



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1773 OF 2013
CHRISPINE AMUNGA CLAIMANT/GRIEVANT
VERSUS
NORBROOK KENYA LIMITED RESPONDENT

M/S Otieno for claimant

M/S Kirimi for respondent

JUDGMENT

1. The suit was commenced vide a memorandum of claim filed on 1st November 2013.
2. The claimant seeks maximum compensation for wrongful dismissal and payment of terminal benefits to wit;
 - i. Unpaid leave for ten (ten) years Kshs.168,000;**
 - ii. Three (3) months salary in lieu of notice Kshs.50,400 ; and**
 - iii. Severance pay in the sum of Kshs.89,600.**
3. From the pleadings and evidence before court including documentary and sworn testimony by the claimant, the claimant was employed by the respondent in the position of production operative on 14th April 2003. He worked continuously until 24 May 2012 when he was dismissed from employment.
4. In terms of the letter of appointment produced in court, employment was on a weekly contract payable Kshs.250 per day. Termination was by one week notice.
5. By a letter dated 15th September 2008, the claimant was offered the position of senior operative from 1st September 2008. The position was on permanent basis. The claimant was earning a gross monthly salary of Kshs.16,800, was entitled to twenty one (21) days leave and eleven (11) statutory holidays. Contract provided for payment in lieu of untaken leave days upon termination and provided for termination by either party upon giving one month notice.
6. The claimant testified that he had a good work record without prior warning or any form of disciplinary case. The claimant rose through the ranks due to good service rendered. That the claimant was dismissed

from employment without any notice to show cause, nor any disciplinary hearing against him. The claimant states that the dismissal was wrongful and unfair and claims as above.

Response

7. The respondent filed a memorandum of reply to the memorandum of claim on 26th November 2013.
8. The claimant filed a reply to the memorandum of reply on 27th January 2014.
9. The respondent purports to file supplementary statement of response which in the court's view is a mis-step not allowed by the Rules of the court or by any fair practice of the court. The claimant must have a last word and the supplementary statement of response is struck off the record. The respondent called three (3) witnesses in support of its case.
10. The respondent called three (3) witnesses in support of its case. Respondent denies that it was a party to the initial contract dated 14th July 2003. The respondent states that it employed the claimant on 2nd July 2007 in the position of General Operative. The letter of offer is attached and marked exhibit I. the respondent avers that the claimant was entitled to a monthly salary of Kshs.10,500 and twenty one (21) days leave per annum. That the claimant was a member of respondent's contributory provident fund scheme from 9th July 2007.
11. On 15th September 2008, the claimant was offered position of senior operative. He earned Kshs.6,800 per month.
12. Sometimes in July 2011, the respondent's employees attempted to initiate an unlawful strike. They reported to work and demanded to be addressed by the General Manager.
13. The respondent was reliably informed upon investigations that the claimant and another employee were responsible for organizing the intended strike. No action was taken.
14. On 24th May 2012, the respondent's production supervisor received information from another employee of an intended strike scheduled to take place after tea break. The informer informed the General Manager that the claimant was behind the move. The respondent's administration manager wrote a letter dated 24th May 2012 to the claimant inviting the claimant for a hearing scheduled for the same date. The claimant was notified of his right to be accompanied by a witness. The claimant came alone to the disciplinary hearing which took place on 25th May 2012. Minutes of the hearing were produced at pages 27 – 28 of the reply. The notice to show cause is at page 26.
15. The disciplinary hearing was chaired by the General Manager Mr. Viktor Proshchanka. The respondent prays that the dismissal of the claimant was lawful and fair and the suit be dismissed with costs.

16. Determination

The issues for determination are as follows;

- i. Was the dismissal for a valid reason and in terms of a fair procedure?**
- ii. Is the claimant entitled to the reliefs sought?**

17. Issue i

The minutes of the disciplinary hearing produced by the respondent are self-evident.

The claimant was accused of gross misconduct in that some named persons reported to the respondent

that the claimant was involved in organizing an intended strike. The meeting was chaired by the General Manager Mr. Viktor Proshchanka and was attended by the claimant only. One Qutoinette-wa-Tindi recorded the minutes.

18. The General Manager asked the claimant questions which the claimant appear to have fully answered. The persons alleged to have reported the matter were not called as witnesses to the meeting. From the record the General Manager was the accuser, prosecutor and Judge. The manner in which the disciplinary hearing was conducted was incapable of establishing the validity of the allegations made against the claimant, simply because no evidence was led against the claimant at all notwithstanding that he was allegedly accused by his co-workers.

19. The process did not meet the most basic requirements of a hearing known to mankind to establish the truth.

20 . The result of this flawed process is that, it violated the requirements under section 41 of the Employment Act, and the basic requirements of the rules of natural justice.

21. The claimant has in the circumstances established on a balance of probability that the dismissal was not for a valid reason and was not done in terms of a fair procedure contrary to sections 41, 43 and 45 of the Employment Act, 2007.

22. The claimant is in the circumstances entitled to payment in lieu of one month notice and to compensation in terms of section 49 (1) (c) as read with section 49 (4).

23. The claimant had served the respondent for a period of nine (9) years without any documented disciplinary record against him. The claimant had been promoted to production supervisor due to his diligence and good work. The claimant wrongfully lost his source of income without notice at all and was not paid any terminal benefits upon dismissal. The court finds that the claimant did not contribute to the dismissal. The court awards the claimant ten (10) months salary for the wrongful and unfair dismissal in the sum of Kshs.(16,800 x 10) 168,000.

14. Notice pay

The finding of unlawful dismissal read with the letter of appointment entitles the claimant to payment of Kshs.16,800 in lieu of one month notice.

25 . Leave pay and severance pay

The claimant has not proved that he was owed payment in lieu of leave days not taken. The respondent has sufficiently rebutted this claim.

26. Similarly, the claimant was registered with provident fund and is not entitled to service gratuity. The claimant was not declared redundant in terms of section 40 of the Employment Act, 2007 and therefore is also not entitled to payment of severance pay. These two claims are dismissed.

27. The final orders of the court are that, judgment is entered in favour of the claimant as against the respondent for;

i. Kshs.16,800 in lieu of notice;

ii. Kshs.168,000 compensation.

Total award Kshs.184,800;

iii. Interest on the award at court rates from date of filing suit till payment in full.

iv Costs of the suit.

Dated and delivered at Nairobi this 25th day of November 2016

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE