



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 73 OF 2010

ARTHUR MUTSUNE.....CLAIMANT

VERSUS

DODWELL & COMPANY (E.A) LIMITED.....1ST RESPONDENT

INCHCAPE SHIPPING SERVICES LIMITED....2ND RESPONDENT

JUDGMENT

Arthur Mitsune the Claimant filed this claim against Dodwell & Company (E.A) Limited and Inchcape Shipping Services Limited by a Memorandum of Claim that is undated, on 3rd February 2010. He seeks the following orders:

- a. A declaration that the purported termination of the claimant's employment was evil, invalid, null and void, unjust and inequitable;
- b. A declaration that the Claimant's fundamental and basic rights of employment under the provisions of the employment Act, 2007 were and are infringed and trampled upon by the Respondents with impunity.
- c. A declaration that the Respondents must obey and respect the law in their dealings with the Claimant;
- d. An order that the Respondents reinstate the Claimant in his employment and treat the Claimant in all respects as if the employment had not been terminated;
- e. That the Respondents pay all the legal costs incurred by the claimant;
- f. In other or further relief (s) as the court may deem fit and just to grant.

The Respondents filed a Memorandum of Reply and a Counterclaim on 30th June 2010. The prayers in the Counterclaim are as follows:

1. The Respondents aver that in April 2009 and in October 2009, the Respondents on request of the Claimant advanced to him by way of a case loan and to enable him pay his medical expenses the sum of Kshs.700,000.00 and Kshs.347,407.00 respectively of which the sums of Kshs.495,831.00 and Kshs.318,823.10 remain due and owing to the Respondents respectively.

2. Wherefore the Respondents pray that the claims made and prayers contained in the Claimants' Memorandum of Claim presented to this Honourable court be dismissed and judgment be entered in their favour whether jointly and/or severally against the claimant in the sum of Kshs.814,654.10 together with costs of the claim and counter-Claim.

The case was heard on 1st and 25th November 2011, 4th February 2013, 21st March 2013, 15th July 2013. Mr. Oyatsi instructed by Shapley Barret & Company Advocates Nairobi, represented the Claimant while the Respondents were represented by Mr. Khagram of A. B. Patel & Patel Advocates, Mombasa.

The Claimant testified on his behalf while the Respondents called one witness, ROSE NDUKIU MAINGI, the Human Resource and Personnel Officer for the 2nd Respondent and Personal Assistant to the Vice President of both Respondents. The Respondents had indicated they would call the Managing Director as their second witness but decided to close their case after failing to secure his attendance. The parties thereafter filed written submissions which they orally highlighted on 23rd June 2014.

The Claimant's testimony was heard by Justice E.K. Mukunya who retired upon reconstitution of the court in July 2012. The file was re-allocated to me and with the consent of the parties, the case proceeded from where it had reached.

The parties made very elaborate presentations in both the pleadings and oral testimonies and submissions. I will consider the relevant fact of the case only.

The undisputed facts of the case are that the Respondents are sister companies with one Managing Director. According to RW1 Inchcape Shipping Services Limited fully owns the 2nd Respondent Dodwell & Company (E.A) Limited while the 1st Respondent owns 75% of the 2nd Respondent. The head office for both companies is in Mombasa.

The Claimant was employed by the 1st Respondent by a contract of employment dated 26th November 2008. His employment was to commence on 5th January 2009. His title was Commercial Manager and he was to be based in Nairobi. Among the terms of the Claimants employment was medical cover which was provided for under clause 7 of the contract of employment as follows:

“The Company maintains a medical insurance scheme with AAR which will be covering your spouse and up to three named children who are under the age of 18 years are also eligible for the medical scheme covers”.

The Claimant's employment was confirmed by letter dated 9th May, 2009. The Claimant's starting salary was Kshs.100,000 per month. He was also entitled to a house allowance of Kshs.25,000 per month, a car allowance of Kshs.40,000/= per month and a mobile allowance of Kshs.10,000/= per month. By letter dated 28th August, 2009 the claimants remuneration was increased as follows; Salary Kshs.108,000; House Allowance Kshs.25,000; Car Allowance Kshs.45,000.

The Claimant's employment was terminated by letter dated 28th December, 2009. The letter is reproduced here below:

DODWELL

Date: 28th December 2009

Mr. Arthur Mutsune,

Nairobi.

Dear Mr. Mutsune,

REF: Termination of Employment

We refer to the conversation and discussion the Managing Director, Mr. David Mackay has had with you concerning the performance of your duties and when he gave you the option of resigning from your employment with us instead of your employment being summarily terminated. It was made clear to you specifically that this option was being given so that there would be no blemish on your career and your future prospects are not hampered.

Regrettably, it appears that you have decided not to take this option and we are, in the circumstances, constrained to summarily dismiss you from your employment with us on the grounds of misconduct and poor performance.

You have persistently neglected to perform your work, reported to work late, used insulting language to other staff at the place of work, absented yourself from work without lawful cause or reason and engaged in conduct suggesting willful neglect or misconduct on your part and in spite of several verbal warnings from both the Branch Manager of the Nairobi Office as well as the Managing Director, have failed and/or refused to desist from engaging in such conduct.

Your terminal dues are Kshs.153,797.00 made up as under:

	Amount in Kshs.	
Basic Pay	108,000	
House Allowance	25,000	
Car Allowance	45,000	
Leave days	93,600	
Gross Pay	271,600	
Deductions:		
PAYE	72,716	
NHIF	320	
NSSF	200	
PENSION	5,400	61,200
ISS COOP SHARES	10,000	80,050
CAR LOAN	29,169	466,664
TOTAL DEDUCTIONS	117,803	
NET PAY	153,797	

A cheque for the said amount together with your pension sum (which will be available for collection upon receipt from the administrators) can be collected upon clearance of the outstanding car loan in the sum of Kshs.466,664.00 and medical loan of Kshs.318,823.10 – whereupon the Motor Vehicle Registration Number KBD 334 Y will be transferred in your name. However should you fail to clear the outstanding

amounts as aforesaid we expect you to return to the company the said Motor Vehicle for disposal and recovery within the next week and hand over the keys to a Nairobi staff member.

You are expected in the meantime to handover all pending assignments.

Thanking you,

Yours faithfully,

DODWELL & COMPANY (EA) LIMITED

In October 2009 the claimant fell sick and was admitted to Nairobi Hospital. Before his discharge he was given a letter to sign to the effect that he was being advanced a loan of Kshs.347,808. He signed the letter before he was discharged. The letter was from Inchcape Shipping Services.

The letter reads as follows:

INCHCAPE

SHIPPING SERVICES

Date: 26th October, 2009

To,

Mr. Arthur Mutsune,

Commercial Manager,

Inchcape Shipping Services,

P.O. Box No.30087,00100,

Nairobi – Kenya.

Dear Arthur,

REF: Loan of Kshs.347,807.00 to be paid by you to Inchcape Shipping

This has reference to your hospital bill of Kshs.447,407.00 As you are aware and upon your request the company has paid the amount of 447,407.00 to the Nairobi Hospital in full to enable your discharge today.

The company has decided to donate an amount of Kshs.100,000.00 towards the bill. The balance of Kshs.347,407.00 will be extended to you as a loan which you will repay back to the company within a year's time. This monthly payment from you will offset this loan at the end of one year.

Kindly put your signature accepting and agreeing to the contents of this letter and that you will agree to pay the above loan of Kshs.347,407.00 back to the company within a year.

Thanking you,

Yours truly,

For: Inchcape Shipping Services,

Narasimha Kollegal

Branch Manager

Cc: HRD – Mombasa

Finance – Mombasa

The Claimant alleges that the termination of his employment was unfair as the reasons given for his termination were not valid. He stated that he had never been warned over late reporting or using abusive language to other staff or for any other reason.

The Claimant denied that he owed the Respondent the sum of Kshs.318,823.10 on account of hospital bill as he was entitled to full medical cover for himself, his spouse and 3 children under 18 years. He however admitted that he owed the company the balance of car loan that had been advanced to him.

The Respondent's witness RW1 testified that the claimant's employment was terminated on grounds of poor performance. She denied that the Claimant's employment was terminated due to his illness. She testified that the Managing Director met the Claimant in Nairobi and explained to him that since the office was not making profit the management had decided to end the contract with him. She explained that it was at that time that the claimant was given options of resignation. This was because he had several loans advanced by the Respondents and was to choose the one he favoured. She stated that the Respondents requested the claimant to resign because they did not want to soil his employment records. She testified that at the time of termination of his employment the claimant was not on duty. That the reasons for termination were neglect of duty, reporting late for work, use of insulting language to other staff and failure to meet his targets.

RW1 testified that when the claimant was terminated he was servicing a car loan for motor vehicle KBD 334 Y for Kshs.700,000/=. The balance of the car loan at the time of termination was kshs.495,831/=.

