



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 697N of 2009

Gilbert Nyabuto Mosome

CLAIMANT

and

The Standard Limited

RESPONDENT

JUDGEMENT

Background

1 Gilbert Nyabuto Mosome (the Claimant) filed a claim against the Standard Limited (the Respondent) on 12 November 2009 and the issue in dispute was stated as wrongful dismissal from employment of Gilbert Nyabuto Mosome.

2 On 17 March 2010 the Respondent filed a Memorandum of Defence having got leave of the Court on 25 February 2010.

3 On 3 June 2010, the claimant filed a Supplementary Memorandum of Claim which led the Respondent to also file a Supplementary Memorandum of Defence on 10 June 2010. These supplementary pleadings were filed pursuant to Court directive on 18 May 2010 when the hearing of the Cause started before retired Justice Chemmutut.

4 Hearing resumed and concluded on 23 July 2010 when the Court indicated that an award would be pronounced on notice.

5 Due to circumstances which are in the public domain, Justice Chemmutut ceased being a Judge of the Industrial Court before he could deliver the award. On 4 October 2012, Mr. Nyabena for the Claimant and Mr. Echesa for the Respondent appeared before me and they informed me of their agreement to my proceeding to prepare an award based on the record of proceedings taken by retired Justice Chemmutut.

Claimant's case

6 It was the Claimant's case that he was employed by the Respondent as a Data Clerk in January 1998 and that with effect from 1 March 2007, his salary was increased from Kshs 12,100/- to Kshs 20,000/- per month.

7 The Claimant also exhibited two contracts made on 1 January 2004 to run until 30 March 2004 and another one made on 1 July 2004 and expiring on 30 September 2004.

8 The Claimant went on that he dutifully served the Respondent until he was terminated by letter

dated 22 May 2007 giving him 7 days notice to end his services effective 31 May 2007. The termination, the Claimant urged was unlawful, unjustified and without giving him a hearing. The letter of termination did not give a reason for the termination. At the time of termination he was earning a gross salary of Kshs 32,666.20.

9 After receiving the termination letter he made several appeals to the Respondent but these were not successful. He further states his terminal benefits were not paid.

10 The Claimant further pleaded that he was a permanent employee of the Respondent for about 9 years and exhibited several pay slips to prove this point.

Respondent's case

11 According to the Respondent, the Claimant was employed on a renewal probationary contract from 19 March 2007 to 19 September 2007. The contract was exhibited as 'SG 1', and is dated 2 April 2007. This probationary contract had a clause stating that it could be terminated by 7 days notice or payment in lieu thereof.

12 In the Supplementary Memorandum of Defence, the Respondent's case is that from 1997 to 2004, the Claimant was a casual worker who was paid on a daily rate basis.

13 The Respondent further stated that it terminated the probationary contract through a letter dated 22 May 2007. The termination letter was exhibited as 'SG 2'. The Respondent contend they abided by the terms of the contract in terminating the services of the Claimant.

14 The Respondent further contend that the Claimant had failed to formally clear with it and that section 47(6) of the Employment Act stopped him from challenging the termination.

15 The Respondent lastly submitted that the claim for 12 months compensation for unlawful termination, severance pay and pay in lieu of leave were not warranted pursuant to the terms of the contract and the applicable law.

16 The Respondent did not make any response to the relationship between it and the Claimant 2005 to March 2007.

Issues for determination

17 From the submissions' of the parties, I have identified the following as the pertinent issues for determination:-

- (i) When was the claimant employed and on what type of contract,
- (ii) Whether the claimant's termination is unfair
- (iii) If answer to (ii) is in the positive what remedies should be awarded.

When was claimant employed and on what type of contract

18 According to the Claimant he was employed in January 1998. The claimant did not produce any contract document to support this contention. What was produced is a document indicating that the claimant worked up to the week ending 9 February 1997. The document is marked Appendices '3e' in the supplementary memorandum of claim. The document has the words 'casual' entered therein.

19 The Claimant further exhibited at Appendices 3 overtime sheets for 9 February 1997, 8 March 1998, 18 April 1999, 13 February 2000, 11 March 2001 and 17 March 2002. He further exhibited a staff identity card said to have been issued in 1997 and one other issued in 2004.

