



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 842 OF 2015

PAUL MUTUKU MULWA.....CLAIMANT

VERSUS

BOARD OF MANAGEMENT

MBOONI BOYS HIGH SCHOOL.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought the claim on 19.5.2015 seeking the following reliefs from the respondent: -

- (a) Declaration that his dismissal was unlawful.
- (b) Compensation for unlawful dismissal.
- (c) Kshs 90000 made up of salary in lieu of notice, accrued leave and unremitted NSSF deduction.
- (d) Compensation under the Work Injury Benefits Act.
- (e) General Damages for injuries sustained.
- (f) Costs of the suit and interest.

2. The respondent filed defence on 30.6.2015 admitting that the claimant was employed by her as a night watchman earning Kshs. 7600 per month; and that on the night of 21st and 22nd May 2012 around 3.00am, he and other colleagues were attacked by robbers while on duty at the school. However, she averred that the claimant resigned from employment thereafter and denied liability to pay him terminal benefits and compensatory damages sought by the claimant.

3. On the other hand the respondent denied the particulars of injuries pleaded by the claimant and the allegation that she did not offer any assistance to him after the attack. On the contrary, she averred that she called an ambulance which took the claimant to the hospital and she was ready to assist him fill the medical forms. She further denied the allegation that she dismissed the claimant unlawfully from employment and averred that it is him who resigned. She further contented that the claimant utilized all his annual leave days. Therefore, she contented that the claimant is not entitled to the reliefs sought and prayed for the suit to be dismissed with costs.

4. The claimant tendered his evidence during the hearing but the respondent did not call any witness to prosecute her defence. However, after the hearing both parties filed written submissions.

Claimant's case

5. The claimant testified as Cw1. He stated that he was employed by the respondent as a Watchman vide Letter of Appointment dated 1.4.2004 for a monthly salary of Kshs.5645 which was later increased to Kshs.7600; that on the night of 21st and 22nd May 2012 at around 3.00 am, he and fellow guards were attacked by robbers and he sustained 3 head injuries leading to loss of consciousness; that he was admitted at Machakos Shalom Hospital for two weeks and after his discharge he visited the respondent and sought off from the Principal until he fully recovered; that on 16.7. 2013 the Principal wrote to him a letter accusing him of desertion and insubordination and he went to speak with Principal and pleaded for more time to recover; however, the principal told him that he seemed not interested in the job and after going back home another person was employed in his place.

6. He further testified that he was not served with any termination notice or any termination letter but he served a demand letter on 26.9.2013 seeking payment of his benefits. He contended that the respondent never remitted his NSSF contributions in respect of some of the months he was in service and prayed for refund of the unremitted NSSF deductions totalling to Kshs 14000. He further contended that he took only a few leave days and claimed 25 leave days for the year 2004, 26 days for 2005, 26 days for 2006, 11 days for 2007, 11 days for 2008, 26 days for 2009, 11 days for 2010, 26 days for 2011, and 26 days for 2012 equalling to Kshs. 68400. He further prayed for kshs. 7600 being one month salary In lieu of notice plus compensation for unfair termination.

7. He further prayed for compensation for the injuries suffered during the robbery on the fateful night. He gave the particulars of the injuries as follows.

(a) Swollen forehead with bruised nasal bridge.

(b) Three irregular deep cut wounds on the head.

He produced as exhibits, copy of Appointment letter, treatment card from Mbooni District Hospital, Discharge Summary from Shalom Hospital, Police P3 Form and DOSH 1 Form duly signed, NSSF statement, Principal's letter dated 16.7.2013, Claimant's letter dated 26.9.2013 and demand letter dated 3.10.2014.

Claimant's submissions

8. The claimant submitted that, notwithstanding section 52(2) of the Work Injury Benefits Act (WIBA), this Court has jurisdiction to determine this suit because by dint of section 12 of the Employment and Labour Relations Court Act which gives the court both original and appellate jurisdiction to determine all disputes arising from employment between employees and employers. He further urged that the bigger part of the suit is related to unlawful dismissal of the claimant but connected to the work injury. He therefore urged that splitting the claims and filing them in different places would not be in the interest of justice and would add on the cost of accessing justice and duplicity of suits. For emphasis, he relied on **Nyanza Garage v Attorney General, Kampala HCCC.No. 450 of 1993** which was cited with approval in **Priyat Shah & another v Myendra Devchand Meghji Shah [2017] e KLR, Barclays Bank of Kenya Ltd v Elizabeth Agidza & 2 others [2012] eKLR and Charles Gacheche Gicheru v SBI International Holdings AG (Kenya) [2018] eKLR.**

9. As regards liability for injuries sustained, the claimant submitted that his claim is founded on common law. He urged that he suffered injuries while in the course of his duty of guarding the school and he never outside the instructions given under his contract of employment. He observed that the respondent has admitted under paragraph 13 of the defence that indeed the he was injured while on duty and she organised an ambulance to take him to the hospital. He therefore prayed that I enter judgment on liability against the respondent at 100%.

10. On the other hand, he submitted that the injuries suffered as indicated in the Discharge Summary included deep cut wounds on the scalp and bruised nasal bridge and loss of consciousness for 4 days. He prayed for kshs. 500,000 general damages for pain and suffering and relied on comparable precedents including **Caleb Onyango Uyogo v PA [2014] e KLR** where the court awarded Kshs. 300,000 and **Mercy Rangoma vPatrick Maganga Mombasa HCCC.491 of 1992** where the court awarded kshs. 500,000.

11. As regards the claim for unlawful and unfair termination, the claimant submitted that he was constructively dismissed from employment by the respondent. He contended that in July 2013, he went to the school and sought for more off days to recover fully from the injuries he had suffered but the Principal told him that if he was not interested in resuming work, the school might employ another person to replace him. He further contended that after going home he learned that another person was employed. He also contended that during the respondent stopped paying his salary two months after suffered the said injuries.

12. He contended that the conduct by the respondent was in breach of the contract of service which closed his door for the performance of his part of the contract and thereby constructively dismissed him. He therefore contended that the action he took to serve the respondent with a demand letter in September 2013 was not voluntary but necessitate by the constructive dismissal for which the employer should be held liable. For emphasis he relied on **Benuel Mareira v Award Enterprises Limited Mombasa ELRC Cause 191 of 2013** and **Maria Kagai Ligaga v Coca Cola East and Central Africa Limited [2015] e-KLR.**

13. He submitted that the said dismissal was without prior notice and it amounted to an unjustified breach of contract which exposed him to great loss and suffering. He contended that his evidence has not been rebutted by the respondent and prayed for the reliefs sought in his claim plus costs. He urged that the leave forms filed as exhibits by the respondent were either for compassionate leave or off duty and not annual leave. He further contended that the forms were not signed by him and they are fake.

Respondent's Submissions

14. The respondent submitted that the claim for compensation under WIBA and general damages for injuries sustained on 21st and 22nd May 2012 is time barred by didn't of section3(1) of the Public Authorities Act Cap 39 Laws of Kenya because it was filed after 12 months after the time when the cause of action arose. He relied on **Samson O. Njenga v Public Service Commission & 5 Others [2013] e-KLR** which relied on **Iga v Makerere University [1972] EA** where the court held that Limitation of Act does not extinguish a suit or action itself, but operates to bar the claim or remedy and the court cannot grant the remedy or relief when a suit is time-barred.

15. She contended that, the for compensation under WIBA is founded on tort and it should have been filed within one year but it was filed on 19.5.2015 which was three years from 22.5.2015 when the injuries were suffered. She therefore prayed the said claim to be disregarded for being time barred.

16. On the other hand, the respondent submitted that the court lacks original jurisdiction to hear work injury disputes and put reliance on

Saidi Muhamed v Diamond Industries Limited [2018] e-KLR where this court followed the Court of Appeal decision in **Attorney General v Law Society of Kenya & another [2017] e-KLR**. She urged that the Court of Appeal did not declare the whole WIBA unconstitutional and contended that as per the preamble to the Act, work injury claims can only be adjudicated under the Act. Finally, she contended that the claimant should not be awarded any damages because she failed to call a doctor to produce a medical legal report to form the basis for determining the quantum of damages payable to the him.

