



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT KISUMU**

**CAUSE NO. 36 OF 2014**

*(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)*

**JOHN NYASAKA OKECH..... CLAIMANT**

**VERSUS**

**KENYA MEDICAL RESEARCH INSTITUTE....2ND RESPONDENT**

**JUDGMENT**

By a Memorandum of Claim dated 25th February 2014 and filed on the same date the Claimant avers that his services were terminated by the Respondent without lawful justification and/or payment of termination dues.

The Memorandum of Claim was amended on 4th June 2014. In the Amended Memorandum of Claim the Claimant seeks the following prayers:-

- (a) The termination of employment be declared unfair;***
- (b) (a) Kshs.433,764.00;***
- (c) (b) Interest at 14% from 25/2/2011;***
- (d) (c) Costs of this claim and interest;***
- (e) Certificate of service.”***

The Respondent filed a response to the Amended Claim in which it denies the averments in the Amended Memorandum of Claim and specifically denies either terminating the employment of the Claimant without lawful justification or failure to pay the Claimant's terminal benefits. The Respondent further denies owing the Claimant Shs.433,764 as claimed in the Amended Memorandum of Claim or any other sum at all.

The case was heard on 5th February 2015 when the Claimant and his witness testified and on 13th June 2016 when the Respondent's witnesses testified. The parties thereafter filed and exchanged written submissions.

**Claimant's Case**

The Claimant testified that he was employed by the Respondent in May 2007 at a salary of Kshs.20,000/= which was increased every year after appraisal. The employment was on annual contracts renewed every

year. The Claimant testified that his last contract commenced in September/October 2010 and was to expire in September 2011 but his contract was terminated before the date of expiry thereof on 1st March 2011. His last salary was Shs.32,000. He testified that he was claiming payment for the remainder of the contract period and annual leave. He was further claiming gratuity.

The Claimant denied that he was a careless driver as alleged in the witness statements

filed by the Respondent. He testified that after leaving employment of the Respondent he was issued with a recommendation letter stating that he was a diligent employee and a good driver. He testified that the termination of the contract was motivated by malice.

Under cross-examination the Claimant stated that on 22nd February 2011 while taking some members of staff to attend a funeral at Maseno in Motor Vehicle Registration No. KAY 413V the vehicle's mirror was hit and broken by an oncoming lorry which did not stop but he denied that the incident was caused by his reckless driving. He further stated that on the way back from Maseno while overtaking he had to flash to an oncoming vehicle to give way because the oncoming vehicle appeared suddenly. He denied overtaking at a dangerous corner when he could not see ahead. He denied that one person refused to board the vehicle back to Kisumu from Maseno while others alighted on the way due to his careless driving.

The Claimant confirmed that he was paid one month's salary in March 2011 in lieu of notice. He also confirmed that he was paid gratuity for all years worked except 2011.

**CW2 FESTO OBONDO OTIENO** testified in support of the Claimant's case. He stated that he is a taxi driver and knew the Claimant to be a good driver. He testified that on 22nd January 2011 he boarded the vehicle driven by the Claimant from Maseno and the Claimant drove the vehicle safely from Maseno to Kisumu without incident. He denied that the Claimant was a reckless driver. Under cross-examination he stated that the Claimant overtook two lorries at Ojola but drove to Kisumu without incident.

### **Respondent's Case**

The Respondent called two witnesses **JOEL ODONDI NGOLO**, a Community Liason Officer working for the Respondent (RW1) and **FRANCIS DERRICK OTHIEN NASIYE** the Respondent's Human Resource Manager (RW2).

RW1, JOEL ODONDI NGOLO testified that he was one of the passengers in the vehicle that the Claimant was driving to the funeral at Maseno. He testified that the Claimant was driving very fast and seemed to be in a hurry. When he asked the Claimant to slow down he responded that the funeral program was already advanced and he needed to hurry the passengers. RW1 testified that at Kisian Bridge just before the junction to Bondo the Claimant was driving at high speed in the middle of the road. He cautioned the Claimant to keep to his side of the road but the Claimant did not respond. An oncoming lorry had to swerve to the extreme side of the road to avoid a head-on collision with their vehicle and the lorry hit the driver's rear view mirror which broke and the glass splintered injuring the Claimant and the passenger seated behind him.

RW1 testified further that on the way back one of the passengers, the then Human Resource Manager Ms. Beatrice Omolo refused to use the vehicle due to the reckless driving of the Claimant. He further testified that several passengers alighted on the way at the Bondo junction following another incident on the way back when the Claimant overtook two lorries at a dangerous spot at Ojola forcing on-coming vehicles to move off the road to give way to their vehicle. He stated that the people sitting at the back of the vehicle which is a double cabin alighted on the way due to the Claimant's reckless driving.

RW1 testified that he had heard other complaints against the Claimant from the staff members. He testified that the Claimant's employment was terminated on 25th February 2011 partly due to his bad driving. He denied that the Claimant was unfairly terminated.

RW2 testified that he joined employment of the Respondent on 1st March 2013 long after the Claimant left, but was in possession of the Claimant's employment records. He stated that from the records he learnt that the Claimant worked for the Respondent from 2nd May 2007 to 25th February 2011, was on one year renewable contracts commencing 1st July to 30th June of the following year and left employment mid-term without completing the last contract.

He testified that the Claimant's contract was terminated and he was paid one month's salary in lieu of notice. RW2 further testified that the Claimant was paid gratuity with salary for August 2008 in the sum of Shs.21,935.50. He was paid gratuity again in September 2009 in the sum of Shs.39,600 and gratuity for 2010 was paid with salary for May 2010 in the sum of Shs.50,688.00 and further gratuity of Shs.121672 with salary for June 2010.

RW2 testified the Claimant's contract was to expire at the end of June and there is therefore no basis for his claim of 7 months salary for the remainder of his contract which was to expire in 4 months.

RW2 testified that the Claimant was relieved of his contract on grounds of poor work performance and he is not entitled to payment for the remainder of the contract term. RW2 stated that he had not come across any application for leave for 2011 and the Claimant was therefore entitled to payment in lieu of prorata leave of 8 months from July 2010 to February 2011 at the rate of 2.5 days per month.

## **Submissions**

In the submissions filed on behalf of the Claimant it is submitted that the Respondent did not comply with the provisions of Section 41 which require an employer to show by way of evidence that the reasons for termination were explained to an employee in a language he understands, that the employee was allowed to be accompanied at the meeting where the explanation was made by a fellow employee or union official, that the employee was given an opportunity to respond and his response was taken into consideration and that the employer complied with its own internal disciplinary mechanism.

It was submitted that the Claimant was not called to defend himself at the meeting called to deliberate on his fate, that there was no witness at the meeting and that in the minutes it is stated that those who witnessed the Claimant's reckless driving had declined to record statements. It was submitted that the meeting had no basis to make a decision against the Claimant and that the decision was against the principles of natural justice.

It is further submitted that the Claimant's annual appraisals congratulated him for his good work and he was given annual increments after each appraisal. Further that even after he left service the Human Resource Manager wrote a glowing letter of recommendation for the Claimant, that all these show that the Claimant was a good employee. It was submitted the termination of the Claimant's employment was unfair and without basis.

For the Respondent it was submitted that the law in Kenya allows either party to an employment contract to terminate the same as provided in Section 35 of the Employment Act. The Respondent submitted that an employee who complains about the termination must demonstrate that the said termination is unfair.

The Respondent submitted that the Claimant wrote two letters explaining the incidents on the journey to and from Maseno. The first letter is dated 18th January 2011 and is appended to the Respondent's bundle of documents, while the second letter is dated 9th February 2011 and is among the Claimant's bundle of documents. It is the Respondent's case that the Claimant must have been informed about the complaint against him and wrote the two explanations upon being given an opportunity to defend himself and this was in compliance with Section 41 of the Act.

The Respondent further submits that the minutes of the meeting held on 14th February 2011 indicate that the two statements by the Claimant were considered before the decision to terminate the Claimant's contract was made.

On validity of reason the Respondent submits that the Claimant admitted in his statements of 18th January and 9th February 2011 that an incident occurred on both the way to and from Maseno as confirmed by the evidence of RW1.

## **Determination**

Section 41 of the Employment Act provides for procedural fairness while Section 43 of the Act provides for proof of valid reason. Section 35 referred to by the Respondent does not provide for either the procedure or reasons for termination but for notice of termination.

Under Section 41 of the Act an employer is required to “*explain to the employee in a language the employee understands, the reasons for which the employer is considering termination*”. At that meeting the employee is entitled to have another employee or a shop floor union representative of his choice present during the explanation.

It is the responsibility of the employer to arrange for such meeting and to inform the employee of his right to be accompanied to the meeting by a fellow employee or shop floor union representative. This means that the employee must be notified in advance to enable him decide if he wishes to be accompanied by a fellow employee or union official and arrange for the presence of the person accompanying him.

