



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 795 OF 2010

(Before Hon. Justice Mathews N. Nduma)

TOM MABYA LUSENO.....CLAIMANT

VERSUS

MARA WEST CAMP.....RESPONDENT

J U D G E M E N T

1. The suit commenced vide a statement of claim filed on 14th July, 2010. The Claimant seeks reinstatement to his job and in the alternative compensation for wrongful and unlawful termination of employment.

2. The Claimant further seeks terminal benefits to wit –

- (i) One month salary in lieu of notice 27,625.
- (ii) Payment in lieu of leave days not taken 30,000.
- (iii) Payment in lieu of off days not taken 28,750.
- (iv) Salary for 8 days worked in November 2009.

3. The suit is opposed vide a statement of defence filed on 26th August, 2010.

Facts of the Case

4. The Claimant was employed by the Respondent as a resident manager on 26th October, 2008 at a basic salary of Kshs.25,000 per month.

5. The Claimant worked diligently and has a clean record until the 8th November, 2009 when the Respondent summarily dismissed the Claimant from work.

6. In terms of the letter of appointment, the Claimant was entitled to 26 working days, annual leave.

7. At the time of termination the Claimant earned a gross salary of Kshs.32,500 as per the payslips produced before court for the month of October, 2009.

8. The Respondent Director Mr. Andrew also gave the Claimant two different letters dated 8th November, 2009. The first one titled “**Letter of termination**” did not give reasons for termination and offered to pay the Claimant terminal benefits outlined as –

- (a) 23 off days in the sum of Kshs.28,750
- (b) Payment in lieu of 24 leave days in the sum of Ksh.30,000 and
- (c) November wages (3 days) Kshs.3,750.

9. The offer was made in full and final settlement of the claim.

10. The second letter of the same date is titled “**Summary Dismissal**” and outlined three reasons for the dismissal as follows –

- (a) Taking alcohol during working hours contrary to company rules.
- (b) Using abusive language and behaving in a manner insulting to the employer.
- (c) Threatening other employees.

The employer did not offer any terminal benefits in this letter.

11. The Claimant testified under oath. The Claimant told the court that on 8th November, 2009, he received the first letter of termination and was to be paid terminal benefits in full and final settlement. The payment was not done and so the Claimant refused to sign the letter.

12. The Claimant denied having received the letter of summary dismissal.

13. The Claimant states that the letter of termination gave no reason for that and was actuated by malice. The Claimant states that he suffered loss and damage. He received the letter on 8th November, 2009 and the termination was back dated to 3rd November, 2009.

14. The Claimant said that he has since been employed and does not seek reinstatement.

15. The Claimant prays for the reliefs set out in the statement of claim.

Defence

16. In the statement of defence filed on 24th August, 2010, the Respondent admits the particulars of employment of the Claimant. The Respondent however avers that the Claimant was summarily dismissed for using abusive language to his employer and supervisors, taking alcohol during working hours at the resident camp, causing actual bodily harm to other employees and use of threats. That the claimant is being sought by police for criminal prosecution.

17. That these acts, amount to gross misconduct hence the summary dismissal was for valid reasons.

18. That having been summarily dismissed, the Claimant is not entitled to salary in lieu of notice.

19. That the Claimant declined to receive the terminal benefits offered to him at the time of termination and he is estopped from claiming the same.

20. The Respondent prays that the suit be dismissed.

Failure to Participate in the Hearing

21. The Respondent caused the suit to be adjourned on several occasions, and the court declined to grant the Respondent further adjournment in its ruling delivered on 4th August, 2007.

22. The suit proceeded without any defence since the averments in the statement of defence remained just that and have no probative value.

Determination

23. The evidence by the Claimant regarding his employment, unlawful termination and failure by the Respondent to pay his terminal benefits remained unrebutted. Furthermore the Respondent admits having offered to pay the Claimant terminal benefits set out in the letter of termination dated 8th November, 2009 and purports to rely erroneously on the doctrine of estoppel, to bar the claimant from asserting his right to those earned benefits in this suit.

24. The court finds that the Claimant has proved on a balance of probabilities that he had by a letter dated 8th November, 2009, his employment terminated by the Respondent without being given any valid reason for the termination and without having been given a notice to show cause or opportunity to explain why his employment should not be terminated in violation of sections 41, 43 and 45 of the Employment Act, 2007.

25. Accordingly, the court grants the Claimant the terminal benefits set out in the statement of claim including payment in lieu of leave days not taken, off days not taken, and eight (8) days arrear salary for the month of November.

26. The Claimant is also awarded payment in lieu of notice. The total award of terminal benefits awarded is Kshs.94,875.

Compensation

27. Having found that the termination of employment of the Claimant was for no valid reason and did not follow a fair procedure, the termination was wrongful and unfair and the claimant is entitled to compensation in terms of section 49(1)(c) of the Employment Act, 2007.

28. In terms of sub-section 49 (4), the court takes into account that the Claimant did not contribute to the termination, having served the Respondent diligently, until the employment was terminated with no reason attached. The Claimant wished to continue working and had immediately sought reinstatement but this suit was delayed for many years and on many times, the delay was occasioned by conduct of the Respondent.

29. The Respondent admitted that it owed the Claimant salary, leave pay, pay for off days but did not pay the Claimant upon termination. This was an act of malice, and an aggravating circumstance. The Claimant suffered loss and damage. As at the time of hearing, the Claimant had obtained alternative job, which is a mitigating factor.

30. Considering similar cases by this court in; **ELRC Cause No.1725 of 2011, Kenneth Onyango v Grofin Services (pty) Ltd** where the Claimant, a County Director, had diligently served the Respondent for a period of six (6) years and was awarded by the court equivalent for five (5) months salary compensation for wrongful termination of employment.

31. In **E & LRC, Cause No. 969 of 2013, Dennis Kiarie**, a product designer who had served the Respondent for a period of eight (8) months, was awarded by the court equivalent of three (3) months salary as compensation for wrongful termination.

32. In the present case, the Claimant had served the Respondent diligently for a period of over one year like in the two other cases, the Claimant did not contribute to the termination and suffered loss and damage.

33. As the Court of Appeal stated in **Civil Appeal No. 79 of 2012, Peter M. Kariuki v Attorney General** at page 43 –

“It bears repeating that assessment of amount of damages is matter for the discretion of Trial Judge, which must be exercised judiciously and with regard to the general condition prevailing in the Country and to prior relevant decisions.”

34. The cases cited by the court are quite recent and the Conditions prevailing in the Country have not changed much over this period.

35. Taking into account all the factors set out herein, the court awards the claimant equivalent of four (4) months salary in compensation in the sum of Kshs.130,000 (32,500 x 4).

36. In the final analysis judgment is entered in favour of the Claimant as against the Respondent as follows –

(a) Compensation (4) months Kshs.130,000.

(b) In lieu of notice Kshs. 32,500 (per last pay slip).

(c) Annual leave Kshs. 30,000.

(d) Off days Kshs. 28,750.

(e) 8 days arrear salary Kshs. 8,500.

Total award Kshs.229,750.

(f) The award is payable with interest at court rates from date of filing suit till payment in full, except compensation in (a) above which is payable from the date of this judgment.

(g) Respondent to pay costs of the suit.

Dated and Signed in Kisumu this 14th day of February, 2018

MATHEWS N. NDUMA

JUDGE

Delivered and signed in Nairobi this 2nd day of March, 2018

MAUREEN ONYANGO

JUDGE

Appearances

M/s. J. A. Guserwa & Co. Advocates for Claimant

Mr. Nyandieka & Co. Advocates for Respondent

Anne Njung'e – Court Clerk