



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 190 OF 2016

KEVINS ALANGO OKONYA.....CLAIMANT

- VERSUS -

EGYPRO EAST AFRICA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday 10th April, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 11.02.2016 through Oraro & Company Advocates. By the notice of change of advocates dated 18.02.2019 the claimant changed his advocates to Kinyua Mbaabu & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondent failed to comply with the mandatory procedure before termination by failing to afford the claimant with an opportunity to be heard hence the termination was procedurally unfair.
- b) Annual leave Kshs.7, 000.00.
- c) Salary for 22 days Kshs. 8, 166.67.
- d) Gratuity pay Kshs. 17, 500.00.
- e) Unpaid housing allowance Kshs. 84, 000.00.
- f) Compensation for unfair termination and loss of employment up to the maximum of 12 months' basic salary Kshs.420, 000.00.
- g) Interest on (c) to (f) above at Court rates.
- h) Costs of the suit on full indemnity basis.
- i) An order directing the respondent to issue the claimant with a certificate of service.
- j) Any other relief the Honourable Court shall deem fit and just to grant in the circumstances.

The response to the claim was filed on 19.04.2016 through Tariq Khan & Associates Advocates. The respondent prayed that the memorandum of claim be dismissed or struck out with costs to the respondent.

There is no dispute between the parties that they were in a contract of employment upon the following undisputed facts:

- a) On 22.01.2014 the respondent offered the claimant employment as a maintenance technician. The employment was communicated to the claimant by telephone and the claimant was deployed to Kisii region. The appointment was oral and no letter of appointment was issued.
- b) The claimant was transferred to the respondent's branches in Kericho, Narok and as at dismissal he was based in Bondo.
- c) At employment the claimant was paid a monthly salary of Kshs. 25, 000.00 usually paid by M-Pesa and no payslips issued. The monthly salary was later increased to Kshs.35, 000.00 as at May 2015.
- d) The respondent and the Kenya Communication Workers Union signed an agreement on 03.09.2015 to the effect that the respondent was to start making payments of NSSF and NHIF effective September, 2015; pay slips were to be issued effective September 2015; and all staff were to be issued with letters of appointment

The Court has considered the pleadings, the evidence and the submissions on record.

The **1st issue** for determination is whether the termination of the contract of service was unfair. The claimant's case is that on 20.05.2015 the respondent's Human Resource Manager summoned him by telephone to attend a meeting at the respondent's head office in Nairobi. The claimant's further case is that he attended the meeting on 22.05.2015 as was scheduled and the Human Resource Manager one John Botros informed him that the Project Manager one Mina Nashed had decided that the claimant be terminated from employment and the decision was mandatory. Further, he had travelled from Bondo to Nairobi and being short of resources for up keep, he signed acknowledging receipt of Kshs. 63, 500.00 in cash being one month salary in lieu of termination notice and 10 days leave earned plus 15 days' salary for days worked in May 2015. The claimant testified that on 22.05.2015 he was informed that he was being dismissed on account of gross misconduct.

The respondent's case was that the claimant was summarily dismissed on account of absence from duty without lawful excuse and failing to report at work for one week as was expected of him. Respondent witness No. 1 (RW1) was the respondent's Human Resource Manager one John Botros. His evidence was that the reason for dismissal was that the claimant was absent from duty for one week. Further, the claimant had requested for sick leave by a text message on cell-phone (SMS) from the Project Manager one Mina Nashed but Mina had said the claimant should not leave. The claimant's evidence in that respect was that he was to provide medical chits and in fact he never left his work place and no assignment went unattended. RW also testified that he received no complaints about the claimant's performance. RW1 met the claimant on 22.05.2015. The record of the meeting shows that the claimant had left his work place without sending to Mina Nashed the relevant medical report or sick leave. RW1 testified that the claimant had been absent from work from 12.05.2015 to 20.05.2015. The respondent's witness No. 2 (RW2) was Mina Nashed. His evidence was that the claimant sent a text message requesting for leave on account of sickness. RW2 asked him not to leave unless he provided the medical evidence. RW2 testified that the main reason for the termination was that the claimant was absent from around 15.05.2015 to 20.05.2015 without medical evidence of the sickness and RW2 had send a supervisor to cover for the claimant's absence during that week. The respondent's witness No. 3 (RW3) was his regional supervisor one Benson Waithaka Mbiu. RW3 testified that they maintained no records for the claimant's presence at work due to the nature of the work. The presence was measured based on calls and targets and schedules for the work done were documented on monthly basis. The claimant had been absent for days but RW3 while stating that the schedules would show such absence, the same had not been exhibited in court. RW3 stated that another employee known as Joseph was the one who would confirm if the claimant had worked on the days he was alleged to have been absent. RW3 stated that for the week in issue, he stood for operations in the place of the claimant. The schedules to show that RW3 stepped in had not been filed. RW3 testified that he was paid per diem for that week but he had not filed

evidence of such payment.

