



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 159 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

KENNEDY MOSS CHEPTUM.....CLAIMANT

VERSUS

GEOHERMAL DEVELOPMENT COMPANY.....RESPONDENT

JUDGMENT

The Claimant filed suit against the Respondent seeking damages for unlawful breach of employment agreement and for payment of his terminal benefits.

He avers that on or about 28th September, 2009, he entered into a written agreement for employment with the Claimant as Environmental Scientist in Resource Development Department at a gross income of Kshs.153,509.

That he served the Respondent diligently, honestly and unreservedly and was promoted from the position of Environmental Scientist 2 to environmental Scientist 2 with effect from 1st December, 2012 which position he held until 21st January, 2014, when the Respondent terminated his employment with effect from 22nd January, 2014 without reasonable cause. Mr. Cheptum also alleges that the termination was unfair because he was not subjected to a fair disciplinary process.

In the Memorandum of Claim dated 10th January 2015, the Claimant prays for:

- a. Pay in lieu of leave
- b. Pay in lieu of notice
- c. Service pay – a month’s pay for every year worked.
- d. A declaration that he termination of employment by the Respondent therein was unjust and unfair.
- e. An order that the Respondent do return the Claimant to work forthwith under the same terms and conditions.
- f. Maximum compensation of 12 months amounting to Kshs.1,842,108.00 to be paid to the Claimant by the Respondent.
- g. Any other or further relief that this Honourable Court may deem fit to grant.
- h. Interest of the above amounts with effect from 1st February 2014, until payment in full.
- i. A certificate of service hereof
- j. Costs of this claim hereof.

The Respondent has filed a memorandum of response and led evidence to the effect that the Claimant was its employee. That in the course of his employment the Claimant consistently absconded duty without lawful permission and abdicated his roles. That the Respondent in good faith warned the claimant concerning the gross misconduct, absenteeism and abdication of his roles and accorded him an opportunity to

show cause why he could not face disciplinary action. That the Claimant on numerous occasions owned up to the contractual breaches and acknowledged that his behaviour attracted summary dismissal but pleaded for mercy which the Respondent responded by giving clemency, but that the Claimant's conduct did not change. That this informed the decision to terminate the Claimant's employment for breach of contract. That the respondent paid him all his dues which the claimant acknowledged. It is also contended that the Claimant is still in possession of the Respondent's laptop which was issued to him in the course of employment but was not surrendered upon termination. The Respondent urges the Court to dismiss the claim with costs.

Submissions

It is submitted on behalf of the Claimant that the procedures for termination under Section 45(2) and Section 46 of the Employment Act were not followed. That no reason for termination was proved before termination and due process was not adhered to and as a result the Court should allow the prayers sought.

The Respondent on the other hand submits that the Claimant was summarily dismissed in accordance with Section 44 of the Employment Act. That the Claimant received various notices to show cause letters on the grounds of absenteeism and his conduct did not change leading to his summary dismissal.

It is also submitted that the Claimant is not entitled to the prayers sought for the reason that the claim for leave is not supported by evidence. The Respondent's witness led evidence to the effect that according to company policy all employees were encouraged to take their annual leave which they did without fail.

As to the claim for pay in lieu of notice it is submitted that the Claimant is not

entitled to the same for the reason that he was summarily dismissed and thus notice did not apply. That in the event court is persuaded to award the same it should be capped at one month's salary.

On service pay the Respondent submits that the same is not payable for the reason that according Section 35(5) of the Employment Act, the Claimant is not entitled to service pay as he was a member of NSSF and the Respondent dutifully remitted contributions on his behalf. The Respondent urge the Court to dismiss the Claim with costs.

Determination

Having considered the pleadings and evidence on record as well as the submissions made by and on behalf of the parties. The issues for determination are whether the summary dismissal of the Claimant was fair and whether he is entitled to the prayers sought.

Section 41 of the Employment Act provides for fair procedure while section 43 provides for proof of reason for termination as follows:-

41. Notification and hearing before termination on grounds of misconduct

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.

43. Proof of reason for termination

1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

Section 45(1) and (2) provides prohibits unfair termination. The section provides as follows:-

45. Unfair termination

1) No employer shall terminate the employment of an employee unfairly.

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.

The grounds for summary dismissal as contained in the summary dismissal letter dated 21st January 2014 which reads:

“Reference is made to the show cause letters Ref :GDC/PERS/100116/MWK/BM dated 11th September, 2013, and GDC/PERS/100116/INO/MWK dated 30th April, 2013. In addition reference is further made to a report from supervisor through your manager dated 2nd January, 2014, indicating that you had not reported to work on 30th December, 2013, to 2nd January, 2014, without explanation.

It is in record that previously on several occasions,, you absconded duty and deserted your place of work without seeking permission or giving any explanation to your supervisor or manager.

Absenteeism is an act of gross misconduct that can lead to dismissal pursuant to the Employment Act, 2007, Section 44 (4a and g) and GDC Staff HRRPP, Clause 16.8.3(a).

In view of the aforementioned, the Company hereby summarily dismisses you from its employment and service with immediate effect.. You are therefore required to hand over any company's property in your possession to the Manager, Environment and arrange to fill and return a duly filed Clearance form to Manager, Human Resource.

Yours sincerely,

Dr Silas Simiyu MBS

MANAGING DIRECTOR & C.E.O”

The Biometric analysis of the clocking in and clocking out by the Claimant attached to the Respondent's Amended Memorandum of Response shows lapses in the Claimant's attendance which was not rebutted in evidence. Further an apology letter dated 13th September, 2013, proves that indeed the claimant had been prior to dismissal accused of absenteeism. The lapses in the Claimant's attendance were not explained or justified by evidence. It is therefore clear that the Respondent had sufficient reason to summarily dismiss the Claimant.

In *Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR* the Court stated that Summary dismissal takes place when an employer terminates the employment of an employee without notice or with less notice than that which the employee is entitled to by any statutory provision or contractual term. In cases of serious breach of a contract as under section 44(3) or on committing acts as outlined under Section 44(4) of the Employment Act, an employee being absent from work, being intoxicated, negligence, abusive, failure to obey lawful orders, criminal arrest or charges, suspect in a criminal case, all these serious acts, such an employee is subject to be treated as under Section 41 of the Employment Act with regard to being accorded a hearing.

In the instant case, the Claimant was still entitled to an actual hearing before termination failing which the termination becomes unlawful in light of the above cited authority. The claimant was not accorded a hearing or an opportunity to be heard.

Although there was reason for termination, the termination was unfair for want of a hearing. The claimant is thus entitled to one month's gross salary in lieu of notice at Kshs.159,260 according to claimant's payslip for January 2014 at Exhibit "GDC9" of memorandum of Response.

On the claim for unpaid leave it was the Respondent's evidence that their policy required all employees to go on leave. According to the Employment Act, it is the duty of the respondent to keep records of leave and to produce such records. If the respondent fails to produce the records, it is its burden to prove the same. The respondent did not even produce the policy on forfeiture of leave. Having failed to prove the same, I award the claimant the leave days in the sum of Kshs.272,978.60.

The claim for service pay fails since the Claimant was a registered member of NSSF and the Respondent made all contributions on his behalf.

Having found the termination unfair, I award the claimant four (4) months' salary as compensation taking into account the length of service and the fact that he was not given a hearing.

In conclusion, I award the claimant the following

1. One month's gross salary in lieu of notice..... Kshs.159,260.00
2. Pay in lieu of 80 days' leave (based on basic pay)Kshs.272,978.60

3. Four (4) months' gross salary as compensation..... Kshs.637,040.00

Total **Kshs.1,069,278.60**

The respondent shall pay the claimant's costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE