



**Korgoren v Jiangxi Zhongnmoi Eng Construction (K) Ltd (Cause
29 of 2014) [2016] KEELRC 1871 (KLR) (14 November 2016) (Judgment)**

Richard Kipkorir Korgoren v Jiangxi Zhongnmoi Eng Construction (K) Ltd [2016] eKLR

Neutral citation: [2016] KEELRC 1871 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE 29 OF 2014
DKN MARETE, J
NOVEMBER 14, 2016**

BETWEEN

RICHARD KIPKORIR KORGOREN CLAIMANT

AND

JIANGXI ZHONGNMOI ENG CONSTRUCTION (K) LTD RESPONDENT

JUDGMENT

1. This matter was originated by way of a Memorandum of Claim dated the 8th December, 2014. The issues in dispute are therein cited as;
 - a. Unfair termination of employment.
 - b. Inadequate compensation for injuries sustained.
 - c. Breach of the law relating to medical attention of employees injured while at work.
2. The respondent in a Response to Memorandum of Claim dated 6th July, 2015 denies the claim and prays that it be dismissed with costs.
3. The claimant's case is that in or about 2010 he entered into an employment contract with the respondent. He was employed as a driver and later promoted to a general supervisor (foreman) of the respondent's fleet of cars. This was not a salary of Kshs.26,000.00.
4. It is the claimant's further case that on 3rd April, 2013, while on duty, he was involved in a motor vehicle road accident along Barsele Kipkelion road at Kaplaban. He was later taken to Kericho District Hospital where he was hospitalized for 17 days and then on 20th April, 2013 he was transferred to Tenwek Hospital for further specialized treatment. He was discharged on 3rd May, 2013 with instructions of going back for further treatment. He had incurred a total bill of Kshs. 67,680.00.



5. The claimant's further case is that since the accident and injury the respondent never followed up on his treatment or offered any assistance. This is a breach of S. 34 and 47 of the Employment Act and Work Injury Benefits Act respectively.
6. The claimant's further case is that with the assistance of the labour office, the insurance paid an amount of Kshs.1,462,00 but the respondent only paid Kshs. 950,000.00 and kept a balance of Kshs. 462,000.00 without any explanation. Again, upon the accident, he was paid an amount of Kshs.20,000.00 instead of Kshs. 26,000.00, his usual salary on grounds that he did not work.
7. The claimant's other case is that the respondent had intimated to him that he was to resume work on 26th October, 2013 but upon arrival at his workplace, the manager informed him that his services had been terminated. He was not even paid during the six months of medication.
8. He claims as follows;
 - a. Compensation equal to his gross monthly salary for 12 months as under Section 49 (1) (c) as read with section 50 of the Employment Act as; $Kshs. 26,000 \times 12 = Kshs. 312,000/=$
 - b. His unpaid leave for three years under Section 28(1) of the Employment Act $Kshs. 26,000/30 \times 21 \text{ days} \times 3 \text{ years} = Kshs.54,600/=$
 - c. Sick leave pay for two consecutive months as follows; full pay (7 days x $Kshs.26000/30 \text{ days} \times 3 \text{ years}$) + Half pay (7 days x $26000/60 \text{ days} \times 3 \text{ years}$) $Kshs.27,300/=$.
 - d. Reimbursement of his medical expenses costs of $Kshs. 67,680/=$.
 - e. One month's salary in lieu of notice being $Kshs.26,000/=$.
 - f. The balance of compensation for injury at work wrongfully retained by the respondent being $Kshs.462,000/=$

Grand Total = $Kshs.949,580/=$
9. In the penultimate he prays for;
 - a. A declaration that the respondent's dismissal of the claimant from his employment was wrongful and unfair.
 - b. General damages for loss of future employment prospects as a driver due to incapacitation.
 - c. An order directing the respondent to pay the claimant his terminal dues and benefits of $Kshs. 948,580/=$ as set out in paragraph 16 above.
 - d. An order directing the respondent to issue the claimant with certificate of service.
 - e. Cost of the suit and interests on (b) and (c) above court rates.
 - f. Such other relief as the honourable court may deem fit and just.
10. The respondent's case is the claimant was employed on an hourly wage of $Kshs. 80.00$ and not a monthly salary of $Kshs.26,000.00$. It is her further case that the claimant was fully compensated for the injuries sustained at $Kshs.1060.109.00$ and this was not $1,462,000.00$. This was in accordance with an assessment by the insurer.
11. It is the respondent's further case that the claimant absconded duty and refused to resume duty on discharge from hospital and has not been dismissed by the respondent. He has also not furnished a



certificate of incapacity to work. Further, the claimant is only entitled to fourteen (14) days sick leave as follows;

8. In reply to paragraph 12 of the Memorandum of Claim, the Respondent avers that Claimant is only entitled to sick leave of a maximum of 14 days every year comprised of 7 days with full payment and thereafter 7 days sick leave with half pay.
12. She therefore prays that this matter be dismissed with costs.
13. The matter came for hearing severally until the 14th June, 2016 when the parties agreed on a disposal by way of written submissions.
14. The issues for determinations therefore are;
 1. Whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawfully.
 2. Whether the Claimant is entitled to the relief sought.
 3. Who should pay costs of the suit.
15. The claimant in his written submissions reiterates his case and rubbishes the respondent's clamour to abscondment of work by the claimant. It is his submission that in such cases, the employer has legal recourse to discipline errant employees and in the instant case, there is no demonstration or evidence of abscondment or disciplinary process appurtenant to the same. These remain mere allegations and beg for support.
16. The claimant further seeks to rely on S. 43 of the *Employment Act*, 2007 which provides as follows;

“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”
17. He further claims that the termination of his employment was unprocedural within the meaning and provisions of S. 43, 45 and 46 (b) and (g) S. 41 provides thus;

“An employer shall before termination employment on an employee, on the ground 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.”
18. The claim in the penultimate relies on the authority of Kenya Union of Commercial Food & Allied Workers Versus North Farmers Sacco Ltd, cause no. 74 of 2013;

“Whatever reason or reasons that arise to cause an employer to terminate an employee, that employee must be taken through the mandatory process as outlined under section 41 of the *Employment Act*, These apply in a case for termination as well as in a case that warrant summary dismissal..... section 41 is couched in mandatory terms. That when employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair.....the situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair.”



19. The respondent also reiterates her case in her written submissions. The respondent denies responsibility for any claim under the Workman Compensation Act, Cap 236 by the claimant and further submits that the claimant was paid his insurance sum and claim in full. The respondent further submits a case of abscondment and further submits that the claimant admits being away from work for thirty nine (39) days without good cause.
20. I agree with the claimant. The respondent had ample opportunity and facilities to manage the case of abscondment as alleged but did not. It merely remains an allegation and therefore cannot pass for any evidential value.
21. Again, there is not the slightest demonstration of due process in the misgivings of the claimant or even termination as he claims. This is met with a mere denial. This enters into the arena of your case against mine in which the court is forced to apply the principles of balance of probability and preponderance of evidence in a determination of the issues at hand. In the circumstances of this case, this tilts in favour of the claimant and I therefore find a case of unlawful and unfair termination of employment.
22. With a finding of unfair and unlawful termination as above, the claimant is entitled to the relief sought.
23. I am therefore inclined to allow the claim and order relief as follows;
 - i. One month's pay in lieu of notice.....Kshs. 26,000.00.
 - ii. Reimbursement of medical expenses.....Kshs. 67,680.00.
 - iii. Six months salary as compensation
for unlawful termination of employment.....Kshs.156,000.00.
Total of Claim=Kshs. 249,680.00.
 - iv. The costs of this claim shall be borne by the respondent.

DELIVERED, DATED AND SIGNED THIS 14TH DAY OF NOVEMBER 2016.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mr. Mutai instructed by J.K.Mutai & Company Advocates for the Claimant.
2. Ms Mitei instructed by Sila Munyao & Company Advocates for the Respondent.

