



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Cause 1433 of 2010

CLAIMANT

KENYA SHOE & LEATHER WORKERS UNION

RESPONDENT

NAIROBI TANNERS

LTD

AWARD

1. On 16/11/2010, the Kenya Shoe & Leather Workers Union [hereinafter 'the claimant'] filed the Claim herein against Nairobi Tanners Ltd [hereinafter 'the Respondent'] disputing the 'termination of Moses Simiyu'.
2. The Claim was served upon the Respondent which entered on 30/11/2010 through the law firm of Malonza & Co. Advocates. On 1/12/2010, the Respondent filed a Memorandum of Response.
3. The Cause was fixed for hearing severally but due to one reason or another it never took off. On 13/10/2011, Mr. David Omolo appeared for the Claimant while Mr. Jackson Makori appeared for the Respondent before Justice Chemmutut. During that appearance, the Court ordered that the Cause be heard on 26/7/2012 at 11.00 am. However, by this date, Justice Chemmutut had ceased acting as a Judge of the Industrial Court and therefore the Cause was placed before me.
4. When the Court convened at 9.30 am Mr. Maina appeared for the Claimant while Mr. Malonza appeared for the Respondent. I ordered the hearing to commence at 11.00 am during which time the Respondent's Advocate was nowhere to be seen.

Claimants Case

5. The Claimant opted to give oral testimony and he was sworn.
6. In his testimony, Moses Simiyu Simindi testified that he was employed by the Respondent on 1/10/2005 as a machine operator at a salary of Kshs 8500 per month.
7. He further testified that the Respondent terminated his services on 2/5/2009 through oral information from a director of the Respondent, a Mr. Laxmi.
8. According to the testimony of the Claimant witness, the Respondent terminated his services because

he had refused to use the Respondents sanctioned Advocate to pursue for compensation for injuries he had suffered while in the course of employment in July 2007. He opted to choose his own Advocate and he further testified that the compensation case had since been settled.

9. After his termination, the witness stated he sought the assistance of the Claimant union of which he was a member. The Union's attempt to negotiate and discuss the termination bore no fruit and the Claimant therefore wrote to the Minister for Labour reporting a trade dispute. A Conciliator was appointed but the Respondent ignored his written pleas to it to submit its settlement proposals.

10. As a result, the Conciliator invoked the provisions of Section 69 of the Labour Relations Act to certify the dispute unresolved and hence of the filing of the Cause.

11. The Claimant relied on 4 sets of documents being: Appendix 1, letter dated 17/7/2009 from claimant to the Minister for Labour reporting the existence of a trade dispute by virtue of Section 62[1] of the Labour Relations Act; Appendix II, being letter dated 24/8/2009 from the Minister for Labour to the Claimant and Respondent advising on appointment of a conciliator and seeking written submissions with a view to settling it; Appendix III being letter dated 5/10/2009 from the Conciliator seeking written proposals from the Respondent and lastly a letter dated 29/10/2009 from the Conciliator to the Claimant certifying the dispute unresolved due to lack of a response from the Respondent.

12. The Claimant sought for :

- | | |
|--------------------------------|--------------|
| [i] One month notice of | Kshs 8,500 |
| [ii] 12 months compensation of | Kshs 102,000 |
| [iii] 2 years leave of | Kshs 17,000 |
| [iv] Severance pay of | Kshs 19,615. |

All coming to a total of Kshs 147,115.

Respondent Case

13. As mentioned above during the hearing the Respondents representative was not in Court at the time of hearing.

14. But from its Memorandum of Response filed on 1/12/2010, the Respondent denied terminating the services of the Claimant's witness and averred rather that he deserted employment.

15. In the Response, the Respondent further pleaded that the Claimant's witness had been paid his terminal dues of Kshs 8,500 which after deductions came to Kshs 4120. A copy of a salary voucher was exhibited as 'N1'.

16. The Respondent further denied the contention of the Claimant witness on using the Respondent lawyer to pursue the injury compensation and the unfair termination allegations.

17. The Respondent denied meeting with the Claimant to attempt to resolve the dispute and also contended that it could not bring itself before the Conciliator because it was not supplied with the facts and basis of the dispute. It denied breaching any law.

Issues for determination.

18. The issues emerging for determination are:

- [i] Whether the Claimant witness, Moses Simiyu was unfairly terminated contrary to the provisions of Section 45 of the Employment Act, and ,

[ii] If the termination was unfair what relief should be granted?

Analysis of the issues

19.The Claimants witness testimony is that he was terminated orally by a director of the Respondent. According to the Respondents Memorandum of Response, Moses Simiyu deserted employment.