Section 41(2) further provides that before terminating or summarily dismissing an employee under Section 44(3) of (4), the employer must *hear and consider any representations which the employee and the person accompanying him if any, may make*.

The Respondent's reference to written statements by the Claimant having been considered at the meeting of 14th February 2011 do not constitute compliance with Section 41. No reason has been given why the Claimant was not invited to the meeting as required under Section 41. No evidence has been adduced to prove that the Claimant was ever informed of the complaint against him and asked to write the two explanations referred to. In any event, such explanations can only constitute part of investigations to gather information forming the basis upon which the Claimant should be subjected to a disciplinary hearing.

The Respondent's submission that the Claimant was under obligation to demonstrate that the termination was unfair, or that the Claimant did not belong to a union, or did not ask for the presence of a colleague, or that he understands English as demonstrated in his letters, is clear demonstration that the Respondent clearly misapprehended the purport of Section 41 on the disciplinary process as provided under the Employment Act.

Section 47(5) expressly provides for burden of proof in complaints of unfair termination as follows:-

***(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.***

The provision in Section 41 for the Claimant to be represented by either a shop floor union representative or a fellow employee takes into account employees who may not be members of a union, or who, although members of a union, do not wish to be accompanied by the union shop floor representative for any reason. That is why the section provides for a “*representative of his choice*”.

The issue of the employee understanding English is not the subject of Section 41(1). The Section deals with the employee's understanding of the charges against him hence the explanation of “*the charges*” in a language understood by the employee.

In the instant case, it is not in dispute that no charges were framed against the Claimant that he was required to respond to, that there was a meeting to discuss the misconduct of the Claimant to which he

was not invited and that therefore the Respondent did not comply with section 41 of the Employment Act.

Although the Respondent may have had valid reason to terminate the employment of the Claimant based on evidence adduced in court, having failed to either frame the charges or give him a hearing as contemplated under Section 41, the validity of such reasons was never proved.

The foregoing reasons can only lead to a finding that the termination of the Claimant's contract by the Respondent was unfair for both want of procedural fairness and validity of reason. I therefore declare the termination unfair.

### **Remedies**

The Claimant prayed for payment of gratuity. During cross-examination the Claimant confirmed that he was paid gratuity with salary for August 2008, September 2009, May and June 2010. The Respondent produced the Claimant's payslips for the said months which confirm that he was paid gratuity for all the completed contracts. The only period for which gratuity was not paid is for the contract that the Claimant was serving at the time of termination being from July 2010 to February 2011. The Respondent's argument about payment of advance gratuity apart from not having been supported by evidence, is illogical and is rejected. No gratuity payment can be made in advance where there is no provision or proof of such. The Claimant is therefore entitled to gratuity for the period served in the last contract.

The Claimant's salary during the period July 2010 to February 2011 was Shs.30,976. In the evidence on the file there is no mention of the rate of gratuity. I will therefore adopt the rate of 15% stated in the Claimant's submissions and not contested by the Respondent. This works out to Shs.37,171.20 which I award the Claimant as gratuity for 8 months from July 2010 to February 2011.

The Claimant prayed for annual leave of Shs.30,976.00. He is only entitled to annual leave for 8 months which was admitted as due by RW2. At the rate of 2.5 days a month stated by RW2, the Claimant is entitled to 20 days leave. I therefore award him Shs.20,650.70 in lieu of 20 days pro-rata leave.

The Claimant further prayed for the unexpired term of the contract. The Employment Act does not provide for payment for the unexpired term of the contract as all employment contracts are by their nature terminable. What an employee is entitled to is compensation for the unfair termination as provided under Section 49 of the Act.

In the present case I do not find the termination of employment to have been unfounded as the Claimant in his testimony confirmed that he was involved in an accident on his way to Maseno and that on the way back he overtook dangerously forcing oncoming traffic to give way. This is admission of reckless driving. I therefore decline to compensate him as the termination of his contract was pre-empted by his own conduct.

### **Conclusion**

In conclusion I find that the Claimant's contract was unfairly terminated and award him the following:-

- |                   |                        |
|-------------------|------------------------|
| 1. Gratuity       | - <b>Shs.37,171.20</b> |
| 2. Pro-rata leave | - <b>Shs.20,650.70</b> |
| <b>T O T A L</b>  | <b>- Shs.57,821.90</b> |

The Respondent shall pay the Claimant's costs and the decretal sum shall attract interest at court rates from date of judgment.

**DATED SIGNED AND DELIVERED THIS 19TH DAY OF JANUARY, 2017**

**MAUREEN ONYANGO**

**JUDGE**