



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

CAUSE NO. 157 OF 2012

CHARLES WANJALA WATIMA.....CLAIMANT

v

NYALI GOLF & COUNTRY CLUB LTD.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent with effect from 1 March 2002 as a Supervisor at a consolidated salary of Kshs 21,600/-. Sometime in 2010 he was transferred to the Course department as a Course Supervisor reporting to the Assistant Estate Manager. Around 29 December 2011 he was confirmed as an Assistant Estate Manager, a position he had acted in since August 2010. His salary was reviewed to Kshs 60,000/- effective November 2011.
2. On 20 June 2012 the Claimant received a letter terminating his services with immediate effect. The termination was stated in the letter to be pursuant to clause 7(d) of the letter of appointment.
3. The Claimant was not amused with the termination and sought legal assistance. A demand letter was written to the Respondent on 27 June 2012 after which the Claimant filed a Statement of Claim on 19 December 2012 stating the issue in dispute as *compensation for wrongful summary dismissal* and seeking payment for accumulated leave days of Kshs 60,000/- and damages for wrongful termination of Kshs 720,000/-.
4. The Respondent filed its Memorandum of Response on 18 February 2013. In the Response the employment of the Claimant was admitted.
5. With respect to the claim that the termination was wrongful, the Respondent pleaded that the termination was lawful and was carried out pursuant to clause 7(d) of the letter of appointment and that the Claimant was paid Kshs 120,000/- being two months' salary in lieu of notice and gratuity of Kshs 300,000/- and Kshs 20,000/- in respect of 4 months accrued leave.
6. According to the Respondent, the Claimant was *a prospector who is stretching his luck too far with the sole aim of extorting the Respondent*.
7. This being essentially a termination claim, I believe I need to restate the statutory obligation placed upon Claimant/employees asserting unfair/wrongful termination and Respondent/employers justifying the termination.

Statutory obligation in unfair termination/wrongful dismissal cases

8. The first and foremost provision dealing with the incident of the statutory burden placed upon the parties in a complaint relating to a claim of unfair termination or wrongful dismissal is section 47(5) of the Employment Act which provides that

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.

9. To my mind, arising from the said section, it is incumbent upon an employee to first prove that a termination or dismissal occurred and, secondly, the employee must show the reasons which makes the termination unfair or dismissal wrongful. To demonstrate that a termination occurred the employee may produce a termination letter or give such evidence as may lead to an inescapable conclusion that a termination occurred.
10. To show why the termination is unfair, an employee may rely on the grounds set out in section 46 of the Act, such as that the termination was based on a female employee's pregnancy, employee's membership of a trade union or race, colour, tribe, sex, religion, political opinion or even participation in a lawful strike. Section 46 of the Act has enumerated nearly nine instances, which if proved will make a termination of employment automatically unfair.
11. But section 46 of the Act is not a closed shop. An employee may establish or rely on other reasons why a termination is unfair/wrongful. It could be that there was a breach of a contractual term of employment. It could be that no notification or hearing/opportunity to be heard as contemplated by section 41 of the Act was given. It could be because of an unfair labour practice, which has not been defined. The list is endless.
12. Once a Claimant has discharged the burden of proving why the termination was unfair, the obligation is placed upon the Respondent/employer to justify the grounds for the termination.
13. The grounds could be those mentioned in section 44(4) of the Employment Act. These include absence without leave, intoxication in the workplace, use of abusive language, refusal to obey lawful orders. Again the list is not exhaustive.
14. But the obligation on the employer does not end with justifying the grounds for the termination.
15. Section 41 of the Employment Act requires an employer to notify and hear the employee before termination. The employer is under an obligation to inform and explain to the employee of the grounds upon which it is contemplating termination. An employee is entitled during this process to have a fellow employee or shop steward present.
16. Section 35(1)(c) of the Act has made it mandatory that a contract where wages is paid periodically at intervals of or exceeding one month is terminable by written notice and if no notice is given, section 36 of the Act expects payment in lieu of notice.
17. The duty placed upon employers does not end with compliance with the procedural requirements outlined in sections 35 and 41 of the Act. Under section 43 of the Act, an employer must prove the reasons for the termination.
18. Indeed, the statute has placed an onerous statutory obligation upon employers. The employer must not only justify the grounds for termination, it must also comply with the procedural requirements of section 41, prove the reasons for the termination and go further to prove that the reasons were valid and fair as required by section 45 of the Act.
19. But that is not the end of the story. The reasons for termination must be the reasons which the employer believed to exist at the time of termination and which caused the employer to terminate the services of the employee.
20. In my view, if an employer sets out the reasons in a letter/writing, the employer will not be permitted during a court hearing to rely on other reasons other than those given in the letter/writing.
21. It is not only in respect of the unfairness of termination that the statute has placed obligations upon employers.
22. Under section 10(7) of the Act, there is an evidential burden upon an employer to produce in legal proceedings a written contract of employment specifying the prescribed particulars, terms and conditions of employment to prove or disprove an alleged term of employment. Section 74 of the Act on its part requires an employer to keep certain records. In view, it is the duty of the employer to produce the records in cases of legal challenges.
23. The incidence of the statutory burden placed upon the parties invariably means that the structure, form and content of the Memorandum of Claim and Memorandum of Response should not be similar to those generally applicable under the Civil Procedure Act and Rules. It should also not be lost to practitioners that it is permissible to plead evidence in the primary pleadings. General denials and putting to strict proof will not meet what the statute expects or do.

