



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1285 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 13th June 2016)

PHILLIP NZUNGI MULINGE CLAIMANT

VERSUS

SBI INTERNATIONAL HOLDING AG KENYA1ST RESPONDENT

REYMOND CONSTRUCTION COMPANY (RCC) 2ND RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant filed his Memorandum of Claim on 05.08.2014, seeking damages for unlawful termination through the firm of Onyata & Company Advocates. The Claimant states that he was employed by the 1st Respondent on 21.01.2007 as a Grove Crane Operator upto 21.05.2010 when his services were terminated by the 1st Respondent who duly paid the Claimant's terminal dues.
2. On the same day 21.05.2010 he was employed by the 2nd Respondent as a Grove Crane Operator and would be assigned duties on a need to basis at the site of the 1st Respondent who also paid his salary from May 2012 upto and including January 2013. He states that some time in December 2012 he approached the 1st Respondent's Project Manager seeking to know who was his employer but declined to give him an immediate answer. He followed up the matter with the said Project Manager and was not given any response and subsequently verbally informed by the 2nd Respondent's Accountant that he had been terminated.
3. He states that he worked diligently without any disciplinary action being taken against him by either the 1st or 2nd Respondents and on 1.02.2013 he was unlawfully, unfairly and wrongfully summarily terminated with effect from 27.1.2013. He was not provided with reasons that the 1st and 2nd Respondents considered in arriving at the decision to terminate the Claimant's services. He was not given an opportunity to defend himself and as such the Respondents' actions were unprocedural, against the principles of natural justice and equity.
4. At the time of termination the Claimant contends that he was earning Shs. 1,038.64 per day for an average of 26 days per month. He therefore prays for:
 1. ***Kshs. 324,048/= being 12 months' salary compensation for wrongful and unfair termination.***

2. ***Kshs. 27,004/= being one month's salary in lieu of notice.***
3. ***Shs 17,960/= being unpaid leave days.***
4. ***Shs. 27,004/= being service pay for 2 complete years worked.***
5. ***Costs of this suit.***
6. ***Interest.***
7. ***Any other relief the Honourable Court considers appropriate.***

5. The Respondents filed a Memorandum of Response where they state that the claim is time barred against the 1st Respondent on account of the Claimant having been dismissed and the lapse of three years before suit was filed as stipulated in Section 90 of the Employment Act. The 1st Respondent admits having terminated the Claimant on 21.5.2010 and paid him all his terminal benefits.
6. In response to the allegation that the 1st Respondent continued to pay his emoluments while the Claimant was working for the 2nd Respondent they state that the Claimant never raised a complaint during subsistence of the relationship.
7. The Respondents state that the Claimant absented himself for a period of two weeks leading to termination of his employment after failing to show good cause why he should not be dismissed. They seek for the suit to be dismissed for being scandalous, frivolous, vexatious, gross abuse of the due process and being time barred.
8. In evidence the Claimant stated that he was sacked by the 1st Respondent alleging that he had absconded from duty for 7 days whereas he was in the employment of the 2nd Respondent. He states that at the time of dismissal he was earning a salary of Shs. 27,000/= per month. He is of the view that he was dismissed irregularly and he was not given an opportunity to defend himself. He seeks for the claim to be allowed as prayed.
9. The Respondents witness gave evidence to the effect that the Respondents are sister companies and the management is the same. The Claimant was paid by the 1st Respondent as he worked on a crane used by both Respondents. He further stated that the Claimant's dismissal was warranted as he had absented himself from work and paid what was due to him. The Respondents allege that the Claimant is not entitled to severance pay because he deserted his work.
10. In cross examination RW1 admitted that the Claimant was not given an opportunity to be heard.
11. In submissions the Claimant states that the reason advanced by the Respondents that he was dismissed for absconding is unsupported by evidence. The Claimant submits that the time card was kept by the employer and verified by the Respondents' management. The Claimant states that he was not given an opportunity to inspect the said time card and respond to the accusation of absenteeism.
12. The Claimant also states that fair procedure was not followed in terminating his services. He states that he was not informed of the reasons for termination, and neither was he given an opportunity to be heard.
13. The Claimant states that he is entitled to notice pay because the Respondents did not meet the criteria set out in Section 44 (4) (a-g) for summary dismissal as the allegation that he absconded from duty is unsupported by evidence. He also states that he is entitled to 12 months' salary as compensation for wrongful and unfair dismissal.

14. The Respondents submit that the Claim is time barred for the reason that the Claimant was terminated on 21.1.2010 whereas the claim was filed in 2014. It is for this reason that the Respondents state that any claim against the 1st Respondent should be dismissed. They also state that the two Respondents are separate entities and joint liability does not exist in employment claims.
15. The Respondents state that they had valid reasons to terminate the Claimant. They state that he was absent from duty for nine days and refer to the time card produced in Court as Exhibit HOS 2, which is a reason for summary dismissal envisaged in the Employment Act. They also state that the Claimant did not give reasons for absencing himself from work without authorization and that they did not dismiss him as the purported dismissal letter produced in evidence has not been signed by the 2nd Respondent.
16. It is the Respondents' contention that they followed procedure during the summary dismissal of the Claimant and paid him all his dues. They therefore pray that the Claim be dismissed with costs.
17. I have considered submissions of both parties. Issues to be determined are as follows:
1. ***Whether the Cause is time barred.***
 2. ***Whether the Respondent had valid reasons to terminate the services of the Claimant.***
 3. ***Whether due process was followed before the Claimant was dismissed.***
18. On the 1st issue, the Claimant told Court that he was summarily dismissed by the Respondents on 27.1.2013. His claim was filed on 5/8/2014. The claim by the Respondents that he stated he was employed in 2010 is not true and the Claimant also annexed Appendix 3.1, 4.0, 4.1, 4.2, 4.3 and 6.0 his payslips for 2012 and 2013 January showing he was still working.
19. His dismissal letter is dated 1.2.2013 Appendix 5 and therefore the claim that the Cause is time barred in terms of Section 90 of Employment & Labour Relations Court Act is not true.
20. On the 2nd issue, the Respondents submitted that they dismissed the Claimant summarily after he absconded duty for 7 days.
21. They aver that he was given an opportunity to defend himself too. The dismissal letter is dated 1.2.2013 and states that the Claimant had been dismissed with effect from 27.1.2013 because of being absent from work for more than 7 days without permission.
22. The Claimant denies he was absent from work in January 2013. Appendix 4.2 is the Claimant's December 2012 payslip. There is no pay slip for January 2013 attached but Appendix 2 (Respondents documents) is the attendance sheet for the Claimant's which does not bear the relevant signatures and is therefore not a conclusive document to indicate that the Claimant was either present or absent from work.
23. That being the case, this reason for summary dismissal which the Claimant denies was supposed to be subjected to proof including submission of daily attendance sheets signed by both the Claimant and supervisor to show the period the Claimant was on duty as opposed to the period he is alleged to have been absent.
24. This, the Respondent failed to demonstrate and so I find that there was no valid reason to warrant dismissal of the Claimant summarily.
25. On the 3rd issue on due process, the process envisaged is that set out under Section 41 of Employment Act 2007 which states as follows:

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an

employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

26. This process was not followed despite the Respondent insisting that it was followed.

27. In the circumstances, this Court finds that the Claimant was unfairly and unjustly terminated as provided for under Section 45(2) of Employment Act which states as follows:

2. *A termination of employment by an employer is unfair if the employer fails to prove:*

a. *that the reason for the termination is valid;*

b. *that the reason for the termination is a fair reason:-*

i. *related to the employee’s conduct, capacity or compatibility; or*

ii. *based on the operational requirements of the employer; and*

c. *that the employment was terminated in accordance with fair procedure.*

28. It is therefore this Court’s finding that the Claimant is entitled to the following reliefs:

1. *1 months salary in lieu of notice = 27,004.56 pay for normal days as per Appendix 3.1.*

2. *Leave pay admitted by the Respondents Kshs.17,960/= in appendix 4.3.*

3. *Service pay for 2 completed years of service being $27,004.56 \times \frac{1}{2} \times 2 = 27,004.56$.*

4. *12 months salary as compensation for unfair and wrongful termination = $27,004 \times 12 = 324,046/=$.*

TOTAL = 396,016/=

5. *Issuance of a Certificate of Service.*

6. *Respondents will pay costs of this suit.*

Read in open Court this 13th day of June, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kamande for Respondents

Mutua holding brief for Onyata for Claimant