



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 998 OF 2017

(Formerly Milimani CMCC 2551 of 2005)

(Before Hon. Lady Justice Hellen S. Wasilwa on 17th October, 2019)

JOHN MCHONGO.....CLAIMANT

VERSUS

KENYA NATIONAL EXAMINATIONS COUNCIL.....RESPONDENT

JUDGMENT

1. This Claim was initially filed on 15/3/2005 as the Milimani CMCC as Case No. 2551/2005. The Claim was later transferred to this Court on 10/10/2016 and registered as Case No.998 of 2017.
2. The Claimant applied before Court to amend his claim and the Court granted him the said orders on 16/2/2018.
3. The Claimant herein filed a Memorandum of Claim filed in Court on 28th March, 2018, seeking compensation for unlawful termination and discrimination in the termination of his employment with the Respondent herein. The Claimant further seeks compensation for discrimination and unfair termination as well as be issued with a certificate of service for the time he worked for the Respondent herein.
4. The Claimant avers that he was engaged by the Respondent as a computer operator on casual basis with effect from 4th October, 1985. He further avers that his terms of engagement were later changed to permanent and pensionable with effect from 24th November, 1986.
5. The Claimant contended that he worked diligently and to the Respondent's satisfaction until the year 2004 when his services were unlawfully and unfairly terminated by the Respondent herein.
6. The Claimant further contends that during the subsistence of his employment with the Respondent he was involved in a road accident on 8th March, 2001 as a result of which he sustained serious injuries and was hospitalized at various hospitals in the year 2003.
7. The Claimant avers that the Respondent unilaterally decided to terminate his services based on his ill health as opposed to retiring him early on account of his ill health. The Claimant contended that this act by the Respondent was malicious, discriminatory, illegal and contrary to the law.
8. The Claimant further avers the Respondent's acts have deprived him of his salary, severance pay, earned leave days, travel allowance and other benefits he would have otherwise earned thereby occasioning him loss and damage. He further contends that he has been deprived of gross salary of Kshs. 39,460.80 per month.
9. Aggrieved by the decision to unfairly terminate his services the Claimant filed the instant claim seeking the following reliefs:-
 - a. **A declaration that the Claimant suffered discrimination, indignity, bias, was treated inhumanely and unfairly.**
 - b. **Certificate of Service and a Clearance letter.**
 - c. **Maximum compensation for wrongful dismissal and lost income for 12 months in the sum of Kshs. 473,529.60/=.**

d. Other benefits to be adduced.

e. Any other relief this Honourable Court deems fit and just to grant

f. General Damages.

g. Costs of this suit and Interest at court rates from the date of this suit until payment in full.

10. The Claimant urged this Honourable Court to allow his claim as drawn.

11. The Respondent in its Response to the Memorandum of Claim dated 16th April, 2018 and filed in Court on 17th April, 2018 admits having engaged the Claimant in the manner as alleged. It however denies that the Claimant was unlawfully dismissed as alleged. It contends that the Claimant did without leave of the Respondent absent himself from duty causing it to issue several warning letters to the Claimant prior to his summary dismissal on 13th January, 2004.

12. The Respondent contends that it had a justifiable reason to terminate the Claimant's services. It further contended that it did not in any way discriminate against the Claimant as alleged. It is averred that the Claimant's summary dismissal was done in accordance with the Respondent's Terms and Conditions of Service, 2003 and the Code of Conduct for employees and that all monies due and owing to the Claimant was paid at the time of separation.

13. The Respondent contended that the instant suit is therefore bad in law, is an abuse to the Court process and urges this Honourable Court to dismiss the same with costs to the Respondent.

Submissions by the Parties

14. It is submitted by the Claimant herein that he was indeed an employee of the Respondent herein until 24th February, 2004 when he received a letter of summary dismissal from the Respondent herein terminating his services.

15. The Claimant further submitted that his summary dismissal was wrongful and in contravention to Section 17 of the Employment Act Cap 226 (repealed) and Clause 10 (II) of the National Examination Council Terms and Conditions of Service, March 2003 (attached at page 47 to 51 of the Respondent's bundle of documents) as his absence from duty was explained by way of doctors' reports which the Respondent duly acknowledges receipt of the same through its letters.

16. The Claimant further submitted that his termination on account of deserting is therefore unjustifiable and therefore amounts to unfair and wrongful termination as evidenced by the various correspondences between the Claimant and the Respondent herein and that the Respondent failed to accord him the principles of natural justice.

17. To fortify this argument the Claimant relied on the case of **Eziakiel Nyangoya Okwemwa Vs Kenya Marine & Fisheries Research Institute (2016) eKLR** where it was held that the Court of Appeal in **Kenya Revenue Authority Vs Menginya Salim Murgani (2010) eKLR** clarified that where the contract of employment, even before the Act of 2007, imposed on the employer the duty to observe principles of natural justice, then the Court should, enforce such obligations and damages could be paid for non-observance of obligation.

18. The Claimant further submitted that he is entitled to the reliefs sought in his Memorandum of Claim and urged this Honourable Court to allow the same as pleaded. The Claimant placed reliance to the provisions of Section 15 of the Trade Disputes Act (Repealed). To buttress this position the Claimant further relied on the cases of **Banking, Insurance and Finance Union (K) Vs Bank of India (2018) eKLR**, **Major Wilfred Kyallo Kangulyu Vs Tetrapak Limited (2014) eKLR** and **Kenya Ports Authority Vs Festus Kipkorir Kiprotich (2015) eKLR**.

19. The Claimant contended that having shown that his termination was unfair and wrongful he urged the Court to find that he is entitled to the reliefs as sought in his Memorandum of Claim and urged this Honourable Court to allow the same as prayed.

Respondent's Submissions

20. The Respondent on the other hand submitted that the Claimant was a perennial absentee and that it had issued several warning letters to him on the issue. It is further the Respondent's submission that it did investigate the allegation of the accident and found the same to be baseless and that the reports as presented did not indicate that the Claimant was involved in an accident as alleged.

21. The Respondent further submitted that it did request for a detailed medical report from Doctor Frank Njenga who diagnosed that the Claimant was being treated for seizure disorder, anaemia and alcoholism as shown in document 32 of the Respondent's list. It further contends that at this point it had already summoned the Claimant for a disciplinary meeting to give reasons why he ought not to be dismissed on grounds of desertion.

22. The Respondent further contends that at the said meeting, the Claimant failed to adduce evidence by way of medical reports to support his assertion of being unwell and as such the Respondent proceeded to dismiss him in line with the provisions of Section 17 of the Employment Act, Cap 226 Laws of Kenya and further in accordance with its Terms and Conditions of Service, 2003 and the Code of Conduct for its employees.

23. It is the Respondent's further submission that it did have a valid reason to terminate the Claimant's services and in doing so it did fairly despite the fact that the Employment Act, Cap 226 did not afford an employee the right to fair hearings as is now provided under the Employment Act, 2007.

24. It is contended that the Claimant was given a fair hearing as per the law and existing framework at the time of termination. For emphasis the Respondent relied on the decision in the case of **Anthony Mkala Chitavi Vs Malindi Water & Sewerage Company Limited (2013) eKLR** where it was held:-

“An employer was free generally to dismiss for bad reason or a good reason but on notice or payment in lieu of notice. The employer could even dismiss for no reason at all. There is no obligation to notify or listen to any representations by the employee.”

25. The Respondent further submitted that the Claimant is not entitled to the reliefs as sought in his Memorandum of Claim having paid all his terminal dues totalling to Kshs. 497,568/= which amount was duly paid on 19/03/2004.

26. The Respondent further contends that the Claimant did receive the said sums of money and is therefore not entitled to the reliefs sought in his memorandum of Claim.

27. To fortify this argument the Respondent relied on the provisions of Section 5 (3) of the Employment Act Cap 226 and the authority of **Mary Wakhabubi Wafula Vs British Airways PLC (2015) eKLR** for emphasis.

28. In conclusion, the Respondent urged this Honourable Court to dismiss the Claimant's Claim with costs to the Respondent.

29. I have examined all the evidence and submissions of the Parties. The Claimant contends that he was terminated after an accident and had been in hospital despite the Respondent insisting that he was guilty of desertion.

30. The Claimant having been terminated on 24.2.2004, the cause of action is determinable under the repealed Trade Disputes Act Cap 234 Laws of Kenya, which did not make it mandatory for the employee to assign any reasons for a termination so long as adequate notice was issued.

31. In the Claimant's case, the Respondent however terminated him after issuing him with a letter of show cause on 29.1.2004. The Claimant produced documents to show that on 12.2.1998, he had been issued with a letter to explain his absence from duty from 10th to 13th February 1998.

32. The Claimant had been involved in an accident and reported to the police on 4/2/2005 and was sent to hospital on 21.3.2001. There is also a police abstract dated 6.4.2005 which indicate that the Claimant was involved in an accident on 8/3/2001 along Eastleigh 1st Avenue at around 7.45 hours in a GK land rover. This was pending investigations.

33. The Claimant also chose to rely on a medical report dated 10/8/2005, which was signed by Dr. Kiama Wangai, which show that the Claimant was involved in an accident on 8/3/2001 and suffered fractures and other injuries but had recovered significantly from the injuries.

34. Indeed these documents point to injuries occasioned to the Claimant in 2001 and which the Respondent were aware of the same. A report from the hospital where he was treated dated 30/5/2002 indicated that in 2001 June he was diagnosed with malaria, typhoid and seizure disorder and hypertension. The report indicated that he was walking with a limp and had a chronically increased blood pressure and was not able to perform heavy duties that involve his spine.

35. He therefore needed a follow up in an Orthopaedic Clinic and also by a Clinician for the hypertension. The Claimant continued being unwell as per documents of 2003.

36. On 29.1.2004, he was issued with a show cause letter indicating he had deserted duty on 12.1.2004 and was expected at the office on 2.2.2004 at 8 am. It appears the Claimant did not attend work and was consequently summarily dismissed on 4/2/2004.

37. There is no indication he responded to the letter of 29.1.2004.

38. However, Appendix at page 34 of Respondent's documents is a letter from Dr. Njenga to Dr. Mathenge on the Claimant indicating that he had been in hospital from 9th December 2003 to 23rd December 2003 under his care and that he had also seen him on 10th January 2004 and treated him of seizure disorder, anaemia and alcoholism.

39. This is an indication that at the time Claimant was being dismissed on 4/2/2004, the Respondent were aware that the Claimant was indeed a sick man and had been in and out of hospital and should have been treated as a sick man by the Respondent by invoking the process of dealing with sickness and not as an abscondee.

40. In the circumstances, the Respondent should either have terminated him or retired him on medical grounds but summary dismissal was not the ideal solution in the circumstances.

41. The Respondent Manual Clause 10(II) provides as follows:-

“Summary dismissal

An employee who is found guilty committing a grave offence or gross misconduct, and due process of the proceedings has been made in terms of the provisions of this code, may be liable to summary dismissal”.

42. There is no indication that the Claimant had committed a grave offence. He had also not been subjected to due process as per this Clause. He was never invited to any disciplinary hearing and the decision to dismiss him was made before he was invited for any disciplinary hearing.

43. I therefore find the summary dismissal was not fair and justified. I find for the Claimant and I award him as follows:-

1. 1 Months’ salary in lieu of notice = 37,006 as per the review of salaries of 29/1/2002.

2. 6 months’ salary as compensation for the and unfair dismissal = 10 x 37,006 = 370,060/=

Total = 407,066/=

3. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this Judgement.

Dated and delivered in open Court this 17th day of October, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wanjihia for Respondent – Present

Mutito holding brief Ms. Kalwa for Claimant