



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1891 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

PETER NJEYA CHEMBE.....CLAIMANT

VERSUS

PADDY KENYA LIMITED.....RESPONDENT

JUDGMENT

The Claimant filed a Statement of Claim on 14th September, 2016 alleging that his dismissal was actuated by malice and was a clear breach of the Respondent's statutory duty. He seeks the following reliefs:

1. A declaration that the Respondent's actions in dismissing the Claimant from employment was unlawful and unfair.
2. A declaration that the Claimant was entitled to a contract of service.
3. The sum of Kshs.408,763.90 comprising of one month's salary in lieu of notice, underpayments, accrued annual leave and house allowance.
4. Costs of the suit.
5. Interest on the amount awarded at court rates.

The Respondent filed a response to the Memorandum of Claim dated 23rd March 2017 denying the averments in the statement of claim.

The suit was disposed of by way of written submissions.

Claimant's case.

The Claimant avers that he was employed by the Respondent on 2nd April 2008 as a security guard but was never issued with a contract of service or an itemised pay slip. He avers that he was paid a gross salary of Kshs.5,000/= exclusive of house allowance. That this was increased to Kshs.10,000/= per month exclusive of house allowance.

He avers that in May 2013 he was diagnosed with Tuberculosis (TB) and was hospitalised for 3 weeks. He avers that he informed the supervisor of his situation and was instructed to stay away from work because he would infect the other employees. He avers that the supervisor informed him that during the sick off, he was not going to be paid any salary.

It is his case that he resumed work on 2nd August, 2013 and the Respondent paid his salary. He contends that despite the Respondent knowing that he had just recovered from an infectious chest disease, he was assigned the duty of a night watchman. That on 15th December, 2014 he started experiencing chest pains. He further contends that the doctor advised him not to work at night and issued him with a letter to that effect which he took to the Respondent's office.

He avers that on 28th February, 2015 at 6.30 am, as he was preparing to leave work after being on night duty, the supervisor informed him that the Manager had instructed him to tell the Claimant that was his last working day and that his employment had been terminated.

He avers that he asked the Supervisor for the reason for his termination to which the Supervisor replied that he did not know and was only acting under instructions. He avers that he was informed that there were no payments to be made to him and if there were any they would be made into his account.

Respondent's case

In the response to the Memorandum of Claim filed on 28th March, 2017, the Respondent avers that the Claimant was employed on a contractual basis as a security guard vide an oral contract at a monthly wage of Kshs.5,000/=. It denies that the Respondent asked the Claimant to stay away from the other employees on the doctor's recommendation. It avers that the Claimant was cleared by the doctor to resume his normal duty as a day and night guard thus he was deployed as a night guard.

It avers that it gave the Claimant sufficient notice pursuant to express conditions of the existing contractual terms and in due regard of his medical condition. It further avers that it paid all the claimant's dues under the existing contract of employment. It avers that the termination was procedural and lawful.

Claimant's Submissions

The Claimant submitted that the Court in **David Gichana Omuya v Mombasa Maize Millers Ltd [2014] eKLR** held that section 43 of the Employment Act has placed a statutory obligation upon the employer to prove the reasons for terminating the services of an employee. He submitted that in determining his medical status and termination, the Respondent's Manager decided to rely on rumours instead of his medical report.

He submitted that the Respondent did not produce any letter or communication requiring him to submit a second medical report. He therefore submitted that the issue of a second medical report is an afterthought by the Respondent to deter the Court from the fact that he was unfairly terminated without following due process.

He argued that the Respondent did not produce a copy of the said notice of termination and maintained that he was not issued with a notice or a chance to defend himself. It was his submission that the Respondent did not follow the laid down process of termination under the labour laws.

He submitted that he was not paid one month's salary in lieu of notice thus he is entitled to the amount under section 36 of the Employment Act. He further submitted that under the Regulation of Wages (General) (Amendment) Order for the years 2010, 2011, 2012, 2013 and 2014, he was underpaid and urged the Court to award him the underpayment.

He submitted that he worked for more than 2 years thus he is eligible for annual leave under section 28 of the Employment Act. He urged that he was not paid house allowance and is entitled to this amount under Section 31(1) of the Employment Act.

He urged that he be awarded 12 months' salary as compensation and that the Court should be guided by Section 49 of the Employment Act as the Respondent has failed to discharge its burden. He submitted that the Respondent should bear costs of the suit.

Respondent's Submissions

The Respondent submitted that it is incumbent upon the Claimant to prove his case against the Respondent on a balance of probabilities. It submitted that the Claimant's claim is for breach of contract, loss and damages he suffered as a consequence thereof, therefore his claim against the Respondent is in the nature of special damages.

It submitted that special damages have to be specifically pleaded and proved. It submitted that no oral evidence was led by the Claimant thus his claim is not proved. It argued that the Claimant has not discharged his duty therefore the claim should fail. In support of this position, it relied on the case of **Okulu Gondi v South Nyanza Sugar Co. Ltd [2018] eKLR** and **Capital Fish Kenya Limited v Kenya Power and Lighting Company Limited [2016] eKLR**.

Its submission was that the Claimant did not substantiate or prove his claim against it on a balance of probabilities. It therefore submitted that the claim ought to fail with costs.

Determination

The issues for determination are:

1. Whether the Claimant was unfairly terminated.
2. Whether the Claimant is entitled to the reliefs sought.

Unfair termination

The Claimant avers that the supervisor stated that he did not know the reason for termination. He further submitted that the Respondent did not have any valid reason for the termination of his employment. In his witness statement, Mr. Okinya Msamba, the Respondent's Security Manager stated that he heard rumours of the Claimant's health which the Claimant denied. He further stated that the Claimant disregarded his request for a medical report declaring him fit for duty and of good health thus he issued the claimant with a notice of termination.

The Claimant only produced the discharge letter dated 10th June, 2013 from Mbagathi District Hospital. He did not produce the doctor's letter advising him not to work at night due to his condition. However, the Respondent's Manager, Mr. Msamba stated that he was aware that the Claimant had TB in May 2013 and that he followed the medical report and allowed him to proceed on sick leave. It is unclear why the Respondent needed a further medical report to prove the claimant's fitness after its investigations on rumours that his condition was worsening. It was prudent for the Respondent to ensure that the Claimant underwent a medical examination to prove that he had sufficiently recovered and was able to resume duty.

In **Kennedy Nyanguncha Omanga v Bob Morgan Services Limited [2013] eKLR** where Ndolo J. held:

“While employers are entitled to terminate employment on the ground that an employee is too ill to work, they must exercise due care and sensitivity. First, the employer must show support to the employee to recover and resume duty. Second, once the employer begins to consider termination, they must subject the employee to a specific medical examination aimed at establishing the employee's ability to resume work in the foreseeable future. Treatment notes and sick off sheets do not qualify as medical reports for purposes of termination of employment on medical grounds. Third, the employer must give the employee specific notice of the impending termination. Failure to follow this procedure even where there is overwhelming evidence of an employee's inability to work amounts to unfair termination for want of procedural fairness.”

From the foregoing, I find that there was no valid reason for the termination of the Claimant's employment under Section 45(2) of the Employment Act as there was no proof of the Claimant's inability to work on medical grounds.

With respect to procedure, the Respondent did not prove that it invited the Claimant to a disciplinary hearing as required under Section 41 (1) of the Employment Act. Additionally, as argued by the Claimant, no notice of termination was produced by the Respondent to prove that the same was issued to him. Therefore, the termination did not meet the procedural requirements set out under section 41 of the Employment Act.

I thus find that the termination of the Claimant's employment was unfair.

The Respondent has raised issues about want of proof due to lack of viva voce evidence. The court takes judicial notice of disruption of court sittings arising out of the COVID-19 pandemic during which period the court encouraged parties to proceed by way of written submissions where possible. The court further takes cognisance of **Rule 21** of the **Employment and Labour Relations Court (Procedure) Rules** which provide that –

21. Determination by documentary evidence

The Court may, either by an agreement by all parties, or on its own motion, proceed to determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties.

In addition, at no time did the Respondent protest the directions to proceed by way of written submissions. The Respondent is therefore estopped from raising any issue over the same.

Further, employment matters are largely based on records and Section 10 and 74 place the responsibility of keeping and producing such employment records on the employer. I find that there are sufficient records produced by parties to enable the court arrive at a just determination of the issues in dispute.

Furthermore, the facts of the case are not contested.

Reliefs

The Respondent did not submit on any of the reliefs.

(i) One month's salary in lieu of notice

The Claimant was neither issued with a termination notice nor salary in lieu of notice. He is therefore entitled to one month's salary in lieu of notice under section 36 of the Employment Act, being **Kshs.12,458.46**.

(ii) Underpayment

The Claimant avers that he earned Kshs.5,000/= which was later increased to Kshs.10,000/=. The Claimant produced Bank Statement which indicate that he earned Kshs.4,000/= between November 2010 and March 2011. It is his case that over the years he was underpaid and in his tabulation for payment he used varied salaries paid to him over the years. I find that the Respondent having not disputed the underpayment which the Claimant has proved, the claimant is entitled to these amounts and I accordingly award him the sum of **Kshs.120,338** as underpayments

(iii) House allowance

The Claimant submitted that his salary was exclusive of house allowance. He is therefore entitled to house allowance at the rate of 15 % of his monthly wage for each month worked. I award the claimant **Kshs.96,391** for house allowance.

(iv) Annual Leave

The Respondent did not prove that the Claimant proceeded on annual leave as required under section 28 of the Employment Act. The Claimant is therefore entitled to annual leave and is awarded the sum of **Kshs.48,545** for accrued annual leave.

(v) 12 month's salary compensation

Having found that the Claimant was unfairly terminated, he is entitled to compensation for unfair termination as set out under Section 49(1) (c) of the Employment Act. Taking into account the claimant's length of service and that he did not contribute to his termination, further considering the factors set out under Section 49(4)(b) and (e) of the Employment Act especially that the termination was on medical grounds, I award the claimant 12 months' gross salary as compensation in the sum of (Kshs.12,548.46 x 12) **Kshs.149,502**.

In summary I award the claimant the following: -

1. One month's salary in lieu of notice Kshs.12,548.46
2. Underpayments of salary Kshs.120,338.00
3. House allowance Kshs.96,391.00
4. Accrued annual leave Kshs.48,545.00
5. Compensation Kshs.149,502.00

The total award is Kshs.427,234.46

The claimant is awarded costs of the suit and interest shall accrue at court rates from date of judgment till payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF NOVEMBER 2020

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE