



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 581 OF 2016

(Before Hon. Justice Hellen S. Wasilwa 11th November, 2020)

BENJAMIN MUTUKU KIMUYU.....CLAIMANT

VERSUS

NGUVU CONSTRUCTION & MINING LIMITED...RESPONDENT

JUDGMENT

1. The Claimant herein filed a Memorandum of Claim dated 8th April, 2016 and filed in Court on 12th April, 2016, in which he seeks compensation for unfair and unlawful termination of his employment by the Respondent herein as well as its failure to pay his terminal dues & compensatory damages.
2. He states that he was employed by the Respondent on or about 9th February, 2011 in the position of site Manager. He further maintained that he performed his duties diligently and to the Respondent's satisfaction and that on or about 16th February, 2016, the Respondent wrongfully, illegally and unlawfully terminated his employment without due regard to the Employment and Labour Laws in Kenya.
3. He further contended that he was not issued with any notice, legitimate reasons for termination or a fair hearing prior to his termination by the Respondent.
4. Aggrieved by the decision to terminate his employment unfairly the Claimant filed the instant Claim seeking the following reliefs:

1. A declaration that his termination/dismissal was unlawful and/or wrongful and be awarded damages amounting to Kshs. 4,515,200/-.

2. An Order directing payment to the Claimant of all the following terminal dues arising out of the period of service with the Respondent: -

a. 12 months' salary as compensation for wrongful dismissal Kshs.40,000 x 12 = Kshs. 480,000/-

b. Unpaid leave for 5 years

= Kshs.40,000 x 5= Kshs. 200,000/-

c. Pay in lieu of notice

Kshs. 40,000/- x 1= Kshs. 40,000/-

d. Overtime money due

Kshs. 520 p/h x 4 daily x 6 days weekly 4 weeks monthly x 60 months = Kshs. 2,995,200/-

e. Unpaid House Allowance for 60 months

1/3 x 40,000 = Kshs 13,333 x 60 months

= Kshs. 800,000/-

f. Issuance of Certificate of Service

g. Costs of this suit

h. Any other relief this Court deems fit to grant or Order.

5. The Respondent in response to the Claim filed its Memorandum of Response dated 8th June 2016 on the 27th June, 2016 in which it admits having engaged the Claimant as alleged in his Memorandum of Claim. It however denied having wrongfully and/or unfairly and/or illegally terminated the Claimant's employment as alleged maintaining that the Claimant willfully absconded lawful duties and deserted employment without any explanation which action amounted to a repudiation of his employment contract.

6. The Respondent maintained that prior to the Claimant absconding lawful duties he was involved in various acts that amounted to Gross misconduct and was under its investigation. For instance, it maintained that it suspected his involvement in the loss of Gypsum material at its Athi River Yard, failure to account for funds allocated for purchase of machinery spare parts, mishandling vital equipment keys resulting in their loss as well as claims that he was demanding for bribes from suppliers in order to receive materials.

7. As a result of the above complaints the Respondent maintained that it was forced to suspend the Claimant for a period of Thirty (30) days to enable it carry out investigations into the allegations, which was done vide the Respondent's letter dated 16th February, 2016.

8. The Respondent further maintained that during the period of suspension the Claimant was impatient and that he reported back to work prior to the lapse of the period and was to leave the premises and was further directed only to report back after the completion of the investigations.

9. The Respondent averred that the Claimant subsequently and without lawful reason decided to abscond lawful duties which was a breach of his employment contract.

10. It is further the Respondent's position that the Claimant is not entitled to house allowance as he received a consolidated salary that was always paid. It further maintained that the Claimant's position was managerial and therefore the question of his entitlement to overtime did not arise at any time during the subsistence of his employment with it.

11. The Respondent further maintained that the Claimant's conduct does not entitle him to seek the remedies he so seeks in his Claim by dint of Section 49 (4) (k) and 50 of the Employment Act, 2007.

12. The Respondent maintained that the Claim as against it is devoid of merit and lacks any legal or factual basis and therefore urged this Court to dismiss it in its entirety with costs to the Respondent.

Evidence

13. The matter proceeded for hearing on 10th March, 2020 with the Claimant testifying as CW1 and the Respondent calling one witness to testify on its behalf.

14. CW1 sought and was allowed to have his Witness Statement filed in Court on 8th April, 2016 adopted as his evidence in chief. In his statement the Claimant reiterates the averments made in his Memorandum of Claim.

15. He further testified that he reported for duty at the Respondent's premises from 7 am to 7 pm on Monday to Mondays and would at times work beyond 7 pm and on Public Holidays with an exception on Christmas and new year's day without payment of overtime.

16. He further testified that he has proved his case as against the Respondent and is therefore entitled to the reliefs sought therein.

17. On cross-examination CW1 maintained that he was indeed a site manager but insisted that he was not at any time in charge of overseeing of materials as contended by the Respondent.

