



REPUBLIC OF KENYA



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Simiyu v Khetia Drapers Limited (Employment and Labour Relations Cause 234 of 2017) [2022] KEELRC 14711 (KLR) (25 February 2022) (Judgment)

Elvine Stanley Simiyu v Khetia Drapers Limited [2022] eKLR

Neutral citation: [2022] KEELRC 14711 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

EMPLOYMENT AND LABOUR RELATIONS CAUSE 234 OF 2017

NJ ABUODHA, J

FEBRUARY 25, 2022

BETWEEN

ELVINE STANLEY SIMIYU CLAIMANT

AND

KHETIA DRAPERS LIMITED RESPONDENT

JUDGMENT

1. Through a memorandum of claim filed on 4th September, 2017 the claimant averred among others that:
 - a. At all material times to the institution of this claim the claimant was employed by the Respondent as a general worker from the year 2014 on the 17th of October.
 - b. That at the time of the claimant's unfair termination from the employment, he was earning a gross salary plus overtime allowances of Kenya shillings Fifteen Thousand and Seventy Two and Thirty Two Cents. (Kshs.15,072.32)
 - c. The claimant has served the respondent with due diligence, loyalty, dedication and professionalism all through until the letter dated 10th August 2017, purporting to interdict the claimant which letter has acted as termination letter as the Claimant has neither gone back to his duties or received half or any pay whatsoever till the institution of this suit and to date.
 - d. That the claimant had been discharging his duties diligently with or without supervision since the time he started working with Khetias Draper and that on or about 22nd of July 2017, he was assigned to offload goods on duty which he indeed did discharge diligently and upon completion, the claimant fell unwell on his back and reported the same to the management on the 23d of July 2017 and continued working.



- e. That on the 24th day of July, 2017 the claimants back pain persisted and he decided to get medication at Reale hospital knowing that it was his off day & upon examination, he was referred to the main hospital for X-ray where the result recommended that he had a back problem and tough jobs like loading and offloading of goods would lead to more complication which was done vide letter dated 24th July, 2017.
 - f. The claimant on 25th July, 2017 went to the management to seek permission from the supervisor but the supervisor did not respond to the advice given to via the letter mentioned above in paragraph 7 where he proceeded to work despite the fact that he was under medication and backpain was still persisting for three days and on or about 28th July, 2017, he sought another permission to get proper medication and was denied but however given a leave for two days without pay.
 - g. That on 3rd August, 2017, the claimant realized that his system had been blocked without any justifiable reason and called the Director on 6th of August 2017 to inquire on the same where the Director advised him to go see him the following day and on that following day, he was told to go after election.
 - h. The claimant on the 9th day of August 2017 was informed to go to the Human Resource and pick all his belongings and issued by the management a letter terminating his employment dated 10th August 2017 and further advised to collect all his dues which have never been given to him despite having been advised do so by the management.
2. The respondent filed a response to the claim in which it stated inter alia that:
- a. At the outset the respondent contend that this suit as brought against it is misconceived, bad in law, incompetent, a gross abuse of the process of this Honourable Court, unmaintainable, and as such ought to be dismissed with costs on the grounds, inter alia that:-
 - i. At no time whatsoever, on or before the 10th day of August, 2017 was the claimant employment terminated as alleged or at all.
 - ii. Under clause 20 of Memorandum & Employment contract signed by the claimant on 19th February, 2015, it stipulates that “in case of any disputes between the Company and myself, I accept that the matter be referred (in preferred order) to the manager, senior management of District Labour Office. In the event that the former is unable to resolve, the matter be referred to an agreed arbitrator and in default of the Agreement, the current chairman of the Chartered institute of Arbitrators (Kenya Branch) shall be appointed as such as arbitrator.”
 - b. In further response to paragraph 4 of the Memorandum of claim, the respondent avers that the claimant herein was first employed as General worker on probation basis for a period of Three (3) months on the 19th February, 2015 with effect from 01/03/2015.
 - c. The respondent further avers that after the Lapse of the first probation period of Three Months, the claimant contract was on 8th June 2015 extended on probation basis for another period of Three (3) months with effect from 7th June, 2015.
 - d. The respondent further avers that after the Lapse of the second probation period of Three months, the claimant contract was on 14th September 2015 extended on probation basis for another period of three (3) months with effect form 14th September 2015 to 14th December 2015.



