



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1527 OF 2011

FREDRICK WANDERA ORUBIA.....CLAIMANT

VERSUS

NAIROBI AVIATION COLLEGE RESPONDENT

JUDGMENT

Fredrick Wandera Orubia, the Claimant, filed this claim against the Respondent Nairobi Aviation College Limited by Memorandum of Claim dated 5th and filed on 8th September 2011 alleging unfair termination/dismissal and failure to pay terminal dues and compensatory damages. The Claimant prayed for the following reliefs:

- i. Payment in lieu of untaken leave for the complete years
of service being Kshs.10,200/= x 4 yearsKshs.40,800/=
- ii. One months salary in lieu of noticeKshs.10,200/=
- iii. Service gratuity at 18 days gross salary
for every completed year of service
being 18/30 x Kshs.10,200/= x 4 yearsKshs.24,480/=
- iv. A declaration that the Respondent’s termination of the Claimant’s employment was unfair and unlawful and the Claimant is entitled to payment of his due terminal benefits and damages.
- v. Payment of due terminal benefits and compensatory damages totaling to Kshs.197,960/=.
- vi. Costs of this case plus interest thereon.

The Respondent replied to the Memorandum of Claim through its reply dated and filed on 6th October 2011. It alleged that the Claimant was dismissed from employment for gross misconduct and absenting himself from his place of work without lawful cause or excuse. The Respondent prayed that the claim be dismissed with costs.

The case was heard on 25th June 2014 when the Claimant testified and on 22nd September 2014 when the Respondents witnesses David Owuor, a data clerk, and Benedict Mwabili Mohatia, the Human Resource Officer, gave their testimony. The parties thereafter filed written submissions.

The Claimant was represented by Mr. Wathombe instructed by Namada & Company Advocates while the Respondent was represented by Mr. Mukele instructed by Mukele Ngacho & Company Advocates. The

parties thereafter filed and exchanged written submissions.

The main facts of the case are not in dispute. The Claimant was employed by the Respondent as a messenger in January 2007. His last salary was Kshs.10,200/=. On 30th August 2010 the Claimant was given sick off and was expected to report back on duty on 4th September 2010. He did not report back and the Respondent later learnt that he was unwell.

According to the Claimant, on 30th August 2010 he was carrying heavy boxes from 6th floor to 3rd floor at the Respondent's office at Uchumi House branch in Nairobi when he skidded and fell due to the heavy load. He was treated at a clinic in town near OTC bus station and granted sick off from 30th August to 4th September 2010. On 4th September 2010 he reported back to work and reported that he was not feeling well and had been referred for an x-ray. The office gave him money for the x-ray which was taken at Mbagathi District Hospital. On 24th September 2010 the company took him to Coptic Hospital where he was admitted upto 6th October 2010. While in hospital an MRI was taken which revealed that he required an operation. He was required to pay cash for the operation. When he informed the Respondent's Director about the operation, the Director sent the Assistant Administrator Robert Owuor to inform him that the Respondent did not have money for the operation and he should be discharged. The Claimant was discharged and the Respondent paid the hospital bill. The claimant went back to his village in Busia where he sold his shamba to get money for the operation. He was operated at Moi Teaching and Referral Hospital in Eldoret.

Since the Respondent had asked him to report back to work after treatment, he reported back to work on 15th April 2011 to the Administrator who took him to the director's office where he was advised to go back home and wait until he was called to report back to work. His salary was paid upto December 2010.

The Claimant testified that he filed the present suit when the Respondent failed to call him back to work. He also testified that he filed a separate suit in the Chief Magistrate's Court No. 1544 of 2012 for compensation for the injury which he sustained while at work.

The Claimant prayed for reliefs in accordance with the prayers in the Memorandum of claim.

The claimant denied that he was abusive or that he was dismissed as alleged in the reply to the Memorandum of Claim.

According to RW1 David Owuor, the Claimant reported back to work with a walking stick after discharge from hospital and was advised to go back home until he had recovered then report back to work. RW1 testified that he was not aware the Claimant was sacked or that the Claimant was injured while at work.

According to RW2 the Claimant was given permission to go for treatment but did not report back to work. RW2 however contradicted himself when he was shown the sick off form. He stated that someone called and informed him that the Claimant was unwell. The Claimant later reported to the office with a walking stick. He testified that the Claimant was never dismissed, but the Respondent continued paying his salary up to December 2010.

In the written submissions of the Claimant, it is submitted that the Claimant is entitled to the reliefs sought.

The Respondent however submitted that the claimant failed to discharge the burden of proof as set out in section 47(5) of the Employment Act which provides as follows:

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer”.

The Respondent further referred the court to the case of **Miriam Kyalo v. MFI Office Solutions Limited (2013) eKLR** in which Radido J. set out in detail the requirements for pleadings. It was submitted that the failure of the Claimant to submit medical documents to court on his medical condition rendered his claim for compensation unproved.

I have considered the pleadings, the evidence adduced in court, the written submissions and the authorities cited. In my considered opinion the issues for determination are whether the Claimant was unfairly dismissed from employment and whether he is entitled to the reliefs sought.

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

The Claimant testified that he was allowed to go for treatment and advised to report back to work after recovery. In the reply to the Memorandum of claim the Respondent alleged that the Claimant was dismissed for absconding duty and using abusive language on the Respondent. However, both RW1 and RW2 did not make any reference to dismissal. They both confirmed that the Claimant reported back to work with a walking stick and that it was due to sickness that he was away from work. RW2 confirmed that the Claimant's salary was paid up to December 2010 only.

I find that the termination of the Claimant's employment was due to ill health and not absconding duty or use of abusive language as alleged in the Response to the Memorandum of Claim. The Respondent first declined to pay the Claimant's hospital bill and allowed him to go home for treatment with the promise to allow him to report back to work upon recovery. While still on sick leave his salary was stopped and when he reported back to work he was sent back home with a promise to wait for a call but was never called. He was not issued with a letter of termination. The termination was therefore unfair.

The Claimant prayed for several remedies

i. Payment in lieu of annual leave

The Respondent has not contested the Claimant's allegation that he never took any leave during his employment. The claimant has prayed for leave for 4 years.

Leave is provided for at Section 28 of the Employment Act at 21 days per year worked. For 4 years the Claimant was entitled to 84 days. This comes to Kshs.(10,200÷30 x 84) 28,560/= which I award the Claimant.

ii. One months' salary in lieu of notice

Having found that the termination of the claimant's employment was unfair, he is entitled to pay in lieu of notice as provided in section 49 (1) (a) of the Employment Act. I award the Claimant Kshs.10,200/= on account of pay in lieu of notice.

iii. Service Gratuity

There is no evidence on record that the Claimant was registered as a member of NSSF or any other retirement benefits scheme. The Claimant is therefore entitled to service pay as provided in section 35(5) of the Employment Act which I award him at 15 days per year worked being Kshs.20,400/=.

iv. Compensation

Having been unfairly dismissed the Claimant is entitled to compensation as provided in section 49 (i) (c) of the Employment Act. I have taken into account the factors stated in section 49 (4), the circumstances under which the Claimant was terminated and his length of service. I award the claimant 12 months salary as compensation in the sum of Kshs.122,400/=.

The decretal sum shall attract interest at court rates from date of judgment.

The Claimant shall also have costs of this case.

Orders accordingly.

Read in open Court this 17th day of December, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

No appearance for Claimant

No appearance for Respondent