical incapacity explain to her, in a language she understands, the reason for which the employer is considering termination and she was entitled to have another employee or a shop floor union representative of her choice present during this explanation. There was no proof that this was done or even any suggestion that it was available. The Claimant seeks to be paid money for her service until retirement age. As held in the case of **D. K. Njagi Marete v Teachers Service Commission [2013] eKLR** by Rika J.

This Court has advanced the view that employment remedies, must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way. In Industrial Court Cause No. 1722 of 2011 between David Mwangi Gioko & 51 Others v. Nairobi City Water & Sewerage Company Limited [2013 e.KLR] and the unreported Industrial Court Cause No. 611 [N] of 2009 between Maria Kagai Ligaga v. Coca Cola East Africa Limited, this Court found that in examining what remedies are suitable in unfair employment termination, the Court has a duty to observe the principle of a fair go all round.

26. A grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, would not be a fair and reasonable remedy. (underline mine, for emphasis)

As held, I would not be giving a proportionate remedy but unjust enrichment to permit the recovery of salaries for a period the employee will not work for the Respondent. In the final result the Claimant is only entitled to judgment against the Respondent for

- i) salary in lieu of notice of Kshs. 8,100/-,
- ii) unpaid leave days -Kshs. 17,010/-,
- iii) compensation for wrongful termination from employment Kshs. 97,200/-,

iv) interest at court rates on the sums in i), ii) and iii) above from date of judgment till payment in full.

v) costs of the suit.

It is so ordered.

Dated and delivered at Nyeri this 22nd day of January 2020

Nzioki wa Makau

JUDGE