



IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 7 OF 2013

(Originally Nairobi Cause No. 468 of 2012)

GILBERT M. MUCHINA

CLAIMANT

v

SCARCE COMMODITIES LIMITED

RESPONDENT

(Consolidated with Mombasa Cause No. 51 of 2012, *Wycliff Masafu Simiyu v Scarce Commodities Ltd* (formerly Nairobi Cause No. 467 of 2012) and Nairobi Cause No. 469 of 2012, *Lawrence Nyakudi Oyaro v Scarce Commodities Ltd*).

JUDGMENT

1. Gilbert Mukanda Muchina (1st Claimant) was employed by Scarce Commodities Ltd (Respondent) on 1 December 2010 as a driver at a salary of Kshs 12,103/-.
2. On 10 November 2011, he received a letter from the Respondent informing him of the termination of his services on the ground of negligence leading to two traffic accidents.
3. The 1st Claimant was not happy with the termination of services, and on unknown date in 2012, he commenced legal proceedings against the Respondent alleging unlawful termination contrary to section 40 of the Employment Act, 2007.
4. The Respondent filed its Response on 27 July 2012, contending that the termination was lawful.
5. Wycliffe Masafu Simiyu (2nd Claimant) was employed by the Respondent on 5 August 2007 as a heavy commercial driver. He served the Respondent until 23 December 2011, when his services were terminated through a letter on the letter head of an entity known as Petrocity Enterprises (Ns) Ltd.
6. The Respondent filed a Response on 27 July 2012.
7. Lawrence Nyakudi Oyaro (3rd Claimant), on his part was employed by the Respondent on 2 January 2008 as a Personnel /Legal Officer and on 3 January 2012, the Respondent gave him one month written notice of termination of services effective 31 January 2012.
8. The 3rd Claimant was equally dissatisfied with the termination of services and on 21 March 2012, he commenced legal proceedings against the Respondent alleging unlawful termination. The Respondent filed a Response on 27 July 2012.
9. On 7 March 2013, Ongaya J made an order that the 3 Causes be transferred to Nakuru and be heard together.
10. The causes of action being clearly different, the Causes should have been allowed to proceed separately but that is now water under the bridge.
11. The 3 claims were partly heard by Ongaya J, who took the Claimants cases on 17 September 2013 and 23 July 2014, while I took the Respondent's case on 27 October 2014.

1st Claimant's case

12. The 1st Claimant pleaded case is that he was employed by the Respondent on 1 December 2010 and served until 10 November 2011, when he was dismissed unlawfully without compliance with section 40 of the Employment Act, 2007.
13. The pleaded reasons for the unlawfulness were that, his trade union was not informed of the intention to declare him redundant, no leave was given, no pay in lieu of notice was paid and severance pay was not paid.
14. The 1st Claimant further pleaded that he was underpaid during the course of employment.
15. Regarding the process followed prior to dismissal, the 1st Claimant testified that he worked until 10 November 2011 when he was summoned by one of the Respondent's managers and given the termination letter without notice, or a hearing being conducted.
16. On the reasons for the dismissal, the 1st Claimant stated that in 2011 he was involved in two traffic accidents in Uganda. He said the accidents were due to defective brakes which he had reported to the Respondent.
17. On contractual and statutory entitlements, the 1st Claimant stated that he was not paid wages for day worked in November 2011; worked long hours without overtime pay; had no rest days and was not granted 2 leave days per month.
18. The 1st Claimant also stated that he was wrongfully deducted Kshs 27,282/- because of the accidents.

Respondent's case

19. In its Response, the Respondent contended that the 1st Claimant was lawfully terminated in accordance with the provisions of section 44 of the Employment Act, 2007.
20. The Respondent called its Accountant, one Geoffrey Kyalo Mulwa, to testify.
21. He stated that the 1st Claimant was dismissed for gross misconduct in that he was involved in two traffic accidents on 29 September 2011 and 10 November 2011, and that notice was not necessary.
22. He also stated that the 1st Claimant was offered one month pay in lieu of notice and that the dismissal was procedural and fair.

Evaluation

23. In a complaint of unfair termination, the Court examines both the procedure, and the fairness and validity of reasons given.
24. Assuming that the 1st Claimant was involved in two accidents and the same amounted to gross misconduct necessitating summary dismissal, pursuant to section 41(2) of the Employment Act, 2007, the Respondent was under a mandatory obligation to hear and consider any representations made by the Claimant.
25. In the instant case, there is no material placed before Court to show that the 1st Claimant was heard or informed in advance of the reasons for the dismissal.
26. On that basis, the Court finds that the dismissal was procedurally unfair. It would serve no purpose therefore to examine whether the Respondent has proved the reasons for termination and that the reasons were valid and fair reasons as required by sections 43 and 45 of the Employment Act, 2007.

Appropriate remedies

One month salary in lieu of notice

27. The termination letter had offered the 1st Claimant one month pay in lieu of notice. This was in consonance with section 35(1)(c) of the Employment Act, 2007.
28. There is no evidence that the same was paid or collected. The Court would award the 1st Claimant Kshs 16,109/- being one month basic pay in lieu of notice.

Accrued leave

29. The Claimant sought Kshs 113,011/- on account of accrued leave from December 2010 to 10 November 2011, when he was dismissed (period of about 12 months).
30. Pursuant to section 10(3) and 74 of the Employment Act, 2007, the Respondent should have produced leave records. This was not done. Section 28 of the Employment Act, 2007 provides that each employee is entitled to at least 21 days annual leave with full pay.
31. On the strength of the cited provisions, the Court would award the 1st Claimant Kshs 16,109/- being a full month wages he would have received while on leave.

Service pay

32. From the copies of pay slips produced by the Claimant, it is clear he was a contributor to the National Social Security Fund. By dint of section 35(5) and (6) of the Employment Act, 2007 he is not entitled to service pay.

Overtime

33. The 1st Claimant did not lay a proper evidential basis for this head of claim. He did not mention the agreed contractual working hours over the week. All that he stated was that

There were no rest days. I was not paid in lieu of rest. We worked long hours on trips. There was no rest. I was not paid overtime.

34. Similarly, no statutory foundation was laid for the head of claim. It is declined.

Refund of unlawfully deducted money

35. Under this head, the 1st Claimant sought Kshs 27,282/-. The money was deducted on account of the accidents. The accidents were not denied.
36. An employer is allowed to deduct from the wages of an employee such amount to cover loss or damage to the employer's property due to the negligence of the employee.
37. The 1st Claimant apart from mentioning faulty brakes did not satisfy the Court that he was not responsible for the accidents. This head of claim is declined.

Compensation

38. This award is one of the primary remedies for unfair termination. It is a discretionary remedy. The Court's discretion is however a fettered discretion.
39. The 1st Claimant served the Respondent for just about a year. Based on the length of service, the Court would award him the equivalent of one month's gross wages assessed at Kshs 18,525/- on basis of the gross wages in the last pay slip.

2nd Claimant's case

40. The 2nd Claimant stated that he was employed on 5 August 2007, and was issued with an appointment letter. He worked until 23 December 2011. He stated that while in Juba on an official trip, the vehicle he was driving was taken by a Mr. Martin after which he was arrested by Police in Juba and later released.
41. While still in South Sudan he was shown a letter of termination.

Respondent's case

42. According to the Respondent's witness, the 2nd Claimant was dismissed in accordance with clause 5.1 and 6.1 of his letter of appointment by Respondent's sister company. The reason given was

delivery of adulterated oil products. He further stated the 2nd Claimant disappeared after being released by Juba Police.

43. He also stated that the 2nd Claimant was not entitled to notice because he stole the Respondent's property but said he did not know whether the 2nd Claimant was afforded a hearing.

Evaluation

44. For similar reasons as in the case of the 1st Claimant, it is obvious that the Respondent did not afford the 2nd Claimant a hearing before taking the decision to dismiss him.