The Court has carefully considered the evidence. The claimant's evidence was that he requested for sick leave and when it was denied (because he failed to provide the required medical records or chits) he remained in his assigned area of work in Bondo and all work went on well as there were no complaints. The Court finds that there is no reason to doubt the claimant's account in that regard. The evidence by RW3, the claimant's supervisor, is found contradictory and therefore cannot be trusted. In particular RW3 testified that it was one Joseph who could confirm if the claimant worked on the week it is alleged the claimant was absent without permission; and at the same time he contradicted himself by stating that on that week of alleged claimant's absence, he travelled to Bondo and stepped in for the claimant. The Court further finds that RW3 failed to exhibit the evidence of payment of the per diem and the monthly work schedules that would confirm his line of evidence. The Court therefore returns that the respondent has failed to establish that on the week of the alleged claimant's absence from work, the claimant had indeed been absent from work. Thus, as at termination the Court returns that the respondent has failed to show that the reason for termination had been valid as envisaged in section 43 of the Employment Act, 2007.

The evidence is clear and there is no dispute that the claimant had been dismissed without due notice and hearing as per section 41 of the Act. It was procedurally an unfair termination. The Court finds that the claimant has discharged his burden of prove unfair termination as per section 47(5) of the Act.

The **2nd issue** for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

- a) The claimant is entitled to the declaration that the respondent failed to comply with the mandatory procedure before termination by failing to afford the claimant an opportunity to be heard hence the termination was procedurally unfair.
- b) The claimant prays for annual leave Kshs.7, 000.00. The basis of the computation of the amount as prayed for is not established at all. Further the claimant testified that whenever he went on leave, changing the same to whenever he went on off, someone stepped in for him on local arrangements. In signing for final dues, 10 leave days are indicated to have been paid. On a balance of probability the Court returns that the claimant took leave and any outstanding leave dues were paid in the final dues the claimant had received. The prayer will fail.
- c) The claimant prayed for salary for 22 days **Kshs. 8, 166.67**. There is no dispute that the termination was on 22.05.2015. That Court finds that the claimant is entitled as prayed for.
- d) The claimant prayed for gratuity pay Kshs. 17, 500.00. It is not in dispute that the NSSF was not remitted and there was no alternative pension or separation benefit and the Court returns that the claimant is entitled to gratuity or service pay per section 35 of the Act. However the amount was already paid as per the computation of final dues on record and the prayer is declined.
- e) The claimant prayed for unpaid housing allowance Kshs. 84, 000.00. There was no established basis for the prayer. The evidence is that the parties agreed upon a consolidated monthly pay and the Court considers that in absence of grievances in that regard while the contract of service subsisted, the consolidated pay had an element of reasonable provision for housing. The prayer will fail.
- f) The claimant prayed for compensation for unfair termination and loss of employment up to the maximum of 12 months' basic salary Kshs.420, 000.00. The Court considers that the claimant while asking for sick leave failed to provide the relevant medical records as the respondent had directed him to do. The Court considers that the claimant's failure significantly contributed to his termination which the Court puts at 50%. The Court has also considered that the claimant had served for slightly over one year and he desired to continue in employment. The Court has considered the alleged poor performance on the part of the claimant and returns that the same was not established at all and the email on poor performance was seen by the claimant for the first time

during the present court proceedings. Taking all the factors into account the claimant is awarded 5 months' compensation under section 49 of the Act making **Kshs.175, 000.00** at Kshs. 35, 000.00 per month.

g) The claimant is entitled to a certificate of service under section 51 of the Act.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the termination of the contract of service on 22.05.2015 by way of a verbal and abrupt dismissal was unfair.
- b) The respondent to pay the claimant a sum of **Kshs.183, 116.67** by 01.06.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- c) The respondent to deliver to the claimant a certificate of service by 01.05.2019.
- d) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Wednesday 10th April, 2019.**

BYRAM ONGAYA

JUDGE