



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
CAUSE NO. 105 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 29th June, 2017)

KENYA CHEMICAL & ALLIED WORKERS UNION.....CLAIMANT

VERSUS

PHARMACEUTICAL MANUFACTURERS COMPANY LIMITED....RESPONDENT

JUDGMENT

1. The Claimant filed the suit on behalf of one Mr. Michael Maithya Ngina who was employed by the Respondent in January, 2001, as a Store Keeper at a salary of Kshs. 3,640 per month. His duties were packing, dispatching as well as delivery of medicine.
2. He states that on 16th February, 2004, he was given two orders before lunch time, and instructed that one of the orders was urgent. That according to company policy orders must be prepared one at a time to avoid confusion. He alleges that he proceeded to process the urgent order but before he could finish he was served with a third order by his immediate supervisor Mr. Dashak who told him that the Order was also urgent.
3. The Claimant avers that he informed his supervisor that he had another urgent order and was not able to process another urgent order in the circumstances. That his supervisor abused him and told him that if he could not do it he should go bring his wife to do the job.
4. That this happened some minutes before lunch time and he proceeded to inform his supervisor that he would process the order after lunch. When he finished processing the orders he took to his supervisor and asked why he had abused his wife who was not an employee of the Company. That his supervisor told him that he could beat him and the Grievant told him to go ahead. That the said supervisor took hold of him by his dust coat, squeezing the coat around his neck and pushed him towards the medicine rolls.
5. That after the said altercation the Grievant proceeded to do his work while the supervisor went to report the incident to the Managing Director. He was called to the Managing Director's office to explain the incident which he says he did. He was told to wait at the reception by the Respondent's Accountant, who thereafter issued him with a termination letter dated 17th February, 2004.
6. The Claimant states that they took over the Grievant's cause and after contacting the Respondent they were referred to Federation of Kenya Employers who delayed in setting up a meeting to discuss the Grievant's case. The matter was then reported to the Minister and an Investigator was appointed on 24th

February, 2005 and a Conciliator on 11th April, 2005. The Investigator did not call any meeting despite many reminders and eventually a certificate to the parties to refer the dispute to Court was issued.

7. The Claimant states that there was no reason for termination and neither was procedure as envisaged in Sections 41, 43, and 45 of the Employment Act, 2007 followed. He prays for the Court to hold his termination unlawful and order reinstatement and for all his salary and benefits contained in the CBA to be awarded.

8. The Respondents filed a reply to the Memorandum of Claim wherein they admit the employment relationship and the existence of a Collective Bargaining Agreement but state that the Claim is bad in law as it has been filed in contravention of the mandatory provisions of Rule 5 of the Rules of the Court which requires that a Statement of Claim must be accompanied by a verifying affidavit.

9. Further that the Statement of Claim is barred by the Limitation of Actions Act, Cap 22 of the Laws of Kenya in that it is founded on an alleged breach of contract of employment which allegedly took place in 2004 and the Claim was filed in 2012 which is outside the six year limitation period for actions based on contract. In the premises the Respondent contends that there is no cause of action and urges the Court to strike it out with costs to the Respondent.

10. They further aver that should the Court find that the suit is not statute barred then it should find that there is no cause of action against the Respondent for the Grievant was lawfully dismissed on 17th February, 2004, for gross misconduct within the meaning of Sections 43 and 44 of the Employment Act, taking the form of assaulting his supervisor, Mr. Darchak U. Bhoghani, in the cause of employment.

11. The Respondent aver that on 16th February, 2004, the Claimant was assigned the task of processing delivery of products to three customers which tasks he found heavy and became annoyed. That in anger he went to the Supervisor's office and set out to physically assault him who in turn defended himself by pushing him away. That those acts amount to gross misconduct within the meaning of Section 44 of the Employment Act.

12. They allege that the reason for dismissal was clearly set out in the letter of termination and in addition there were further incidences of insubordination which he had been warned about. The Respondent avers that the remedy of summary dismissal for gross misconduct does not require an employer to give an employee who has grossly misconducted himself an opportunity to be heard. That the Claimant lost his right to be heard the moment he allegedly assaulted Mr. Darchak Bhoghani.

13. It is the Respondent's further contention that between 2004 and 2005, the Respondent and the Claimant Union exchanged correspondence on the issue but no settlement was reached. That the Claimant was obliged to seek redress in either the ordinary Courts of law or the Industrial Court any time between February 17th, 2004, and February 17th 2011. They therefore pray for the Claim to be dismissed with costs.

Submissions

14. The Claimant rely on submissions filed in the memorandum of claim and pray that:

1. This Honourable Court finds the dismissal /termination to have been wrongful and unlawful and order the reinstatement with full benefits.

2. This Honourable Court order the grievant to be paid his salary and other benefits stated in the CBA for the time he has been out of employment.

3. Incase Court at its own discretion find this prayer not possible, the Court order maximum compensation within its powers to the grievant for wrongful loss of employment, having been out of employment since February, 2004.

15. The Respondent have filed submissions wherein they submit that this Honourable Court lacks jurisdiction to grant any relief sought since even if the case is established it is barred by the Limitation of Actions Act. They rely on the decision of Radido J in **Kenya Electrical Traders and Allied Workers Union vs. Kenya Power and Lighting Company Ltd (2015) eKLR** where it was stated:

“to us the meaning of the wording of section 4 (1)... it is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years form the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no Court may or shall have the right or power to entertain what cannot be done namely, an action arose or any application to extend such time for bringing of the action.”