18. CW1 further confirmed that he was suspended from duty on 4th March, 2016 vide the Respondent's letter dated 16th February, 2016 for a period of thirty days and that the period was to end on 1st March, 2016.

19. CW1 further confirmed that he did write to the Respondent seeking payment of his terminal dues. He further stated that the suspension was on account of the alleged loss of material.

20. On re-examination CW1 stated that he received his suspension letter on 4th March, 2016 and that prior to this he had been suspended orally on 16th February, 2016.

21. He further testified that no disciplinary process was conducted prior to his dismissal and that no notice was issued prior to the termination.

Respondent's Case

22 RW1, **Christopher Ndung'u**, the Respondent's Managing Director similarly sought to have his witness statement dated 16th May, 2019 adopted as his evidence in chief. In his statement RW1 stated that the Claimant was suspended on 16th February, 2016 for a period of thirty (30) days to pave way for investigations on his conduct. He further testified that on 1st March, 2016 he (the Claimant) went back to the Respondent's premises demanding for payment of his terminal dues.

23. RW1 further averred that at the time of the Claimant's demand investigations were yet to be concluded and that he subsequently absconded lawful duties.

24. On cross-examination RW1 confirmed that despite the Claimant's letter of suspension having been dated 16th February, 2016 the same was received on 4th March, 2016 and was not drafted after the Claimant's suspension.

25. RW1 further confirmed that he did not issue the Claimant with any notice prior to his termination. He further confirmed that following their suspensions investigations were conducted and that the Claimant failed to attend to a disciplinary hearing he was invited to after the outcome of the investigations.

26. RW1 further testified that the Claimant was paid a consolidated salary and is therefore not entitled to any house allowance. He however acknowledged that there was no document to prove this assertion.

27. On further cross-examination RW1 further testified that there was no evidence availed to this Court to prove that the Claimant duly proceeded on leave. He further stated that the Claimant did not receive his February 2016 salary. He further confirmed that he was not issued with a certificate of service.

28. RW1 further confirmed that no warning letter was issued to the Claimant prior to his termination and that he worked from 8am to 5 p.m and not for the hours alleged by the Claimant.

29. The Parties thereafter filed and exchanged their written Submissions to the Claim.

Submission by the Parties

30. The Claimant submitted that his termination was wrongful and unfair as the Respondent failed to follow the mandatory provisions of Sections 43 and 45 of the Employment Act, 2007.

31. He further submitted that the Respondent further failed to subject him to a fair internal disciplinary procedure prior to his termination. He maintains that the Respondent had a duty to according him a fair disciplinary hearing for any alleged misconduct prior to his termination. To buttress this position the Claimant cited and relied on the case of **Nicholus Muasya Kyula Vs Farmchem Limited (2012) eKLR** where the Court emphasised on the need for a Respondent to have its own independent administrative investigations to investigate any alleged misconduct prior to a decision is made.

32. The Claimant maintained that the Respondent did not in fact have valid reasons to warrant his suspension from duties as highlighted in the judicial decision in the case of **Fredrick Saundu Amolo Vs Principal Namanga Mixed Day Secondary School & 2 Others (2014) eKLR**. He further submitted that the Respondent's actions infringed his right to fair Labour Practice as protected under the provisions of Article 41 of the Constitution of Kenya, 2010.

33. On whether he absconded duties as alleged by the Respondent, the Claimant maintained that the same was unfounded and that the Respondent's action of sending him on prolonged suspension in itself amounted to a termination of his employment and was in-fact an unfair labour practice on the part of the Respondent. For emphasis the Claimant cited and relied on the case of **Donald Mumo Moses Vs Mid-Wave Freighters Limited (2014) eKLR**.

34. The Claimant further denied any alleged gross misconduct on his part to warrant his summary dismissal and further that no reports of any alleged theft were made by the Respondent to the nearest police station and that no criminal charges were levelled against him in a competent Court of law.

35. On his entitlement to overtime payment, the Claimant maintained that he was a loader and that he worked on all days save for Christmas day and New Year's Day and as such is entitled to payment of overtime by dint of Section 27 of the Employment Act, 2007. He therefore urged the Honourable Court to award him the relief as prayed.

36. On the Claim for compensation for wrongful/unfair termination, the Claimant maintained that his termination was indeed unfair, unlawful and wrongful as the Respondent failed to follow the mandatory provisions of Sections 41, 43 and 45 of the Employment Act and is therefore entitled to maximum compensation for unfair termination by dint of Section 49 of the Employment Act, 2007. For emphasis the Claimant cited and relied on the cases of **James Kabengi Mugo vs Syngenta East Africa Limited (2013) eKLR**, **Vitalis Omondi Othuo Vs National Water Conservation & Pipeline Corporation Industrial Cause No. 99 of 2012** and **Alice Njoki Miringu Vs Barclays Bank of Kenya Limited Industrial Cause No. 29 (N) of 2010**.

37. On the Claim for unpaid leave, the Claimant maintained that his evidence remains uncontroverted and that it was the Respondent's duty to provide the requisite documentation to disproof this assertion. He maintained that he is therefore entitled to the Claim for leave by dint of the provisions of Section 28 of the Employment Act, 2007.

38. He further argued that he is entitled to payment of salary in lieu of notice by dint of the provisions of Section 36 of the Employment Act, 2007. He further submitted that he is entitled to payment of house allowance as pleaded by virtue of the provisions of Section 31 of the Employment Act, 2007.

39. The Claimant argued that he is entitled to the Claim for Certificate of Service by dint of Section 52 of the Employment Act, 2007 and the Claim for gratuity service pay by dint of Section 35 (5) of the Employment Act, 2007. To buttress this argument the Claimant cited and relied on the case of **Elijah Tanui Vs Ngara Opticians T/A Bright Eyes Limited (2012) eKLR**.

40. In conclusion the Claimant urged this Honourable Court to find merit in his Claim and proceed to allow it in terms of the reliefs sought therein.

Respondent's Submissions

41. The Respondent on the other hand maintains that it was justified to summarily dismiss the Claimant on account of gross misconduct for absconding lawful duties by dint of Section 44 (4) (a) of the Employment Act, 2007. To buttress this position the Respondent cited and relied on the case of **David Nyanjui Mburu Vs Sunmatt Limited (2017) eKLR**.

42. The Respondent further submitted that the Claimant is not entitled to the reliefs sought in the Claim by virtue of the provisions of Sections 49 (k) and 50 of the Employment Act, 2007.

43. Having had a valid reason to terminate the Claimant's employment the Claim as filed is devoid of merit and therefore fails in its entirety with costs to the Respondent. For emphasis the Respondent cited and relied on the case of **Daniel Kioko Pius Vs Athi River Steel Plant Limited (2017) eKLR**.

44. In conclusion the Respondent urged this Honourable Court to dismiss the Claim as filed with costs to the Respondent.

45. I have examined the evidence and submissions of the Parties herein. The issues for this Court's determination are as follows: -

1. Whether the Claimant was dismissed by the Respondents or he absconded duty.

2. If he was dismissed, if the dismissal was fair and justified.

3. Whether the Claimant is entitled to the remedies sought.

46. On the issue of dismissal or absconding of duty, the Claimant avers that he was terminated unfairly. The Respondents aver that he absconded duty. On 16/2/2016, the Claimant was actually placed on 30 days unpaid suspension for various allegations. This letter he avers he received on 4/3/2016.

47. On 1/3/2016, the Claimant wrote a letter to the Respondents inquiring on the suspension and he averred that the same was increased to another week. He presumed he had been terminated and demanded his terminal dues. The Respondents did not reply to this letter nor advise him that he should wait for the period of suspension to be over.

48. There is also no indication that the Respondents issued any notice to show cause to the Claimant to explain why disciplinary action should not be instituted against him for absconding duty.

49. In my view, the issue of absconding duty does not arise as the Respondents should have followed up on the suspension and inform the Claimant of the results of their investigation and also advise him on the next cause of action for failing to report back to work. It is therefore my finding that the Claimant did not abscond duty as alleged but was dismissed.

50. On issue of fair process, there is also no indication that there was any disciplinary instituted against him for either absconding duty as alleged or for the reasons stated in the suspension letter. In view of this, I also find that the Claimant was dismissed without following due process.

51. Section 41 of the Employment Act 2007 states as follows:-

1. "Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make".

52. Section 45 (2) of the Employment Act 2007 provides as follows:-

2. "A termination of employment by an employer is unfair if the employer fails to prove:

a. that the reason for the termination is valid;

b. that the reason for the termination is a fair reason:-

i. related to the employee's conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

c. that the employment was terminated in accordance with fair procedure".

53. In absence of due process and without proof of valid reasons for the termination of the Claimant, I find his termination was unfair and unjustified.

54. As for remedies, I find for Claimant and I award him as follows:-

1. 1 month's salary in lieu of notice = 40,000/=

2. Unpaid leave for 3 years preceding the termination, the rest of the years being time barred = 3 x 40,000 = 12,000/=

3. Unpaid house allowance for 3 years (the rest also being time barred) = 15% x 40,000 x 36 = 216,000/=

4. 8 months' salary as compensation for the unfair and unlawful termination = 8 x 40,000=320,000/=

TOTAL = 696,000/=

Less statutory deductions

5. Issuance of a certificate of service

6. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in Chambers via zoom this 11th day of November, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Esami holding brief Nyamu for Respondent – Present

Okeyo Omwansa for Claimant – Present