



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 677 of 2012

AUGUSTINE PETER OBIRIK.....CLAIMANT

VERUS

CARD CENTRE LIMITED.....RESPONDENT

JUDGEMENT

This is a claim for unlawful and wrongful termination of employment of Augustine Peter Obirika dated 28th February 2012. There was no appearance on the part of Card Centre Limited nor was there defence filed in this case. This matter was fixed for hearing on 21st June 2012 and despite the respondent being served vides return by Nelson Ondiki, there was no apurtenance. Another hearing for 31st October 2012 vide return filed by Nelson Ondiki but no defence or appearance from respondent. This Court being satisfied that summons were issued but no appearance entered or defence filed continued with the formal proof of the claim.

This is a claim for:

- 1. A declaration that the respondent actions are in breach of the contract of employment between the claimant and the respondent and particularly that the stopping of salary while claimant was on sick leave is unlawful and unjust;*
- 2. A declaration that the respondent's actions amount to termination and or constructive termination of contract of employment between the claimant and the respondent and particularly that the lawful procedure of termination of contract was never followed by the respondent;*
- 3. An order that the respondent to pay the claimant an equivalent amount of twelve (12) months' salary for the unfair termination of his employment being the sum of kshs.270,000.00;*
- 4. An order that the respondent pay the claimant unpaid salary for the months of June, July, August and September 2010 amounting to Kshs90,000.00;*
- 5. The the claimant be awarded severance pay at the rate of 15 days for each year worked which amounts to Kshs.405,000.00*
- 6. An award on overtime worked by the claimant working overtime on weekdays (6 hours) for 36 years kshs.1,435,449.00, overtime public holidays (3 hours) for 31 years kshs.188,845.00 and overtime on Sundays (3 hours) for 31 years kshs.824,054.00;*
- 7. The claimant be paid two months notice of Kshs.45,000.00;*

8. *Accrued leave days of 21 days in the year 2010 amounting to Kshs.15,750.00;*

9. *Costs of this suit; and*

10. *Interest for all the above.*

It was the evidence of the claimant that he was employed by the respondent on 8th May 1974 as a salesman on a verbal contract. He worked diligently for the respondent for the last 36 years where he served on a daily basis from Monday to Sunday. That on Mondays to Saturdays he worked for overtime one hour for 36 years while on Sundays and public holidays he worked overtime from 10 am to 1 pm, being 3 hours for 31 years.

The claimant fell ill on 9th June 2010, was rushed to Guru Nanak hospital where he got treatment but referred to Kenyatta national Hospital where he was admitted and underwent an operation. That he was in admission at this hospital until 18th June 2010 where the respondent representative, a Director Mr. Sodha visited him three times and that the respondent was notified of this admission in hospital. Upon discharge, he reported to the respondent who advised him to take rest as he needed to recuperate from the operation that was still not healed and needed more medication and visits to the hospital.

That while on sick leave with the knowledge of the respondent; his salary was not paid prompting him to report back to work, though frail and in ill health. That upon enquiry the respondent director stated that he could not be paid while he was away from work and for further medical bills, his dues were with the National Social Security Fund (NSSF). That he was forced to work even though his health was poor. While at his place of work, no work was allocated to him and his presence was not taken well.

In evidence, the claimant submitted that he was forced to report back to work to help follow up his unpaid salary not remitted while he was on sick leave. That his medical bill had accumulated, his rent was not paid and his children in school were suffering unpaid fees. That when he wrote to the respondent about his salary, he was told that he would be paid when he got well go be able to go back to work. He was advised to follow with NSSF and the respondent helped him write to NSSF for his dues.

It was the claimant's evidence that the respondent wrote to NSSF that he was eligible to claim his NSSF contributions due to personal needs and thus should be paid his contributions. Unfortunately upon presentation of this letter to NSSF, the claimant was advised that the letter was not acceptable as claims were only paid upon retirement. He returned this message to the respondent who wrote another letter indicating that the claimant was seeking for his dues due to retirement on medical grounds. This second letter was accepted by NSSF.

Despite these intervention of NSSF, the claimant continued to report for work at the respondent offices as his intention was to get funds to pay for his medical bill and due to the fact that he had not been paid his salary for several months until 29th September when the letter to NSSF was written by the respondent. Unfortunately, things did not improve at the work place and claimant took it that he had constructively been terminated.

It was submitted in evidence that after working for the respondent for 36 years, this was the only time the claimant got sick and the treatment received was wrong, unfair and the constructive termination that followed inhuman and degrading to the service rendered to the respondent by the claimant.

He claims for his dues, for wrongful and unfair termination.

Court notes that in the absence of a defence to the above claim, only evidence on record for court consideration is that of the claimant. Based on the documents filed in the claim and evidence in submissions court makes the following observations.

That it is now settled law under the Employment Act that a verbal contract is a contract that can confer

rights and can be enforced.

8. The provisions of this Act shall apply to oral and written contracts.

Further that all employers should seek at the earliest opportunity to reduce oral contracts of employment into writing. This would help in spelling out the terms and conditions of engagement between the parties.