RW1 further testified that the company's medical scheme had a limit of Kshs.400,000/= for in-patient while out patient was unlimited. She stated that the claimant was aware of the limit as the Provider's Consultant met staff directly to discuss the scheme and to sign the insurance forms. She testified that when the Claimant was sick he called RW1 and told her he was scheduled for admission the following day at Nairobi Hospital but the provider advised him the cover could not cover the bill for the hospital. She testified that the Claimant told her that AAR mentioned that the policy would not cover the period he would be admitted at Nairobi Hospital and had suggested other hospitals which the Claimant rejected as his doctor had insisted he could only admit the Claimant at Nairobi Hospital. She advised the claimant to get in touch with the management. This was on a Friday. On Monday when she reported to work she learnt that the Claimant was admitted at Nairobi Hospital. The Claimant's total bill was Kshs.847,407. The amount in excess of the cover of Kshs.400,000/= was paid by the Respondents at the Claimant's request. The company paid Kshs.447,407/=. She testified that the request was made by the claimant to the Branch Manager at Nairobi office Mr. Narasimha Kollegal who in turn called the Managing Director who approved payment of the entire bill. Kshs.100,000/= was a donation while the balance was a loan advanced to the Claimant to be paid by installments over a period of one year. The letter advancing the money was given to the claimant in hospital after the bill was paid. She denied that the claimant was forced to sign the letter.

I have considered the pleadings and the evidence adduced in court as well as the oral and written submissions.

The issues for determination in my opinion are the following:

1. Whether the termination of the claimant's employment was unfair;

2. Whether the Claimant is entitled to reinstatement;
3. Whether the Claimant is entitled to damages.
4. Whether the Respondent is entitled to counter claim

1. Was the termination of the Claimant's employment unfair

The claimant alleged that the termination of his employment was evil, invalid, null and void, unjust and unequitable.

The Respondents on the other hand contend that the Claimant was fairly treated and that despite the fact that he was liable to summary dismissal he was granted the option of resigning so that he does not leave a blemished career.

The Employment Act provides for what would qualify as fair termination at Section 41 and 43, as well as Section 45.

Under Section 41 an employer is required to give a hearing to the employee after informing him of the grounds for which the employer intends to terminate or dismiss the employee. The employee should be given an opportunity to be accompanied by a fellow employee or union official (if he is a member of the union).

In the present case the claimant was never informed of the reasons for which the employer intended to terminate his employment. Both the Claimant and RW1 testified that the claimant's employment was supposed to be terminated because the Respondent wished to cut down costs due to economic hardships. However the letter of termination refers to persistent neglect of work, reporting on duty late, using insulting language to other employees and absenteeism, all grounds that the Claimant was not given an opportunity to respond to.

For the foregoing reasons, I find that the termination of the claimant's employment was unfair for both want of procedure and validity of reason.

The Claimant has cited other reasons such as fraud, extortion, harassment and mistreatment which in my opinion were not proved.

2. Is the Claimant entitled to reinstatement

The Claimant prayed for only the remedy of reinstatement. The Employment Act provides at Section 49(3) (a) that an employee who has been unfairly dismissed may be reinstated. However, Section 49(4) (c) and (d) provide that the court must take into account the practicability of recommending reinstatement and the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances.

I find that the claimant has not proved that there were special circumstances warranting his reinstatement. He had only worked for about one year. By the time of the hearing he was already working elsewhere though he stated that the work was on commission basis from December 2009, the same month in which he received his letter of termination.

In any event the Industrial Court Act now provides at Section 12(3) (vii) that an order for reinstatement may only be made within 3 years from the date of termination of employment. The termination of employment of the Claimant herein was in December 2009 which is more than 3 years now.

I therefore find that the Claimant has not demonstrated that his case falls under the special circumstances which would qualify for an order of re-instatement and further, the law prohibits reinstatement after 3 years. The prayer for reinstatement is dismissed.

3. Whether the Claimant is entitled to compensation

Mr. Oyatsi submitted that in the event that the court does not award the Claimant reinstatement, he should be paid compensation in addition to emoluments to date of judgment. He submitted that what happened to the Claimant cannot be equated to damages.

Mr. Khagram in response to Mr. Oyatsi's submissions submitted that there is no prayer seeking the relief for unfair termination and that what the claimant is seeking is against the principle that the party is bound by its pleadings. Mr. Khagram submitted that there is no room to convert the reinstatement to compensation. He further submitted that from the authorities he attached to his written submissions, the courts will not order reinstatement unless the Claimant has a statutory right. He further submitted that the court cannot force a contract between two individuals.