Whether the dismissal was wrongful

24. In the Statement of Claim it was pleaded that the dismissal was wrongful because no reasons were given or explanations offered. While giving evidence the Claimant stated that no complaints had been raised against him previously nor did he have a bad disciplinary record. In cross examination the Claimant denied that he was declared redundant.
25. On the side of Respondent, it was pleaded that the dismissal was pursuant to a contractual term, clause 7(d) and in evidence it was stated that the Respondent decided to downsize/restructure sometime in May 2012 because it could not afford the wage bill. The Respondent had financial difficulties. As a result, about 15 employees were laid off. These employees were said not to have been productive or necessary.
26. In evaluating the respective parties' contestations I must observe that the Respondent in evidence sought to introduce its operational requirements as the reason for dismissing the Claimant.
27. Section 43(2) of the Employment Act has provided that the reasons for termination must be the reasons which genuinely existed at the time of termination and which caused the employer to terminate the employee.
28. The minutes of the Respondent's Main Committee meeting held on 29 May 2012 are quite explicit that the Respondent was overstaffed and a committee to 'thin out' staff was appointed.
29. What the Respondent was proposing to do and did was in actual fact declaration of redundancy. Redundancy has been defined in section 2 of the Employment Act as

the loss of employment, occupation, job or career by involuntary means though no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.

30. Under section 40 of the Employment Act, the Respondent was under a statutory obligation to notify the Claimant and the local Labour officer of the reasons and extent of the intended redundancy at least a month in advance in writing. This was not done.
31. The Respondent was also expected to have regard to seniority in time, skills, ability and reliability of each employee in selecting those to be declared redundant. There was absolutely no evidence that this was done.
32. Any leave due and severance pay are also to be paid to the employee declared redundant.
33. In my view the Respondent camouflaged the termination of the Claimant as an action which was being taken pursuant to a contractual term while in reality it was declaring redundancy and for which it should have followed the law but did not. The termination of the Claimant was clearly unlawful and not only wrongful but also unfair.
34. Despite my finding above I also want to discuss whether clause 7(d) of the letter of appointment could make the termination of the Claimant lawful. The clause provided that

7. TERMINATION

(d) By Notice After confirmation of your appointment, your appointment may be terminated by either party giving to the other two months notice in writing expiring on any calendar month. The Club is under no obligation to give any reason for terminating your appointment under this sub-clause.

35. This clause was agreed on before the commencement of the Employment Act, 2007. In my view this type of clause which gives an employer the liberty to terminate an employment relationship without assigning any reasons (without cause) cannot stand scrutiny under sections 41(1)(2) of the Employment Act on notification and hearing before termination; 43 on proof of reasons for termination; 45(1)(2) on proof that reasons for termination are valid and fair and (4) that the termination is in accord with justice and equity and 47(1) and (5) on justification of grounds for termination provisions of the Employment Act.
36. Any employment contractual provision which purports to reserve power to an employer to terminate an employment relationship without giving and justifying the reasons when challenged

is contrary to statute and therefore illegal, unlawful and unconscionable. It cannot be a lawful term of an employment contract, at least from 2 June 2008.

