



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO.675 OF 2017

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

JACOB ODUOR NYALIDHE.....CLAIMANT

VERSUS

AUTOMEK LIMITED.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Claimant has filed the Memorandum of Claim dated 5th April 2017 suing the Respondent for wrongful and unfair termination of his services and failure to pay him terminal benefits. He avers that on or about August 2014 the Respondent employed him as a Mechanic at a monthly salary of Kshs.25,000/= but was not given an appointment letter as required by law. That he served the Respondent diligently until 11/02/2017 when it terminated his services without notice or payment in lieu of notice and that the Respondent thus breached the actual and implied employment contract between them. Further, the Respondent failed to compensate him for outstanding wages, vacation pay, and severance pay and that it had no just cause to terminate his services. The Claimant thus claims one month's salary in lieu of notice, NSSF remittance for the entire employment period, compensation for unfair termination, costs of this suit, and interest on the sums.

CLAIMANTS'S CASE

2. In his Statement, the Claimant asserts that his services were terminated verbally and although he protested for not being given an opportunity to be heard the respondent did not comply. He further seeks in his statement for: a declaration that he was wrongfully and unfairly dismissed from his employment; payment in lieu of service; and punitive and aggravated damages for breach of his constitutional rights.

RESPONDENT'S CASE

3. The Respondent filed a Response to Claim dated 24th April 2017 averring that the Claimant was ungraded Artisan being taught at the Respondent's garage and that theirs was not an employer-employee relationship.

4. That it has never summarily dismissed or unlawfully terminated the services of the Claimant and that it only wanted to know the Claimant's reasons for absconding work and his continuous absenteeism. That it gave the Claimant an opportunity to explain himself in the presence of an employee of his choice, but he absconded on 11/02/2017 and never came back to work.

5. The Respondent further denies owing the Claimant any monies. They further say that since there was no contract of service between it and the Claimant from where obligations would arise, no employment was unlawfully terminated as alleged. The Respondent prays that the entire claim be dismissed with costs.

6. The Respondent also filed a witness statement signed by Sonia Rathod who asserts that the Claimant was a Trainee in the Respondent's company and that he was never discharged of his duties until he begun to continuously abscond himself from work. She claims that the Claimant took away the Respondent's clients for work and undercharged them for his own gain and made the Respondent run into huge losses. That the reliefs he seeks are untrue, false and abuse of the .

CLAIMANT'S SUBMISSIONS

7. The Claimant submits that **section 47(5) of the Employment Act** provides that the burden of proof is upon parties in a complaint relating

to a claim of unfair termination or wrongful dismissal. That an employee has to prove that a termination occurred and may rely on the grounds set out in **section 46 of the Act** to show why the termination is unfair and that once the employee discharges this proof, the obligation then shifts to the employer to justify the grounds for termination of employment. That **Article 4 of the ILO Convention 158 - concerning termination of employment at the initiative of the Employer, 1982** provides that there has to be a valid reason for terminating an employment connected with the capacity or conduct of the worker or based on the operational requirements of the company. The same is similar to Section 45 of the Employment Act 2007.

8. That the court must decide whether the employer acted reasonably and that in the present case the Respondent did not allege any lack of capacity and misconduct and neither did it make any specific charges against him.

9. He further submits that **Section 35(1) (c) of the Act** has made it mandatory that a contract where wages are paid periodically at intervals of or exceeding one month is terminable by written notice or payment in lieu of notice. That since the Respondent did not serve notice or pay him in lieu of notice, he is entitled to notice pay as sought and to costs of this claim because the Respondent did not bother to make good the Claimant's demands. It is the Claimant's submission that he has proved he was wrongfully and unfairly terminated from his employment.

RESPONDENT'S SUBMISSIONS

10. The Respondent avers that the Claimant was issued with notice to show cause about absenteeism from duty and also was given an opportunity to be heard but he never reported for duty. That it relied on the provisions of **section 43 of the Employment Act** and **section 44[a, e) of the Act** inter alia that the Claimant regularly absented himself from work, wilfully neglected to perform his work due to his absenteeism, and refused to obey lawful and proper command from his employer. It is the Respondent's submission that having proven its case in accordance with the law, the Claim should be dismissed with costs.

