



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 100 OF 2014

[FORMERLY CMCC NO 2278 OF 2005]

ISAAC GACHOHO KANYI.....CLAIMANT

VERSUS

DEL MONTE (K) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim was originally filed in the Chief Magistrate’s Court at Nairobi as CMCC no 2278 of 2005. By an order made by **Aluoch J** on 31st March 2006 in Miscellaneous Civil Application No 240 of 2006, the matter was transferred to the Resident Magistrate’s Court in Thika where it was registered as Civil Suit No 441 of 2007.

2. By notice dated 29th August 2012, the injury related part of the claim was withdrawn. The Claimant subsequently filed Miscellaneous Civil Application No 19 of 2012 seeking to have the surviving part of the claim transferred to this Court. His application was granted by my sister, **Onyango J** on 23rd July 2013. The Claimant filed an amended Plaint on 17th September 2018.

3. The matter came up for hearing before me on 15th November 2018 during the Nairobi Station Service Week. The Claimant testified on his own behalf. The Respondent did not call any witness.

The Claimant’s Case

4. In his Plaint dated 3rd March 2005 and amended on 17th September 2018, the Claimant states that he was employed by the Respondent on 20th March 1996 in the position of Driver II. The Claimant further states that his employment was governed by his letter of employment dated 10th March 1996 and the Collective Bargaining Agreement (CBA) between the Respondent and Kenya Plantation and Agricultural Workers Union.

5. The Claimant pleads that owing to his medical condition, he was advised by the doctor to avoid contact with and exposure to hazardous chemicals. The Claimant states that the doctor’s advice necessitated that he be transferred from the Spray Department to another department.

6. The Respondent however refused to comply with the doctor’s advice and insisted that the Claimant continues working in the Spray Department or be dismissed. The Claimant could not continue working in the Spray Department and was therefore dismissed on 7th October 2004.

7. The Claimant avers that his dismissal was in breach of his terms and conditions of employment with the Respondent as well as employment law.

8. The Claimant therefore claims the following:

- a) Payment in lieu of notice (75 days).....Kshs. 33,150.00
- b) 12 months’ salary in compensation.....132,600.00
- c) Accumulated salary arrears.....19,433.52

d) Costs plus interest

The Respondent's Case

9. The Respondent did not respond to the Claimant's amended Plaintiff and in its Defence dated 8th April 2005, there is no disclosure as to the circumstances leading to the Claimant's dismissal from employment.

Findings and Determination

10. There are two (2) issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Dismissal

11. The Claimant was dismissed by Memo dated 7th October 2004 stating as follows:

“Sub: DISMISSAL

This is to inform you formally that you have been dismissed from employment of this Company with effect from 29th September 2004. This is in accordance with Section 18(a) of the Union Contract.

You will be paid all days worked plus any pro-rata leave due.

(Signed)

JK Munyiri”

12. The cause of action herein arose in 2004 before enactment of the Employment Act, 2007. The Claimant's employment was therefore governed by his contract of employment, the obtaining CBA and the rules of natural justice.

13. The Claimant produced medical reports issued from the Respondent's Dispensary on 15th February 2001 and 19th August 2004 confirming that he suffered from peptic ulcers necessitating his exemption from spray work. The Claimant's medical condition was further confirmed by radiological reports from Diagnostic Imaging Clinic.

14. In spite of the medical reports issued from the Respondent's own Dispensary, the Claimant was deployed to Spray Department by Memo dated 18th September 2004. This was clearly against medical advice.

15. The Claimant told the Court that he was unable to continue working in the Spray Department and was therefore dismissed. The Respondent did not contradict the Claimant's evidence and the Court had no reason to disbelieve him.

16. If it was not possible to deploy the Claimant away from the Spray Department, what the Respondent should have done was to retire him on medical grounds. Instead, the Respondent dismissed the Claimant without notice. This was in clear breach of the rules of natural justice and the Claimant is entitled to damages.

Remedies

17. In light of the foregoing findings, I award the Claimant Kshs. 200,000 being damages for unlawful dismissal. The other claims were not proved and are dismissed.

18. I therefore enter judgment in favour of the Claimant and against the Respondent in the sum of Kshs.200,000. This amount will attract interest at court rates from the date of delivery of this judgment until payment in full.

19. The Claimant will have the costs of the case.

20. It is so ordered.

DATED AND SIGNED AT MOMBASA THIS 17TH DAY OF DECEMBER 2018

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Mbenji h/b Mr. Ochieng for the Claimant

Mr. Magani for the Respondent