He further submitted that the court has no jurisdiction to grant any damages where there was no prayer for damages. He relied on the following cases:

1. Daniel Okoth v Kenya Commission of Human Rights (2014) eKLR
2. William Kinuthia v Judicial Service Commission (2007) eKLR
3. Walter Musi Anjenje v. Hilton International Kenya Ltd & Another (2008) eKLR
4. Peter Denis Mbwali & Another v. Kenya Literature Bureau (2012) eKLR

As I have already stated above, Section 49(3) of the Employment Act and Section 12 (3) (vii) provide for reinstatement. Section 49 (1) states that:

Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to:

(a) Reinstatement the employee and treat the employee in all respects as if the employee's employment had not been terminated; or

(b) Re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.

Section 50 provides as follows:

In determining a complaint or suit under this Act involving wrongful dismissal or unfair termination of the employment of an employee, the Industrial Court shall be guided by the provisions of section 49.

Section 12 states that the court shall have power to make any of the orders stated thereunder. These include compensation, damages, reinstatement and (viii) any other appropriate relief as the court may deem fit to grant.

In the case of ODD JOBS V. MUBIA, (1970) E.A 476, the Court of Appeal held that "a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision".

In my opinion, the law relating to reliefs in employment cases gives this court a free hand to grant any of the remedies that are consequential upon the findings of the court. Section 49 is specific that where the court finds termination or dismissal is unfair or unjust, it may grant any of the remedies provided therein. Section 49(4) further gives the court the leeway to grant any of the remedies specified in subsection (1) and (3). The section's opening paragraph reads as follows:

"49 (4) A Labour Officer shall, in deciding whether to recommend the remedies specified in subsection

(1) and (3), taking into account any or all of the following”.

The section thereafter lists the factors to be taken into account before deciding which of the remedies in subsection (1) and (3) to grant the claimant.

In my opinion, this section means that the court is not bound by the remedy a party prays for but rather, is left to decide on which of the remedies specified in subsections (1) and (3) to grant. In my opinion even if a party does not seek a specific prayer the court must grant one or other of the prayers in subsection (1) or (3) once it finds that there is unjust or unfair termination or dismissal.

For the foregoing reasons, it is my finding that the court is not bound by the pleadings of a party in the circumstances set out in section 49 of the Employment Act. It is also my opinion that this position is reinforced by section 12(3)(viii) of the Industrial Court Act.

Having found that the termination of the Claimant’s employment was unfair, and further that reinstatement is not appropriate in the present case, I find that he is entitled to compensation. Maximum compensation provided for in Section 49(1) of the Employment Act is 12 months gross salary. I find that in this case the Claimant who had only worked for about, one year is not entitled to full compensation. In my opinion 2 months compensation is reasonable in the circumstances.

I therefore award the Claimant Kshs.376,000/= being 2 months gross salary (basic pay, house allowance, car allowance and telephone allowance).

Counter claim

The Respondent filed a Counter-claim of Kshs.814,654.10 being balance of car loan and hospital bill advance.

I have noted that the claimant admitted owing the car loan. The car loan may therefore be set-off against monies payable to the Claimant as tabulated in the letter of termination.

On the hospital bill, the Claimant’s contract of appointment provided for him to be covered though a medical scheme taken out with AAR. The Respondent did not prove that at any time during his employment the Claimant’s attention was drawn to the fact that there was a limit to the inpatient cover.

I have also taken note of the fact that the claimant was made to sign the offer of a loan for payment of the hospital as a condition for his release. That could not have been a free choice but a choice made out of desperation and the desire to be released from hospital. I find that the Claimant was coerced into signing the letter and therefore did not consent freely to the hospital bill loan.

I also take note of the fact that when persuading the claimant to resign, the Respondents offered to absorb the full hospital bill. This is contained in the signed letters that were written in anticipation to the Claimant accepting to resign.

Again Section 31 (1) of the Employment Act requires employers to ensure the provision of sufficient and proper medicine for his employees during illness and if possible, medical attendances during serious illness. It is my opinion that where an employer does not expressly limit its liability to ensure its employees such liability will be unlimited. In this case I have already found that the Claimants employment contract did not specify the extent of the medical cover and he was entitled to assume that the employer would ensure payment of the full medical bill.

For these reasons I find that the Claimant is not liable to refund the medical bill paid by the Respondent and dismiss the count-claim in respect of the said sum of Kshs.318,823.10.

The Respondent shall pay the Claimant’s costs of this case.

The sums awarded to the Claimant, less the set off, will attract interest from date of judgment.

Orders accordingly.

Read in open Court this 15th day of October, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Ohenja holding brief for Oyatsi for Claimant

Ms. Karimi holding brief for Mr. Khagram for Respondent