



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 1318 OF 2011

ROBERT MWANIKI NDARU.....CLAIMANT

VERSUS

KENYA BREWERIES LIMITED.....RESPONDENT

CONSOLIDATED WITH

CAUSE NO. 1319 OF 2011

BENJAMIN MUTUA KITONGU.....CLAIMANT

VERSUS

KENYA BREWERIES LIMITED.....RESPONDENT

(Before Hon. Lady Justice Maureen Onyango)

JUDGMENT

The claimants had originally filed two separate suits which were consolidated and heard under file No. 1319 of 2011.

The 1st and 2nd Claimant in their Statements of Claim dated 1st August 2011, are suing the Respondent for wrongful dismissal and failure to pay the right terminal dues. They seek the following reliefs:

- a. Compensation in damages for breach of contract and wrongful termination of the employment contract.
- b. Immediate reinstatement to employment without any loss of status, employment or benefits attendant thereto.
- c. Damages for malicious prosecution and reimbursements of Kshs.150,000 respectively, spent as legal fees in defending the criminal charges.
- d. Damages for character assassination.
- e. The sum of Kshs.1,758,000 for Robert and Kshs.585,000 for Benjamin respectively.
- f. Costs of this cause.
- g. Interest on all monetary payment at court's rate.

The Respondent in its respective responses dated 10th June 2013 and filed on 11th June 2013, admits the parties' descriptions. The Respondent denies the contents of the Statements of Claim save for paragraph 9 of the 1st Claimant's Statement of Claim, which is admitted to the extent that the Respondent served the Claimant with a termination letter dated 31st July 2008.

It is undisputed that the 2nd Claimant was employed as a shift leader vide a letter dated 7th September 2005 earning a basic salary of

Kshs.140,000 and other benefits while the 1st Claimant was employed as an operation manager-spirits earning a salary of Kshs.431,115.77 and other benefits. It is also not disputed that the Claimant's services were terminated on 31st July 2008 for loss of KRA stamps.

The parties have not disputed that the Claimants were suspended on half pay or that they were charged in Criminal Case No. 60 of 2008.

Claimant's Case

The 2nd Claimant avers that he worked for the Respondent for 3 years without complaints on his work ethics and values.

It is the 2nd Claimant's case that the Respondent maliciously instituted criminal charges against him.

At the time of termination, the Claimant was earning a basic salary of Kshs.195,140 and a shift allowance of Kshs.14,970. It is his case that the Respondent constructively terminated his services without reasonable cause and declared him redundant un-procedurally and unlawfully.

The 2nd Claimant avers that he has been exposed to mental anguish, torture, inconveniences and has compromised his station of life since this was his only source of income.

The 1st Claimant's account of facts is similar to those of the 2nd Claimant save that he has worked for the Respondent for 2 years 7 months without complaints on his work ethics and values. He avers that on 25th July 2008, he made a response letter to the Respondent's enquiries but received no response from the Response. It is the 1st Claimant's case that at the time of termination, he was earning a basic salary of KShs. 586,000.00 per month.

CW1, **Benjamin Mutua Kitongu** the 2nd Claimant in this case, testified that he was called to office on 2nd February 2008 and told to report to the KRA office which he was informed of the theft of KRA stamps. He was asked to record a statement, detained at the Railway Police Station and released on cash bail the following day.

It was the 2nd Claimant's evidence that he had been on suspension for 6 months.

The 2nd Claimant testified that stamps were delivered for inspection to confirm the numbers of the factory thereafter they were under the care of the store manager and then in the 2nd Claimant's care during production, to apply on the product. It is the 2nd Claimant's testimony that there is no record that whatever number was given was not applied correctly. He asserted that the stolen stamps were not in his custody and that the ones brought to his office were used.

It is the 2nd Claimant's evidence that when they received a show cause letter, they responded and denied the charges. He received a letter of termination 6 days later. There was no meeting or hearing.

The Claimant testified that it was difficult for him to get a job as his history with the Respondent is usually interrogated during interviews. However, it was also his testimony that he had been employed by Delmonte from July 2009 to September 2015.

Upon cross examination, the 2nd Claimant stated that he could not recall whether the stamps got lost in the 1st Claimant's offices or he received the stamp's last ream. It was the Claimant's evidence that he did not have receipts for the legal fees paid in his criminal case.

CW2, the 1st Claimant in this case, testified that on 21st January 2008, he went to his office and found boxes of stamps missing.

The 1st Claimant reiterated the facts of the arrest as stated by the 2nd Claimant.

It was his testimony that the storekeeper was not interrogated or charged in court.

The 1st Claimant posited that his employment was unlawfully terminated yet he did what any manager would do and reported the case.

It was the 1st Claimant's evidence that he was employed by the County Government of Embu as the Chief Officer in charge of Public Service and Administration. He was employed on contract which was to lapse in April 2017.

During cross examination, the 1st Claimant testified that the decision to have the stamps moved to his office was made by him, in consultation with the finance manager.

The 1st Claimant denied that he lost the KRA stamps and instead asserted that his office was frequented by other staff members.

It is the Claimant's evidence that he spent Kshs.150,000 on legal services in the criminal case and was issued with receipts.

Respondent's Case

In her respective witness statements both dated 24th October 2018, Njeri Njenga testified that on or about 22nd January 2008, 8 cartons

containing KRA stamps valued at about Kshs.150,000 disappeared from the 1st Claimant's office under unclear circumstances. The Claimants were responsible for the accountable usage of the KRA stamps.

A police investigation led to the arrest of the Claimants and they were subsequently charged alongside others with the offence of stealing in Criminal Case No. 60 of 2008.

The Respondent conducted internal investigations into the loss of the stamps. It is her evidence that apart from the issue of half salary, other terms of service were not affected when the Claimants were suspended from duty. Pursuant to the investigations, the Respondent wrote show cause letters to the Claimants on 23rd July 2008. They responded vide their respective letters dated 25th July 2008, but the same were found wanting. The Respondent opted to terminate the Claimant's employment rather than summarily dismiss them for misconduct. They were paid 3 months' salary in lieu of notice.

It is her evidence that the 1st and 2nd Claimants were paid all their terminal benefits vide cheque number 777946 dated 7th January 2009 and cheque number 763927 dated 23rd January 2009 respectively.

During trial, it was her testimony that the Claimants employment were terminated lawfully and in accordance with the terms of the contract.

Upon cross examination, she conceded that she did not have the report of the investigations conducted by the Respondent. She also conceded that the records did not show the reasons the Claimants' letters were found wanting. It was her evidence that she did not have proof that the cheques issued to the claimants were banked.

Submissions

The Claimants in their respective written submissions dated 13th November 2018 and filed on 14th November 2018, reiterated the contents of the Statement of Claim and restated their account of the trial proceedings. The Claimants submit that the termination of their employment was procedurally and substantively unfair and contrary to section 41 and 43 of the Employment Act as they were never given a fair opportunity to be heard. The Claimants rely on the case **Walter Goal Anuro vs. TSC [2013] eKLR** where the Court held that:

"... for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination."

For further emphasis, the Claimants relied on the cases of **Rebecca Ann Maina & 2 Others vs. JKUAT [2014] eKLR** and **Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited [2014] eKLR**.

The Claimants submit that failure to follow the procedure amounts to summary dismissal and rely on the case **Nicholas Muasya Kyula vs. Farmchem Limited Industrial Cause No. 1992 of 2011; [2012] LLR 235 (ICK)** where the Court held that:

"It is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes of undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at."

The Respondent in its respective submissions dated 7th December 2018 and filed on even date, submits that the termination of the Claimants' employment was fair and procedural as the reasons for termination were valid. Further, the Claimants were given an opportunity to explain themselves.

The Respondent submits that the contract between the Respondent and the respective Claimants was followed to the letter and that the termination of their employment was fair and lawful. The Respondent further submits that the Claimants' claim for reinstatement is spent as it has been over 10 years since their employment was terminated. It is the Respondent's submissions that the Claimants have failed to prove the alleged mental stress and anguish. The Respondent relied on the case of **Musa Ogara Osoro vs. Wakenya Pamoja Sacco Society Limited [2018] eKLR** where the Court in dismissing a similar claim observed:

"The Claim for general damages for mental anguish and psychological torture is also dismissed for lack of particulars and evidence..."

The Respondent submits that the claim for damages for malicious prosecution is improperly before this court. The Respondent also submits that the Claimants have not proved that the prosecution was instituted without reasonable and probable cause. The case of **Susan Mutheu Muia vs. Joseph Makau Mutua [2018] eKLR** was relied upon to set out the ingredients for malicious prosecution which are:

"... The prosecution was instituted by the defendant or by someone whose acts he is responsible

... The prosecution was instituted without reasonable and probable cause.

... The prosecution was actuated by malice.

... *The prosecution was terminated in the Plaintiff's favour.*"

The Respondent submits that the claim for Kshs.150,000 is for special damages and its payment has not been proved.

It is the Respondent's submissions that no evidence was adduced to prove defamation and as such the claim must fail. The Respondent relies on the case of ***Miguna Miguna vs. Standard Group Limited & 4 Others [2017] eKLR***, where the Court held that:

"A claimant in a defamation suit ought to establish that there is a defamatory statement; that the defendant has himself published or caused another to publish that statement and the statement refers to the Claimant."

It is also the Respondent's submissions the Claimants are not entitled to their respective claims of Kshs.585,000 and Kshs.1,758,000 which are based on unpaid half salary. This is because they were not exonerated of the charges, they faced at company level.

Determination

After considering the evidence adduced by the parties, the following are the issues for determination:

1. Whether the termination of the Claimants' employment was unfair and unlawful.
2. Whether the Claimants are entitled to the reliefs sought.

Whether the termination of the Claimants' employment was unfair and unlawful.

The termination procedure as set out in Section 41(1) of the Employment Act was not complied with by the respondent. The Claimants were issued with letters to show cause, they responded, their responses were found wanting leading to the termination of their employment. The Claimants' termination letters and RW1's testimony prove that the Claimants were not granted a hearing.

The procedure as provided for under section 41(1) of the Employment Act is mandatory and should be adhered to by an employer who seeks to terminate an employee's services. This was made clear by the Court in ***Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR***.

Though the Respondent communicated the reasons for the termination of the claimants, the same is not sufficient to deem the termination fair and lawful. The right to a fair hearing is at the core of any proceedings and the same should be accorded to an individual faced with circumstances where they are required to defend themselves.

Whether the Claimants are entitled to the reliefs sought

Having established that the termination of the claimants' employment was unfair and unlawful, the next issue for determination is whether they are entitled to the reliefs sought.

The Claimants seek damages for breach of contract and wrongful termination of employment. Since they have proved on a balance of probabilities that their employment was unfair and unlawful, they are entitled to compensation as provided for under section 49(1)(c) of the Employment Act.

The Claimants seek immediate reinstatement to employment. Section 12 (3) of the Employment and Labour Relations Court Act gives this Court the powers to make an order for reinstatement of any employee within 3 years of dismissal subject to the conditions as the Court thinks fit to impose. It is 10 years since the Claimants' employment was terminated. It is the Claimants' case that they have not been able to get employment since their termination yet it was their evidence that they managed to secure employment after their termination. Consequently, I find that besides the time limitations, they have not demonstrated special circumstances that would warrant the issuance of this prayer and it therefore fails.

The Claimants seek damages for mental stress and anguish. The claim has not particularized and no evidence to prove this claim has been adduced. It is trite in law that for such a claim to succeed, the same must be proved. The claim having not been proved, fails and is dismissed.

The Claimants seek damages for malicious prosecution. The 4 necessary ingredients for malicious prosecution have not been proved. The Court in ***Susan Mutheu Muia vs. Joseph Makau Mutua [SUPRA]*** opined that it was one thing for one to make a complaint and another thing for one to prefer and institute charges. That further for malicious prosecution to succeed, the 4 ingredients must be proved. I note that the Director of Public Prosecution, who is an essential party where one is seeking damages for malicious prosecution arising from public prosecution, has not been joined to these proceedings. It is also trite that a claim for malicious prosecution can only be made after acquittal. This claim was filed in 2011 while the acquittal of the claimants was in 2016. This is contrary to what was held in ***Susan Mutheu Muia vs. Joseph Makau Mutua [SUPRA]***. In addition to this, the claim has not been specifically pleaded. As a consequence, the claim fails.

The Claimants seeks damages for character assassination. They have failed to prove the elements of defamation as set out in the Court of Appeal case of ***Miguna Miguna vs. Standard Group Limited & 4 Others [SUPRA]***, which proof is necessary for a claim of defamation to succeed. Further, the same has not been specifically pleaded. As such, the claim fails.

The Claimants seek reimbursement of Kshs.150,000.00 in legal fees. However, the claim has not been proved. No receipts were produced in court as proof of payment. Since claims for special damages must be proved, the claim fails.

The 1st and 2nd Claimants seek Kshs.1,758,000.00 and Kshs.585,000.00 unpaid half salary during their suspension period. No record of the Respondent's disciplinary rules showing the basis for withholding payment of half salary during suspension was adduced.

Section 12 of the Employment Act requires an employer with more than 50 employees to have Disciplinary Rules. Further, the court in **Lawrence Lien Shoona v East Africa Portland Cement Company Limited [2018] eKLR** quoted the case of **Simon Otieno Mboga -V- Kenya Forest Service [2015] eKLR** where the Court stated:

“Issues such as interdiction and suspension ought to be provided for in the statement of disciplinary rules.

...Suspension is where an employee is forbidden from performing or attending to official duties pertaining to his/her office and no salary is payable during the suspension period. However, the employer has the discretion to continue paying other benefits such as medical, education for dependants and housing allowance to the employee.”

Having been terminated and not dismissed, the Claimants are entitled to the half salary withheld during suspension since there was no basis for suspension on half salary.

In conclusion I enter judgment for the claimants against the respondents as follows –

- 1..... Robert Mwaniki Ndano..... Kshs.1,758,000
- 2..... Benjamin Mutua Kitongu..... Kshs.585,000
3. Costs of the suit.
4. Interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF JANUARY 2019

MAUREEN ONYANGO

JUDGE