



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 93 OF 2018

JUMA KATUKU.....CLAIMANT

VERSUS

KENYA STEEL COMPANY (2006) LTDRESPONDENT

J U D G M E N T

1. Vide a Memorandum of Claim dated 28TH February 2018 and filed in this Court on the same date, the Claimant sued the Respondent herein and pleaded as follows:-

- a) that the Claimant was employed by the Respondent as a security officer/guard on 14th March 2014, earning a gross monthly salary of ksh.11,000.
- b) that pursuant to a report made by the Respondent and/or its agents at Changamwe police station, the Claimant was arrested and charged in Court on 25/3/2015 with the offence of store breaking and committing a felony contrary to Section 306 of the Penal Code in Mombasa (Chief Magistrate's Court) Criminal Case No. 534 of 2015.
- c) that on being released on bail, the claimant went back to work but was told by the Respondent through its agents to clear his name through the Court before going back to work.
- d) that the Claimant was acquitted of the said offence and on going back to work, as directed by the Respondent, he was denied access, prompting the Claimant to take legal action.
- e) that Claimant's advocate wrote a letter to the Respondent on 4/4/2017 and delivered the same to the Respondent on 10/5/2017, but still the Respondent refused to take the Claimant back to work.
- f) that the Respondent terminated the Claimant's employment unfairly, without any valid reason, without following the laid down procedure, and failed to pay the Claimant's terminal benefits as required by law.
- g) that the Respondent did not give the Claimant termination notice, and did not remit deducted NSSF and NHIF deductions.

2. The Claimant prayed for the following reliefs:-

- a) Payment in lieu of noticeksh.11,000
- b) Salary arrears i.e March 2015 to
February 2017 @ 11,000x24ksh.264,000
- c) 12 months pay for unfair termination @ 11000X12....ksh.132,000
- d) NSSF i.e. 5/3/2015 to 21/2/2017 @ 400x24ksh.9,600
- e) NHIF i.e. 320x2x24 Monthsksh420,971

3. The Claimant also sought to be paid overtime, costs of the suit and interest, and to be issued with a Certificate of Service by the Respondent.

4. The Respondent also filed his written witness statement dated 28th February 2018 and two lists of documents, dated 20th February 2018 and 10th September 2021 respectively. Documents listed and filed with the said lists of documents included copies of demand notice (letter) dated 4th April 2017, the Claimant's national identification card, charge sheet on Criminal Case No. 543 of 2015 and the Court's Order (in Mombasa Chief Magistrate's Court Criminal Case No. 543 of 2015) dated 25th February 2017 discharging the Claimant and other four persons under Section 87(a) of the CPC.

5. The Respondent, though shown to have been served with Summons and claim documents on 13th March 2018 and an affidavit of service in that regard duly filed in Court, did not enter appearance, and did not file any Response to the claim. Several Mention Notices are shown to have been subsequently served on the Respondent, but still the Respondent did not defend the suit.

6. Hearing of the Claimant's case is shown to have proceeded partly by way of formal proof (*ex-parte*) on 23rd March 2021. The Claimant is shown to have been stood down to allow filing of the criminal case proceedings which were ordered to be filed within thirty days. The proceedings were eventually filed on 15th September 2021 together with the Claimant's further list of documents referred to in paragraph 4 of this Judgment.

7. When the suit came up for further hearing on 30th November 2021, I directed that hearing starts *de-novo*. The Claimant testified and adopted as his testimony his witness statement dated 28th February 2018. The witness statement substantially replicates the averments made in the statement of claim. He also produced in evidence the filed documents referred to in paragraph 4 of this Judgment. The Claimant further testified:-

a) that he was employed in March 2014 as a security guard and his salary was ksh.11,000 per month.

b) that in March 2015, some property was lost in the company and the Claimant and others were arrested and locked up in Changamwe Police Station before being charged in Court at Mombasa the following day vide criminal case No. 543 of 2015.

c) that on being released on bail the following day, he went to work but was told to go and wait until his case was concluded; but after his discharge by the Court, the Respondent did not allow him back to work.

d) he prayed to be granted the reliefs sought.

8. The Claimant's evidence stands rebutted and unchallenged as the Respondent did not defend the suit, though shown to have been served.

9. Upon considering the Claimant's pleadings and evidence, issues that fall for determination are:-

a) Whether termination of the Claimant's employment by the Respondent was unfair.

b) Whether the Claimant is entitled to the reliefs sought.

10. On the first issue, an employer terminating an employee's employment is mandatorily required to comply with Section 41 of the Employment Act, 2007. The Section provides:-

“(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds 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 a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person if any chosen by the employee within subsection (1) make.”

11. On the other hand, Section 45(1), (2) (a) & (c) provides that no employer shall terminate the employment of an employee unfairly, and that termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid and that the employment was terminated in accordance with fair procedure.

12. Section 43(1) of the Employment Act, 2007 provides that where an employer fails to prove the validity of the reasons for termination of employment, the termination shall be deemed to have been unfair within the meaning of Section 45 of the Act.

13. In the present case, the Respondent is not shown to have complied with the mandatory procedural provisions of Section 41 of the Employment Act 2007. The Respondent did not defend the suit. The Claimant was discharged from the criminal charges preferred against him at the Respondent's instigation, and the validity of whatever reason that led to termination of the claimant's employment was not placed before the Court by the Respondent, and none was proved. Termination of the Claimant's employment was substantially and procedurally unfair, and I so find and hold.

14. On the second issue, it is my finding that the Claimant is entitled to compensation for unfair termination of employment and to one month salary in lieu of notice. I award the Claimant twelve months' salary as compensation for unfair termination of employment, in view of the circumstances under which his employment was terminated. The Claimant is not, however, entitled to claim unremitted NSSF and NHIF remittances. National Social Security Fund (NSSF) and National Hospital Insurance fund (NHIF) are statutory bodies with statutory powers to recover from employers any unremitted deductions made by employers from employees' earnings. Such statutory recovery powers are reinforced with prosecutorial powers against employers. The deductions, once made, cease to be an employee's entitlement. They become the relevant statutory body's right and entitlement.

15. The Claimant's claim for salary arrears for twenty four months (March 2015 to February 2017) was not pleaded and/or specifically pleaded. A claim for salary arrears is in the nature of a special damage and must be specifically pleaded and proved. The Claimant did not do so, but only set out a prayer for it. The same is declined.

16. The Claimant's prayer for issuance with a Certificate of Service is allowed. Issuance of a Certificate of Service to an employee is a right under Section 51(1) of the Employment Act.

17. The prayer for payment of overtime cannot be allowed. Payment of overtime was not pleaded and/or specifically pleaded, and was not proved. The same is declined.

18. In sum, judgment is hereby entered in favour of the Claimant against the Respondent as follows:-

a) Twelve months salary being compensation for unfair termination of employment (ksh.11,000x12).....
ksh.132,000

b) One month's salary in lieu of noticeksh. 11,000

Total Ksh.143,000

19. The Respondent is directed to issue the Claimant with a Certificate of Service within thirty days of this judgment.

20. The Claimant is awarded costs of this claim and interest at Courts rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 31st DAY OF MARCH 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

No appearance for Claimant

No appearance Respondent