45. The Court also finds it strange that the 2nd Claimant was dismissed by a *sister company* to the Respondent. It is Company law 101 that a limited liability company has a distinct and separate juristic existence, and I do not understand how an entity which was not this Claimant's employer purported to dismiss him.

46. The dismissal was not in accord with section 41 of the Employment Act, 2007 and therefore I find it was procedurally unfair.

Appropriate relief

One month salary in lieu of Notice

47. Pursuant to section 35 and 36 of the Employment Act, 2007 and clause 5 of the letter of appointment, the Court finds the 2nd Claimant is entitled to Kshs 16,276/-, as one month pay in lieu of notice.

Accrued leave

48. The 2nd Claimant sought accrued leave pay of Kshs 43,370/- covering 2007 to December 2011.

49. For similar reasons to the 1st Claimant, the Court would find in favour of the 2nd Claimant in the sum of Kshs 43,370/-.

Service pay

50. The 2nd Claimant's pay slips produced indicate he was contributing to the National Social Security Fund. Pursuant to section 35(5) and (6) of the Employment Act, 2007 he is not entitled to service pay.

Overtime

51. No evidential, contractual or statutory foundation for this head of claim was produced. It is declined.

Refund of unlawfully deducted money

52. No evidence was led in respect of this claim and it is declined.

Compensation

53. Having found the termination procedurally unfair and considering that the 2nd Claimant served the Respondent for about 4 years, the Court would award him the equivalent of three months gross wages as compensation. The same is assessed as Kshs 56,151/-.

Underpayments

54. Although referred to in the body of the Memorandum of Claim, no particulars were given in

testimony. The relief is declined.

3rd Claimant's case

55. The 3rd Claimant, Lawrence Oyaro was given one month notice of dismissal as earlier stated through a letter dated 3 January 2012. The letter did not give any reasons. Prior to termination there was no warning letter.

56. The Respondent's second witness, one Salim Joha stated in testimony that the 3rd Claimant was dismissed for purporting to act as an advocate and that he had been suspended prior to dismissal.

57. In the Response, it was pleaded that according to the letter of appointment, there was provision for dismissal without notice. I have previously dealt with employment contracts which provide for termination on notice without reasons.

58. In *Peter Maroko Omondi v Pandya Memorial Hospital* (2014) eKLR, I stated that

38. The Court needs to say a word or two about dismissal or termination of employment on notice or payment but without reasons. This Court dealt with the question in *David Gichana Omuya v Mombasa Maize Millers Ltd* (2014) eKLR and in *Alphonse Sulpice Mzenge v Mombasa Air Safari Ltd*, Mombasa Cause No. 110 of 2013 and in the latter case I held that

Prior to the Employment Act, 2007 an employer could dismiss an employee for a bad reason or no reason at all, provided it was on notice. That has now changed. Section 45 of the Employment Act has made serious inroads in regard to dismissals. An employer is under an obligation to prove the existence of good and valid reasons for dismissal even if he gives notice.

39. Under the statutory regime in Kenya today, it is not open to an employer to terminate the services of an employee without cause by the giving of notice or payment in lieu of notice. Any provision in an employment contract which provides for termination on notice or pay in lieu of notice without giving reasons is unlawful and invalid. The Court states so, on the basis of sections 43 and 45 of the Employment Act, 2007. All terminations of employment must be on reasons which an employer is required to not only prove but prove as valid and fair reasons. Ordinary employees now have security of tenure against unfair terminations.

59. I don't think I have anything useful to add except to find that the termination of the services of the 3rd Claimant without giving him reasons prior to the termination was unfair.

Appropriate relief

3 months pay in lieu of Notice

60. This Claimant sought Kshs 172,307/- being three months notice. He said the one month notice he was given was inadequate.

61. The letter of appointment provided for one month notice. The Respondent gave him a notice shy a month by a few days. This head of claim is therefore declined.

3 years unpaid leave

62. The 3rd Claimant sought Kshs 210,000/- on account of three years accrued leave. His leave records dated 24 August 2011 indicated that the Respondent approved his annual leave for 2009. The form indicated that leave balance carried forward was NIL.

