

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
ELRC CAUSE NO. 390 OF 2018

DAVID ESHITUBI.....CLAIMANT
VERSUS
TALASH DRY CLEANERS AND LAUNDRY..... RESPONDENT

JUDGMENT

The Claimant filed suit against the Respondent on 22nd March 2018 seeking the following reliefs:-

- (a) Declaration that the termination of the employment of the Claimant was unlawful and unfair.
- (b) Payment of unpaid leave for 2015 and 2017 @ KSHS. 17,000.00 per month Kshs. 34,000.00
- (c) Notice pay Kshs. 17,000.00
- (d) Service pay for 3 years Kshs. 25,500.00
- (e) Reinstatement to his job and in the alternative damages for wrongful dismissal.
- (f) Letter of service
- (g) Interest and costs

The Claimant adopted witness statement dated 22/3/2017 as his evidence in chief.

The Claimant (CW1) testified that he was employed in January 2015 as Plant Mechanic Operator. That he worked diligently. That he did not go on annual leave due to high volume of work and worked over weekend also.

That on 18th September 2017 at 8:30 a.m. he reported to work but the mother of the Respondent's director (Sharon) inexplicably and without any explanation or provocation assaulted, insulted and pushed the Claimant out of the Respondent's premises as she threw to him several stones and threw water from a bucket to the Claimant whilst calling him "*mbwa hii usirudi hapa kwangu tena.*"

That the mother of Sharon was not his employer and so the Claimant was very surprised.

That upon contacting Sharon on phone and told her what had happened Sharon told the Claimant to remain at home until she called him back.

That the Claimant continued to report to work but was told to go away. That Sharon told him to go away on 3rd October 2017 and he was given a warning letter for reporting to work under the influence of alcohol, backdated to 18th September 2017. The Claimant was told unless he accepted the letter and signed it he could not get back to work.

The Claimant refused to sign the letter and was told to stay away. That Claimant denied that he ever went to work drunk as alleged or at all and there was no valid reason to terminate his employment. That he was

terminated without any opportunity to explain himself and on false accusations.

The Claimant prays for the reliefs sought. The Claimant reiterated his testimony under cross-examination by the advocate for the Respondent and denied that he was the aggressor on the material day against Sharon's mother.

The Respondent called RW1, Talasha Sharon who adopted a witness statement dated 8th August 2018. She testified that the Claimant was employed by the Respondent that the Claimant had a drinking problem and used to come to work under the influence of alcohol. That the Claimant was cautioned severally but continued to report to work late and under influence.

That the Respondent tolerated him for sometime. That on 18th September 2017, the Claimant came to work late at 10:30 a.m. instead of the official 8:00 a.m. That the Claimant confronted RW1's mother and threatened to beat her up. That RW1's mother asked the Claimant to go home upon realizing that he was drunk and was not in a position to operate the dry-cleaning machine.

That the Claimant became more hostile and RW1's mother called one Susan Njoki to help her as she was apprehensive that the Claimant would beat her up. That at the time her mother had undergone a calf surgery and could not defend herself if attacked. RW1 denied that her mother assaulted the Claimant as alleged or at all. That Susan Njoki also called one John

Ikame to come and help to have the Claimant leave and go home. That John escorted the Claimant out of the compound and he left for the day.

That the Claimant never returned to work until the 3rd October 2017. That RW1 handed the Claimant a warning letter which he declined to sign. That the warning letter had been prepared on 18th September 2017, the day of the incident.

That the Claimant was always treated fairly despite his misconduct but his conduct had now gone overboard, hence the warning letter.

That the Claimant was paid all his dues and is not entitled to payment in lieu of notice since he absconded work and he is the one who should pay in lieu of notice. That the Claimant took 21 days annual leave at the end of each year and is not entitled to payment in lieu of leave. The Claimant was also paid for days he did not take leave at the end of each year in the alternative. The Claimant is not owed any salary arrears and is not entitled to any award of damages.

RW1 repeated his version upon cross-examination by the advocate for the Claimant. She produced documents showing that her mother had undergone surgery and was in no position to assault the Claimant as alleged. She also produced documents to show that the Claimant was registered with NSSF and NHIF and was not entitled to payment of service pay as claimed.

RW2, John Njoroge testified that he worked as a driver for the Respondent and that he had served the Respondent for a period of 11 years. RW2 adopted a witness statement dated 2/10/2023 as his evidence in chief.

That on 18/9/2017, while at work in the morning a house help called him stating that the Claimant was beating mama. RW2 said he rushed to the scene since mama was an old woman and was bandaged. RW2 said he found the two shouting at each other. RW2 said he held the Claimant and asked him what the matter was. RW2 said he noticed that the Claimant was drunk and held mama's by her clothes. RW1 said he escorted the Claimant out of the compound.

Under cross-examination RW2 said he was a driver for a school owned by RW1's father while mama was RW1's mother. That it was not the first time he had heard the Claimant argue with RW1's mother in the compound. That mama always rested outside her house where the Claimant passed while reporting to work.

RW2 said the Claimant had defied request by mama to go away as he had come to work drunk. RW2 said the Claimant came to work drunk frequently. That on the day, the Claimant cooperated when he asked him to go home as he was drunk and smelling alcohol.

The parties filed written submissions which the court has carefully considered together with the testimonies of CW1, RW1 and RW3.

DETERMINATION

The issues for determination are:-

- (a) Whether the Claimant has proved that his employment was wrongfully terminated by the Respondent.
- (b) Whether the Claimant has proved that he is entitled to the relief's sought.

In terms of section 47(5) of the Employment Act 2007 which reads:-

'(5) 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,'

the Claimant has the initial onus of making a prima facie case that his employment was terminated by the Respondent. At that point, the evidential burden shifts to the Respondent to justify the termination in terms of section 47(5) read with section 41 and 43 of the Employment Act, 2007.

In the present case the Respondent has denied that it terminated the employment of the Claimant. The Respondent has stated that on 18/9/2017, the Claimant came to work drunk and was aggressive towards the mother of RW1. RW2 testified that he was called to the scene and he escorted the Claimant out of the Respondent's compound as he found him shouting at RW1's mother and holding her clothes.

RW2 said that the Claimant was co-operative and left.

RW1 testified that the Claimant did not return until 3/10/2017 when she handed him a warning letter dated 18/7/2017, which RW1 produced before court. RW1 testified that the Claimant refused to accept the warning letter and sign it and left work never to return again until he filed this suit.

The court has examined the warning letter which corroborates the testimony by RW1 and RW2. The court finds the evidence by RW1 and RW2 credible and sufficient to rebut the testimony by the Claimant which the court did not believe.

The court therefore finds that the Claimant absconded work upon refusing to accept and sign the warning letter given to him by RW1. The court finds that the Claimant used to come to work under the influence of alcohol and the Respondent largely accommodated him until his misconduct escalated on 18th September 2017 when he was given the warning letter which he refused to accept.

The claim for unlawful and unfair termination lack merit and is dismissed. The Claimant having absconded work is not entitled to payment in lieu of notice, reinstatement or award of damages. The reliefs sought are refused for lack of merit.

With regard to the claim of service pay, the court is satisfied that the Claimant was registered with NSSF and NHIF and is not entitled to an award of service pay in terms of section 35(5) of the Employment Act, 2007. The Claim for service pay is accordingly dismissed.

In respect of payment in lieu of leave days not taken, the Respondent had the onus to produce evidence that the Claimant, actually took leave or was paid in lieu of leave days not taken as alleged by RW1. RW1 failed in that respect. The court finds that the Claimant has proved that he is owed Kshs. 34,000.00 in lieu of leave days not taken for the years 2015 and 2017. The Claimant is also entitled to an award of certificate of service.

In the final analysis the suit by the Claimant is dismissed except with regard to payment in lieu of leave in the sum of Kshs. 34,000.00 which is payable with interest at court rates from date of judgment till payment in full. The Respondent to give the Claimant a certificate of service within 30 days of this judgment.

Each party to bear their own costs of the suit.

Dated at Nairobi this **16th Day of October 2025.**

Mathews Nduma

JUDGE

Appearance:

Mr. Odawa for Claimant

Mr. Mativo for Respondent

Mr. Kemboi – Court Assistant