20 The Claimant further furnished the Court with two contract documents. The first one is an agreement made on 1 January 2004 employing the claimant as a general worker up to 30 March 2004 and another made on 1 July 2004 and running up to 30 September 2004.

21 Similarly the claimant exhibited pay slips from January to December 2004. The pay slips indicate the claimant's basic wage was Kshs 10,100/- which went up to Kshs 12,100/- in November 2004.

22 According to the Respondent the claimant was engaged as a casual worker between 1997 to 2004. That is nearly five years. The Respondent did not produce any documentation to back up its contention. This is contrary to the applicable law at the material time.

23 The law applicable during this period was the Employment Act, Cap 226 (now repealed) and at the material part it provides:

Section 14(1). Every contract of service-

(a) For a period, or a number of working days which amount in the aggregate to the equivalent, of six months or more; or

(b) which provides for the performance of any specified work which could not reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of six months, shall be in writing.

24 The Respondent had a duty also under section 38 of the repealed Act to keep records as stipulated in therein. The Respondent did not provide any records it kept in relation to the Claimant nor establish whether he was being paid daily as a casual.

25 Relying on the pay slips for 2004 exhibited by the Claimant, the fact that the Respondent employed the Claimant for more than six months but did not produce any written contract as required by law applicable then and the meek position taken by the Respondent, I have no hesitation in finding that between 1997 and 2004 he was not a casual employee but employed on contractual terms as envisaged under section 14(5) (iii) of the repealed Employment Act.

26 Between 1 January 2004 to 30 September 2004 I also do hold the Claimant was engaged by the Respondent on renewable contractual terms.

27 However, I still have to determine the type of relationship between the Claimant and Respondent after 30 September 2004 up to end of March 2007 when another written contract of employment was entered into.

28 The Claimant in his Supplementary Memorandum of Claim exhibited several pay slips covering the years 2005 up to April 2007. These pay slips indicate the claimant was earning Kshs 12,100/- basic pay. Based on these pay slips I again have no hesitation in finding that the claimant was on contractual and not casual employment terms with the Respondent.

29 From 19 March 2007 up to 19 September 2007, it is not in dispute that the operative contract between the parties was governed by the contract of employment made on 2 April 2007.

Whether the claimant's termination was unfair

30 It is not disputed that the genesis of this dispute was the termination letter from the Respondent to the claimant dated 22 May 2007. The termination was to take effect from 31 May 2007. The Respondent's case being that it was acting in accordance with clause 4(b) of the contract of employment made on 2 April 2007.

31 Clause 4(b) of the contract states:

This contract may be terminated;-

By the Employer on giving to the Employee written notice of seven (7) days

or payment of seven days in lieu thereof.

32 The Respondent strenuously argued it complied with the letter and spirit of this clause in terminating the services of the claimant and that therefore it need not have given the claimant a hearing before taking the decision to terminate or even assign reasons for the termination.

33 In fact the Respondent in its pleadings contends the termination was in compliance with section 42(4) of the Employment Act, 2007 which covers termination of probationary contracts.

34 The contentions of the Respondent however, I must state at the outset cannot stand the rigours of the law.

35 One, the contract made on 2 April 2007 is a contract for a definite period. It is a contract for 6 months, it is not a probationary contract by the stretch of any imagination. Probationary contracts, it is openly known within human resource management and personnel administration, is the period of a contract during which an employer takes time to assess and appraise whether an employee newly contracted can measure up the job specifications.

36 Second, the Claimant had served with the Respondent for a long time as a general worker and data clerk. If the Respondent can imagine it could continuously renew the contract as a probationary contract, it would be treading on very slippery legal ground. Such type of practice may amount to an unfair labour practice, which the Constitution has out rightly disallowed in Article 41.

37 Three, the 6 month contract entered into by the parties is subject to the Employment Act, 2007 by virtue of Section 3.