- e. The respondent avers that thereafter, the claimant was employed on contractual basis for a period of Twelve (12) months renewable at the option of the Respondent after the expiry of the said 12 months.
 - f. That the claimant contract was renewed for a further period of Twelve months on the 28th December 2016.
3. In his oral testimony before Court, the claimant stated among others that he was employed on 17th October, 2014 by the respondent and issued with a written contract. He worked for three years as a genial worker and was earning Ksh.17000/= per month. He was issued with payslips.
 4. On 23rd July, 2017 he was allocated work to off-load goods. They were carrying goods to 5th floor. He fell in the process and got hurt. His colleagues helped him home. The next day he reported the injury to the management but they refused and ordered him to continue working. It was further the claimant's evidence that on 24th July, 2017 he was on off and saw a doctor who advised him not to continue with heavy duties for ten days. He informed his supervisor who spoke to his boss. The boss only approved three days. He never got better so he called his supervisor and asked if he could get financial assistance to get treatment. When he reported to work he found he had been blocked from the system. When he asked the operations manager, he called to see him. It was his evidence that he showed him the X-rays and the doctors report and he took a copy and asked him to see the Human Resource Manager. According to the claimant, when he saw the Human Resource Manager, he was issued with a termination letter.
 5. According to the claimant, he was never subjected to any disciplinary hearing and was never issued with any show cause letter and further, he was never given any reason for the termination.
 6. The claimant further stated that he had no previous disciplinary issues and that during the period he worked, he went on leave and used to work from 8.00am to 9.00pm but was never paid overtime.
 7. In cross-examination the claimant stated that he was employed on 17th October, 2014 as a casual. He denied being put on probation for three months. He further stated that he was issued with a contract for 12 months and later a permanent contract for 1,200 months. He denied being issued with another fixed term contract.
 8. It was further his evidence that when he got injured, he went to hospital the following day and that he produced treatment notes showing where he was injured and a medical report.
 9. The respondent's witness Mr. Ernest Obunga informed the Court that he worked for the respondent as Human Resource Manager. It was his evidence that he knew the claimant and that he used to work for the respondent. He recorded a statement on 23rd October, 2017 which he adopted as his evidence in chief. According to him, the claimant was initially employed in October, 2014 as a casual worker. He later applied to be employed on probation. This was done on 19th February, 2015 and extended on 18th June, 2015 for another three months. Later on 14th September, 2015 the claimant was issued with another 3 months contract which expired in December, 2015. On 28th December, 2015 the claimant was issued with a contract for twelve months which expired in December, 2016. It was his evidence that the claimant did not serve the full term of his contract issued on 28th December, 2015. Further the claimant had several warning letters. Once the claimant was found with a phone at work which was against the regulations. The claimant also retained a customer's change. He was warned and he apologized. The claimant however did not change despite the fact that he was warned. The management then decided to terminate the claimant's service.



10. Mr. Obunga further stated that the claimant was taken through a disciplinary hearing and it was decided that as a result of the several warnings, his service be terminated. Upon terminating the claimant's service, his dues were calculated and paid to Uasin Gishu Labour Office through one Joyce. This was done on 25th August, 2017. It was Ksh.40,226/=.
11. In cross-examination Mr. Obunga stated that warning letters dated 2nd August, 2016 and 19th July, 2019 referred to keeping customer's money and being in possession of a mobile phone at work. He further stated that the claimant was warned severally and he apologized. The claimant was issued with a show cause letter however the letter was not before court.
12. The claimant in his memorandum of claim alleged that he was injured in the course of his duties and sought treatment the following day. According to him the doctor who saw him recommended that since he had a back problem he should not perform heavy work such as offloading of goods. He went to the management to seek permission from his supervisor but the supervisor did not respond to the doctor's advice. He later on 28th July, 2017 sought leave to get proper medication but was denied. He was however given leave for two days without pay. On 3rd August, 2017 the claimant realized that the system had blocked him. On the August he was asked by the Director to see the Human Resources Manager and when he went, he was told to pick his belongings and was issued with a letter of termination.
13. From above, the claimant seems to allege that his service was terminated on account of his injury at work.
14. The respondent on its part maintained that the claimant was dismissed after several warnings. According to the respondent, the claimant was found with a mobile phone while at work and warned. He further retained a customer's change and was warned about it. On both incidents, the claimant admitted the offence and apologized. The apology letters were produced in evidence.
15. The warning letters to the claimant dated 2nd August, 2016 and 19th July, 2017 both cautioned the claimant that they were last warnings should he engage in similar infractions in future, stern action would be taken against him.
16. On 21st July, 2017 the claimant was invited through a letter of even date to a staff committee meeting to take place on 29th July, 2017. The meeting was in relation to a recent case where the claimant was found using a mobile phone while serving customer.
17. The meeting took place on 29th July, 2017. From the minutes the claimant seemed not have attended the meeting but was represented by one Paul Kemboi.
18. The meeting after deliberating on the claimant's case forwarded the matter to Human Resource Department for disciplinary action.
19. The burden of proving that an unlawful termination has taken place is cast upon the employee. In this case the claimant. In the case before the court, whereas the claimant alleges that he was terminated on account of injuries he sustained in the course of his duties, the evidence tabled by the respondent including written apologies point to the contrary. The claimant was simply a disobedient worker who kept repeating offences he had been warned against and even after apologizing and promising not to do so again.
20. In the circumstances the claimant has failed to discharge the burden cast upon him by law. In other words, the respondent had justifiable reason to terminate the claimant's service.
21. The claim is therefore found without merit and is hereby dismissed with no order as to costs.



22. The claimant is however at liberty to collect his terminal dues deposited at Uasin Gishu Labour Office if not collected already.
23. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 25TH DAY OF FEBRUARY, 2022

ABUODHA NELSON JORUM

JUDGE ELRC