63. In the light of the document and in the absence of any other records by the Respondent, the 3rd Claimant was entitled to 21 days leave in 2010 and 21 days in 2012 with full pay.

64. This is so because the letter of appointment did not state the leave days, so the fall back position is

the statutory minimum 21 days annual leave with full pay under section 28 of the Employment Act, 2007.

65. It is not disputed the monthly pay was Kshs 35,000/- per month. The 3rd Claimant would be entitled to Kshs 70,000/- under this head.

Underpayments

66. This comprised the biggest portion of the reliefs sought. The underpayments were computed as Kshs 1,715,000/-.

67. No contractual or statutory foundation was laid for this head of claim and it is declined. Further, there was no proof the Claimant was holding two distinct jobs with different terms and conditions of service entitling him to a salary of Kshs 70,000/- per month instead of the Kshs 35,000/-.

Service benefits

68. The 3rd Claimant was a contributor to the National Social Security Fund. This relief is therefore declined.

Compensation

69. Considering the length of the 3rd Claimant's service, the Court would award him the equivalent of 3 months gross wages assessed at Kshs 105,000/- as compensation for unfair termination.

Salary for January 2012

70. The Claimant is entitled to salary for 2012 during the notice period. He is awarded Kshs 35,000/-.

15% house allowance

71. The letter of appointment provided for a basic pay and allowance. The basic pay was set at Kshs 20,000/- initially. The same was increased to Kshs 35,000/-.

72. Section 31 of the Employment Act, 2007 requires employers to provide housing accommodation to employees but not in instances where a consolidated wage is paid. There is no indication the salary offered to the Claimant was consolidated.

73. In terms of giving a purposive interpretation that favours rights granted to citizens, the Court finds that the wage did not include an element of house allowance and therefore the Respondent was under a statutory obligation to provide housing or allowance in lieu of housing.

74. The Claimant did not disclose when the salary was increased from Kshs 20,000/- to Kshs 35,000/-. In the absence of such information, the Court would use a factor of 15% of Kshs 20,000/- multiplied with the 48 months to arrive at a figure of Kshs 144,000/- as unpaid house allowance.

75. Before concluding, the Court once again urges practitioners in the employment and labour relations field to familiarize themselves with the primary employment/labour statutes.

76. The present Causes were pleaded under section 40 of the Employment Act, 2007 which deals with terminations through redundancy and not the appropriate sections 41, 43 and 45 of the Act.

77. The Employment Act, 2007 and the other primary statutes are now going 7 years and the transition is gone.

78. The Courts will therefore require high standards of practitioners or else it would not be easy to do substantial justice to both employers and employees.

Conclusion and Orders

79. The Court finds and holds that the termination of the services of the Claimants individually were unfair and awards them as follows

a. **GILBERT MUKANDA MUCHINA**

- i. One month pay in lieu of notice Kshs 16,109/-
- ii. Accrued leave Kshs 16,109/-
- iii. 1 month pay as Compensation Kshs 18,525/-

TOTAL

Kshs 50,743/-

b. WYCLIFFE MASAFU SIMIYU

- i. One month pay in lieu of notice Kshs 16,276/-
- ii. Accrued leave Kshs 43,370/-
- iii. 3 months pay as Compensation Kshs 56,151/-

TOTAL

Kshs 115,797/-

c. LAWRENCE NYAKUDI OYARO

- i. Accrued 2 years leave Kshs 70,000/-
- ii. 3 months pay as Compensation Kshs 105,000/-
- iii. January 2012 salary Kshs 35,000/-
- iv. House allowance Kshs 144,000/-

TOTAL **Kshs 354,000/-**

80. The Claimants to have costs.

81. For the avoidance of doubt the prayers sought and not awarded are dismissed.

Delivered, dated and signed in open Court in Nakuru on the 28th day of November 2014.

Radido Stephen

Judge

Appearances

For Claimants Chepkwony & Co. Advocates

For Respondent A.B. Patel & Patel Advocates