38 And because the contract is subject to the Employment Act, section 35 thereof immediately becomes implicated in case of termination. It is not disputed that the claimant was being paid a monthly wage as stipulated in clause 2 of the contract letter. He was entitled to a notice of at least 28 days. Clause 4(b) of the contract therefore was against the letter of the Employment Act and therefore unlawful. Any contract of service of employment, such as the instant one, which has a provision for payment of salary on a monthly basis and purports to provide for termination by the giving of notice of less than 28 days, is unlawful. Clause 49(b) of the contract made on 2 April 2007 is therefore unlawful. The Respondent cannot even claim cover under the provisions of section 37 of the Employment Act, which does not recognise casual employment contracts after one month or three months continuous service under the circumstances enumerated therein.

39 But the matter does not end there. The Respondent submitted that it needed not give a hearing to the Claimant nor assign a reason for the termination. This is because the contract stipulated how it could be terminated. But is this the correct or a sound legal position or argument? I will examine briefly two authorities from the Court of Appeal and also the statutory/legal framework created by the Employment Act, 2007, though the parties regrettably did not cite any case law.

40 A good start would be the decision of the Court of Appeal in *Nakuru Civil Appeal No.27 of 1992, Rift Valley Textiles Limited v Edward Onyango Oganda*, where the Court held that:

But the appellant appeals to this court because having found and held that the summary dismissal was unlawful, the learned Judge proceeded to award to the respondent twelve months gross salary as general damages and despite the respondent's repeated admission that he had been paid for the three months salary in lieu of notice. Was the Judge entitled in law to do this?.....

With respect to the learned judge, *the rules of natural justice have no application to a simple contract of employment unless the parties themselves have specifically provided in their contract that such rules shall apply. Where a notice period is provided in the contract of employment as was the case here, then an employer need not assign any reason for giving the notice to terminate the contract and if the employer is not obliged to assign a reason, the question of offering to the employee a chance to be heard before giving the notice does not and cannot arise.....as we have said, unless there be a specific provision for the application of the rules of natural justice to a simple contract of employment, those rules are irrelevant and cannot found a cause of action'*(emphasis mine)

41 A second case which affirmed the jurisprudence in the *Oganda* case is Court of Appeal *Nairobi Civil Appeal No. 108 of 2010, Kenya Revenue Authority v Mengina Salim Murgani*, where it was held that:

'it is for the parties to provide in the contract how such organs should operate and how hearings, if any, are to be conducted. A court of law cannot in our view, import into a written contract of service rules of natural justice and the Constitutional provisions relating to the right of hearing'.

42 In my considered view the *Oganda* decision was sound jurisprudence during the life of the Employment Act, Cap 226 which was repealed by the Employment Act, 2007 and which commenced on 2 June 2008 and that the decision in the *Murgani* case on the right to hearing before termination was made *per incuriam*.

43 I say so because it appears that the Court of Appeal did not consider the relevant provisions of the Employment Act, 2007. I am not sure if the attention of the Court was drawn to the Act. The purpose of this Act was to repeal the Employment Act, declare and define the fundamental rights of employees, provide basic conditions of employment amongst others.

44 The Employment Act, 2007 has radically changed and transformed the relationship between employees and employers in Kenya. It lays the irreducible minimums. One of the irreducible minimums is in section 35 on termination notice. As it were, many contracts of employment have various provisions on how the contracts can be terminated. But the Employment Act now has provided the irreducible minimums in three types of situations. If wages are paid daily, then the contract can be terminated at the close of any day without notice; if the contract is one in which wages are paid at intervals of less than a month, it can be terminated at the end of the period next following the giving of notice in writing and lastly if the contract provides for the payment of wages at periodic intervals of or exceeding a month, then at least 28 days notice must be given or payment thereof in lieu of notice.

45 The purport of this in the instant case is that since the Claimant was being paid monthly, the contract could not provide for a lesser period of notice.

46 Section 35(3) of the Employment Act, 2007 though not expressly providing that reasons be given for termination, obligates the employer to explain to the employee the termination notice in a language the employee understands.

47 However, in my humble view, the provisions of the Employment Act, 2007 has fundamentally changed the rules of engagement regarding termination or dismissal and Section 41 is succinct and I believe it is only fair that I reproduce it in full:

41(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.

41(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.

