



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
CAUSE NO. 1664 OF 2013
JAMES WAINAINA GUCHU.....CLAIMANT
Versus
WAIGANJO INVESTMENTS LTD.....RESPONDENT

Claimant in person

M/s Muigai for Respondent

JUDGMENT

1. The suit was commenced vide a Memorandum of Claim on 17th October, 2013. The Claimant seeks compensation for wrongful dismissal and special damages set out in paragraph 9 of the Memorandum of Claim in the sum of Kshs.268,175. The suit is opposed vide a Reply to Memorandum of Claim filed on 11th June, 2014.
2. The parties rely on the bundle of documents attached to the respective memoranda and oral testimony by the Claimant and RW1 Stephen Irimu, Administrative Manager of the Respondent. Both parties filed final submissions upon closure of their respective cases.

Facts of the Case

3. The facts of the case may be summarized as follows,
4. The Claimant was employed by the Respondent on 2nd May, 2009 as acting General Manager earning a monthly salary of Ksh.55,000. The Claimant worked up to 15th June, 2009, when his employment was terminated. The Claimant was paid for days worked. The Claimant was then re-employed on 13th July, 2009 and worked up to 10th October, 2009, when he was suspended on allegation of fraud. The Claimant was again paid his final dues.
5. The Respondent re-employed the Claimant on 22nd November, 2010 at a monthly salary of Kshs.65,000. The claimant worked until 23rd August, 2011 when the Respondent terminated his services on the ground that the Respondent company had financial difficulties and a bloated workforce. The claimant was re-employed on 18th January, 2012 at a monthly salary of Kshs.75,000. The Claimant worked until 30th May, 2012 when his employment was terminated on grounds that the Claimant was withdrawn and had lost zest of work.

6. The Claimant denies these allegations and states that his employment was terminated for no good reason and without following a fair procedure.
7. In all these instances, the claimant got a letter of appointment and the final letter of termination is marked 'APP 9'.
8. The Claimant seeks,
 - i. Compensation for wrongful dismissal
 - ii. Payment of non-remitted NSSF dues in the sum of Kshs.4,400
 - iii. House allowance calculated at 15% of the basic pay for 15 months in the sum of Kshs.220,275
 - iv. Transport allowance of Ksh.2,900 per month for 15 months Kshs.43,500.

Response

9. The Respondent filed a Reply to Memorandum of Claim on 11th June, 2014 in which he denies all the particulars of claim. The Respondent states that, the Claimant was initially employed as acting General Manager on 2nd May, 2009 and on 15th May, 2009 he left the employment of the Respondent voluntarily for greener pastures. The Respondent issued him with a recommendation letter dated 15th June, 2009 upon his request. The claimant accepted payment of the final dues on 15th June, 2009.
10. The Claimant was re-employed on 13th June, 2009 and dismissed on 21st October, 2009 for fraud and using insulting language to other employees. The Claimant was paid final dues on 13th November, 2009.
11. The Claimant was re-employed again on 22nd November, 2010. This time round the employment of the Claimant was terminated on 23rd August, 2011 on ground of redundancy. The Claimant's employment was terminated giving regard to seniority in time, was paid in lieu of leave days not taken; one month's salary in lieu of notice and severance pay calculated at 15 days salary for each completed year of service.
12. The Respondent denies that the Claimant was in continuous service from 2nd May, 2009 to 23rd August, 2011 and denies that the final termination was wrongful. The Respondent states that all terminal benefits were paid to the Claimant and in particular, the Claimant received a gross salary at all material times and was not owed house allowance or transport allowance as claimed, or at all. The Respondent prays that the suit be dismissed with costs.

Determination

- i. Was the Claimant in continuous employment from 2nd May, 2009 to 23rd August, 2011?
- ii. If not, was the last term of employment from 22nd November, 2010 to 23rd August, 2011 terminated fairly?
- iii. What remedies if at all is the Claimant entitled to?

Determination

13. From the totality of evidence before court the Claimant served through different contracts and was not in continuous employment from 2nd May, 2009 to 30th May, 2012. In each period the Claimant received a different salary.
14. In the last term, which commenced on 18th January, 2012 to 30th May, 2012, the Claimant earned a net salary of Ksh.75,000 after deductions of PAYE, NHIF, NSSF. The Claimant was placed on three months' probation. The Claimant served in the position of Personal Assistant Manager. The Claimant was summarily dismissed for being withdrawn and loss of zest at work. The Claimant

was also said to be arrogant and indifferent. The letter of dismissal was by Mr. John Waiganjo, the Managing Director.

15. It is not in dispute that the Claimant was not given a notice to show cause why his employment should not be terminated in respect of the four (times) his employment was terminated. The Claimant was not subjected to any disciplinary hearing and the reasons given for the summary dismissal on 30th May, 2012 remain largely unsubstantiated by the Respondent.
16. The employment and dismissal of the Claimant had degenerated into a comedy were it not so tragic to the career growth and development of the Claimant.
17. The conduct by the Respondent in subjecting its acting General Manager and later on Personal Assistant Manager to an on and off employment like a stop watch is a classic example of exploiting the vulnerability of an employee to the whims of an employer to the detriment of the employee
18. The claimant has proved on a balance of probability that the Respondent was engaged in unfair labour practices and the eventual summary dismissal on 30th May, 2012 was not for a valid reason and the dismissal was not effected in terms of a fair procedure contrary to Section 43 as read with Section 45 of the Employment Act, 2007.
19. The Claimant is in the circumstances entitled to compensation in terms of Section 49(1)(c) as read with Section 49(4) of the Act.
20. The Claimant was humiliated by being employed, dismissed for flimsy reasons or non at all, re-employed and then dismissed again four times in a period of four years between 2nd May, 2009 to 30th May, 2012. No employee deserves this kind of treatment by an employer.
21. As a result the Claimant lost chances of career development and growth. The Claimant lost his means of livelihood unlawfully. The Claimant clearly intended to continue with the employment but was humiliated each time he came back by being sacked and then re-employed.
22. The Claimant has suffered loss and damage and the court awards him four (4) months salary as compensation for the wrongful dismissal in the sum of Kshs.300,000.

Terminal benefits

- i. The Respondent deducted NSSF dues from the salary of the Respondent but did not remit the same for the period set out in the Memorandum of Claim. The Respondent is directed to refund Kshs.4,400 in respect thereof.
- ii. The last contract of service dated 18th January, 2012 provided for a net salary of Kshs.75,000 monthly. This means the Claimant was entitled to 15% housing allowance on the net salary for a period of four and a half months. The court award the claimant Kshs.84, 375 in terms of Section 31(1) of the Employment Act, 2007.
- iii. The Claimant has not proved the claim for transport allowance, the same not being in the contract of employment and the claim is dismissed.
- iv. In the final analysis the total award to the claim as against the Respondent is Kshs.388,775.
- v. The award is payable with interest at court rates from the date of filing the suit till payment in full
- vi. The Respondent is to pay the costs of the suit.

Dated and delivered in Nairobi this 1st day of April, 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE