



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CASE NO. 96 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

GEORGE ODIYO MINYIKAAPPLICANT

VERSUS

CHEMILIL SUGAR CO. LTD.....RESPONDENT

J U D G E M E N T

Introduction.

By a Memorandum of Claim filed on 14th May, 2014 the Claimant alleged that he was unfairly terminated by the Respondent and seeks the following remedies:-

- (a) Severance pay in lieu of notice.....Shs. 117,531.00
- (b) Damages for wrongful dismissal.....Shs. 470,124.00
- (c) Half salary unlawfully withheldShs. 195,885.00
- (d) Accumulated leaveShs. 24,812.00

Total

Shs.1,591,892.00

The Claimant further prayed for reinstatement to the position he held before dismissal, costs and interest.

The Respondent filed a Reply to the Memorandum of Claim on 9th June, 2014 denying that the termination of the Claimant's employment was unlawful.

The case was heard on 3rd March, and 27th July, 2015. The Claimant testified on his behalf while the Respondent called one witness Moffat Omondi, the Human Resource and Administration Manager. Parties thereafter filed and exchanged written submissions.

Facts of the case

The Claimant was employed by the Respondent as a Fitter in 1989. His employment was terminated on 17th February, 2014. The grounds for termination according to the letter of termination were that he made a false allegation that he was given an intravenous injection through his left thumb at the Respondent's dispensary which led to serious injury and amputation of the said left thumb.

The Claimant filed a civil suit against the company for compensation for the amputated thumb in TAMU CIVIL CASE NO. 9 of 2012 and was on 17th December, 2013 awarded general damages of Shs.400,000/= which the Respondent paid. The Claimant was served with a Show Cause and suspension letter dated 18th April, 2013 requiring him to Show Cause within 48 hours why disciplinary action should not be taken against him. The letter further sent him on suspension on half pay. The letter of suspension accused him of filing a suit against the Respondent and refusing to record a statement in relation to the injury.

In his response to the show cause letter dated 23rd April, 2013 the Claimant stated that he did not record a statement because he was suffering from lapse of memory, was in a lot of pain and was preparing to go to Jaramogi Oginga Odinga Referral Hospital for review the following day. The Claimant was later invited for disciplinary hearing on 8th October, 2013. The disciplinary committee recommended the termination of the Claimant's employment.

In the letter of termination the Respondent offered to pay the Claimant's terminal benefits as follows:-

- (a) Salary up to 8th February, 2014
- (b) 18.92 days accumulated annual leave earned up to 8th February, 2014
- (c) Three months salary in lieu of notice
- (d) 25 days pay for every completed year of service from 2nd October, 1989.

The letter of termination stated that the Claimant would be paid at half rate for the period 18th April, 2013 to 7th February, 2014 when he was on suspension. The letter of termination advised the Claimant to collect his dues from the Financial Accountant subject to clearance of liabilities owing to the company.

At the hearing the Claimant testified that he had not collected his terminal dues while RW1 testified that the Claimant had been paid. RW 1 was however not able to confirm either the date of payment or the amount paid.

Issues for determination.

1. Whether the termination of the Claimant's employment was fair
2. Whether the Claimant is entitled to the prayers sought.

Whether the termination of the Claimant's employment was unfair

The reasons for termination of the Claimants employment are not clear. The show cause and suspension letter gave the reasons for suspension at paragraph 1 and 2 thereof as follows:-

We have reliably learnt that you have filed a suit against the company on the ground that on or about 14th December, 2010, you got chronic malaria and was taken to the Health Centre where you were admitted. You alleged that you were given intra venous injection through your left thumb that led to serious injury and later amputation.

In our attempt to establish the facts on this matter, it is alleged that you refused to record a statement as required by the company policy. The above offense constitutes gross misconduct contrary to the rules and regulations governing your employment.

The letter of termination on the other hand gives the grounds for termination as follows:-

Reference is made to our letter Ref; CSCL/HRD/PA/PR2938 dated 18th April, 2013, where you were suspended for giving false allegation that you were given an intra venous injection

through your left thumb that led to a serious injury and later amputation of your left thumb. Your response dated 23rd April, 2013 and your subsequent appearance before the disciplinary committee on 8th October, 2013 on the disciplinary case was not satisfactory. This is to convey Management's decision to terminate your services with immediate effect.

At the hearing during cross examination RW 1 stated that the trigger of the termination of the Claimant's employment was that he sued the company on wrong allegations.

Section 41 of the Employment Act states that :-

(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 he person, if any, chosen by the employee within subsection (1), make".*

Section 43 provides that :-

(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."*

Section 45(2) of the Employment Act provides that for termination of employment to be fair, the employer must prove both valid reason and fair procedure.

Section 46(b) states that it is unfair to discipline an employee for initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation.

In the present case, no record of the disciplinary hearing was availed to the court and there are 3 different reasons for termination that can be discerned from the proceedings. It is not clear whether the reason for termination is that stated in the Show Cause and suspension letter, or in the letter of termination, or that stated by RW1.

A reasons for termination must be ascertainable and unequivocal. In the present case it is not clear what the reason for termination was or what charge the Claimant was responding to at the disciplinary hearing. However, as stated by RW 1 the trigger for the disciplinary process and the eventual termination was the injury claim filed by the Claimant via Tamu Civil Case No. 9 of 2012. No appeal was filed against judgment in the claim and the Respondent paid the compensation. The claim can therefore not be deemed to have been irresponsible or without foundation to justify termination of the Claimant's employment on disciplinary grounds.

From the foregoing, I find that there was no valid reason for termination of the Claimant's employment and the termination was therefore unfair.

Remedies

The Claimant prayed for reinstatement to his position prior to the termination but no mention was made of this either in his testimony or in the written submissions. I will therefore treat this head of claim as having been abandoned and therefore make no determination in respect of the same.

In the letter of termination the Respondent offered to pay the Claimant salary for days worked, accumulated annual leave, 3 months salary in lieu of notice and gratuity service pay at 25 days salary per completed year of service. The Claimant testified that he did not collect the same while RW1 testified that the Claimant was paid but did not have any proof of date of payment or the amount paid.

The claim for days worked should be up to the date of the letter of termination which is 17th February, 2014. This amount to Shs.122,200.30. Three (3) months salary in lieu of notice is Shs.117,531. Annual leave of 18.92 days works out at Shs.24,707.60. Gratuity at 25 days per year worked for 25 years service is Shs.816,187.50.

Having found the termination of the Claimant's employment unfair, he is entitled to full salary for the period of suspension from 18th April, 2013 to the January, 2014, a period of 10 months at Shs.391,770.

Having been unfairly terminated and taking into account the Claimant's long service of 25 years, and further taking into account the fact that the Respondent did not allude any adverse disciplinary record against the Claimant except the incident that led to the termination of his employment, I award the Claimant maximum compensation of 12 months salary at Shs.470,124.

I therefore enter judgement for the Claimant against the Respondent in the total sum of Shs.1,842,520.40.

The same will be subject to PAYE provided that the Respondent must adduce proof of remittance to Kenya Revenue Authority and that the PAYE taxation is spread over the period of April, 2013 and February, 2014.

The Respondent will also pay the Claimant's costs of this suit.

The Claimant will be entitled to interest from date of judgement.

Dated signed and delivered in open court this 20th day of November 2015

MAUREEN ONYANGO

JUDGE.