ISSUES FOR DETERMINATION

11. (i) Did the Claimant abscond from duty or was he unlawfully terminated.

(ii) Is he entitled to any reliefs.

DECISION

12. The Claimant averments are that on 11th February, 2017 his employment was terminated verbally. He does not give any further background of how his employment was terminated.

He also implies he was not given an appointment letter.

13. The Respondent on the other hand claims that Claimant used to abscond himself from duty.

On 11th February, 2017 the Respondent state that they gave the Claimant a notice to appear for a meeting to discuss his conduct of being absent from work for the whole of January.

He was asked to take the matter seriously and to be accompanied by the employee of his choice. The Respondent avers that he Claimant did not respond.

14. The Respondent did not bring evidence in court to demonstrate that the Claimant absented himself from work to deserve being put through disciplinary process.

The Respondent says when Claimant was called for disciplinary meeting he left employment – letter dated 11th February 2017. The letter does not indicate the day he was to appear for the disciplinary meeting and also was not informed as required by law that the Respondent was considering terminating him on the basis of such absenteeism.

15. There is no more evidence from the Respondent to indicate whether the Claimant received the letter inviting him for a disciplinary meeting or not.

The day for the disciplinary meeting is not indicated in the letter.

16. The court finds that the mandatory requirement that the employer gives a valid reason for terminating Claimant's employment is not proved as provided in Section 45 of the Employment Act.

The days the Claimant was said to have been absent from employment is not established except to write that he was absent in January. Section 74 of Employment Act provide that employer must keep records of his employees. Such records would have been crucial to confirm the Claimant absented himself from work.

Section 45 of the Employment Act provide that no employer shall terminate the employment of an employee unfairly.

17. Further the section provides that termination of employment is unfair if the employer fails to prove the reason for termination is valid.

18. In any event if the Claimant deserted from work the Respondent is to give the Claimant notice that termination of employment on these grounds is under consideration.

In the case of **RONALD NYAMBU DAUDI VS TORNADO CARRIERS LIMITED CAUSE NO. 236 OF 2016** the court held that desertion of duty is a grave offence which if proved would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to an employee and putting them on notice that termination of employment on this ground is under consideration.

19. In the same way the employer must show that the employee deserted employment with no intention to return to work.

This is a case where the Respondent simply says the Claimant deserted work. There is no evidence adduced and or presented to prove the same and so the court is reluctant to accept mere allegations.

20. There is also no evidence in court that the Respondent followed fair procedure set out in Section 41 of the Employment Act in inviting the Claimant for disciplinary action.

In the often quoted case of **WALTER OGAL ONURO VS TEACHERS SERVICE COMMISSION CAUSE NO.955 OF 2011** the court held that for termination to pass the fairness test, it ought to be shown that there is not only substantive justification for the termination but also procedural fairness.

21. In this case before me did the Respondent pass the fairness test on the two fronts i.e. valid reason and procedural fairness?

I find in the negative.

22. Let me also refer to the certificate of service given by the Respondent on behalf of the Claimant where he is described as hard working, sincere and requires minimum supervision when working.

The Respondent did not deny he authored that referral letter and so cannot then start claiming acts of misconduct by the Claimant.

Finally the Respondent denies he had not employed the Claimant.

In fact he says that they did not have an employer and employee relationship.

Yet in the letter referred to the Respondent avers that the Claimant worked as a mechanic for the Respondent for more than two years.

That is enough prove of that fact.

23. Having found that the Respondent failed the fairness test in terminating the Claimant verbally and with no notice or valid reason and now proceed to enter judgement in favour of the Claimant.

REMEDIES

24. I award him the following reliefs:-

- a. One month salary in lieu of notice Kshs.25,000/=.
- b. NSSF remittances Kshs.9,600/=.
- c. 2 months equivalent compensation for unlawful termination Kshs.50,000/=.
- d. Costs are awarded to the Claimant.

25. Total effect of this award is Kshs.84,000/= plus interest at court rates from the date of this judgement until payment in full.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 15TH DAY OF MARCH, 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 Civil 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