



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2231 OF 2014

Formerly HCCC No. 860 of 2006

(Before Hon. Lady Justice Maureen Onyango)

PETER EZEKIEL OWUOR.....CLAIMANT

VERSUS

DELMONTE KENYA LIMITED.....RESPONDENT

JUDGMENT

The Claimant filed this suit by way of a Plaint in the High Court at Nairobi on 9th August 2006 contending that the termination of his employment was wrongful and unlawful. The Claimant seeks the following reliefs:

- a) A declaration that the Plaintiff's termination was without lawful authority, irregular, procedural and null and void.
- b) A declaration that the Defendant is under a duty and liable to correctly calculate and pay to the Plaintiff all his salaries, allowances, employment benefits and terminal benefits up to 3rd March 2016 together with interest thereon.
- c) An order directing the Defendant to correctly calculate and pay to the Plaintiff compensation under the Workmen's Compensation Act (Cap 236) for the injuries sustained by the Plaintiff during the motorcycle accident on 15th July 2005.
- d) General damages for wrongful interference with the Plaintiff's employment progression an unlawful termination together with interest thereon.
- e) Any such other or further relief as this Honourable court may deem just to grant.
- f) Costs of this suit together with interest thereon.

The Defendant filed its Statement of Defence denying the allegations in the plaint.

Claimant's Case

The Claimant avers that he was employed by the Respondent, which was then known as Kenya Cannery Limited, vide a Letter of Appointment dated 21st December 1982 at a Supervisory Category Level.

The Claimant avers that on the 14th November 2005 the Respondent issued him with a letter informing him of his termination. The Claimant stated that at the date of termination, he was holding the position of foreman in the Culture Central Section.

The claimant avers he had a long service with the respondent which was characterised with good performance and he was never given any reasonable opportunity to be heard prior to his termination.

The Claimant further avers that on 15th July 2005, he was seriously injured in a motor cycle accident while on duty and the Respondent failed to compensate him for the said injuries. The Claimant particularised the particulars of malice as follows:

- a) Wrongfully unfairly unreasonably and falsely accusing the Plaintiff of making fake medical claim when the Claim made by the Plaintiff was actually genuine.
- b) Failure to conduct any proper investigation on the allegation made against the Plaintiff and failing to consider the Plaintiff's response of 25th October 2005, to the Defendant's show cause letter of 24th October, 2005.
- c) Making false accusation of fraud against the Claimant to justify summary dismissal so that the Claimant may lose his long service benefits with the Respondent.

During the hearing, the Claimant testified that he had worked for 23 years and at the time of termination his salary was Kshs.58,250. The Claimant further testified that he was issued with a show cause letter on 24th October 2005 which alleged that he had forged company documents, that he had cheated on medical claim betraying his authority and responsibility. The Claimant further testified that he was required to provide his response within 48 hours and did so response on 25th October 2005.

The Claimant further testified that Respondent's policy had five forms of termination which included normal termination, termination on poor performance, termination on medical grounds, disciplinary termination after 2 warning and dismissal. The Claimant testified that in all these cases there was an opportunity for an employee to appear before a panel but he never appeared before any panel.

In cross-examination, the Claimant testified that he had sustained injuries while on duty and that the documents proving the injuries had been given to his counsel but were not produced in Court. The Claimant further testified that he had the original termination letter dated 14th November 2005 but did not produce it.

Respondent's Case

The Respondent admits terminating the Claimant's employment but avers that the termination was not adverse and was in accordance with the law. The Respondent further states that the allegation that the Claimant was injured in a motorcycle accident is an afterthought and as such does not lie.

The Respondent states that the reasons for termination were contained in the termination letter and any other reasons not provided in the termination letter cannot lie and is intended to create a cause of action which does not exist.

RW1, **James Kimani**, the Respondent's Human Resource Officer testified that upon termination the Claimant was paid for the days worked, pro rata leave, 3 months lieu in notice, contributions, interest and pension. RW1 further testified that the Claimant did not collect the amount. RW1 testified that the Respondent is still willing to pay the Claimant.

In cross-examination, RW1 testified that neither the show cause letter nor the medical claim records were produced in Court. He further testified that he was not aware that the Claimant was injured in an accident and that the Report of injury was done by the employer but he did not have facts on how investigations were done.

In re-examination, RW1 clarified that the medical claim was investigated and an audit conducted. The Audit Report recommended the termination.

Claimant's Submissions

The Claimant submitted that the Respondent did not produce the Respondent's policy in Court which would inform the Court on the Respondent's policy on termination. The Claimant further submitted that he was terminated on grounds of misconduct but the provision of Sections 41(1) of the Employment Act 2007 were violated by the Respondent.

The Claimant further submitted that the termination letter did not make reference to notice to show cause but merely informed the Claimant that his services had been terminated. The Claimant therefore submitted that the Respondent had failed to adhere to the provisions of Sections 43 (1) 45 (1) and 45 (3) (b) of the Employment Act. Thus, his termination was unfair and the prayers sought be granted.

Respondent's Submissions

The Respondent submitted that in the Staff Policy produced in court provides at Clause 4(b) that an employee can be dismissed if he has exposed company personnel, property and money to serious damage or loss. The Claimant caused the company's money or property to be lost when the Claimant produced false claim and received reimbursement.

The Respondent submitted that the provisions of the Employment Act 2007 relied upon by the Claimant are inapplicable since the law does not apply retrospectively. The Respondent further submitted that the provisions of the Employment Act Cap 226 of were complied with.

On the terminal dues, the Respondent submitted that the Claimant was only entitled to the dues indicated in the termination letter which included the days worked, pro rata leave and three months' pay in lieu of notice.

Issues for determination

- a) Whether the Claimant's termination was unfair.

b) Whether the Claimant is entitled to the reliefs sought.

a) Whether the Claimant's termination was unfair.

It is undisputed that the Claimant was terminated from employment vide the termination letter dated the 14th November 2005 and the suit filed on 9th August 2006. This was before the enactment of the Employment Act, 2007. Therefore, as submitted by the Respondent the Employment Act, 2007 is not applicable due to the principle of retrospectivity as held by the Court of Appeal in **Kenya Ports Authority v Andrew Ochieng Odongo [2017] eKLR** which states thus:

*“It must be borne in mind as we consider these two questions that the suit giving rise to this appeal was instituted in 2006 before the coming into force of the Employment Act, 2007 and the Employment and Labour Relations Court Act, 2011 but the hearing and determination took place between 2012 and 2015. We are of the view therefore that the dispute was governed by the repealed Employment Act as the current labour laws cannot be applied retrospectively. We are guided in arriving at this by the Supreme Court decision in the case of **Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others** Civil Application No. 2 of 2011 in which the principle of retrospectivity of a statute was explained this way:*

“As for non-criminal legislation, the general rule is that all statutes, other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature.”

We find no express intention in the Employment Act, 2007 and the Employment and Labour Relations Court Act, 2011, for their retrospective application. As a matter of fact the Fifth Schedule paragraph 2 (4) of the Labour Relations Act expressly provides, inter alia that any trade dispute that arose before the commencement of the Act and any summary dismissal that took place before the commencement of the Act would be determined in accordance with the provisions of the repealed Trade Disputes Act.”

The Claimant avers that he was not given an opportunity to appear before a panel required under the Respondent's policy. The Respondent contends that the Claimant was terminated for having forged medical claim forms based on which he received a reimbursement. The RW1 testified that the Respondent conducted an audit which recommended the termination of the Claimant. The appropriate clause on the termination of the Claimant as provided in paragraph (b) of Termination/Dismissal clause in the Management Committee Procedures Manual which provides:

“Dismissal for Cause means the immediate dismissal of an employee for an act on his/her behalf that has exposed company personnel, property and money to serious danger, damage or loss.

To have cause for dismissal the company must determine that the employee has committed a serious offence e.g. civil conviction for a criminal offence involving a prison sentence, being evident to the Company as stealing; making fraudulent records; false statement; fighting with Company employees or causing bodily injury to another person within the Company without leave and for his/her own interest makes use of company property; insubordination or conduct which violates common decency and morality.”

From this Clause the Claimant was not expected to appear before a disciplinary panel since the offence committed was one that involved falsified documents under Clause (b) as opposed to a misconduct of a lesser degree or poor job performance which required the employee to defend themselves. All that was required in this case was for the company to determine that the employee had committed a serious offence. RW1 stated that an audit had been conducted. The Audit Report dated 26th October 2005 revealed that there had been fictitious claims which had been reimbursed to 11 employees. One of the fraudulent claims lists the Claimant as having a fictitious claim of Kshs.16,920. This was a sufficient reason for the Respondent to dismiss the Claimant.

The Employment Act Cap 226 did not afford an employee the right to a fair hearing as now provided under Employment Act. Therefore, by virtue of the provisions in the respondent's Management Committee Procedures Manual and the provisions of the now repealed legislation, the Claimant did not have an automatic right to appear before a disciplinary panel to respond to the issues raised. There was also no requirement that the reasons for termination be given to the Claimant. Reasons for termination were expected to be given to an employee in instances of redundancy under Section 16 A and to the labour officer upon dismissal Section 5 (4) (b) of the Employment Act Cap 226.

In **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR** Radido J. held:

“Section 41 of the Employment Act, 2007 has now made procedural fairness part of the employment contract in Kenya. Prior to the enactment of the Act, the right to a hearing was not part of the employment contract unless it was expressly incorporated into the contract by agreement/staff manuals or policies of the parties or through regulations for public entities.

An employer was free generally to dismiss for a bad reason or a good reason but on notice or payment in lieu of notice. The employer could even dismiss for no reason at all. There was no obligation to notify or listen to any representations by the employee.”

From the foregoing, the Claimant's termination was procedurally and fairly undertaken in compliance with the repealed statutes and the Respondent's Management Committee Procedures Manual as existed then.

b) Whether the Claimant is entitled to the reliefs sought.

The Claimant stated that he did not receive any terminal dues. However, the RW1 stated that the Respondent was willing to pay the required dues as stated in the terminal letter dated 14th November 2005. In the letter the Respondent stated that the Claimant would be paid:

- a) All days worked up to 16th November 2005.
- b) Pro-rata leave due.
- c) Three (3) months' salary payment in lieu of notice less any debt owing to the company.
- d) Your pension contribution and interest earned thereof.

Section 5 (3) of the Employment Act Cap 226 provided:

Where an employee is summarily dismissed for lawful cause, he shall be paid on dismissal all moneys, allowances and benefits due to him up to the date of his dismissal.

Since the Respondent indicated that it was willing to pay the Claimant but the Claimant is yet to collect his dues, judgment is entered for the claimant against the respondent in terms of the letter of termination.

The prayer for compensation in respect of the injuries accrued fails since no evidence was adduced by the Claimant to support this claim.

The prayer for general damages for wrongful interference and the payment of employment benefits from the Claimant's termination date also fail. In the Court of Appeal decision in *Mary Wakhabubi Wafula v British Airways PLC [2015] eKLR* the Court held:

"In realizing these caps this Court in the case of Rift Valley Textiles Ltd v. Edward Onyango Oganda (Nakuru) Civil Appeal No. 27 of 1992 (unreported) quoted, with approval, the holding in Cyrus Nyaga Kabute v. Kirinyaga County Council, Civil Appeal No. 29 of 1985 (unreported):

"The High Court in Wanjohi v Mitchell Cotts Kenya Ltd (2002) 2 KLR 462 similarly held that the general damages for wrongful dismissal is well settled, such that damages are limited to the amount that the employer would have been obliged to pay in accordance with the terms of the contract."

The question, therefore, before us is whether the remedies that are available in the Employment and Labour Relations Court Act, 2011, and the Employment Act, 2007 are available to an employee who suffered unlawful termination before the enactment of these current laws...All that said, then, is to say that this Court only has jurisdiction to award the remedies available at the time of the wrongful dismissal or unfair termination, that is, when the cause of action arose. These are the remedies that are provided for under the repealed Employment Act, Cap 226, Laws of Kenya and the repealed Trade Dispute Act, Cap 234, Laws of Kenya."

Conclusion

In conclusion, judgment is entered for the claimant in terms of the letter of termination being –

- a) All days worked up to 16th November 2005.
- b) Pro-rata leave due.
- c) Three (3) months' salary payment in lieu of notice less any debt owing to the company.
- d) Pension contribution and interest earned thereof.

In view of the fact that these payments ought to have been made on the date of termination and were withheld to date and the respondent made no attempt to tabulate and offer the same to the claimant, the respondent shall pay interest on the same at court rates from date of filing suit until payment in full.

The respondent shall pay claimant's costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE