



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1731 OF 2014

DOUGLAS NYAKUNDI BOOKO.....CLAIMANT

- VERSUS -

KENYA KAZI SERVICES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 5th July, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 07.10.2014 through Nyamweya Mamboleo Advocates. The amended memorandum of claim was filed on 11.08.2015. The claimant prayed for judgment against the respondent for:

- a) Compensation for unfair dismissal amounting to Kshs.219, 396.00 as per section 49 of the Employment Act.
- b) Compensation for wrongful dismissal amounting to Kshs.18, 283.00 per section 49 of the Employment Act.
- c) Interest on (a) and (b) above.
- d) Damages for loss of future employment and earnings as determined by the Court.
- e) General damages for pain and suffering.
- f) Costs of the suit.
- g) Any other relief that the Court may deem fit to grant.

The claimant's case is that he was employed by the respondent by a contract of service dated 21.11.2011. The respondent trained the claimant as a Dog Handler and upon qualification the parties concluded the Dog Handler Agreement dated 13.06.2012. The claimant says that he was then assigned the duty of cleaning canine vehicles which was not within his job description, training, knowledge, expertise, experience and skills. The claimant's case is that the cleaning entailed use of some chemical and the respondent provided no protective gear and safety training and sections 6 and 89 of the Occupational Safety and Health Act, 2007 was violated. The claimant states that he was thereby exposed to noxious cleaning agent, dust and cold on a daily basis when carrying out his duties. The claimant states that on 08.08.2012 while cleaning the vehicles he experienced difficulty in breathing and he collapsed as a result and he was diagnosed with chronic bronchitis. The claimant says he proceeded for treatment with the respondent's knowledge but in breach of section 41 (2) of the Employment Act, 2007 on representation, the respondent summarily dismissed the claimant from employment. He opposed his termination by the letter dated 19.05.2014 that he had been absent from duty on account of medical treatment. The claimant's further case was that his health had seriously deteriorated towards permanent incapacitation by reason of the ailment and he can no longer engage in meaningful employment and he is destitute. He urged that he had also suffered physical and mental pain and suffering and torture.

The respondent filed on 07.11.2014 the reply to memorandum of claim through Waruhiu, K'owade & Ng'ang'a Advocates. The amended reply to the memorandum of claim was filed on 19.08.2015.

The respondent denied all the claimant's pleadings and stated as follows:

- a) The claimant was employed by the respondent effective 01.09.2011 and his last assignment was as a Dog Handler.
- b) The claimant failed to report on duty on 02.07.2013 and he advanced no reason for the absence.

c) On 24.07.2013 the respondent wrote a letter summarily dismissing the claimant from work on account of desertion from duty effective 02.07.2013.

d) Later the claimant appeared at the hearing of 03.06.2014 and it was confirmed that the claimant's health could not permit him to discharge his duties accordingly. He was then terminated on account of ill health as per the letter dated 03.06.2014 which superseded the letter dated 24.07.2013. The respondent paid the claimant one month pay in lieu of termination notice and further issued a certificate of service.

To answer the **1st issue** for determination the Court returns that the parties were in a contract of service and the respondent employed the claimant as a Dog Handler. The contract was from 18.05.2011 to 02.07.2013 as per the certificate of service.

The claimant testified that he was employed to train dogs, cleaning and feeding the dogs. The dogs were many. He was assigned to clean vehicles used to transport dogs. They were 2 motor vehicles and 12 trailers. He did the cleaning at a dam and handled water from morning to about 3.00pm on daily basis and he was not given any protection gear and he used a disinfectant known as Kerol. Boots and not gumboots were provided; overall was provided but no mask was provided.

The claimant testified that on 08.08.2012 he collapsed while on duty and was unconscious. When he regained consciousness he discovered he had been admitted at the Kikuyu PCEA Hospital. The respondent was aware of the claimant's condition and the claimant was put on sick leave both by PCEA Hospital and the respondent's Hospital at Karen. The claimant was diagnosed with bronchitis and advised to avoid cold and dust. The claimant's case was that he was predisposed to bronchitis by reason of long hours handling water in the cold and by reason of exposure to the dog fur.

The claimant went to the respondent's office to deliver the letter dated 24.07.2013 from his physiotherapist and his testimony is that before he handed in the letter, the respondent handed to him the letter of summary dismissal dated 24.07.2013. The dismissal was on account of desertion effective 02.07.2013. He testified that he had not informed the respondent that he would be absent for the previous 15 days. After the dismissal, the claimant said that he appealed the dismissal but he received no reply. On 03.06.2014 the claimant had met the Human Resource Manager and it had been decided that he be retired on medical grounds. The claimant stated that as at termination and as at the hearing of the suit he was sick and unable to work. The claimant testified that his doctor had advised him not to stand for a long time and medical examination showed that he was unfit to work.

To answer the **2nd issue** the Court returns that the claimant has established that the summary dismissal was re-examined and set aside and replaced with termination on medical grounds. Accordingly the Court returns that the reason for termination being on medical grounds was not in dispute and the termination on medical grounds followed due process of a hearing on 03.06.2014. Accordingly the reason was valid as per section 43 of the Act and due procedure accorded per section 41 of the Act. The Court returns that the termination was not unfair and the claimant has not established a case for compensation under section 49 of the Act in that regard.

The **3rd issue** for determination is whether the claimant is entitled to damages for loss of future earnings attributable to the ill-health. The medical records show that the claimant was treated and advised to avoid cold and dusty environments to enhance his recovery. Thereafter he was retired on account of ill-health. It was not his case that he requested for alternative assignments consistent with the recovery medical advisory and the same denied. He produced no medical reports to show his continued incapacity to work. He introduced evidence and submissions on multiple lumbar disc prolapsed and without medical and other evidence showing how such ailment may have been triggered by the respondent's failures. Without documentary evidence it was submitted that he expended Kshs. 6, 420.00 every six weeks to deal with an ailment related to a failing bladder. The medical evidence on failing bladder and how it was attributable to the respondent was not provided. Thus, the submission for an award of Kshs. 1, 500, 000 on account of pain and suffering on alleged occupational disease was not established at all – and in any event the compensation for the disease as was alleged would fall under the Director's authority as provided in the Work Injury Benefits Act, 2007.

The respondent failed to comply with directions to bring a witness after the reopening of the suit and each party shall bear own costs of the suit.

In conclusion the Court returns that the claimant has failed to establish the claims and prayers as made and the suit is hereby determined with orders:

a) it is dismissed; and

b) each party to bear own costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 5th July, 2019.**

BYRAM ONGAYA

JUDGE