16. They further state on the issue of jurisdiction, that it is everything in determining any issue before the Court. They rely on the case of **Owners of Motor Vessel ‘Lillian s’ vs. Caltex Oil (Kenya) Ltd 1989 1KLR 14** where it was stated:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.”

17. The cause of action in the instant suit arose on 17th February, 2004, and this suit was filed on 1st March, 2012, eight years after that termination. They are of the view that the suit is hopelessly out of time and he did not advance a valid reason for initiating the suit out of time.

18. It is the Respondent submission that Section 4(1) (a) of the Limitation of Actions Act provides that a cause of action based on contract must be filed within six years. This is a suit based on contract and there the limitation period they submit, applies. They therefore hold the view that the Court lacks jurisdiction to award any relief based on the Employment Act passed 3 years after the Claimant was terminated or under the repealed Employment Act cap 226 which was in force in February, 2004. Further that even conciliation procedures under the Trade Disputes Act were not adhered to and as such he cannot find relief therein.

19. That in the said repealed Employment Act Section 17 thereof gave the employer the power to terminate a contract for gross misconduct. Further that the said act under Section 16, a contract of employment could be terminated by either a month’s notice of intended termination or by payment in lieu of notice.

20. That accordingly Section 107 of the Evidence Act, places the burden of proof on whoever makes an assertion. That the Claimant was as such bound to prove existence of a contract, its terms, the alleged wrongful termination and the loss suffered as a result.

21. That the Claimant admits that he was an employee of the Respondent but he failed to prove the terms of the contract and merely claims that he was wrongfully terminated despite admitting that there was a fight between him and Mr. Dashar, the supervisor.

22. It is also the Respondent’s submission that the Claimant has not proved being injured by his supervisor in an altercation. The medical card produced is an antenatal care card which he alleged was to prove that he was beaten up and received medical treatment. As such the claim that his supervisor injured him in a fight is false and ought to be disregarded.

23. The Respondent also submits that the Claimant did not prove the 4,600/= he claimed he was earning by producing any document to that effect.

24. They submit that in the Claimant’s submissions, they rely on Sections 41, 43 and 45 of the Employment Act which was not in force at the time of termination. They pray for the Claim to be dismissed for want of jurisdiction of the Court and for failing to prove the Claim as required.

25. They conclude by urging the Court that in the event that the Court finds that there is a claim against the Respondent then it should be a mere one month's salary in lieu of notice.

26. I have considered the evidence and averments of both parties. The cause of action if any occurred in year 2004 and therefore this case is governed by the procedure set out under the Trade Disputes (now repealed). Any reference therefore to the Employment Act 2007 will be out of contest.

27. Under the repealed Trade Disputes Act Section 4 trade dispute could be reported to the Minister for Labour. The Minister was expected to consider the report and appoint a Conciliator to deal with the complaint.

28. Under Section 14(e) of the Trade Disputes Act

“the Court shall not take cognizance of any trade dispute or deal with any matter connected thereto unless the Court has received a Certificate signed by the Labour Commission stating that the Minister has accepted the report of the trade dispute and that all available machinery (including statutory machinery) the voluntary settlement of disputes prior to reference to the Court has been exhausted”.

29. From the above producer, the time of Limitation stated arising after the Court had received the referral of the dispute from the Minister. The Trade Dispute did not have any time limited but going by Cap 22 then, the time envisaged is 6 years in matter of contract.

30. In this case, the referral of this case to the Industrials Court was made on 3rd August 2011 vide the letter PMC 3 (page 11). The Claimant subsequently filed this case on 19th January 2012. The issue of time barredness is therefore not valid and I find so.

31. It is also apparent that the Respondent through their Memorandum of Reply admits employing the Grievant. They however state that he was dismissed for gross misconduct for fighting his supervisor.

32. From evidence adduced by the Claimant, he had an altercation with his supervisor Mr. Dashar but his was after the supervisor pushed him and abused him.

33. It is his position that he didn't fight his supervisor but a box fell on him. The Claimant even reported being assaulted to the police. There is actually no evidence of the commission of the alleged criminal offence by the Claimant. No report was even made to the police by the Respondent and the Claimant was never charged with any criminal offence. What remains is the Grievant's word against the Respondent and vice versa.

34. In absence of such proof the commission of the criminal offence as alleged, it follows that there was no reason for the termination of the Claimant. That notwithstanding the Respondent was obliged by reason of the rules of natural justice to give Claimant a chance to be heard which was not accorded to him.

35. On the submissions of the Respondent that the Claimant has not proved the existence of an employment contract, it is this Court's position that the Respondent having admitted the existence of an employment relationship, the Respondent was obliged to provide the contract to the Grievant as an employer and he cannot shift the burden of proving the contents of the contract to the Claimant.

36. I find that Claimant was unfairly dismissed and I award him as follows:

1. 1 month's salary in lieu of notice Kshs. 4,600/=.

2. 12 months salary as damages for unlawful termination = 12 x 4600 = 55,200/=

Total = 59,800/=

3. Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this Judgment.

Read in open Court this **29th day of June 2017.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mweke for Claimant – Present

Muhoro for Respondent – Present