20.I am more inclined to belief the Claimants witness since he testified under oath and his testimony was not challenged.

21.This is coupled with the requirement of Section 45 of the Employment Act which requires an employer to prove that the reasons for terminating the services of an employee are valid and fair.The Respondent did not avail itself of this opportunity to either prove that Moses Simiyu deserted employment or that the reasons he gave for his termination were false.

22.Of course I have not lost sight of the requirements of Sections 41, 43 and 44 of the Employment Act on procedural fairness, proof of termination and summary dismissal, but since the Respondent was not in Court to ventilate these provisions, it cannot get the benefit accruing there from. This is because the Respondent had alleged that Moses Simiyu deserted duty which conduct qualifies as gross misconduct justifying summary dismissal.

23.In the end result I find the termination of Moses Simiyu was unfair pursuant to the provisions of Section 45 of the Employment Act.

Appropriate Relief

24.Having held that the termination of Moses Simiyu was unfair termination, the question of what relief should be given must be dealt with.

One Month payment in lieu of notice

25.Regarding the claim for 1[one] months' payment in lieu of notice, I note that Moses Simiyu served the Respondent between 2005 and 2009 and pursuant to Section 37 of the Employment Act, there is no other conclusion that can be drawn except that he was not a casual employee and therefore the provisions of Section 35[1] [c] comes into play. There was no suggestion that Moses Simiyu is exempted from the provisions of section 35[1][c] because of section 35[6].

26.The Respondent also did not prove its annexure marked 'N1' and I therefore award Moses Simiyu one month's pay in lieu of notice in the sum of Kshs 8,500.

2 years leave

27.The Respondent, in reference to the claim for 2 years leave merely stated that the same were utilised. The Respondent did not attach any records to indicate whether Moses Simiyu took leave for the 2 years claimed.

28.Section 74[1][f] requires an employer to keep an employee's annual leave records and nothing would have been easier than for the Respondent to file these documents pursuant to rule 14[4] of the Industrial Court [Procedure] Rules,2010.

29.According to section 28 of the Employment Act, an employee is entitled to, as an irreducible minimum, not less 21 days annual leave with full pay. In the circumstances, I award Moses Simiyu the sum of Kshs 17,000 being the compensation for the 2 years claimed.

Severance pay

30. I am unable to grant this aspect of the Claim because according to section 40[1][g] of the Employment Act, this relief is only applicable where a claimant was declared redundant. No evidence was led to show that this was a case of declaration of redundancy.

12 months compensation

31. There is a claim for 12 months compensation. This Court is directed by section 50 of the Employment Act to be guided by the provisions of section 49 in fashioning an appropriate relief in cases of wrongful dismissal or unfair termination. This Court has already determined that the termination in the instant Cause was unfair. Section 49[1] [c] provides and I quote, '***Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following- the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal***'.

32. The Claimant did not draw or even attempt to draw the attention of this Court on the factors to consider in awarding compensation provided in Section 49 of the Employment Act. It is also apparent there is not much jurisprudence on this issue locally which this Court could rely.

33. This Court must therefore look at the particular circumstances of this case and how the parties conducted themselves before this Cause was filed. The Claimant attempted to have the dispute negotiated and settled amicably with the Respondent through his union. A letter from the Claimant union to the Respondent was exhibited. The Respondent never took up the issue. The Respondent equally did not bother to respond to the request from the Conciliator. In essence, the Respondent frustrated the conciliation process.

34. Again, the Respondent did not comply with the elaborate procedures set out in the Employment Act regarding disciplinary processes and keeping of records. Even if the Claimant witness had deserted as alleged, the Respondent did not demonstrate it tried to get in touch with him for purposes of establishing what the reason for the 'desertion' could be.

35. The Claimant witness had served with the Respondent for about 4 years.

36. Considering the factors enumerated in paragraphs 33, 34 and 35 above, this Court is of the view that compensation for 3 months would meet the interests of justice.

Orders

37. The Court therefore orders as follows:

[a] The Respondent do pay Moses Simiyu the sum of Kshs 8,500 being one month's payment in lieu of notice.

[b] The Respondent do pay Moses Simiyu the sum of Kshs 17,000 being the equivalent of 2 years leave with full pay entitlement.

[c] The Respondent do pay Moses Simiyu the sum of Kshs 25,500 being 3 months equivalent pay compensation for unfair termination.

[d] The Claim for severance pay of Kshs 19,615 is dismissed

[e] The costs of the Cause granted to the Claimant.

Dated and delivered at Nairobi this 17th day of September 2012.

Justice Radido Stephen
Judge