



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO.873 OF 2017

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

SAMUEL MAJUMA MIRERA.....CLAIMANT

VERSUS

BOBMIL INDUSTRIES.....1ST RESPONDENT

DANREE MULTIHANDLING SERVICES LIMITED.....2ND RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Claimant filed his claim dated 15th March, 2017 and the Respondent put a response dated 10th December, 2018.

CLAIMANT'S EVIDENCE

2. The Claimant says 2nd Respondents was an agent of the 1st Respondent and used to handle and recruit employees on behalf of the 1st Respondent.

He says he was an employee of the Respondents from 2016 at a salary of Kshs.15,810/= per month.

3. He says he worked for the Respondent until September, 2016 when he was suspended by the 2nd Respondent.

4. He says after two weeks he went back to work but was turned away by the Respondent. He says he did not give him any reason for terminating his employment.

He says he was also not given an opportunity to be heard.

5. He now prays for terminal dues as follows:-

- a. Payment for accrued leave Kshs.80,402/=
- b. Overtime hours worked Kshs.47,430/=
- c. One month salary in lieu of notice Kshs.15,810/=
- d. 12 months equivalent as compensation for unlawful termination Kshs.189,720/=
- e. NSSF deductions not remitted for November 2015 to September, 2016 Kshs.4,400/=

Total Kshs. 337,762/=

6. He also prays for certificate of service, costs of the suit and any other relief the court may deem fit to grant.

RESPONDENT'S CASE

7. The Respondent states the Claimant was a liability if any of the 2nd Respondent and the 1st Respondent has no relation with the Claimant.
8. He further says the 2nd Respondent was a casual employee and was dismissed on account of gross misconduct for sleeping while on duty and subjecting 1st Respondent to losses.
9. The termination of the Claimant was therefore lawful and he is not entitled to any claim. He prays the Claimant's claim be dismissed with costs.

ISSUES FOR DETERMINATION

10. (i) Was the Claimant lawfully terminated by the Respondent.
- (ii) Is he entitled to the reliefs prayed?
- (iii) On the issue of whether the Claimant was lawfully terminated by the Respondent there is some conflicting evidence before the court.

DETERMINATION

11. The Claimant says he was sent on suspension for two weeks for sleeping while on job. He says when he went back to work he was asked by the Respondent to leave and no reasons were given to him for termination.

12. The Respondent in his response says the Claimant was terminated for a lawful cause for sleeping while on duty.

However in the evidence the Respondent gave in court he said the Claimant was suspended for two weeks and thereafter he absconded from duty. He said he was not terminated but absconded from duty.

13. Since the Respondent had admitted in the pleadings that they had terminated the Claimant's employment for gross misconduct the court would go by that. The averment that the Claimant absconded from duty now seems to be an afterthought and the court would not consider it seriously.

In the case of **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND ANOTHER VS STEPHEN MUTINDA AND 3 OTHERS (2014) eKLR** which cited with approval the decision of the **SUPREME COURT OF NIGERIA IN ADETUOD OLADEJI (NIG) VS NIGERIA BREWERIES PLC NO.91 OF 2002** – where court held

“it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support averments in the pleadings or put in another way, which is at variance with averments of pleadings goes to no issue and must be disregarded.”

14. The Respondent with his own mouth admitted they terminated the Claimants employment for gross misconduct and also in his pleadings he repeated the same. This was conducted in total disregard of Section 45 of the Employment Act 2007 and Section 41 of the same Act.

15. The case of **SABINA MUTUA VS AMEDO CENTRE KENYA LIMITED (2017) eKLR** it was held that ultimately Section 41 and Section 44 of the Employment Act 2007 requires that where an employee has misconducted herself or grossly misconducted herself, there must be a hearing and at such a hearing there are mandatory safeguards to be guaranteed as follows:-

Section 41 – provides specifically subject to Section 42 (1) an employee shall before terminating the employment of an employee on the ground of misconduct, poor performance or physical incapacity explain to the employee in a language the employee understands the reason for which the employer is considering termination and the employee shall be entitled to have another employee or shop floor union representative of his choice present during this explanation.

16. Procedural justice therefore requires that the employee accused of gross misconduct even over matters that warrant summary dismissal be accorded due process.

17. In this case the Claimant says he was sent on two weeks suspension and after that he was just told to leave. This was in disregard of fair labour practices as provided in Article 41 of the Kenya Constitution. The Claimant was not given an opportunity to be heard as provided in the Employment Laws of Kenya and in particular Section 41 of the said Act.

18. The reason for termination must be given prior to and not after termination as held in the **CASE OF MARY CHEMWENO VS KENYA PIPELINE COMPANY LIMITED (2014) eKLR**.

19. I have considered painstakingly the evidence and pleadings adduced hereto and the submissions and I find all point to the fact that he was unlawfully terminated without procedural fairness.

Accordingly judgement is entered for the Claimant against the Respondent.

REMEDIES

21. Having entered judgement in favour of the Claimant, I proceed to give the following awards:-

- a. payment for accrued leave days, public holidays and weekends worked and this being a claim for special damages it needed to be specifically pleaded and proved and I find there are no particulars and so decline it.
- b. overtime hours worked is also declined for lack of particulars.
- c. one month salary in lieu of notice Kshs.15,810/=.
- d. Compensation for unfair and unlawful termination awarded at 5 months having worked for Claimant from 2010 to 2016, I find Kshs.79,050/= is fair compensation.
- e. NSSF deductions November, 2015 to September 2016 Kshs.4,400/=.

TOTAL AWARDED KSHS.99,260/= plus interest at court rates from date of Judgment till full payment.

f. Costs are awarded to the Claimant.

g. Certificate of service to be issued within 30 days from date of judgement.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 17TH DAY OF FEBRUARY, 2022

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE