



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 2089 OF 2012

NIXON MANDALA MALONGO.....
.....CLAIMANT

VERSUS

CLIFFORD OKELLO RACHUONYO.....
.....1ST RESPONDENT

AND

JAPHETH ONDIRA RACHUONYO

T/A RACHUONYO & RACHUONYO ADVOCATES.....
2ND RESPONDENT

JUDGMENT

By a Memorandum of claim dated 15th October supported by a verifying affidavit sworn on the same date and filed in court on 16th October 2012, the Claimant herein NIXON MANDALA MALONGO alleges that he was maliciously and unlawfully dismissed from employment by the Respondents CLIFFORD OKELLO RACHUONYO and JAPHETH ONDIRA RACHUONYO T/A RACHUONYO & RACHUONYO ADVOCATES on 23rd August 2012. He alleges the dismissal was unlawful as no reason or proper explanation was given to him contrary to the provisions of the Employment Act, his terms of service and other relevant statutes. He seeks the following orders;

- a. Three (3) month's salary in lieu of notice, less one month already paid @Kshs.36,000/= being Kshs.72,000/=.
- b. Compensation for unlawful termination of 12 months @ kshs.36,000/= as provided under Section 49(1)(c) of the Employment Act being Kshs.432.00/=.
- c. Declared redundant/Severance pay for each completed year @ Kshs.18,000/= for 18 years being Kshs.324,00/=.
- d. Damages for loss of employment and accumulated uncompleted earning years of up to 60 years to be assessed at kshs.36,000/= per month in lieu of reinstatement for each remaining year for 20 years.
- e. The respondent be ordered to issue a certificate of service to the Claimant forthwith as per section 51 of the Employment Act and they be directed to pay kshs.100,000/= as fine for ignoring the demand by the claimant.
- f. Damages for wrongful and unlawful termination of employment.

The Respondents filed their Memorandum of Response dated 31st october

2012 in which they deny the claim and aver that the Claimant was dismissed for gross misconduct after various verbal warnings, that there was no malice as alleged by the Claimant. The Respondents further deny the Claimant's allegation that he was declared redundant.

The case was heard on 2nd May and 2nd October 2013. The claimant testified on his behalf while the 1st Respondent testified on behalf of the Respondents.

The claimant stated in his testimony that he was employed by the respondents from August 1994 to 23rd August 2012 as a court clerk. His last salary was shs.36,000 per month net. He was dealing with registration of land issues. He was not given the reason for termination. He never received any warning letter for the 18 years he worked with the respondents. He was never given an opportunity to defend himself before receiving the letter of termination. He was paid shs.36,000 being salary for August 2012 and a further 36,000 so he received a total of Kshs.72,000. That after termination he approached an advocate who sent a demand letter to the Respondents. That the reason for termination was given in the response to the demand letter. That he became aware of the allegations against him after reading the Respondents' Response to the Memorandum of claim.

A summary of the uncontested evidence is that the Claimant was employed by the Respondents in 1994 and worked until 23rd August 2012 when he was dismissed from employment. His last position was as clerk and he was handling matters relating to the lands registry.

The reason for his dismissal was that while in the process of registering property purchased by one of the respondents clients at an auction by the name Stephen Kahugu Kinyanjui (RW1) he demanded Shs.250,000/= to bribe the land valuer to give a favourable valuation. That RW1 carried out investigations and confirmed that indeed at the time the claimant demanded the money the valuation had already been done at Shs.19 million as declared on the face of the documents. This was also the price that RW1 paid for the property at the auction. The claimant had however in a note dated 28th May 2012 given to Mr. Rachuonyo (RW2) stated that the valuation was at Shs.40 million and would attract additional stamp duty in the sum of shs.840,000/=. In his testimony RW2 stated that the valuation for stamp duty was done on 25th May 2012 but the claimant's note demanding the bribe was on 28th May 2012, after the valuation had been done.

The issues for determination as stated in their submissions according to the parties are as follows;

For Claimant

1. Whether the termination by the respondents was fair, just and in compliance with the employment Act?
2. Whether the Respondents gave the Claimant any show cause notice and heard his representations before terminating him?
3. Whether the alleged unproved ground of attempted extortion by the Claimant is relevant to be considered by this court: the Respondents having failed to comply with the statutory provisions of the Employment Act on the procedure of termination?
4. Whether the Claimant is entitled to 3 months salary in lieu of notice, severance pay, and compensation for wrongful termination and a payment of earnings until the declared age of 60 years?
5. Whether the Respondents should be compelled to issue a certificate of service to comply with Section 51 of the employment Act and to pay kshs.100,000 as a fine?
6. Who should bear the cost of this claim?

For Respondent

- i. Was the Claimant unlawfully and maliciously dismissed by the Respondents.
- ii. Was the summarily dismissal due to gross misconduct.
- iii. Is the claimant entitled to compensation claims.
- iv. Who shall bear the cost of the claim.

I will collapse the issues as follows;

1. Whether the Claimant was unfairly dismissed by the Respondent.
2. Whether the Claimant is entitled to the terminal benefits as prayed.
3. Who should bear the costs.

1. Whether the Claimant was unfairly dismissed by the Respondent.

The Employment Act provides for the procedure for termination of employment at section 41 as follows;

41. Notification and hearing before termination on grounds of misconduct (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.

In a nutshell the employee must be informed of the reasons for which the employer intends to terminate his employment and be given an opportunity to defend himself.

The Employment Act further provides at Section 45 that termination of employment must be both substantively and procedurally fair. At section 43 the Act provides for the employer to give proof of reasons for termination.

In the present case the letter of termination does not give the reasons for termination. In his testimony RW2 stated that there was no reason to ask the claimant for an explanation as it was obvious the Claimant was trying to cheat. He stated that there were other clients apart from RW1 who had reported that the claimant had attempted to make demands from them in the same year. RW2 stated under cross examination that he had not raised any complaints with the claimant over the alleged attempted demands. He further admitted that the letter of termination does not state the reason for termination.

Section 41 is couched in mandatory terms. Where an employer does not give an employee an opportunity to defend himself or does not state the reasons for termination of employment, the termination is unfair *ab initio*. It does not matter how compelling the grounds for termination are as such grounds cannot be proved if the person against whom the complaint has been made has not been given an opportunity to defend himself. This is a cardinal rule of natural justice, which has been adopted in Section 41 of the Employment Act.

Having failed to give the Claimant the reasons for termination of his employment or an opportunity to defend himself, the termination of the claimants employment was unfair and I find accordingly.

2. Whether the Claimant is entitled to the terminal benefits as prayed for.

The Claimant has prayed for terminal benefits as follows;

- i. 3 months' salary in lieu of notice
- ii. Shs.432,000 being 12 months' salary as compensation.
- iii. Severance pay of Shs.324,000/=.
- iv. Shs.36,000/= per month for unexpired period of employment to date of retirement at 60 years being 20 years salary.
- v. Certificate of service.
- vi. Damages for wrongful and unfair termination.

(i) Notice

Section 35 and 49(1)(a) of the Employment Act provides for 1 months notice of termination or pay in lieu of notice of an equivalent amount unless parties have agreed on longer notice. The Claimant has prayed for 3 months' salary in lieu of notice. He has not stated that his terms of employment provided for longer notice nor did he produce any evidence to prove the same. He admits that he was paid 1 months' salary in lieu of notice.

I agree with the Principle enunciated by the Court of Appeal in *Shimba Tourist Services Limited v Wilson Mise Kigani (99) eKLR* to the effect that damages for wrongful employment are Limited to the amount the employer would have been obliged to pay if he had brought the contract to an end in accordance with its terms by giving either the proper notice or salary in lieu thereof. This is as provided for in Section 49(1)(a).

I find that the Respondents paid the Claimant in lieu of the notice he was entitled to and that there is no further entitlement for notice. The Claim is dismissed.

(ii) Compensation

Section 49 (1) (c) provides for compensation of up to 12 months gross salary where employment has been unfairly terminated. The Claimant had worked for 18 years for the Respondent. Having found that he was unfairly terminated and having considered the provision of section 49 (4) especially the length of service and the process through which his employment was terminated, I find that the Claimant is entitled to the maximum compensation of 12 months gross salary. I therefore award him the same in the sum of Kshs.432,000/= as prayed for in his claim.

(iii) Severance Pay

The Claimant has claimed severance pay in the sum of Kshs.324,000/=. No evidence has been adduced in support of this claim. The facts of the case as pleaded and the evidence as adduced do not support a claim of redundancy. Severance pay is only payable in the event of redundancy.

I find that this Claim has not been proved and dismiss the same.

(iv) Damages for loss of Employment

The Claimant has claimed damages for loss of employment for 20 years being the unexpired period of his contract to the date of retirement at 60 years.

In the first instance no evidence was adduced to support the fact the retirement age of the Claimant was 60 years. The law does not provide for retirement age at 60 years.

Secondly the Employment Act and the Industrial Court Act do not provide for damages for loss of employment for the unexpired term of the employment contract other than compensation for 12 months. For the Claimant to be entitled to damages for loss of employment he would have to prove to the court that the Respondents have incapacitated him to an extent that he is unable to find other employment. This

is because employment is never permanent. It is a contract that provides for an exit and either party is only liable to the extent to which they have failed to comply with the exit clause in such contract or as presumed by law. In this particular case I have already found for the Claimant and awarded him compensation to the tune of 12 months' salary being the maximum payable under the law.

The Claimant referred me to the following cases;

1. Robert Brown v Livinstone Registrars Limited & 2 others (2012) eKLR.
2. Shankar Saklani v DHL Global Forwarding (K) Limited (2012 eKLR.
3. Gilfrine Noah Masio v Mareba Enterprises Limited Industrial Court Cause 2007 of 2011.
4. Dominic N. Mbithi V Dubai Bank Kenya Limited Industrial court case 1259 of 2011.

The Respondent on the other hand relied on the following authorities;

1. Njeru v agip (k) Ltd (1986) KLR 480.
2. Shimba Tourist Services Limited v Wilson Misc Kigani (1997) eKLR.

I find that the claimant has not proved that he is entitled to any further damages for loss of employment. The claim is therefore dismissed.

(v) Certificate of Service

Section 51 provides for issuance of a certificate of service to any employee who has left employment after completion of a minimum of 4 weeks service. The section further provides for the particulars to be included in the certificate of service. The Certificate of Service issued by the Respondents does not comply with section 51.

The Respondents are directed to issue a proper certificate of service in compliance with section 51 of the Employment Act within 30 days from today.

3. Damages for wrongful Unfair termination

This has already been dealt with under item (ii) and (iv) above. I therefore make no further orders in respect of the same.

The Respondents shall pay the Claimants costs for this case.

Orders accordingly.

Delivered and signed in open court on **22nd** day of **January** 2014

MAUREEN ONYANGO

JUDGE

In the presence of:

Mandala Claimant in person

Ngani for Respondent