



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1124 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 14th March, 2018)

JEREMIAH N. MUKONO.....CLAIMANT

VERSUS

MAREBA ENTERPRISES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed suit on 9.7.2014, through the firm of J.A. Makau seeking payment of salary arrears and terminal benefits arising out of an employment relationship entered into in November 1982.
2. The Claimant avers that he was employed in the Respondent's department of accounts earning a salary of Shs. 28,000/=. That the Claimant had not been issued with an employment letter but was issued with a work Identity Card.
3. He avers that he worked continuously, diligently and with total dedication until 9.2.2012, when he was called to the General Manager's office and informed that his services had been terminated indefinitely to which the Claimant wrote a letter on 10.2.2012 raising the issue. This letter was not responded to prompting him to write other letters to the Chairman of the board dated 12th and 19th March, 2012 seeking clarification and audience.
4. It is his contention that the Respondent thereafter resorted to acts of frustration by causing his arrest and prosecution by the police and on 2.4.2012, the Claimant was asked to report back to work without any consultations, orientation or training and without due regard to his experience and skills was transferred to the stores department as a result of which he resigned on 10.4.2012.
5. That the Respondent admitted in a letter dated 31.12.2005 to being indebted to the Claimant to the tune of Shs. 1,008,673.36.00 being salary in lieu of notice, severance pay, leave days, and salary arrears which are yet to be paid. He avers that he had not been paid arrears for many years and he seeks for the entire claim to be allowed.
6. The Respondent filed a Memorandum of Response through the firm of Hayanga and Company admitting the employment relationship and that he served them until he attained retirement age of 55 years. They aver that the Claimant was paid his benefit from NSSF since he had been enrolled as a member.
7. That a under the terms of the employment contract either party could terminate services by issuing one month's notice or payment in lieu thereof. They contend that by a letter dated 10.4.2012, the Claimant voluntarily tendered his resignation which was to take effect immediately and was not terminated as alleged.
8. The Respondent contends that prior to the resignation and during his tenure as the Account's clerk, the Claimant deducted NSSF contribution of other employees but did not remit the same. Further that a sum of shs. 42,000/= from the Respondent's bank account which sum was lost/stolen while in his custody was not reported by the Claimant to the Police station. That prior to this, factory equipment was lost which incident was reported to the Police who recommended several workers including the Claimant be sent on leave or suspension.
9. That the Claimant was recalled back to duty on 2.4.2012, on condition that he submits to ongoing investigations, and abide by security measures and other structures put in place in view of combating theft and loss of property.
10. The Respondent aver that at the time of suspension, they had embarked on computerizing its accounts operations and since the Claimant was not computer literate, he was redeployed to another department within the Respondent employment.
11. It is the Respondent's contention as at the time of the Claimant's termination he was paid all his salary arrears that were due to him and as such do not owe him any of the sums pleaded in the Memorandum of Claim. They pray for the Claim to be dismissed with costs.

Evidence

12. The Claimant led evidence according his pleadings whereas the Respondent did not call any witnesses.

Submissions

13. It is submitted on behalf of the Claimant that his termination was unfair. They refer to the case of **Bamburi Cement Limited Vs William Kilonzi (2016) eKLR** where in determining whether an employee was terminated fairly, it was held:

“Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires assessment of the context of the alleged misconduct. More specifically the test is whether the employees dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee’s obligations to his or her employer.”

14. They also cite the case of **Principal and BOG Machakos Teachers College Vs Wambua Muange (2016) eKLR** where it was held:

“A wrongful dismissal occurs when an employer dismisses an employee in a way that is in breach of an employee’s contract of employment. Most commonly this arises when the employer dismisses the employee summarily (i.e. without any notice at all) or with short notice, and has no sufficient justification for doing so. However, there may also be a wrongful dismissal in other situations for example if the employer terminates the employment without following procedure prescribed by contract. Further if the employee resigns in response to some repudiatory⁶ breach of contract by the employer that will give rise to a claim which is in effect for wrongful dismissal.”

15. That in the instant case the Claimant was called to the General Manager’s office and told that his services had been terminated. No notice was issued; no cause was shown as to why his employment was terminated and a such the termination was wrongful and should therefore be compensated as prayed for in the claim.

16. The respondent’s counsel submits that the Claimant was initially sent on compulsory leave owing to incidences of theft after recommendations by the police. That the Claimant was recalled back to work but owing to his illiteracy in computers he was redeployed to the stores department. That the Respondent was served with a resignation letter shortly thereafter and at no point was the Claimant dismissed without being given an opportunity to be heard. It is submitted that the Claim should be dismissed as a result.

17. It is also submitted that this is not a redundancy and severance pay is not payable.

18. As to unpaid salary arrears, Counsel submits that according to its Financial Statements attached to their Response, unpaid arrears as at 2010 amounted Shs. 212,773 and as such the claimed amount of shs. 539,650 has not been proved and should not be allowed.

19. On Leave and travelling allowance it is submitted that the Claimant did not establish how he arrived at the claimed figures. That he did not specify the number of days per year or the days carried over entitling his allowance. The claim of Shs. 320,978.00 was not established as no document was placed before the Court to validate the claim as such the same should be disallowed.

20. As to salary in lieu of notice, it is submitted that the Claimant resigned with effect from 10.4.2012 and as such the Respondent should not be condemned to pay the same.

21. The Claim for outstanding leave, the Respondent submits that the same is time barred and should be disallowed. They cite the case of **Albert Ouma Akeyo Vs Maguna Andu Self Selection Store Limited (2013) eKLR** where it was held:

“The Court would like to observe that leave is a fundamental labour right protected by the Constitution, Employment Act and relevant international conventions... The Court however discourages practice by most employees who sit back and watch their rights at work being violated only to re awaken them when their services are terminated”.

22. I have examined the evidence and submissions of the parties. I note that the Claimant worked for the Respondent from 1982. On 10.4.2012, he resigned from work. He averred that he resigned due to frustrations by the Respondent. I looked at the letter of resignation by the Claimant and the Claimant indeed stated he was resigning because of his advanced health and deteriorating health.

23. The Claimant submitted that he was forced to resign but there is no indication that he was actually forced out of work. Having found that he resigned, the claim for unfair termination cannot stand.

24. In the same vein, the prayer for severance pay cannot stand because this was not a redundancy issue.

25. The Respondent have conceded owing the Claimant salary arrears of Kshs.313,198/=(as per Appendix G). In this regard I enter judgement for the Claimant for this amount of Kshs.313,198/=.

26. On termination dues, the Claimant having been a member and contributor of NSSF, service pay is also not payable.

27. On the prayer for travelling allowance, the Claimant has not demonstrated how it accrued but as per Appendix H the Respondent had

admitted owing him this amount of Kshs.92,400/= which I award.

28. The Claimant prayed for accrued leave for 136 days. I will award him outstanding leave for this amount being Kshs.146,461.12 as per Appendix H.

29. In total I award the Claimant as follow:-

1) Salary arrears – Kshs.313,198/=

2) Leave traveling allowance – Kshs.92,400/=

3) Outstanding leave days – Kshs.146,416.12

Total Kshs.552,014.12

4) The Respondents will also pay costs of this suit.

Dated and delivered in open Court this 14th day of March, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mulindi holding brief for Khayesi for Respondent – Present

Mutinda for Claimant – Present