17. As regards the claim for unlawful dismissal from employment, the respondent submitted that there was a valid reason that justified the dismissal, namely desertion. She urged that it is the claimant who authored his own misfortune by failing to resume duty one year after the injuries and also insubordination. According to her, the claimant should be deemed to have resigned from employment and thereby forfeited his benefits including salary in lieu of notice.

18. She submitted that the claimant is not entitled to kshs. 68,400 for leave because he never applied for the same. She contended that the claimant has adduced no evidence to prove that he applied for the leave and he was denied. She therefore prayed for the suit to be dismissed with costs.

Issues for determination and analysis

19. There is no dispute from the pleadings, evidence, and submissions that the claimant was employed by the respondent as a watchmen and that on 22.5.2012 he was injured by robbers while on duty. There is also no dispute that due to the said injuries he never reported back to work for over one year and another person was employed to replace him. The issues for determination are:-

- (a) Whether the claimant was constructively dismissed by the respondent or he resigned.
- (b) Whether the dismissal was unfair and unlawful.
- (c) Whether the court lacks jurisdiction to hear and determine the claim under WIBA.
- (d) Whether the claim for compensation under WIBA is time-barred.
- (e) Whether the claimant is entitled to the reliefs sought.

Dismissal or resignation

20. The respondent contended in her defence that the claimant failed to report to work for over one year after being injured while on duty and she wrote a letter to him to report to the school on 24.6.2013 to explain his continued absence from work but he failed to do so. According to her the failure by the claimant to comply with the letter amounted to insubordination.

21. The claimant contended that two months after being injured, the respondent stopped his salary despite him having not fully recovered. He further contended that when he got better, he visited the Principal and begged for more time to recover only to receive a letter dated 16.7.2013 accusing him of desertion and insubordination. In response, to the letter the claimant went to see the Principal who told him that he seemed not interested in his job and proceeded to employ another person.

22. The respondent did not call any witness to prosecute her defence and as such the alleged resignation has not been proved on a balance of probability. For the same reason, the evidence by the claimant that he was dismissed has not been rebutted and as such I find that the claimant has proved on a balance of probability that he was constructively dismissed. His evidence that his salary was stopped and thereafter another person appointed to replace him has not been shaken. In fact, it was corroborated by the admission by the defence counsel in his submissions when he contended that the claimant was dismissed for a valid reason.

Unfair dismissal

23. The question that arises is whether the dismissal was substantively and procedurally fair. Under section 45(2) of the Employment Act, termination of employee's contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that fair procedure was followed. In this case the respondent did not adduce any evidence to prove the reason for the dismissal and that fair procedure was followed. However, the court has taken note of the letter dated 16.7.2013 produced by the claimant which stated: -

“Reference is drawn to letter ref MSS/JS/04/01/14 written on 24th June, 2013. You were expected to have given a written reply on 30/6/2013 as to why you did not resume your duties on 3/5/2013 as agreed upon.

1. The management has noted that you declined to take up your duties hence deserted your job as a watchman.

2. You did not bother to reply on official letter written by the employer and addressed to you, hence insubordination.

The management will take necessary disciplinary measures against you.”

24. The foregoing letter points to misconduct on the part of the claimant and I will not turn a blind eye on it. Therefore, I agree with the submissions by the respondent that there was a valid reason warranting dismissal of the claimant from service. He did not respond to show cause letter from his employer and he failed to report back to work on 3.5.2013 as agreed.

25. As regards the procedure followed, the letter dated 16.7.2013 notified the claimant that disciplinary measure would be taken against him but he was never invited to any hearing in the company of union official although the letter was copied to a trade union. Under section 41 of the Employment Act, before an employer terminates the services of his employee on ground of misconduct, he must explain the reason to the employee in the presence of another employee or shop floor union official of his choice, and then accord the employee and his companion a chance to air their representations which must be considered before the termination is decided.

