



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1436 OF 2014

MUNYWOKI KILELE FESTUS.....CLAIMANT

VERSUS

CANTON ENTERPRISES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the respondent as a mason. On 18/09/2013, while on the course of employment by the respondent, he suffered injury after a tool of the trade (*Mbao*) fell from a colleague and fractured his right hand. After two months his employment was terminated and he brought this suit claiming damages for wrongful and unfair termination of his employment, plus General damages for pain and suffering.

2. The Respondent filed her Defence on 19th March, 2015, denying that the claimant was her employee and further denied that he was injured as alleged since no accident occurred on 18/9/2013 as alleged. She further averred that the claimant never reported any accident to her. She, therefore, prayed for the dismissal of the suit with costs.

3. On 25/4/2019 the counsel for the two parties recorded a consent to the effect that judgement on liability be entered in favour of the claimant on 70% on the worker injury claim. In addition, the parties agreed to dispose of the issue of damages for the injury claim and termination of employment by written submission on the basis of the document on the basis of the document on record including the medical reports by Dr Okere dated 11/12/2013 and Dr Wambugu dated 13/11/2015.

4. On 11/7/2019 the Court fixed the suit for judgement on 25/10/2019 but on 23/10/2019, the parties appeared before the court for mention for directions on the issue of the claim for unfair termination of employment and sought leave to file further submissions on the same. The said request was granted and thereby the judgement was deferred.

Claimant's Submissions

5. The claimant submitted his doctor assessed the degree of his permanent incapacitation at 5% as per the medical report dated 11/12/2013. The medical report describes the injuries suffered as a "chip fracture dorsal aspect of the Lunate." Upon consideration of comparable judicial precedent, the claimant urged the Court to award him Ksh 450,000 as general damages for pain suffered and loss of amenities.

6. The precedents cited included **Luka Osoro & another v Daniel K Cheruiyot**, and **Atanas Isoso v National Water Conservation and Pipeline Corporation**, where the court awarded Ksh 250000 and Ksh 450000 respectively for pain, suffering and loss of amenities. The Claimant further relied on **Lydia Waringa v George G.W. Nthenge** where the court awarded Ksh 700000 for pain suffering and loss of amenities.

7. The Claimant also prayed Ksh 1500 being special damages for the cost of preparing the medical reports

8. In his further submissions filed on 21/11/2019, the claimant submitted that his Ksh 800 daily wage translated to Ksh 24000 per month. He contended that he was 35 years when he suffered the injuries and lost his job. He further contended that his retirement age was 55 years, therefore, he prayed for lost salary from the period he would have worked before retirement at the rate of Ksh 24000 per month equalling to Ksh 5,760,000.

9. He submitted that he was ready to report back to work for light duties but he was intimidated, heckled and laid off discriminatively. Therefore, he prayed for the reliefs sought in the claim.

Respondent's Submissions

10. The respondent submitted that an award of Ksh 120000 is adequate compensation to the claimant for pain suffering and the loss of

amenities taking into account comparable judicial precedent, severity of the injuries suffered, time lapse and inflation transactions. She relied on **Bernard Nyaga Munene v Millennium Star Enterprise Ltd [2017] eKLR**, where the appellant suffered a fracture of his right hand wrist and the court awarded him Ksh 75750 general damages for pain, suffering and loss of amenities. She also relied on **Kipkebe Tea Limited v Duke Nyang'au [2015] e KLR**, where the appellant suffered a dislocation of the right hand wrist joint and deep cut wound on the right elbow and the trial court awarded him 120000 for pain and suffering, but on appeal, it was reduced to Ksh 100000. Finally, he relied further on **Kimathi Mbuvi t/a Kimathi Mbuvi & Bros v Augustine Munyao Kioko [2006]**, where the Court of Appeal upheld an award of Ksh 300000 for multiple cuts and fractures of radius and ulna bones suffered by the appellant on 28/7/2006.

11. By his further submissions filed on 26/11/2019, the respondent contended that the claim for damages for unfair termination was unsubstantiated by evidence and prayed for the same to be dismissed. She urged that for the claim to succeed, the claimant ought to have adduced evidence to prove that he was unfairly dismissed. For emphasis, she relied on **Kenfreight (EA) Limited v Benson K Nguti [2016] eKLR**.

Issues for Determination

12. After careful consideration of the respondent's evidence and submissions, the issues for determination are: -

- a) Whether the claimant was employed by the respondent on 18/9/2013 when he suffered bodily injury.
- b) What is the quantum of damages payable to him for the injuries suffered.
- c) Whether his employment was unfairly terminated by the respondent
- d) Whether he is entitled to damages for unfair termination

Employment Relationship

13. The respondent denied in her defence that the claimant was her employee when he got injured. However, by the written statements filed by her witness, Mr John Kimanga on 29/7/2016, the employment relationship between the parties here was confined. The witness stated as follows: -

"I remember on 18/9/2013, I was on duty as a mason. I know Munywoki Kilele Festus, the plaintiff. He was my workmate. On the material day, we were shifting the stepping ladder when the plaintiff was pulling a piece of timber he got injured on the hand. He reported to the foreman and first aid was administered to him, he did not report to work the following day."

The Quantum of Damages for the Bodily Injuries Suffered

14. The respondent proposed an award of Ksh 120,000 in general damages for pain, suffering and loss of amenities. However, the claimant proposed Ksh 450000. I have considered the judicial precedents cited as well as the medical reports produced by consent. The most relevant precedent is the Court of Appeal decision in the **Kimathi Mbuvi Case**, *supra*, cited by the respondent.

15. In the said case the claimant suffered multiple bruises on the forehead, deep cut on the palm of his left hand (about 10cm long and 1 cm deep), deformed forearm and fracture of the left radius and ulna bones and the Court of Appeal upheld an award of Ksh 300000 for pain and suffering. The said injuries were more severe than the injuries suffered in the present case. Considering the degree and nature of injuries suffered by the claimant herein, time and inflation factors, I award the claimant Ksh 250000 as general damages for pain suffering and loss of amenities.

Unfair Termination of Employment

16. The Claimant did not adduce any evidence towards proving unfair termination of his employment. Under section 47 of the Employment Act, the burden of proof rested with the employee while the burden of justifying the grounds for the termination rested with the employer.

17. In this case, the written statements by the defence witness was to the effect that after the claimant suffered injury on 18/3/2013, he never reported to work the following day. That evidence was not rebutted by the claimant and the court returns that the claimant has failed to prove on a balance of probability that his employment was unfairly terminated by the respondent. He is, therefore, not entitled to any damages for wrongful and unfair termination.

Conclusion

18. I have found that the claimant has not proved his claim for unfair termination. However, I have entered judgment for the claimant against the respondent in the sum of Kshs. 250000 less 30% contributory negligence as general damages for pain, suffering and loss of amenities in respect of the work injury claim. The net award is therefore Kshs. 175000 plus costs and interest of court rates from the date hereof.

Dated, signed and delivered in open court at Nairobi this 29th day of April, 2020.

ONESMUS N. MAKAU

JUDGE