



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2555 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 19th February, 2015)

JOSEPH ISAGI NYANDO.....CLAIMANT

VERSUS

IMAGINE IMC. LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. On 21/12/2012, the Claimant herein filed his claim in person. His claim was that he had been unfairly and unlawfully dismissed from the service by the Respondents. The Respondents were served with a copy of the Memorandum of Claim and Summons and entered their appearance and filed defence on 23/1/2013 through the firm of Njeru R. Ngari & Co Advocates. The firm of Nyabena Nyakundi & Co Advocates subsequently filed a notice of appointment to act for the claimant on 23/7/2012. The case was subsequently set down for hearing on 28/1/2015. The Respondents were served with a hearing notice on 11/12/2014 but on the date set for hearing, they failed to turn up. This case therefore proceeded ex-parte on 28/1/2015.

The Claimant's case

2. The Claimants' case is that, he was employed by the Respondents on 20/2/2012 as a Professional Driver holding a 'BCE' driving license. He was issued with a letter of contract on the same day marked Annex 2. His employment was confirmed on 29/6/2012 as per Annex 3.
3. On 20/7/2012, his salary was reviewed to 25,000/= per month as per Annex 4 but he was never paid any house allowance.
4. On 1/10/2012 however without any warning, the Respondents summarily dismissed the Claimant as per Appendix 5. It is the claimant's case that before dismissal, he was never given any notice nor accorded any hearing. It was just alleged that he was insubordinating his superiors without any details. He denies insubordinating anybody. He avers that during his time of service he was not paid any house allowance and that at time of dismissal he was only paid 8,205/= as terminal dues.
5. The Claimant asks this court to find that his termination was not justified and therefore order that he be paid damages for unlawful termination plus costs of this suit. He also seeks to be paid his house allowance at 15% of salary as required. He also wants the court to order that he be issued with a certificate of service.

Respondent's case

6. The Respondents through their memo of defence admit that they had employed the Claimant but deny that they dismissed him unfairly or wrongly in any way. They aver that the dismissal was lawfully effected and within the provisions and the requirements of the Employment Act 2007 and also as per the employment contract. They further aver that the Claimant was accorded a hearing and his explanations taken into account before he was suspended and finally dismissed.
7. The Respondents state that they relied on the repeated cases of misconduct and disrespectful engagements of the Claimant to his colleagues and seniors which acts were reported to the Human Resource Department and the same was recorded in the Claimant's employment file. They further aver that, the Claimant used abusive and/or insulting language and behaved in a manner insulting to his employer Personal Assistant/Head of Department – Appendix A is a copy of a verbal warning issued to the Claimant.
8. On the claim for house allowance, the Respondents case is that the Claimant's salary was a consolidated sum inclusive of house allowance and is not payable. The Respondents position is that they paid the Claimant all his terminal dues for which he signed for and acknowledged. The Respondents want the Claimant's case dismissed with costs. They are willing to issue the Claimant with a Certificate of Service if the requests for it.

Issues for determination

9. Having considered the evidence of both parties the issues for consideration are as follows:-
 1. Whether the termination of the claimant by the Respondent's was lawful and justified.
 2. Whether the Claimant is entitled to remedies sought.
10. On the lawfulness or otherwise of the Claimant's dismissal, Section 43 of the Employment Act 2007 states as follows:-

“(1) 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.

(2) The reason or reasons for termination of a contract are

the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

Reason which warrant dismissal or termination shall be real reason existing at the time of the said termination of dismissal.

11. Section 44 of Employment Act lists reasons which would justify summary dismissal and Section 44(d) states that one such reason is where;

“an employee uses abusive or insulting language or behaves in a manner insulting; to his employer on to a person placed in authority over him by his employer”.

The Respondent had alleged insubordinating and use of abusive language against the claimant. They purportedly issued him with a verbal warning as per their Appendix 1A which is not signed nor acknowledged by the Claimant in any way and it remains a mere allegation.

12. That notwithstanding Section 41 of Employment Act is also clear on procedure to be employed before termination of employment on grounds of misconduct. Under Section 41 of Employment Act 2007:-

“(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”.

The law here envisages a proper hearing where the Claimant is expected to produce witnesses and even examine his accusers. In the case of the Claimant, no hearing was accorded him. He was condemned unheard and in contravention of the law.

13.Failure to adhere to provision of Section 41 of Employment Act 2007, also flouted Article 50(1) of the Constitution of Kenya which states that:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body”.

14.The Claimant was denied a hearing as envisaged by the law and even inspite of the Respondents own acknowledgement in the Claimants contract of employment that:-

“This employment contract shall be governed and construed in accordance with the laws of Kenya”.

It is therefore the finding of this court that the dismissal of the Claimant was unlawful and unjustified.

Remedies

15.Having found as above, the next issue is whether the Claimant is entitled to remedies he has sought. He sought for various remedies as per his claim. He was not given any notice as envisaged under the contract of employment and under Section 35 of the Employment Act 2007. He is therefore entitled to payment of 1 months salary in lieu of notice equivalent to Kshs.25,000/=.

16.On house allowance, Section 31 (1) and (2) of Employment Act 2007 stats that:-

“(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service:-

(a) Contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).”

If the employer does intent that the salary paid encompasses house allowance, this must expressly be stated in the employment contract. The contract of employment given to claimant is silent on this aspect

and so it can safely be assumed that the Respondent was expected to pay the Claimant a house allowance separate from the salary given to him. I therefore find that the Claimant is entitled to payment of house allowance for the period worked equivalent to 8 months being 15% of monthly salary x 8 (number of months)

$$= 15/100 \times 8 \times 25,000$$

$$= 30,000/=.$$

17. Having also found that the termination was unlawful, I also award the Claimant 12 months salary as damages for unlawful termination.

$$= 12 \times 25,000$$

$$= 300,000/=$$

Total awarded = 355,000

Plus costs of this suit

18. The Claimant should also be issued with a Certificate of Service.

It is so ordered.

Read in open Court this 19th day of February, 2015

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kenyatta holding brief for Nyabena for Claimant present

No appearance for Respondent