



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 2079 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

PAUL MUSINA CHIEDO.....CLAIMANT

VERSUS

READY CONSULTANCY COMPANY LIMITED.....RESPONDENT

JUDGMENT

The claim herein was filed by the claimant against his former employer, the Respondent, on 24th November 2015. He avers that he was employed by the Respondent on 18th February 2013 at a consolidated salary of Kshs.12,640 per month. That he was dismissed from employment on 28th January 2015 through an act of frustration by being denied access to the facility. That the dismissal was without justifiable cause.

The claimant avers that he worked for the Respondent for about two years. He avers that he was not paid salary in lieu of notice, severance pay and accrued benefits. He prays for orders against the Respondent as follows –

a). A declaration that the termination was unlawful, untimely and an order that the Claimant be paid his dues and benefits of Kshs.218,215/- as tabulated below

- (i) Full payment of one month's salary
- (ii) in lieu of notice.....Kshs.12,640
- (iii) Full payment of days worked.....Kshs.12,640
- (iv) Annual leave accrued.....Kshs.26,544
- (v) Compensation for unfair loss of job.....Kshs.151,680
- (vi) Full payment of service gratuity.....Kshs.14,711
- Total.....Kshs.218,215**

b). A declaration that the claimant is entitled to a Certificate of service

c). Costs of the claim plus interest therein.

In the witness statement the claimant filed on 28th September 2018, he states that while in the employment of the Respondent, he developed an occupational illness, which caused his ears to have a problem, while stationed at Patco Industries Ltd, which was his assigned duty area, and that he reported the same to his employer who neglected his condition prompting him to report the same to the County Occupational Safety and Health Office, Nairobi County who did their investigation and wrote back to the Respondent.

The claimant avers that when his condition got worse on or around 18th January, 2015 he asked the Respondent to facilitate his treatment at Coptic Hospital. The Respondent responded to his pleas by denying him access to the facility on or about 28th January, 2015. That consequently, the Respondent dismissed him from its services through an act of frustration as it denied the claimant access to medical treatment for an occupational illness that he had acquired in the course of carrying out his duties in the Respondent's premises.

The claimant avers that he reported his dismissal to the Sub-County Labour Officer, Industrial Area region, who tried to arrange for a conciliation meeting between the Claimant and the Respondent to no avail.

That claimant submitted that the Respondent has not paid him terminal benefits and he claims for the same.

The Respondent although properly served with summons, claim and several mention and hearing notices, did not enter appearance or file a defence to the claim. The Respondent did not participate in the proceedings.

The claim was disposed of by way of witness affidavit and submissions which the claimant filed on 3rd August 2020. In both the submissions and witness affidavit, the claimant reiterates the averments in the memorandum of claim and in his witness statement. He however adds in the witness affidavit that he was denied access to his duty station on 28th January 2015.

Analysis and Determination

In an undefended claim, the claimant must as a preliminary point prove the existence of an employment relationship between him and the Respondent. In this case, the claimant exhibited two contracts of employment between him and the Respondent the first commencing 18th February 2013 and expiring on 18th February 2014 and the second commencing 1st January 2014 to 31st January 2015. The contracts set out the claimant's employment terms including salary which for the 2nd contract, is stated as Kshs.11,085 for basic salary and Kshs.1,663 as house allowance. I thus find that the claimant has proved that he was employed by the Respondent.

The second issue for determination is whether the claimant's employment was terminated unfairly.

At paragraph 6 of the memorandum of claim, the claimant pleads as follows –

“On or about 28th January 2015, the Respondent dismissed the services of the Claimant through an act of frustration to wit: denying the claimant access to the facility. The termination of the claimant was therefore without any justifiable cause.”

At paragraphs 17 and 18 of the memorandum of claim he pleads as follows –

“17. The Claimant avers that he developed an occupational illness while working at Patco Industries Ltd, which was his assigned duty area, and that he reported the same to his employer who neglected his condition prompting him to report the same to the County Occupational Safety and Health Office, Nairobi County who did their investigation and wrote back to the respondent.

18. The Claimant avers that his condition got worse on or around 18/01/2015 after which he regularly asked the respondent to facilitate his treatment at Coptic Hospital. The Respondent replied to the Claimant's prayers by denying him access to the facility on or about 28/01/2015.”

In the witness affidavit the claimant states as follows at paragraphs 3 to 7 –

3. *“That the filling of this Claim was necessitated by the events that took place on 28th January, 2015.*

4. *That on 18th February, 2013 I was employed by the Respondent.*

5. *That while I was working at PATCO Industries Limited, which was my assigned duty station at the time, I contracted an occupational illness.*

6. *That I reported the same to the Respondent who neglected my condition prompting me to report the matter to the County Occupational Safety and Health Office, Nairobi County who carried out their investigation and wrote to the Respondent.*

7. *That on 18th January, 2015 my condition worsened after which I regularly asked the Respondent to facilitate my treatment at Coptic Hospital.*

The claimant exhibited a letter from the Directorate of Occupational Safety and Health Services, Ministry of Labour, Social Security and Services dated 12th February 2014, in which the Directorate states that the claimant had reported that he had contracted an occupational disease while at the place of work. The Directorate sought a copy of the claimant's pre-employment and periodic medical examination to enable it carry out investigations.

It is not clear whether the letter was responded to or whether any investigations were carried out subsequent to the said letter as no information was submitted to the court in respect thereof. Further, the claimant did not produce any medical report to prove that he was suffering from any occupational disease.

The court further notes that the claimant continued to work for the Respondent after the letter from the Directorate of Occupational Safety and Health until 28th January 2015 when he alleges to have been denied access to the work premises. This is a period of almost one year after the date of the letter from the Directorate of Occupational Safety and Health Services.

It is not clear what the claimant meant when he alleges that his employment was frustrated. It is not clear from the pleadings of the claimant whether the frustration arose from being denied treatment at Coptic Hospital or being denied access to the workplace on 28th January 2015, which was just three days to the date of expiry of his second contract.

From the analysis above, I do not find proof of unfair termination of employment of the claimant by the Respondent.

Remedies

Having found no proof of unfair termination of the claimant's employ-

ment, he is not entitled to pay in lieu of notice. He is further not entitled to compensation for unfair loss of job.

The claimant's contract stated that statutory deductions would be recovered from his salary. The claimant has not proved that no NSSF was deducted from his salary and remitted by the Respondent together with its own contribution. He did not produce a payslip or statement from NSSF. The claimant's contract did not provide for service gratuity. I therefore find that the claimant has not proved that he is entitled to service gratuity either under Section 35(5) of the Employment Act or by virtue of his contract.

The claimant is however awarded salary for January 2015 in the sum of **Kshs.12,748.00** being the consolidated salary stated in his contract.

He is further awarded 21 days' leave at **Kshs.10,296.50**.

In conclusion judgment is entered in favour of the claimant against the Respondent in the total sum of Kshs.23,044.50.

The Respondent shall pay claimant's costs and decretal sum shall attract interest from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF DECEMBER 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