



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI

CAUSE NUMBER 1165 OF 2014

BARNES MWEMA.....CLAIMANT

VERSUS

KENPOLY LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant pleaded that he was employed by the respondent initially as a casual worker but later promoted to the position of Human Resources Personnel. On or about 31st August, 2007 the respondent through its managing director Ramesh Patel sent him on compulsory unpaid leave on the allegations that he had signed and rubberstamped court summons and documents on behalf of the company without informing the management.

2. The claimant further averred that he was never made aware of any charges and given opportunity to defend himself before decision to send him on compulsory leave was made. He further stated that Mr Ramesh gave him Kshs 20,000/= allegedly as advance for leave which amount was deducted from his September payslip. The claimant further pleaded that at the time of being sent on compulsory leave he was earning Kshs 43,500.40 per month.

3. According to the claimant up to January, 2012 he occasionally met Mr Ramesh Patel who maintained he was still on suspension. He therefore contended that he was still a legitimate employee of the respondent.

4. The respondent on its part pleaded that the claimant was a former employee of the respondent. The respondent further conceded that it sent the claimant on compulsory leave on grounds of gross acts of omission in handling his duties in that the claimant received court summons but never notified management for action.

5. According to the respondent the suspension was not indefinite. The respondent further avers that the claimant was duly paid his dues totaling to Kshs 716,278 which comprised of leave days, advances and service pay. The respondent further averred that the claimant's service was terminated on 2nd November, 2007 hence the claimant's averments were an after thought.

6. In his oral evidence the claimant further stated that he joined the respondent in 1977 as an unskilled worker and later became a human resource officer. On 31st August, 2007 he was issued with a letter of compulsory leave. The leave has no duration and that he was never issued with any notice or warning prior to the leave. According to him, he was paid Kshs 20,000/= and told it was on account of leave. He further stated that he was accused of receiving summons and stamping without authority. It was further his evidence that he never received any termination letter. He denied receiving the termination letter attached to the memorandum of response.

7. In cross-examination he stated that he knew one Benson Mutua as an employee of the respondent and further that he was the only person called Barnes Mwema in the organization. He denied swearing the affidavit found at page 17 of the respondent's bundle of documents where he purportedly deposed to receiving summons on 3rd August, 2006 but failed to pass them over to his boss Mr Ramesh Patel and that he kept the summons and plaint in his drawer and forgot. He stated that he signed the verifying affidavit in support of the claim but denied signing supporting affidavits at page 17 of respondent bundle of documents. The claimant denied knowledge of the payment vouchers and denied being paid any amount except Kshs 20,000/=.

8. The respondent's witness Mr Wanjala informed the court he was working for the respondent as Human Resource manager and that he got employed in April, 2012. According to him the claimant swore the supporting affidavit. He further stated that the claimant was asked and collected his terminal dues totaling to Kshs 690,670/=. It was his evidence that from 2007 the claimant next communicated in 2014 when the respondent received a demand letter. In cross-examination he stated that the claimant's suspension letter did not indicate the specific court matter and the response to the demand letter did not mention any payment. He further stated that the termination letter was collected by the claimant when he came for his dues.

9. The issue in this matter seems to be whether the claimant's service was properly terminated. That is to say, whether there was a valid reason for terminating his services and whether in doing so proper procedure was followed. Concerning reason for termination, failure to bring to the attention of the respondent a matter in court leading to default judgement and eventual execution process is gross negligence hence a valid reason for termination of service.

10. The claimant as a Human Resource Officer was the person tasked with handling personnel matters. He admitted knowledge of the plaintiff in the civil claim which gave rise to the execution process. He stated that the plaintiff was an employee of the respondent. The claimant did not deny the authenticity of the court papers. All he said was that he never signed the affidavit in support of the application.

11. However, this did not negate the existence of the civil claim. The court may not be an expert in handwriting but the similarity of the signature on the verifying affidavit and affidavit in support of the application in the civil claim are overwhelming. It is the court's view therefore that there existed a valid reason for terminating the claimant's service.

12. Concerning procedure followed there was no evidence on record that the claimant was taken through a disciplinary hearing a prescribed under the Employment Act. There is no evidence of notice to show cause. All the court has on record is a letter sending the claimant on compulsory leave starting from 1st September, 2007 until the court matter was resolved. An employer may have a valid and justifiable reason for terminating an employee's services but if due process as prescribed in the Employment Act is not followed, the court will return a verdict of unfair termination and award appropriate compensation. This is what is bound to happen in this particular case.

13. Concerning the termination of claimant's service, the respondent purported to have done so on 2nd November, 2007 through a letter. However, there was no evidence that the claimant ever received the letter since the postal address used was the same as the respondent's. No explanation was given why the letter was not posted to claimant's last known personal address.

14. On the other hand, the claimant cannot remain on suspension indefinitely. The claimant was sent on compulsory leave on 31st August, 2007. He alleged in his pleading that he kept following up the issue with a Mr Ramesh Patel who kept telling him he was still on compulsory leave and would be called. According to him, it was in 2012 when he concluded that he had been dismissed after he was refused entry to respondent's premises. From 2007 to 2012 is a period of five years and no person can reasonably consider themselves an employee after being kept away that long more so when such period even exceeds the limitation period for bringing claims arising under the Act or contract of employment generally.

15. Leave is an annual event in a contract of employment cycle and no employee can be on leave indefinitely especially where such leave is involuntary and discipline related. An employee on involuntary leave for a period exceeding the annual leave prescribed by the Act without any communication from the employer ought to consider himself constructively dismissed and seek either reinstatement or compensation for unfair termination of service.

16. In the circumstances, the court will decline to declare that the claimant is still an employee of the respondent but come to a finding that his services were improperly terminated.

17. The court therefore awards the claimant in the circumstances the maximum twelve months wages as compensation for unfair termination of services. The claimant's salary at the time of termination was Kshs 43,500.40. The court therefore awards him Kshs 552,005/= as compensation for unfair termination of

services. This award shall be subject to statutory deductions and taxes. The claimant shall further have costs of the suit.

18. It is so ordered.

Dated at Nairobi on this 29th day of June, 2018

Abuodha J. N.

Judge

Delivered at Nairobi on this 29th day of June, 2018

Abuodha J. N.

Judge

In the presence of:-

..... **for the Claimant**

..... **for the Respondent**