



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 525 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 24th September, 2018)

FRED OKOTHO NDONJI.....CLAIMANT

VERSUS

CUMMINS COGENERATION KENYA LIMITED...RESPONDENT

JUDGEMENT

1. The Claimant herein filed his Memorandum of Claim on 1/4/2015 through the firm of Rachier & Amollo Advocates. The Claimant averred that he was employed on or about the 21st day of July 2013 by the Respondent as an on-site Project Supervisor as per his Appendix F00-1 the appointment letter. His gross salary was Kshs.600,000/= per annum payable monthly.
2. The duties and responsibilities of the Claimant were spelt out in the appointment letter but included but were not limited to supervision and co-ordination of civil, mechanical and electrical works, assisting the Project Manager on all construction works.
3. The Claimant was expected to be on a 6 months' probation period and thereafter be confirmed in employment.
4. The Claimant avers that he performed his duties diligently under the employment contract (Appendix F00-2. After the first review, the Project Manager advised the Claimant to improve on some aspects of his performance. The Respondent then extended the Claimant's probation period to enable the Claimant improve on his performance for a further 3 months. It is the Claimant's case that he worked on and off at the Marigat site.
5. He avers that while he worked there, he had to spend his night in some cottages known as Ronnella Cottages. He raised complaints with the Chief Executive Officer about the state of the Cottages but was ignored. However on 27th February 2014, he was bitten by a snake while asleep in the Cottages.
6. The Claimant did not have a medical cover at the time. He was rushed to the nearby Marigat District Hospital and thereafter to Kabarnet District Hospital where first aid was administered but there was no anti-venom treatment. The anti-venom treatment was finally administered on 28/2/2014 and he was finally discharged from hospital on 1.3.2014 with instructions to attend weekly check-ups. He still had pain and psychological disturbance at the time.
7. The Respondent finally provided a medical cover for Claimant and others after the snake bite incident.
8. The Claimant avers that it was a term of the contract that he was entitled to seven day paid sick leave and a further seven-day sick leave with half pay. However, despite the sickness, the Claimant aver that the Respondent expected him to report to his place of work immediately.
9. Despite the Claimant resuming his duties and dispensing with his responsibilities in his condition while undergoing medical treatment, the Respondent proceed to deduct his dues for the month of March allegedly for the days he did not work due to the illness contrary to the law and the contract of employment. (F00-3) are copies of his pay slips for February, March and April showing deductions for the month of March.
10. He avers that he worked for the entire month of March and was not afforded sick leave save for the minimum days he went for surgery and medical checkups. (F00-4) are copies of email correspondences by his supervisor stating that the Claimant worked during the month of March and was thus entitled to full pay.

11. The Claimant complained about the deductions in his salary as per the email correspondence F00-5.
12. The Respondent however failed to give any reason and/or explanation for the deductions.
13. The Claimant was again evaluated by his supervisor who was pleased with the Claimant's work but the Project Manager proceeded to amend the evaluation on what he deemed as appropriate (Appendix F00-6). The Technical Director even demanded to be included as a signatory to the Claimant's evaluation reports (Appendix F00-7).
14. The Claimant avers that the Technical Manager even started racially abusing him and on 8/8/2014, he unexpectedly terminated the Claimant's employment even after he had been reviewed for confirmation for employment by his immediate supervisor based on the Claimant's performance and improvements. The reason for the termination was that the Claimant was not able to perform his duties and failure on "performance improvement".
15. The Claimant's claim is for payment of Kshs.22,116 being illegally and unfairly withheld during the month of March and damages for breach of Claimant's right to fair labour practices and freedom from discrimination and damages for breach of Claimant's right to legitimate expectation. He also seeks costs and interest.
16. The Respondents were served with the claim and they filed a Response on 30.6.2015. The case was scheduled for hearing on 20th February 2018 when the Claimant testified.
17. The Respondent sought an adjournment and further hearing was scheduled for 21.5.2018 when the Respondent and his advocates failed to turn up and their case was ordered closed without having called a witness.
18. I have examined the evidence of the Claimant plus submissions filed. The Claimant was employed on 21.7.2013 and was to be on probation for 6 months. The 6 months' probation ended on 20/1/2014. The month of January 2014 passed without any communication from the Respondent. In July 2014, the Claimant was informed by the Respondent of their intention to extend his probationary period. In June 2014, the Claimant's supervisor had recommended that he be confirmed in employment.
19. The issue then is whether the letter of July 21st 2014 extending his probation period had any force.
20. Section 42(2) of the Employment Act 2007 states as follows:-

“A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee”.

21. The law is clear that an employee's probationary period cannot exceed 6 months. However, this can be extended for another 6 months with the agreement of the employee (emphasis is mine).
22. In the case of the Claimant, the initial 6 months period ended in January 2014. The Respondent chose not to communicate to the Claimant on his status at that point but waited another six months in July 2014 to communicate their intention to extend the probation period. This in my view was in bad test and without any agreement with the Claimant who by this time assumed and rightly so that the silence on the part of the Respondent meant confirmation in employment.
23. In **David Namu Kariuki vs Commission for the Implementation of the Constitution (2015) eKLR** Hon. J. Ndolo made this observation and made a finding that the Claimant was confirmed in his appointed upon expiry to the probation period set out in the letter of appointment. See also **Gichuki Kabukuru vs Postal Corporation of Kenya (2012) eKLR**.
24. I therefore find the Claimant became a permanent employee of the Respondent on 20/1/2014 after the probation period and they could not purportedly be deemed otherwise in July 2014 when the Respondent are purporting to extend the probation period.
25. In purporting to terminate the Claimant's employment under probation terms, the Respondent erred. The Respondent were expected to be guided by the provisions of Section 41 of Employment Act which envisages that the claimant should have been afforded a hearing and be allowed to call evidence and even cross examine the Respondent's witnesses if any who were to give any adverse evidence against him. This was never done.
26. It is therefore my finding that the Claimant's termination was effected without due process and without any valid reasons.
27. Section 45(2) of Employment Act 2007 states as follows:-

(2) “A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

28. The Respondent failed to call any evidence and so the Claimant's case remained uncontroverted. I therefore make a finding that the Claimant was unfairly and unlawfully terminated. I find for the Claimant and award him as follows:-

1. Payment of 1 month salary in lieu of notice = 50,000/=

2. Payment of Kshs.22,116/= deducted from Claimant's salary during the month of March 2014 when he was unwell.

3. Payment of 12 months salary as damages for unfair and unlawful termination = 12 x 50,000/= 600,000/=.

TOTAL = 672,116/=

4. 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 24th day of September, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Macharia holding brief for Wakwaya for Claimant – Present

Respondents – Absent