



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 115 OF 2016

ALFRED ORUTA KIMAIGA.....CLAIMANT

VERSUS

LABORATORY AND ALLIED LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 28.1.2016 alleging that his employment was unfairly and unlawfully terminated by the respondent on 1.12.2015. He therefore prayed for the following reliefs:

(a) A declaration that the Respondent's termination/dismissal of the Claimant's employment was illegal, unlawful and inhumane and that the Claimant is entitled to his due terminal benefits and damages.

(b) An order for the Respondent to pay the Claimant his terminal dues and compensatory damages totaling to Kshs.270,900.

(c) An order for the Respondent to pay the Claimant's costs of this claim plus interest thereon.

2. The respondent filed her defence on 2.8.2016 denying the alleged unfair and unlawful dismissal of the claimant and averred that the claimant's employment was under a fixed term contract which lapsed. She therefore denied the claim for reliefs sought and prayed for the suit to be dismissed with costs.

3. The claimant filed a Reply to the defence denying the alleged fixed term contract and reiterated his averments in the Memorandum of Claim.

4. The issues arising from the pleadings are

(a) Whether the claimant was employed under a fixed term contract or not.

(b) Whether the contract of service was unfairly/unlawfully terminated by the respondent or it lapsed by effluxion of time.

(c) Whether the reliefs sought should be granted.

5. The suit was heard on 17.12.2018 when the claimant testified as Cw1 but the Respondent never attended the hearing to tender her defence despite service of a Hearing Notice. After the hearing again, only the claimant filed written submissions and the respondent did not.

Claimant's Case

6. Cw1 testified that he was employed by the respondent as a Machine Operator on 2.2.2012. His monthly salary of Kshs.12,900 inclusive of House Allowance and it was paid through his account at Equity Bank Limited. He was a member of NHIF but not NSSF.

7. He further testified that he worked continuously until 1.12.2015 when he reported to work as usual but found a Notice at the Respondent's gate terminating the employment of seven (7) people listed thereon including himself. He contended that there was no prior notice served on him as required by the law he was not accorded any hearing. He therefore prayed for the reliefs sought in his suit.

Submissions

8. The claimant submitted that he was unfairly and unlawfully terminated contrary to section 45(2) of the Employment Act because he was not terminated without prior notice, valid reason and without being accorded any hearing. He contended that under section 45(2) of the Act, termination of employment is unfair if the employer fails to prove that the reason for termination was valid and fair and that the termination was done in accordance with a fair procedure. He therefore prayed for judgment as prayed in the Memorandum of Claim.

Analysis and Determination

9. There is no dispute that the claimant was employed by the respondent until 1.12.2015. I will therefore proceed to answer the issues framed herein above.

(a) Fixed term contract or not

10. The respondent alleged in her defence that she employed the claimant under a fixed term contract from 1.11.2015 to 30.11.2015. The said allegation was not supported by evidence since the respondent never prosecuted her defence during the hearing.

11. On the other hand, the claimant has testified that he joined the Respondent on 2.2.2012 and worked continuously until 1.12.2015 when he his services were terminated. The said evidence of continuous service has not been contested and rebutted. Consequently, I return that the respondent has failed to prove on a balance of probability the she employed the claimant on a month’s fixed term contract.

(b) Unfair and unlawful termination

12. As correctly submitted by the claimant under section 45(2) of the Employment Act, termination of employees employment is unfair if the employer fails to prove that it was grounded on a valid a fair reason and that a fair procedure was followed. In this case, the respondent never tendered evidence to prove the reason for the termination and that fair Procedure was followed before terminating the claimant’s services.

13. It follows that the claimant’s evidence that he was terminated without a valid reason and without following a fair procedure has not been rebutted. Consequently, I return that the termination of the of the claimant’s contract of service was unfair within the meaning of section 45 of the Employment Act and therefore unlawful.

(c) Reliefs

14. In view of the foregoing holding, make a declaration that the termination of the claimant’s employment was unfair and unlawful.

Flowing from the foregoing declarations, I award the claimant one month salary in lieu of notice plus 3 months’ salary compensation as compensation for unfair termination, under section 49(1) of the Act. In making, the said award I have considered the fact that the claimant served for over 3 years and did not contribute to his termination through misconduct.

15. The claims for 96 leave days, and service gratuity are dismissed for lack of particulars and evidence.

Conclusion and Disposition

16. I have found that the claimant was not employed under one month fixed term contract. I have further found that the claimant was unfairly and unlawfully dismissed from his employment. Consequently, I enter judgment for him as follows:-

(a) Notice.....Kshs.12,900

(b) CompensationKshs.38,700

Kshs.51,600

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The claimant will also have costs of the suit plus interest at court rates from the date hereof.

Dated, Signed and Delivered in Open Court at Nairobi this 17th day of May 2019

ONESMUS N. MAKAU

JUDGE