26. The respondent did not tender any evidence to prove that she followed the said mandatory procedure before terminating the services of the claimant. Consequently, I find and hold that the dismissal of the claimant from service was unfair within the meaning of section 45 of the Employment Act.

Jurisdiction over WIBA Claims

27. The respondent contended that the court does not have original jurisdiction to hear and determine compensation claims under the WIBA. The claimant is of the view that the claim is related to the claim for dismissal and splitting them would lead to duplicity of suits and increase on costs to the parties. The question that arises is, what was the law when the suit was filed?

28. The suit was filed on 19.5.2015 and it is common knowledge that the law then allowed filing of claims in court following the decision of High Court that sections 52 of WIBA was unconstitutional. However, following the Court of Appeal decision in **Attorney General v Law Society of Kenya & another [2017] e-KLR**, the High Court decision was reversed and this court was deprived of the original jurisdiction over WIBA claims but retained appellate jurisdiction only. The Court of Appeal decision was upheld by the Supreme Court in November 2019 after my decision in **Charles Gacheche Gicheru v SBI International Holdings AG (Kenya) [2018] eKLR**.

29. Therefore, I agree with Rika J in **Saidi Muhamed v Diamond Industries Limited [2018] e-KLR** where he held that this court enjoys only appellate jurisdiction over WIBA compensation claims and not primary jurisdiction. Consequently, I must at this juncture down my tools over the claim founded on WIBA for want jurisdiction and refer it to the relevant forum under WIBA.

Reliefs

30. In view of the finding that the dismissal of the claimant was unfair within the meaning of section 45 of the Employment Act, I make declaration that the dismissal was unlawful. Accordingly, under section 49 of the Act, he is entitled to one month salary in lieu of notice as prayed plus 10 months' salary compensation for unfair and unlawful dismissal from employment. In granting the said compensation, I have considered the fact that although he contributed to the dismissal through misconduct, he may not be able to secure another job due to the injuries he suffered while serving the respondent. I have also considered that he served the respondent for about ten years with dedication to an extent that he was seriously injured while protecting her property.

31. The claimant prayed for kshs 68400 being the value his accrued leave for 9 years. He testified that his claim is made up of 25 leave days for the year 2004, 26 days for 2005, 26 days for 2006, 11 days for 2007, 11 days for 2008, 26 days for 2009, 11 days for 2010, 26 days for 2011, and 26 days for 2012 equalling to 198 days. Hence $198 / 26 \times \text{kshs.}7600 = \text{Kshs. } 57,876.90$. The respondent did not adduce any evidence to rebut that claim and as such I award the claimant kshs 57,876.90 for accrued leave.

32. The claim for refund of unremitted NSSF contribution deducted from his salary has not been rebutted by evidence. However, the gaps in the NSSF statement produced represent 32 months of which I take judicial notice that the claimant was deducted kshs. 200 per month equalling to kshs 6400 which I award to him.

33. In view of the finding that the court lacks primary jurisdiction under WIBA, I decline to grant any reliefs to the claimant and refer the claim to the Director envisaged under the WIBA for consideration.

Conclusion and disposition

34. I have found that the claimant did not resign but he was unlawfully dismissed by the respondent and awarded him terminal dues plus compensatory damages. I have further found that this court lacks original jurisdiction to entertain compensation claims under WIBA and referred the claimant's claim herein to the Director for consideration under the provisions of the Act. consequently, I enter judgment for the claimant against the respondent in the following terms:-

Notice	kshs. 7,600.00
Compensation	kshs 76,000.00
Accrued leave	kshs 57,876.90
Unremitted NSSF deductions	<u>kshs. 6,400.00</u>
Total	<u>kshs. 147876.90</u>

35. The award is less statutory deduction but the claimant is awarded costs plus interest at court rates from the date hereof.

Dated, Signed and Delivered in Nairobi this 9th day of July, 2020.

ONESMUS N. MAKAU

JUDGE