



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 415 OF 2017

KEVIN KUBAYI.....CLAIMANT

VS

BOB MORGAN SERVICES LIMITED.....RESPONDENT

JUDGMENT

Introduction

- 1. This is an employment dispute between Kevin Kubayi and his former employer, Bob Morgan Services Limited. The Claimant’s claim is contained in a Memorandum of Claim dated 25th April 2017 and filed in court on 18th May 2017.
- 2. The Respondent did not file any reply in spite of being given adequate opportunity to do so. The matter therefore proceeded by way of formal proof.

The Claimant’s Case

- 3. The Claimant states that he was employed by the Respondent in its export section from November 2015 until August 2016 when his employment was terminated on medical grounds. He earned a monthly salary of Kshs. 14,000.
- 4. The Claimant pleads that he sustained injuries at work and while in the process of recovery, he received a letter dated 10th August 2016 being notice of expiry of his sick leave and on 22nd August 2016 he received another letter discharging him from employment on medical grounds. He states that he was not paid his salary for the month of August 2016.
- 5. The Claimant claims that he worked on public holidays without compensation. Further, he worked from 6.00 am to 6.00 pm without overtime pay.
- 6. The Claimant’s case is that the termination of his employment was unlawful and unfair. He therefore claims the following:

- a) One month’s salary in lieu of notice.....Kshs. 14,000.00
- b) Public holidays from November 2015 to August 2016.....10,770.00
- c) Overtime from February 2016 to August 2016.....48,994.40
- d) Salary for August 2016.....14,000.00
- e) 12 months’ salary in compensation.....168,000.00
- f) Certificate of service
- g) Costs plus interest

Findings and Determination

- 7. There are two (2) issues for determination in this case:

a) Whether the Claimant has made out a case of unlawful termination;

b) Whether the Claimant is entitled to the remedies sought

Unlawful Termination?

8. On 22nd August 2016, the Respondent wrote to the Claimant as follows:

“Dear Sir,

RE: DISCHARGE ON MEDICAL GROUNDS

We write to notify you in reference to the above and wish to advise that following completion of 100 days not being on duty, the company finds it fit to discharge you on medical grounds effective 20th August 2016 so that you may be able to get specialized treatment and rest.

Once you are certified okay report to the undersigned for re-engagement consideration.

Yours faithfully,

BOB MORGAN SERVICES LTD.

(Signed)

JOHN OCHUKU

CHRO-ADMIN.

9. Prior to this letter, the Claimant had been issued with a notice dated 10th August 2016 notifying him that his sick leave would end on 20th August 2016. It is not in dispute that the Claimant’s employment with the Respondent came to an end on medical grounds.

10. In the final submissions filed on behalf of the Claimant, reference was made to the decision in ***Kennedy Nyanguncha Omanga v Bob Morgan Services Limited [2013] eKLR*** where this Court recognised ill health as a valid ground for bringing an employment relationship to an end subject to the following due procedure:

a) That the employer has given support to the employee to recover and resume duty;

b) That the employee has been subjected to a specific medical examination to establish their ability to resume work in the foreseeable future;

c) That the employee has been given specific notice of impending termination of employment on medical grounds.

11. The Court went further to hold that failure to observe the above procedure even in the face of overwhelming evidence that the employee is unable to work amounts to unfair termination of employment.

12. In the case before me, the Claimant was allowed sick off but was not subjected to a medical examination to establish his ability to resume work. Further, the Court did not see any attempt by the Respondent to re-deploy the Claimant to lighter duty.

13. It seems to me therefore that in arriving at its decision to discharge the Claimant on medical ground, the Respondent did not observe due procedure. The result is that the discharge amounts to unfair termination of employment within the meaning of Section 45 of the Employment Act and the Claimant is entitled to compensation.

Remedies

14. Further to the foregoing findings, I award the Claimant six (6) month’s salary in compensation. In arriving at this award, I have considered the Claimant’s length of service accentuated by the Respondent’s failure to observe due procedure in discharging the Claimant.

15. I further award the Claimant one (1) month’s salary in lieu of notice as well as salary for the month of August 2016.

16. Regarding the claims for public holidays and overtime I have this to say; the Claimant did not specify the actual days for which he makes these claims. The said claims being in the nature of special damages ought to have been specifically pleaded and proved. In this regard I am guided by the decision by the Court of Appeal in ***Richard Okuku Oloo v South Nyanza Sugar Co. Ltd [2013] eKLR.***

17. The Claimant did not prove these claims to the required standard and they therefore fail and are disallowed.

18. Ultimately, I enter judgment in favour of the Claimant as follows:

a) 6 months' salary in compensation.....	Kshs. 84,000
b) 1 month's salary in lieu of notice.....	14,000
c) Salary for August 2016.....	<u>14,000</u>
Total.....	112,000

19. This amount will attract interest at court rates from the date of judgment until payment in full.

20. The Claimant is also entitled to a certificate of service plus costs of the case.

21. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF APRIL 2019

LINNET NDOLO

JUDGE

Appearance:

Mr. Tolo for the Claimant

No appearance for the Respondent