



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.201 OF 2014

HINGA MBUGUA.....CLAIMANT

VERSUS

KEROCHE INDUSTRIES.....RESPONDENT

JUDGEMENT

Issues in dispute

- I. *Non-payment of salary from April 2013 to date*
- II. *Unfairly and unlawfully denying the claimant the right to work*
- III. *Unfairly and unlawfully denying the claimant the right to earn a living*
- IV. *Unfairly and unlawfully denying the claimant this job security.*

1. On 19th February 2014, the claimant filed his Memorandum of Claim, summons were effected vide Certificate of Posting and an Affidavit of Service filed to this effect on 10th June 2015 and sworn by John Maina Ngechu.

2. The claim is that on 6th August 2012 the claimant was employed by the respondent as the Quality Assurance manager on a two years contract. On 4th April 2013, the claimant was sent on compulsory leave over alleged claims of absenteeism. The respondent indicated that there would be investigation and the claimant would be informed within 21 days but he has never been recalled to date. Despite demand to know the outcome of any investigations, the respondent has remained silent and also refused to pay the salary due. The claimant therefore submitted that the compulsory leave was unjustified and unlawful on the reasons that he was not called for any investigations and where such investigations were undertaken he was not informed of the outcome yet he has not been returned to work or paid for his time under his 2 years contract of employment.

3. the claim is for damages for unlawful and wrongful compulsory leave; salary from May 2013 until August 2012 being the period of contract; exemplary damages for unlawful termination; a declaration that the claimant had a right to work and earn a living as well as the right to remuneration and job security; and costs.

4. In evidence, the claimant supported his case. he was paid Kshs.130,000.00 gross per month and upon being sent on compulsory leave, the respondent failed to recall him, given him the results of any investigations or inform him as to the outcome of any resulting decision made hence causing him great anguish and anxiety. He had been accused of not having an interest in his work, that he was negligent and absent from work but the details for these allegations were never set out to enable him respond. The subsequent compulsory leave was only meant to deny him a right to earn a living and the right to a job.

5. The claimant also filed his written submissions on 14th December 2015 where he reinterests his claim.

Determination

6. The essence of the claim herein is that on 4th April 2013 the claimant was sent on compulsory leave pending investigations and that he would be informed in 21 days. The notice stated;

Re: LEAVE PENDING FURTHER INVESTIGATIONS

It has come to the attention of management that you have neglected your duties by lacking interest in your work, frequent absenteeism without any reasonable reason and late coming.

To facilitate this and to enable further unbiased investigation of pertinent facts, you are hereby instructed to proceed on compulsory leave with immediate effect.

7. It has been the position of this court that an employer has the right to discipline any employee, and such may include sending the employee on leave pending investigations of any nature. Such is a right the employer enjoys. However, such a right must have a basis upon which it can be exercised within reasonable limits. See **Amrick Consales versus Mara Ison Technologies Kenya Limited, Cause No. 2538 of 2012** and the court held;

Ordinarily in work relations, where an employee commits acts of misconduct, such an employee may be suspended to allow the employer to carry out investigations. Such investigations are meant to give the employer a chance in the absence of the subject employee to interrogate and establish if there are grounds that warrant a show cause notice against the employee that warrant a response. Until such a process is concluded, the employee remains without a concluded case against him that warrant a defence. Once the investigation is complete, the employee must be recalled from the suspension to answer to any allegations leading to the process of hearing where the employee is to give his defence. Once hearing is concluded, a sanction follows.

8. Work relations require the confidence of the parties involved and hence where any form of investigations becomes necessary, the subject employee once sent out leave or on suspension to facilitate investigations, then such an employee must oblige. As noted above in the case of Mr Consales, such compulsory action is the prerogative of the employer. But such should not be abused. The claimant was informed that he would be informed of the outcome of the investigations against him in 21 days. Such was not given and was never recalled back to work to date. His contract of employment lapsed on 6th August 2014. To fail to recall the claimant thus back to work upon investigations of the very serious allegations of lack of interest in his work, absenteeism and late coming is subjective and without basis. This was in essence causing the claimant to be out of his employment and a violation of his right to earn a living. This was also an unreasonable denial of his livelihood by denying the claimant a chance to keep his job for no reason and causing his contract to lapse without earning the salaries due for no apparent cause.

9. Section 43 of the Employment Act requires an employer to give reasons for termination, reasons that must be valid and just in any given case. Where such reasons are not given, substantiated or an employee is not taken through a fair process before he is denied his job, then this results to unfair termination under the provisions of section 45 of the Employment Act. In this case I find the actions of the respondent of sending the claimant on compulsory leave for a period without a recall to get feedback on the investigations against him and failing to pay the due salaries was in essence meant to deny him work. By causing the claimant's contract to lapse without payment in full in its due consideration, this amounted to an unfair termination of his work and contrary to the law.

Remedies

10. The claimant is seeking damages for unlawful compulsory leave. He is also seeking salary for

months of May 2013 to August 2014 when the contract lapsed. Even where the respondent was right in sending the claimant on leave, such sent the claimant into oblivion and was without pay which is contrary to fair labour practice. Such will be factored in the claim for salaries due from May 2013 to August 2014 which is due under the fixed term contract and in accordance with section 49(1) of the Employment Act thus;

49. (1) where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—

(a) The wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

11. The claimant is hereby awarded the gross pay due for the remainder of his contract term being May 2013 to August 2014, a period of 14 full months at Kshs.130,000.00 all being Kshs.1,820.00.00.

12. The claim for exemplary damages for unlawful compulsory leave though claimed was not set out as to how this is different from the claim for damages claimed for unlawful compulsory leave. Such should have been set out in evidence as how these damages arose and contradistinguished with each other. This is declined.

13. There is claim for the denial of right to work, right to earn a living and job security, where there is a finding of unfair termination of employment, compensation is due. As set out under section 49(1), the court on good basis, can award all or any of the remedies therein. In this case where the claimant was essentially denied a chance to earn a living due to the unfair labour practice of the respondent, compensation is awarded equivalent to 11 months' salary all assessed at kshs.1, 300,000.00?

14. The claimant is also awarded costs of the suit and interest on the unpaid salaries from May 2013 to August 2014.

Judgement is hereby entered for the claimant on the following terms;

- a. **A declaration that the claimant was unfairly terminated and denied a right to earn a just living;**
- b. **Compensation awarded at Kshs.1,300,000.00;**
- c. **Salary due from May 2013 to August 2014 at Kshs.1,820,000.00;**
- d. **Interest is due on (c) above; and**
- e. **Costs of the suit.**

ORDERS ACCORDINGLY.

Delivered in open court at Nairobi and dated this 20th day of January 2016.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

.....

.....