It is the duty of every employer to keep employee records. Pay slips and leave schedules, should have been issued to the claimant as of right by the employer. Court notes that under Section 10 of the Employment Act, in a contract as between the parties herein [verbal as established by this Court] there are specific details that must be incorporated. Thus the employment particulars;

A written contract ... shall state particulars of the employment ... shall contain particulars as at a specified date ... [stating] any terms and conditions relating to any of the following –

(i) Entitlement to annual leave, including public holidays, and holiday pay, (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated);

(ii) Incapacity to work due to illness or injury, including any provision for sick pay; and

(iii) Pension and pension schemes.

(b) The length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment.

In this case the Court is guided by the applicable law, the evidence before it and the submissions in court. The respondent letters to NSSF for an on behalf of the claimant are quite instructive into the relationship envisaged by the parties herein. That all medical and other benefits due to the him were computed and envisaged as falling under this pension scheme and where need arose, the respondent would facilitate access to the same even where circumstances demanded that the applicable statutory body to do this was the NHIF.

The above scenario notwithstanding; the law on the issue of an employee's medical condition and or situation is already settled thus under Section 30 of the Employment Act;

(1) After two consecutive months of service with his employer, an employee shall be entitled to sick leave of not less than seven days with full pay and thereafter to sick leave of seven days with half pay, in each period of twelve consecutive months of service, subject to production by the employee of a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre.

(2) For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.

Whatever condition befell the claimant and whatever the terms of his contract details, the provisions of Section 30 of the Act were still applicable in his case as this covers all employees. The Court understanding of these provisions of the law in this case is that the claimant having served the respondent for over 36 years, his services were still needed by the employer hence the constant visits in hospital and at home by his employer and also his continued service to undertake work for the respondent.

The claimant was away in hospital with the knowledge of the respondent having fallen ill within the term of his contract. He fell ill on or about the 9th June 2010. This period is covered and under Section 30 of the Act and looking this section of the law must be read together with Section 34 of the same Act:

34. (1) ... an employer shall ensure the provision sufficient and of proper medicine for his employees during illness and if possible, medical attendance during serious illness.

(2) An employer shall take all reasonable steps to ensure that he is notified of the illness of an employee as soon as reasonably practicable after the first occurrence of the illness.

(3) It shall be a defence to a prosecution for an offence under subsection (1) if the employer shows that he did not know that the employee was ill and that he took all reasonable steps to ensure that the illness was brought to his notice or that it would have been unreasonable, in all the circumstances of the case, to have required him to know that the employee was ill.

(4) This section shall not apply where—

(a) The illness or injury to the employee was contracted during a period when the employee was absent from his employment without lawful cause or excuse;

(b) The illness or injury is proved to have been self inflicted;

(c) Medical treatment is provided free of charge by the Government or under any insurance scheme established under any written law which covers the employee.

Does this then mean an employer cannot terminate the employment of an employee? Not at all. Under the law the grounds that may justify termination of the employment by the employer and these are misconduct of an employee, physical incapacity, poor performance or an employer's operational requirements/retrenchment. However for an employer to terminate an employee he/she should have a genuine reason as specified in section 45 (2) and section 46. In order for termination to be fair in the eyes of the law it has to be both substantively and procedurally fair. The employer needs to have a valid and fair reason for termination.

Apart from this valid reason of termination the employer must follow fair procedures for termination as provided under the Employment Act, section 45 (2) and section 46. In any form of termination the employer is required to prove the reasons for the termination, otherwise it will be termed as unfair section 45 (2). The procedures for termination are different depending on the reason for termination but they all have a common item - the right of an employee to be heard before a termination decision is taken against an employee (section 41 (2)).

Were these requirements followed in the case of the claimant? The Court finds that there was no justification for the termination of the claimant employment with the respondent noting the circumstances and the law applicable. It was therefore the responsibility of the respondent as the employer to ensure the wellbeing of all its employees even where constructive termination is established.

In the circumstances I am persuaded that the claimant is entitled to one month salary in lieu of notice as the constructive termination was at the instance of the respondent. The claimant served for 36 year without any case of indiscipline and his service should be awarded looking at his age and the fact that he is still ailing and forced to take his retirement savings with NSSF instead of the respondent making medical savings for him either with NHIF or with any other pension scheme. He is also entitled to damages for unlawful and unfair loss of employment. This is one case where this Court will grant the maximum allowable time and find twelve months' salary compensation reasonable in the circumstances.

For the above reasons the court enters judgement for the claimant as follows:

a) That the claimant suffered unlawful and unfair loss of employment due to constructive termination;

b) The respondent is directed to pay the claimant the following final dues:

- 1. Unpaid salary for June, July, August and September 2010 amounting to Kshs. 90,000.00**
- 2. One month salary in lieu of notice at Kshs. 22,500.00;**
- 3. Service pay for 36 years worked at Kshs. 405,000.00**
- 4. Twelve months salary as compensation for unlawful loss of employment amounting to Kshs. 270,000.00;**

Total Kshs.787, 500.00

c) Costs of the suit.

Dated and delivered at Nairobi this 9th day of November 2012

M. W. Mbaru
JUDGE
INDUSTRIAL COURT OF KENYA

In the presence of:

Court clerk.....

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