



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 113 OF 2017

(Before Hon. Justice Mathews N. Nduma)

HENRY FANUEL OTIENO.....CLAIMANT

VERSUS

KISUMU CONCRETE PRODUCTS LTD.....RESPONDENT

JUDGMENT

1. The suit was filed on 21st March 2017. The Claimant seeks an order declaring that the termination of employment was unlawful and unfair and payment of compensation in respect thereof and for:

- i. One month salary in lieu of notice in the sum of Kshs. 16,200.
- ii. Payment of house allowance calculated at Kshs. 5,000 per month from 2010 to January 2017.
- iii. Refund of NSSF and NHIF deductions not remitted for 43 months Kshs. 51,600.
- iv. Interest and costs and
- v. Certificate of service.

1. The claimant, CW1 adopted a witness statement dated 15th March 2017 as his evidence in chief. He testified that he was employed by the respondent on or about 2010 to do menial jobs including managing blocks from machines loading trucks and attending to the general production works of building blocks and related products.

2. The claimant was not given a letter of appointment and worked continuously until 9th August 2017 when he reported to work as usual and was asked to attend to a concrete mixer and/or concrete block making machine he was used to working with.

3. The machine had a problem because it had a hole under it hence it let out sand and cement. The problem had persisted for a while and CW1 would occasionally scoop the cement and sand that had leaked and return it to the mixer.

4. At around 11 AM, the supervisor instructed CW1 to find a way of repairing the machine so as to stop wasting time, sand and cement.

2. CW1 had no technical knowhow to repair the machine but he tried to cover the hole using cement but in the process of repairing the machine, the machine pulled the sleeve of the oversize work coat the claimant was wearing and dragged the claimant's hand into the blade causing the claimant injuries. The claimant suffered great pain and loss of blood and he was rushed to hospital.

3. The claimant testified that he suffered a crushed left hand and his left index finger was amputated at Jaramogi Oginga Odinga Referral Hospital where he was hospitalized for nine (9) days. CW1 paid for the hospital bills.

4. The Claimant instructed an advocate to follow up his injury claim. The Advocate issued a demand letter on 17/1/2017. The Respondent then summoned the claimant and instructed him to follow a claims procedure and see a company doctor for assessment of injuries to enable compensation.

5. The claimant agreed to that but insisted to have his advocate pursue the claim on his behalf. The respondent vide Mr. Sudhi was not happy with that. CW1 testified that Mr. Sudhi assaulted the claimant and evicted him from the respondent's premises. He told CW1 that his

employment had been terminated with immediate effect.

6. The Claimant was warned never to return to the company premises. This happened on 27th January 2017. The claimant was not given notice nor paid in lieu of notice. The claimant was left destitute with an injury to cater for and school fees to pay for his children. The claimant suffered mental anguish and trauma.

7. The respondent declined to give the claimant letter to enable him his NSSF dues. The claimant added that he then discovered that deductions of NSSF and NHIF were not remitted for a period of 43 months. The claimant prays for the suit to be allowed and he be awarded the reliefs set out in the statement of claim.

8. Under cross examination by Mr. Abira for the respondent, CW1 stated that Mr. David was his foreman and that he was not given protective gear whilst operating the block making machine. CW1 denied that he absconded duty and stated that he was paid Kshs. 12,000 per month.

9. CW1 insisted that he was sacked for insisting on his right to have an advocate follow his injury claim.

10. CW1 stated that he was not given a pay slip and he got no letter of termination. CW1 said he was verbally sent away by Mr. Sudhi CW1 said he got no certificate of service.

11. RW1 Mercy Ogendi the Human Resource Manager testified for the respondent and adopted a witness statement filed on 9/10/2017 as her evidence in chief.

12. RW1 testified that the claimant was employed by the respondent as a casual handler in August 2014. That the claimant worked in that capacity until 1st January 2017 when the claimant abandoned employment without reasonable cause and has never returned to work.

13. That the claimant worked well until the 11th August 2016 when he got injured while cleaning a machine. The respondent took the claimant to hospital and claimant was admitted at Jaramogi Oginga Odinga Teaching and Referral Hospital for about 9 days.

14. That the respondent took care of the medical expenses that was settled by NHIF. That the claimant continued to visit the hospital for checkups and he was reimbursed when he used his own money.

15. That the Claimant was advised that he could only continue doing light duties or return home to rest sometimes in September 2016. That the claimant continued to receive his wages. In December 2016 the claimant demanded to be compensated for the injury. The claim was well received by the Director and he was advised to visit the company doctor for medical examination before damages would be assessed.

16. That the claimant left and did not return until January 2017 when he brought a letter of resignation. That he was advised RW1 against resigning and was asked to see the company doctor.

17. RW1 added that the claimant did not submit the letter of resignation and left promising to return to work. That sometimes on 23rd January 2017, the claimant asked for salary advance of kshs. 5,000 and he was granted. The claimant never returned to work again until March 2017 when he reported to work only to request for his certificate of service.

18. RW1 stated that all KRA, NSSF and NHIF dues for the claimant were deducted and remitted. The claimant was never abused nor was he physically assaulted as alleged or at all.

19. RW1 said that the claimant never met the Directors but he always conveyed his issues to RW1 who would inturn inform the Directors. RW1 concludes that the employment of the claimant was never terminated and the suit be dismissed with costs for lack of merit.

Determination

20. The issues for determination are:-

i. Whether the employment of the claimant was terminated or he absconded work.

ii. Whether the claimant is entitled to the reliefs sought.

21. The testimony by CW1 and that by RW1 on whether CW1 absconded work or he was verbally dismissed by a director of the company Mr. Sudhi is mutually destructive. However one has to go a step further to analyze the credibility of the respective testimony to arrive at a factual decision. In this respect, it is not in dispute that the claimant sustained injuries on his hand in the course of employment and had engaged an advocate who wrote a demand letter to the respondent with respect to compensation.

22. The claimant testified that Mr. Sudhi told him not to use an advocate in pursuing the claim and when the claimant insisted on using the advocate he was verbally summarily dismissed by Mr. Sudhi. CW1 did not say that his dismissal happened in the presence of RW1.

23. RW1 did not testify that she was present when CW1 allegedly met Mr. Sudhi at the work place.

24. RW1 testified to the contrary that CW1 did not at any one time meet any of the directors of the company and that CW1 only dealt with

her alone in the matter of his injury.

25. RW1 went on to say that CW1 was advised to go and see the company doctor on the issue of the injury but CW1 had chosen to go and seek advice from his advisors first but never returned to see the doctor.

26. It is common cause that the claimant later on sought an advance payment from the respondent and was granted Kshs. 5,000. RW1 stated that CW1 subsequently wrote a resignation letter which RW1 persuaded him not to submit and he left without submitting the letter but never returned back to work until when he came to demand for a certificate of service.

27. CW1 testified that the respondent did not provide him with a letter of termination. That he was never given a letter of appointment. CW1 testified that he was not given a certificate of service to date.

28. Nothing would have been easier than for Mr. Sudhi to come to Court and refute personally the testimony by CW1 that he verbally chased him away from work and warned him not to return to the company premises for insisting on using an advocate in his injury claim.

29. The testimony by RW1 in circumstances that indicate she was not present when the verbal dismissal took place is not sufficient and/or credible enough to rebut the direct evidence by CW1 which was unshaken by the close cross examination by counsel for the respondent.

30. The Court beliefs and finds that the claimant was verbally dismissed and without notice or payment in lieu of notice by Mr. Sudhi a Director of the respondent.

31. The purported cause or reason for the dismissal is not a valid reason in law to justify a dismissal of an employee. Apparently no procedure at all was followed by the respondent in dismissing the claimant.

32. The court finds consequently that the dismissal of the claimant violated sections 36, 41,43, and 45 of the Employment Act no. 11 2007 and is therefore unlawful and unfair.

33. The Claimant is entitled to compensation in terms of Section 49 (1) (c) and (4) of the Act.

34. In this respect the claimant had served the respondent diligently from the year 2010 up to January 2017, a period of over 6 years. The claimant suffered serious hand injury resulting in permanent disability in the course of employment. The claimant had not been compensated by the time he left employment but to the contrary he was dismissed for using an advocate in pursuant of the claim.

35. The claimant was summarily dismissed without payment of any terminal benefits and was also not compensated for the sudden loss of employment. The claimant was also not paid in lieu of notice.

36. The Claimant was left with no money to care for his injuries, his support and that of his family. The claimant did not contribute to the dismissal in the Court's view. The Claimant lost prospects of career development in his job and was not given a certificate of service to help him look for alternative employment. The claimant suffered injuries, loss and damage.

37. The Court relies on the case of **Liz Ayany – VS – Leisure Lodges Limited (2018) eKLR** in Cause no. 2210 of 2014 to affirm the unlawfulness of his dismissal and award the claimant the equivalent of ten(10) months' salary in compensation for the unlawful and unfair dismissal in the sum of Kshs.(13,313 X 10) Kshs. 133,130.

38. The claimant is also awarded Kshs. 13,313 in lieu of one month notice.

39. From the pay slips produced by RW1, it would appear that NSSF and NHIF was deducted from the salary of the claimant. The pay slips produced by RW1 were only for the period August 2014 to December 2016. The Claimant prays for refund of deductions made by the respondent and not remitted for a period of 43 months. The court finds the claim sufficiently proved and awards the claimant Kshs. 51,600 being refund of unremitted NSSF and NHIF deductions.

40. The Claimant has not sufficiently proved the claim for payment of special damages in the sum of kshs. 90,000 and the same is dismissed. Equally the Court lacks jurisdiction to entertain the work injury claim in this matter which was filed on 11th March 2017 a period when The Work Injury Benefits Act no 13 of 2007 was in operation even though it had been declared unconstitutional by the High Court at the time. The decision has since been reversed by the Supreme Court of Kenya. Accordingly this claim belongs to the Director of Occupational Health and Safety and may only be brought before this court on Appeal.

41. Accordingly and in the final analysis Judgment is entered in favor of the claimant as against the Respondent as follows:-

a. Ksh. 133,130 in compensation.

b. Kshs. 13,313 in lieu of one month notice.

c. Kshs. 51,600 being refund of unremitted NSSF and NHIF contributions.

Total award Kshs. 196,043.

- d. Interest at Court rates from date of Judgment in respect of (a) above and from date of filing suit in respect of (b) and (c) above till payment in full.
- e. The respondent to provide certificate of service to the claimant for the period 2010 to 2017 within 30 days of this judgment.
- f. Costs to follow the event.

Judgment Dated, Signed and delivered at Nairobi this 11th day of June, 2020

Mathews N. Nduma

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, this ruling has been delivered to the parties online with their consent. 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 18 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.

Mathews N. Nduma

Judge

Appearances

Kevin Mwalo for Claimant

Mr. Abira for Respondent

Chrispo – Court Clerk