48 The question which may beg for an answer is whether the employee is entitled to hearing when the termination is not on one of the four grounds named, namely, *misconduct, poor performance or physical incapacity or in summary dismissal cases which form the fourth category*. The answer to this question, in my view, is subsumed in section 41(2) and of course an employer need not go through this process if the employee is serving on a probationary contract.

49 And to reinforce my view, I am fortified by Section 43 as read with Section 45 of the Employment Act which also obligates an employer to prove the reasons for termination of a contract and on failure to so prove, the termination would be deemed to be unfair. It appears an employer would only escape these demands in cases where contracts of employment terminate by effluxion of time or on retirement.

50 The import of what I have out above is that the Respondent was under a statutory obligation, unlike under the common law and the situation prevailing under the repealed Employment Act, Cap 226 to give the Claimant an opportunity to make representations before the decision to terminate his services was made and also to give reasons for the termination.

51 I do therefore find that the Claimant was unfairly terminated. That is what the law demands. The only other option would have been for the Respondent to let the contract run out its life and cease through effluxion of time.

Appropriate remedies

Reinstatement

52 The Claimant sought an order reinstating him to his former position. While the statute provides reinstatement as one of the remedies available for unfair termination, considering the time lapse from when the claimant's services were terminated, it would not be inappropriate in the circumstances. The Court should also be wary of ordering specific performance in an instant such as pertains here. But in appropriate circumstances, reinstatement would be ordered but I leave the debate on the relevant considerations for such occasion for an appropriate case.

One month's salary in lieu of Notice

53 Having found the termination unfair and the termination clause in the Claimant's employment letter unlawful, it is appropriate that the Respondent do pay the Claimant the sum of Kshs 20,000/- in lieu of notice.

Severance pay

54 The Claimant was not declared redundant and therefore I am unable to invoke the provisions of section 40(1) (g) of the Employment Act in his favour. This head of claim is declined.

Payment for Leave for One year

55 The Claimant sought Kshs 20,000/- being untaken leave for one year. The Respondent's case was that the entitlement under this head of claim should be fixed at Kshs 1,995/- for the one and a half months served and in any case cannot exceed Kshs 8,000/- had the 6 month contract run its time. Leave is earned and if an employee does not serve for the requisite one year, it is prorated.

56 I can see no justification to depart from this general practice of prorating leave when a contract is terminated prematurely. I therefore uphold the Respondent's case and award a sum of Kshs 1,995/- being earned leave for the period March to May 2007.

12 months compensation for unlawful termination

57 At the time the Claimants services were terminated, that is effectively 31 May 2007, he still had some four months of his contract to go. I find this a suitable case to order the Respondent to pay the Claimant the equivalent of four months' salary in the sum of Kshs 80,000/- in compensation. That is the basic salary he was earning as of April 2007.

Terminal dues

58 There is a claim for some Kshs 440,000/- which the claimant referred to as balance of terminal dues. No evidential or contractual basis was laid for this head of claim and therefore I decline to make an award in respect of it.

Conclusion

59 In the final analysis I find for the Claimant in the total sum of Kshs 101,995/- and make no order as to costs and in any event the parties did not make any case for me to use my discretion to award costs.

Orders

60 In conclusion I find in favour of the Claimant as follows:

- (a) The termination of the Claimant is declared unfair and unlawful
- (b) The Claim for reinstatement or alternative payment of balance of terminal dues is declined.
- (c) The Claim for severance pay is declined.
- (d) The Claimant is awarded one month's salary equivalent in lieu of notice in the sum of Kshs 20,000/-.
- (e) The Claimant is awarded Kshs 1995/- being prorated leave entitlement.
- (f) The Claimant is awarded Kshs 80,000/- being 4 months' compensation for unfair termination of employment.
- (g) There will be no order as to costs.

Dated and delivered in open Court at Nairobi this 26th day of October 2012.

Justice Radido Stephen

Judge of the Industrial Court

Appearances

Mr. Nyabena instructed by Nyabena Nyakundi & Co

Advocates

For the Claimant

Mr. Echesa instructed by Ochieng, Onyango, Kibet & Ohaga

Advocates

For Respondent