37. The Employment Act, 2007 now gives each ordinary employee security of tenure. Before the Employment Act, 2007 an employee could be dismissed on notice or payment in lieu of Notice (without cause) although he might have served the employee faithfully and diligently for all his productive life. That is no longer the law of Kenya. The statute has altered the contractual/common law position. It has fundamentally altered the legal relationship between employers and employees.

38. For those who do not want to accept the reality they should keenly read section 45(1) of the Act which provides that

No employer shall terminate the employment of an employee unfairly

39. The section is akin to the provisions of the Industrial Relation Act, 1971 which has been reenacted in schedule 1 of the Trade Union and Labour Relations Act, 1974 at paragraph 4 that

every employee shall have the right not to be unfairly dismissed by his employer

40. This later section was the subject of discussions by the Court of Appeal of England and Wales in *Western Excavating (ECC) Ltd v Sharp* (1978) IRLR 27 to restate the legal position in England. Lord Denning stated that

So, whereas at common law an employer could dismiss a man on a month's notice or a month's wages in lieu, nowadays an employer cannot dismiss a man even on good notice, except at the risk of having to pay him a large sum should the Industrial Tribunal find that the dismissal was unfair

41. The position in Kenya under the current legal framework can be no different. The Employment Act at the sections I have mentioned in paragraph 35 above lead no other conclusion on the state of the law.

42. Before discussing appropriate relief I must make two observations. One, that on declaration of redundancy, an employee is entitled to severance pay at a rate not less than the equivalent of fifteen days for each completed year of service. This is by virtue of section 40(1)(f) of the Employment Act. The Claimant would be entitled to up to 150 days pay as severance pay. Using the usual and correct formula the severance pay would be Kshs 346,153/-.

43. The Claimant was paid gratuity of Kshs 300,000/-. I was not addressed on whether gratuity and severance pay in law are the same thing. I will therefore say no more on this issue.

44. Two, the Claim was pleaded on the basis of wrongful termination. Wrongful termination relates to breach of contract. It is a different concept from unfair termination which was introduced into our laws through the Employment Act, 2007. It appears the Act has now provided same remedies for both, but the practitioners unlike unrepresented parties should be alive to the different conceptual basis of both causes of action.

Appropriate relief

Accumulated leave days

45. In the Statement of Claim the Claimant sought Kshs 60,000/- as accumulated unpaid leave days for 30 days.

46. The computation of the Claimant's final dues show that he was entitled to Kshs 20,000/- being leave days for 4 months'. No proper basis was laid for any other pending accrued leave days. The Claimant accepted that he was paid. In the circumstances I dismiss this head of claim.

Damages for wrongful termination

47. The Claimant sought damages for wrongful termination in the sum of Kshs 720,000/-. By this I

understand the Claimant to be praying for the maximum twelve months' gross wages as compensation provided for in section 49(1)(c) of the Employment Act which he computes in the sum of Kshs 720,000/-. An award under this head of claim is subject to any or all of the thirteen factors set out in section 49(4) of the Act.

48. The Claimant has admitted he was paid gratuity. The financial status of an employer is not one of the factors set out in the statute. But this Court is also a court of equity and it must be alive to the socio-economic realities of society. The Respondent is a not for profit entity. Evidence given was that it was not performing well. The Claimant served the Respondent for nearly ten years.

49. Weighing all the relevant factors set out in section 49(4) of the Act, I would award the Claimant the equivalent of two months gross wages as compensation. The Claimant was earning Kshs 60,000/- at time of redundancy. I award him Kshs 120,000/-.

Conclusion and Orders

50. In conclusion I do find that the Claimant was declared redundant but camouflaged as contractual termination and that therefore the termination was unfair. I do find and hold the termination unfair and award him

a. Two months gross wages as compensation Kshs 120,000/=

51. There will be no order as to costs.

Delivered, dated and signed in open court in Mombasa on this 26th day of July 2013.

Justice Radido Stephen

Judge

Appearances

Ms. Omollo instructed by

M Ananda & Co Advocates for Claimant

Mr. Nduna instructed by

Federation of Kenya Employers for Respondent