



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1709 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 27th April, 2018)

JOSEPH APINDI OCHIENG.....CLAIMANT

VERSUS

KENYA COMMERCIAL BANK FOOTBALL CLUB.....RESPONDENT

JUDGEMENT

1. The Claimant filed suit through the firm of Mulanya & Maondo Advocates claiming damages for unfair/unlawful termination and non-payment of terminal dues. He avers that he was employed by the Respondent as a professional football player on 3rd January 2011 and served them diligently and competently up to December 2012 when his services were unfairly and unlawfully terminated.
2. He further avers that in the month of December 2012, without any notice, the Respondent proceeded to terminate his services in clear breach of the employment contract and provisions of the Employment Act 2007. He avers that at the time of the said termination he had been injured and needed the assistance of the Respondent to get better medical treatment.
3. He contends that on 24th June, 2012 while playing a friendly match sanctioned by the team coach, he sustained an injury which occasioned him not to play and as a result, his contract was unlawfully terminated by the Respondents in the month of December 2012.
4. The Claimant further avers that the Respondent had a contractual obligation to offer him medical treatment for any injuries sustained during the performance of the contract, which they refused and/or ignored to offer and instead terminated his employment contract unfairly without notice and without paying his terminal dues.
5. The Claimant states that he is entitled to be compensated damages of Kshs. 5,000,000 for reasons that as a footballer, he has lost an opportunity to earn an income and develop his career as a professional football player due to the injury he sustained while on duty and in the cause of employment with the Respondent.
6. The Respondents filed a reply to the claim where they deny that the Claimant was their employee and put the Claimant to strict proof. They also deny each and every statement of allegation contained in the Memorandum of Claim and aver that the Claimant's services were lawfully terminated in accordance with the contract and thus the Claimant was not entitled to any prayers claimed or at all.
7. They contend that all his entitlement under contract were paid to him upon termination of the contract and denies that demand letter and notice of intention to sue were ever issued.
8. In his submissions, the Claimant submit that the Respondents on their part admitted that the Claimant was their player and employee from 3rd January 2011 till December 2012 when his contract lapsed as seen in paragraph 7 of their response and defense to statement of claim.
9. He also submits that although the Respondents are trying to introduce a second contract, it should be noted that one cannot have 2 contracts in force for the same subject. He avers that the alleged second contract which is disputed by him does not in any of its clause invalidate the first contract dated 3rd January 2011.
10. The Claimant avers that at the time of his termination, he was injured and instead of treating him, the Respondents decided to terminate his contract by invoking the provisions of clause 2.1 (b). He submits that the said termination was equally not lawful and fair as he was to be given 30 days' notice as provided for in the contract. He avers that having realized that they acted unlawful and unfairly to him, the Respondent went ahead and introduced a new contract so that it could be deemed that he was not terminated but instead his contract lapsed,

which is in contrast to their pleadings.

11. The Respondent submitted that in July 2011, after the expiry of the initial contract and just before the existing contract was renewed, the Kenya Premier league (KPL) introduced a standard contract to be signed by all players and their respective football clubs. The standard contract was to ensure that its terms of engagement with the players were the same for all football clubs in the Kenya Premier League. That the parties therefore duly executed a new contract by the Kenya Premier League. They aver that the Claimant served the Club until the expiry of his Contract in December 2012 when his engagement with the respondent came to an end.

12. The Respondent further state that while the Claimant was playing a friendly match, he sustained an injury that was not a fresh one as he had sustained it while playing for other football clubs before joining the Respondent.

13. They aver that the Claimant was not terminated as he had claimed but his contract had lapsed and that the Claimant had lawfully and willingly entered a contract with the Respondent in the year 2009 for provision of football playing services for a period of three (3) years. The contract was for the definite period from June 2009 to the year July 2011.

14. They submit that the Claimant had failed to prove his case for breach of contract and damages against the Respondent on the required threshold and as such the Claim before the Court is baseless and unsubstantiated and should be dismissed.

15. I have examined evidence and submissions on record from both parties. The issues for determination are as follows:-

1. Whether the Claimant was an employee of the Respondent.

2. If so what were the terms of engagement between Claimant and Respondents.

3. If there was a contract between claimant and Respondent how was the contract terminated.

4. What remedies do I grant in the circumstances.

16. On the 1st issue, I note that the Claimant entered a contract with Kenya Commercial Bank Football Club on 3.1.2011 as per Appendix 1 of the Claimant's documents. This contract was to last for 36 months and could be terminated by either party giving a one months' notice or could be terminated on medical grounds upon confirmation by the club's doctor.

17. At paragraph 7 of the Respondent's Reply to the claim, the Respondents aver that they terminated the Claimant's services lawfully and as per the contract and therefore their denial of having entered into a contract with the Claimant as per their paragraph 3 of the Defence is baseless.

18. On the 2nd issue, the contract of employment stated that it was to be in force for 36 months and this implies that it was to terminate on 2.1.2014. The Respondent produced yet another contract where duration is 17 months with effect from 1st July 2011 and end in November 2012.

19. The Claimant denies signing this contract and states that he did not know about it. In view of the Claimant denying signing this contract exhibited by the Respondent, the onus of proving that indeed the Claimant signed the contract rests upon the Respondent, which they did not do. They have averred that they gave a notice to terminate this contract but the notice was also not exhibited in Court. The new contract also never nullified the 1st contract.

20. It is therefore my finding that the contract in existence that was guiding the relationship between Claimant and Respondent is Appendix 1. This contract was to be terminated by either party upon giving 1 months notice. The Respondent avers that the contract lapsed but I do not find this to be the correct position.

21. I find that the contract had not expired and the Respondent terminated it by stopping salary payments to the Claimant in January 2013 without any notice. I therefore find the termination of the contract was unfair and unjustified.

22. The Claimant avers that he was injured while serving this contract and that the Respondent failed to treat him. The Respondent called one witness a medical doctor who confirmed he examined the Claimant and found that he suffered a serious knee injury and so he could not play football.

23. From the foregoing, I find that Claimant was unfairly terminated by Respondent who also failed to accord him treatment after being injured while the contract was still subsisting. I therefore find for Claimant and award him as follows:-

1. 1 months salary in lieu of notice = 25,000/=.

2. Damages for injuries suffered and resultant loss of amenities = 2 million.

3. Compensation for unfair/unlawful termination payable at 12 months salary = 25,000 x 12 = 300,000/=.

Total 2,325,000/=

4. Plus costs and interest at Court rates with effect from the date of this judgment.

Dated and delivered in open Court this 27th day of April, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Nyabenge for Respondent – Present

Chabula holding brief for Mulanya for Claimant