



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1016 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

JOHN MUTHENGI MUTHUL.....CLAIMANT

VERSUS

ADDED PERFORMANCE KENYA LIMITED...RESPONDENT

JUDGMENT

By memorandum of claim dated 4th July 2013 and filed on 4th July 2013, the claimant avers that he was dismissed from employment by the respondent without any lawful justification or excuse. He states the dismissal was verbal and was irregular and unlawful as he was not given an opportunity to defend himself, was not given notice, letter of dismissal, certificate of service or terminal dues. The claimant avers that he was dismissed on account of illness that he contracted in the course of employment.

The claimant seeks the following remedies –

- a) A declaration that the termination of his services was irregular, illegal and unlawful and an order that the claimant be paid his dues and compensation in the sum of Kshs.352,751/=.
- b) Costs of the claim and interest thereon and on (a) above at court rates from November 2013 until full and final satisfaction of the decree mad herein.
- c) Any other relief that the court may deem fit and just to grant.

The respondent filed a statement of defence dated 12th August 2013 which was amended by the amended statement of defence and counterclaim dated 21st February 2014 pursuant to leave obtained on 12th February 2014. In the amended defence and counterclaim, the respondent denies ever terminating the employment of the claimant as alleged in the claim. The respondent avers that the claimant absented himself from duty without reasonable cause, acted contrary in breach of terms of his employment contract, was insubordinate and failed to heed to discipline.

In the counterclaim, the respondent avers that due to the claimant's negligence and fraud it suffered loss of 148 NTO Added Performance Batteries during the period 1st January 2011 to 13th May 2012, which were under the claimant's care as the storekeeper at the respondents' company which loss amounts to a sum of Kshs.717,622. The respondent prays that the claimant's claim be dismissed and judgment be entered in favour of the respondent as prayed together with costs.

The claimant's evidence was taken on 13th July 2016 but the respondent opted to close its case without calling any witness on 16th April 2018. The parties thereafter filed and exchanged written submissions.

At the hearing, the claimant testified that he was employed by the respondent as storekeeper in August 1992 and worked until July 2012 when he went on annual leave. He reported back from leave on 14th August 2012 but was sickly. The respondent is a manufacturer of batteries and the claimant who worked in the store had been affected by battery acid.

The claimant testified that he submitted to the respondent hospital documents, which showed that he had high levels of lead in his body. He was told to go back home until he is recalled. The respondent paid him salary for August and September then made no further payment.

The claimant testified that in November the respondent called and told him he could not be given alternative work as recommended by the

doctor.

He testified that he had a clean record as he had no disciplinary issues. He denied that he absconded duty or that he stole or was responsible for loss of 148 batteries as alleged by the respondent.

Under cross-examination, the claimant testified that he worked under the supervision of Mr. Shiraz Raj and his cousin Sultan. He testified that he handed over his medical records to Mr. Shiraz and did not keep any copy. He testified that the doctor recommended that he be removed from the store or else he was going to die, that Mr. Shiraz told him there was no alternative job. The claimant testified that he worked for 22 years and his last salary was Kshs.15,337. He was a member of both NSSF and NHIF.

In the written submissions filed on behalf of the claimant, it is submitted that the claimant produced a payslip for the month of July 2012, his employment card and demand letter as evidence in support of his claim, that there was no evidence to prove the respondent's claim that the claimant absconded duty or caused loss of 148 batteries worth Kshs.712,622 counterclaimed by the respondent.

The claimant urged the court to enter judgment in his favour of the claimant and dismiss the counterclaim.

For the respondent it is submitted that the claimant admitted that he was a member of NSSF and is therefore not entitled to severance pay (sic). The respondent relied on the case of **LUCY NYANDIA MWANGI –V- MATHENGE AND MUCHEMI ADVOCATES (2013) eKLR**.

Determination

The claimant's evidence herein has not been rebutted by evidence of the respondent. Further, the respondent did not adduce any evidence in support of its counterclaim.

In the circumstances, the counterclaim is dismissed with costs as the claimant filed a response to the same and led evidence denying the same.

Since the claimant's evidence is not rebutted, I find that the termination of the claimant's employment was due to his illness and was unprocedural and unfair as the procedure set out in Section 41 and 43 of the Employment Act was not complied with. The only issue for determination is therefore whether the claimant is entitled to the remedies sought.

The claimant prayed for three months' salary in lieu of notice. He did not submit any evidence to support his claim for three months' notice.

I award him one month's salary in lieu of notice as provided under Section 35 of the Employment Act. I thus award his gross pay of Kshs.16,537 as reflected in payslip for August 2012 attached to respondent's list of documents filed on 13th October 2014.

The claimant's employment having been unfairly terminated and taking into account his long service of 22 years and the fact that he contracted an occupational disease in employment. I award him maximum compensation of Kshs.198,168.

In the final analysis, I make the following orders –

1. I find the termination of the claimant's employment unfair.
2. I award the claimant one month's salary in lieu of notice in the sum of Kshs.16,537.
3. I award the claimant compensation in the sum of Kshs.198,168.
4. The respondent's counterclaim is dismissed.
5. The respondent shall pay claimant's costs for both the claim and the counterclaim.
6. The decretal sum shall attract interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE