



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT

AT MOMBASA

CAUSE NO. 349 OF 2014

DENIS OMBESE NYAKUNDICLAIMANT

VERSUS

BRANDED FINE FOODS LTDRESPONDENT

J U D G M E N T

I N T R O D U C T I O N

1. The claimant has brought this suit against the respondent claiming ksh.880,331, certificate of service plus costs and interest. The claim is for terminal dues accruing on separation plus compensation for unfair termination. The basis of the suit according to the claimant is that he was chased away from employment on 23/3/2013 by his boss for requesting for his annual leave.
2. In response to the suit, the respondent has denied liability and averred that it is the claimant who terminated his employment without prior notice. According to the respondent the claimant verbally told the respondent's Managing Director (MD) that he had resigned and walked out of the office immediately on his own volition. The respondent has however admitted the claim for 20 leave days but counter-claimed for Ksh. 21048 being one month salary in lieu of notice.
3. The suit was heard on 6/10/2014 when the claimant testified as CW1 while he respondent called Christine Mufutu as RW1. After the hearing both parties filed written submissions urging he court to find in their favour.

CLAIMANT'S CASE

4. CW1 was employed as a junior Credit Accountant by the respondent on 14/1/2011 on 2 years fixed term contract which was renewed on 14/1/2013 to lapse on 13/1/2015. His salary for the new contract was ksh.22500 per month. On 22/3/2013, CW1 applied for 63 days leave inclusive of the 42 leave days outstanding from the lapsed contract. He got the application from the HR Manager Mr. Emmanuel Kenga and after filing he attached two to previous leave application forms by which he had secured ½ day leave respectively. When CW1 reported to work the following day, 23/3/2013, he found photocopies of his 3 leave application forms on his desk and asked the HR Manager why leave forms were placed on his desk. When the MD Mr. Igbal heard CW1 enquiring about he leave forms, he became furious and told CW1 that he did not want to see him at the work place anymore. The MD then gave him a chase around the office while the other workers burst into laughter. Finally CW1 ran away from the premises and the MD directed the HR Manager Mr. Kenga, a Madam Karim and the Security guards at the gate not to let CW1 back to the work place.
5. CW1 contended that the said termination of his employment was not preceded by a one month

- notice or a hearing and no terminal dues were paid. According to CW1 the reason for his dismissal was his pursuit for accrued leave. He prayed for one month salary in lieu of notice, 63 leave days outstanding, salary for 23 days worked in March 2013, and 12 month salary for unfair termination. He denied receipt of ksh. 10000 as salary advance for March 2013.
6. on cross examination by the defence counsel, CW1 maintained that he was entitled to 21 days annual leave under the law although his employment contract did not provide for any leave. He further maintained that under the first contract he was entitled to 42 leave days because he never went for any leave during that contract. He maintained that under the new contract he only worked for about 2 months. He also maintained that his salary under the new salary was ksh. 22500 according to the payslips, he was signing. He denied validity of the copy of payslips for February 2013 filed by the defence on ground that it did not bear his signature. He further denied that he authored the email dated 3-4-2013 purportedly send to the MD to convey his resignation. According to CW1, by 3-4-2013 he had already been dismissed from employment. CW1 further explained that the said email was send from outlook account which was accessible by any other officer of the respondent because it had password.
 7. CW1 admitted that there was time card to show attendance which was operated using a thumb to clock-in. He however explained that the HR Manager, the MD and the CEO had the password or ability to edit the data in the time card. He denied the validity of the time card print out filed by the defence on ground that it had been falsified to reflect his attendance from 24/3/2013 to 3-4-2013. CW1 denied that he stole his personal files from the office and maintained that he was not the custodian of the files. CW1 explained that his demand letter to the respondent was thorough the address indicated by the respondent on the employment contract. He admitted that he was servicing a KCB loan at the rate of ksh. 6600 per month. He maintained that he did not resign.

DEFENCE CASE

8. RW1 is the respondent's Operations manager for the last 15 years. She admitted that CW1 was reemployed by the respondent from 13/1/2013 as a Junior Credit Accountant for a 2 year fixed term contract. According to her CW1's salary was kshs. 17673 plus house allowance of ksh.3,375 totalling to Ksh.21048 per month. She denied that CW1 was dismissed and contended that it is CW1 who voluntarily resigned from employment on 3-4-2013 without any prior notice.
9. RW1 therefore denied CW1's claim for one month salary in lieu of notice. She also explained that CW1 utilized 22 of the 42 leave days earned under the first contract as such he contended that CW1 had only 20 leave days outstanding. She however explained that the said 20 leave days should be used to offset the counter-claimed salary in lieu of notice.
10. RW1 contended that CW1 took away his personal files upon his resignation forcing the MD to report him to the police. She explained that although CW1 was entitled to ksh. 14496 as salary for days worked in March 2013, he took ksh. 10000 salary advance leaving only ksh.4,496 due. She further denied the claim for ksh.472,500 being the salary for the unexpired period of the contract, because CW1 resigned voluntarily and because Section 49 of the Employment Act provides for a maximum of 12 month salary. She also denied the claim for ksh.22000 being compensation for wrongful termination because CW1 resigned voluntarily on 3-4-2013.
11. RW1 explained that on 23/3/2013 she was on duty but she could not tell what happened between CW1 and the MD because she used to do some outside duties. She maintained that CW1 worked until 3-4-2013 a Saturday when she saw him take away 2 files and left the office.
12. On cross examination by the claimant's counsel, RW1 confirmed that the HR manager was able to edit the time card data. She also admitted every employee of the respondent was assigned an outlook address by the IT Manager. The account was however without any password. RW1 contended that CW1 became angry when he found his leave was not approved and left with the files. She confirmed that the HR Manager was the custodian of the files but she could not tell how CW1 accessed them. She admitted that salary is increased when a contract is renewed. She admitted that the respondents employee are given 2 copies of payslips during payment of which he signs and surrenders one copy to the respondent.

ANALYSIS AND DETERMINATION

13. There is no dispute that CW1 was employed by the respondent on fixed term contract of 2 years between 14/1/2011 and 13/1/2013 which was renewed for another 2 years from 14/1/2013. There is also no dispute that CW1's new contract ended prematurely either on 23/3/2013 or 3-4-2013. The issues for determination are:
- Whether CW1 was dismissed on 23/3/2013 or he resigned voluntarily on 3-4-2013.**
 - If CW1 was dismissed, whether the dismissal was unfair.**
 - Whether the reliefs sought vide claim or counterclaim should be granted.**

Dismissal VS Resignation

14. The evidence by the claimant that he was chased around by the MD and finally sent away and barred from returning to work was not rebutted. Neither the MD nor the people he directed not to let CW1 back to work testified or filed any written statement. On the other hand, RW1 did not rebut the CW1's testimony on that issue because during cross examination she stated that she could not tell what happened between CW1 and the MD on 23/3/2013 because she was not in the office throughout that day.
15. As regards the alleged resignation of CW1 on 3-4-2013, RW1 did not prove that CW1 continued to work till then. She also did not prove that the email allegedly used for resignation was authored by the claimant because it emanated from an outlook account. According to her the account was accessible by all people because it was without any secret password. As regards the time card print out, RW1 admitted that it could be edited by the HR Manager. For the foregoing reasons, the court finds on a balance of probability that the claimant did not resign on 3-4-2013 but was dismissed on 23/3/2013.

Unfair termination

16. The reason for dismissal of the CW1 was because he sought to go for his lawfully earned leave. The respondent was out to deny CW1 his right to leave during the expired contract period. The court is persuaded by the contract letters that the respondent was out for bad labour practices because it did not provide for the salary payable to the claimant or any annual leave. That deliberate omission by the respondent to provide for annual leave in the contract was the reason upon which CW1 was dismissed when he demanded for it as a statutory right. Under Section 46 of the Employment Act, dismissing an employee for demanding leave is deemed unfair and this court makes the finding that the dismissal from employment was unfair and unjustified. The matter was made more worse when the MD violently insulted and chased CW1 from the office before even according him a hearing. The said dismissal also amounted to breach of the fixed term contract because it prematurely ended his services without any justifiable cause and without notice.

Reliefs

17. Under Section 49 of the Act unfairly dismissed employee is entitled to salary in lieu of notice, accrued dues plus compensation for unfair termination. This case being a fixed term contract, the court will however, only award salary for the unexpired period of the contract being 22 months. The period of 22 months multiplied by salary of ksh.22500 total to ksh.495000. The court has deemed that CW1's correct salary was ksh.22500 and not 21000 as alleged by the defence. According to CW1, he always signed on the payslips, copy of which was kept by the employer. That was corroborated by RW1 in her testimony who did not produce the same as exhibits.³
18. CW1 is also awarded 42 leave days earned during the first contract that ended on 13/1/2013. He is also awarded 5 leave days for the 2 ½ months served upto 23/3/2013 less the aggregate 1 day leave taken. That makes the accrued leave days to be 46 for the two contracts which is assessed at ksh.34,500. The allegation by the defence that CW1 utilized 22 leave days is dismissed for lack of evidence in form of records from the respondent.

DISPOSITION

For the reasons and findings above judgment is entered for the claimant for ksh.529,500 and a certificate of service, costs and interest.

Orders accordingly.

Dated, signed and delivered this 13th February 2015.

O. N. Makau

Judge