



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1514 OF 2010

PATRICK WANYONYI MUTALI CLAIMANT

v

KIMS HOLDINGS LIMITED RESPONDENT

JUDGMENT

1. The record in this Cause show lack of diligence and unpreparedness on the part of both parties at various times.
2. Patrick Wanyonyi Mutali (Claimant) instituted legal proceedings against Kims Holdings Ltd (Respondent) on 9 December 2010 alleging unfair termination of employment and breach of contract.
3. In its Memorandum of Reply, the Respondent contended that the Claimant voluntarily opted not to attend work after recuperating from injuries sustained during a robbery, and that there was no breach of contract.
4. On 25 May 2015, the Claimant filed an *Amended Memorandum of Claim* to include a cause of action for negligence and breach of statutory duty.
5. The Respondent filed an *Amended Memorandum of Reply* on 19 June 2015 and the Cause was heard on 14 March 2018 and on 12 June 2018.
6. The Claimant filed submissions on 3 August 2018 and the Respondent filed its submissions on 29 August 2018.
7. The Court has considered the pleadings, evidence and submissions and condensed the Issues for determination under the under listed subheadings.

Unfair termination of employment

8. The Respondent's Director maintained in his testimony that the Claimant asked for and was given sick leave of 2 months around 5 October 2009 after sustaining injuries during a robbery in the workplace.
9. According to the witness, the Claimant within a short time brought a demand letter from an advocate alleging unfair termination of employment.
10. On his side, the Claimant asserted that after about a month of sick leave he reported to work but was informed that his services were no longer required, and that he would be considered for re-engagement after fully recovering.
11. The Court has only the word of the Claimant as against the Respondent's director without much corroborative material.
12. However, in the usual course of employment, it is not probable that the Claimant would have rushed to seek legal assistance alleging unfair termination of employment if indeed the Respondent's director had acceded to his request for leave to go recuperate.
13. In this respect, and considering that the demand letter alleging unfair termination came so soon after the meeting between the Claimant and the Director, the Court is inclined to believe the version of the Claimant.
14. There being no evidence that notice of termination/*show cause notice* as envisaged by section 35 of the Employment Act, 2007 was given, the Court finds that there was unfair termination of employment.

Breach of contract/statute

Underpayments

15. The Claimant although pleading underpayments did not lay an evidential foundation to this head of claim.

Accrued leave

16. An employee is entitled to at least 21 days annual leave after every 12 months.

17. The Claimant pleaded that he had outstanding leave and leave travelling allowance for 2008 and 2009 which he computed as equivalent to Kshs 4,787/30 and Kshs 9,000/- respectively.

18. No evidential foundation for leave travelling allowance was disclosed, and the Court will only allow the head for accrued leave.

Medical costs

19. The Claimant was injured in the workplace.

20. In terms of the Employment (Medical Treatment) Rules, 1977, the Respondent should have been responsible for the medical expenses.

21. The Claimant admitted that the Respondent paid some parts of his medical bills. He also called a doctor to testify on his behalf, and a receipt for Kshs 6,000/- was produced.

22. He also produced copies of receipts from Kisembo Health Clinic and Kenyatta National Hospital totalling Kshs 26,580/-.

23. The Court finds he is entitled to reimbursement of the medical expenses.

Injuries in the workplace

24. The entity responsible at the first instance for assessment of compensation for injuries in the workplace is the Director of Occupational Health and Safety.

25. The Court therefore declines jurisdiction over this part of the cause of action.

Appropriate remedies

Certificate of Service

26. A certificate of service is a statutory right and the Respondent should issue one to the Claimant within 21 days.

Pay in lieu of notice

27. In terms of section 35(1) of the Employment Act, 2007, the Court finds that the Claimant is entitled to the equivalent of 1 month salary in lieu of notice.

Accrued leave

28. Court will allow the relief.

Medical costs

29. The Court will allow the relief.

Compensation

30. The Claimant served the Respondent for about 3 years and the Court is of the view that compensation equivalent to 3 months gross pay would be appropriate (Claimant testified that he was earning Kshs 5,500/-).

Conclusion and Orders

31. The Court finds and holds that the Claimant's employment was unfairly terminated and awards him

(a) Pay in lieu of notice Kshs 5,500/-

(b) Medical costs Kshs 26,580/-

(c) Accrued leave Kshs 4,787/-

(d) Compensation Kshs 16,500/-

TOTAL Kshs 53,367/-

32. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 30th day of October 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kiarie instructed by Nchogu, Omwanza & Nyasimi Advocates

For Respondent Mr. Gikaria instructed by Antony Gikaria & Co. Advocates

Court Assistant Lindsey