



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 271 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

PETER MAGATA ROBI.....CLAIMANT

-Versus-

THE MANAGEMENT COMMITTEE OF EKERUBO DISPENSARY....RESPONDENT

J U D G M E N T

By a statement of Claim dated 5th October 2013, the Claimant alleges that he was unfairly terminated by the Respondent who also refused to pay his terminal dues. He seeks the following remedies -

- (i) A declaration that the Claimant's suspension from his employment was unlawful and unfair.
- (ii) The Claimant be paid his terminal benefits as set out in paragraph 13 herein above amounting to Kshs.667,336.40/-.
- (iii) The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
- (iv) The Respondent to pay the costs of this claim.
- (v) Interest on the above at Court rates.
- (vi) The Respondent be ordered to issue the Claimant with a certificate of service as required by the provisions of section 51 of the Employment Act, 2007.

The Respondent filed, a Reply to the Statement of Claim denying the averments in the memorandum of claim.

Claimant's Case

At the hearing of the case the claimant testified that he was employed at Ekerubo Dispensary on 20th February, 2006 as a watchman where he worked until he received a letter of suspension on 10th August, 2012. The letter of suspension stated that the suspension was to investigate allegations of misconduct. The Claimant testified that he was not told the particulars of misconduct even after he asked. The letter further stated that the suspension was indefinite. He was never told the outcome of the investigation or

told to go back to work. He was never called for any meeting to discuss the misconduct.

The Claimant further testified that his salary was Shs.1,500/- per month which was never increased for the entire period he worked. He used to sign for payment in a register. He testified that he was not paid house allowance and was not given leave. He testified that he was owed arrears of salary but did not know the amount which according to him, was in the Respondent's records. He referred the court to a letter he wrote to the Respondent on 5th April, 2012 asking for salary for 16 months. He testified that after that he was paid Shs.8,000/- then another Shs.2,000/- but the balance was still outstanding. The Claimant prayed for payment as tabulated in the statement of claim.

Under cross examination the claimant stated that he started working during construction of the dispensary. He stated that the contractor disappeared with his money. He stated that he was not an employee of the Government as he was employed by the Management Committee of Ekerubo Dispensary. He stated that he was living in his house outside the dispensary. He stated that when he was employed there was no discussion of leave and house allowance.

He stated that he was aware of a complaint by Jeddy Nyakerario about indecent assault but was not aware if that was the reason for his suspension, and further that the committee established that Jeddy was lying. He stated that he was informed there was no evidence of indecent assault.

The Claimant stated he was aware that the committee advertised his position and he applied and attended an interview. He stated that someone was recruited after the interviews.

Respondent's Case

For the Respondent, HARRISON MOMANYI, a nursing officer working at Ekerubo Hospital testified that he had signed a witness statement which he wished to rely on. In the statement he states that he was the officer in charge of Ekerubo Dispensary since April 2012. He states the dispensary was built as a community initiative funded by CDF funds and a contractor was hired to do the construction.

He states that the Claimant was hired by the contractor as a watchman to guard the materials and hardware stores at the construction site. That the facility was opened on 24th December 2006 by then area member of parliament.

He states that the contractor did not pay the claimant his wages and when the Claimant brought the claim to the dispensary committee on 7th February, 2007 it was decided that he be engaged to work as other casuals on a wage of Shs.1,500 per month. He states that the Claimant worked on and off, renewing his contract until August 2012. He states that at one time the Claimant claimed that the dispensary owed him arrears of salary which prompted a management committee meeting of 7th September, 2012. The Committee established from records that the claimant was owed Shs.10,000 which he was paid in two instalments of shs.8,000 on 14th September, 2012 and the balance Shs.2,000 together with shs.575 wages for August 2012 was paid on 17th September, 2012.

He states that in August 2012 a cleaner/clerk, Jeddy alleged that she was touched inappropriately by the claimant. After hearing the complaint the management committee decided to allow the claimant and Jeddy to settle the complaint at family level. It was then that the two were suspended. They later agreed on settlement of the assault complaint and resumed work on 27th August, 2012.

Mr. Momanyi states that thereafter the committee decided to advertise for new casuals. The Claimant applied by letter dated 30th August 2012 and was interviewed on 3rd September, 2012 together with others. He was not the best candidate and was informed that someone who scored better than him was appointed. The Claimant applied for employment again on 11th February, 2013 following an advertisement on 8th February, 2013 but failed to attend the interview.

Under cross examination Mr. Momanyi stated that he found the Claimant working at the dispensary when he joined in April 2012 and the Claimant's salary was shs.1,500 per month. He stated that according to

records the claimant started working at the dispensary in 2007. Mr. Momanyi stated that the suspension of the claimant was not the reason why the claimant's employment was terminated as the claimant resumed duty on 27th August, 2012. He stated that he did not have the letter recalling the claimant to resume duty. He denied that the advertisement was intended to replace the Claimant following his suspension, and stated that the interviews were for the positions of cleaner, watchman and gardener.

Submissions

In the written submissions filed on behalf of the claimant it is submitted that the claimant was denied a fair hearing following his indefinite suspension.

The Respondent on the other hand submitted that due process was followed before the claimant was suspended from duty. It is the Respondent's submission that the claimant resumed duties on 27th August, 2012 after the suspension and was therefore not dismissed by the Respondent, that the Claimant exited the Respondent through an interview where he attained 52% marks while the person who was appointed garnered 80%.

Determination

I have considered the pleadings, the evidence adduced by the parties and the written submissions. The issues for determination in my opinion are the following -

- 1) Whether or not the claimant was dismissed urgently by the Respondent.
- 2) Whether the Claimant is entitled to the remedies he prayed for.

Dismissal

According to the evidence of the Claimant, he was suspended by letter dated 10th August, 2012 on non-specific allegations of misconduct and never recalled or given a hearing. The Respondent however contends that the issue of suspension was resolved and the claimant resumed duty, and his exit was due to his failure to garner the highest marks at an interview on 3rd September, 2012.

Section 47(5) of the Employment Act provides for burden of proof in complaints of unfair termination or wrongful dismissal 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.

According to minutes of meetings held on 10th August and 27th August 2012, the complaint by Jeddy against the claimant was heard on 10th August 2012. Both Jeddy and the Claimant testified and several witnesses were called before a resolution was made to suspend the two and give them a chance to resolve the matter at home. At the meeting of 27th August 2012 it was observed under minute 20/2012 as follows -

Minute 20/2012

The reports of case of Magata/Jeddy was given and the committee was informed they had agreed to forgive each other by family members from both sides. It was agreed that they report to work immediately.

There is also evidence that the claimant together with Jeddy and others applied for employment following advertisement and attended interview for recruitment of casuals "following the expiry of present contract for casuals ...", It is my opinion that the foregoing sufficiently explains the manner in which the claimant

exited employment being that his contract expired and he was not the best candidate and therefore did not qualify for re-engagement at the interview for filling of the position. I therefore find that the claimant was not unfairly terminated by the Respondent.

Remedies

The Claimant prayed for payment of notice, leave, public holidays, salary, underpayments, maximum compensation for unfair termination, salary for period he was under suspension and certificate of service. I will consider each of the prayers below.

(i) Notice

Having exited employment upon expiry of his contract, the Claimant is not entitled to pay in lieu of notice. The claim is dismissed.

(ii) Leave

The Respondent did not contest the claimant's averment that he was not granted annual leave. I award him annual leave at 21 days salary for each year worked. The Claimant has claimed that he worked from 2nd February 2006. He however admitted during cross examination that in 2006 he was working for the contractor while the dispensary was under construction. The Respondent's witness stated in the witness statement that the claimant started working on 7th February, 2007. He therefore worked for 67 months. The statutory minimum wage that the Claimant was entitled to at the time of termination of his employment is a consolidated daily rate of Shs.263.40. For 67 months at 1.75 days per month the claimant is entitled to Shs.30,883.65 which I award him.

(iii) Public Holidays

No evidence was given to prove that the Claimant worked on public holidays. The prayer is dismissed as it was not proved.

(iv) Salary Underpayments

The Respondent admitted that for the entire period the claimant worked for the Respondent he was paid Shs.1,500/- per month. He was therefore underpaid as tabulated by the Claimant which tabulation was not contested by the Respondent. The Claimant is entitled to underpayments as follows -

February 2007 - 2009 (Shs.3,301 - 1,500) x 27 months	Shs.37,199
May 2009 - April 2010 (Shs.3,901 - 1,500 x 12)	Shs.14,099
May 2010 - April 2011 (Shs.4,291 - 1,500 x 12)	Shs.33,492
May 2011 - April 2012 (Shs.4,827 - 1,500 x 12)	Shs.39,924
May 2012 - August 2012 (Shs.5,459.30 - 1,500 x 4)	Shs.15,837.20
Total Underpayments	Shs.140,551.20

I award the Claimant the sum of Shs.140,551.20 on account of Salary underpayments.

(v) House Allowance

The Claimant was entitled to house allowance at 15% of basic pay. He was therefore entitled to house allowance as follows -

February 2007 - April 2009 (3,301 x 15% x 27)	Shs.13,369
May 2009 - April 2010 (3,301 x 15% x 12)	Shs.5,941.80
May 2010 - April 2011 (4,291 x 15% x 12)	Shs.7,723.80
May 2011 - April 2012 (4,827 x 15% x 12)	Shs.8,688.60
May 2012 - August 2012 (5,459.30 x 15% x 4)	Shs.3,275.60
Total	Shs.38,998.80

I award the Claimant the sum of Shs.38,998.80 on account of house allowance.

(vi) 12 Months Compensation

The Claimant is not entitled to compensation for unfair termination as he was not unfairly terminated. The claim is dismissed.

(vii) Salary for Entire Period of Suspension

From the evidence on record the Claimant was suspended on 10th August, 2012 and recalled on 27th August, 2012. No evidence was adduced by the Claimant on whether or not he was paid salary during the period of suspension. I therefore find no proof of the claim and dismiss it.

(viii) Certificate of Service

Under section 51 of the Employment Act, the Claimant is entitled to certificate of service. The Respondent is ordered to issue the same to the Claimant in accordance with the provisions of the Act.

(ix) Costs

The Respondent will pay the Claimant's Costs of the claim. There is no order for payment of interest.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF FEBRUARY, 2017

MAUREEN ONYANGO

JUDGE