



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 411 OF 2016

MUSA ODOYO OMOLLO.....CLAIMANT

VERSUS

CRAYFISH CAMP.....RESPONDENT

JUDGMENT

1. The Claimant filed his Memorandum of Claim dated 17th February, 2016 on the 17th October, 2016 claiming to have been unfairly terminated by the Respondent. The Claimant prays for the following remedies: -

i. A declaration that the termination of the claimant was unfair, wrongful, unlawful and illegal.

ii. Find that the claimant is eligible for payment of:-

a) One month salary in lieu of notice

b) 20 days worked and not paid

c) Underpayment

d) Pending off/holidays.

e) House allowance

f) Overtime

g) Severance pay

h) 12 months' salary compensation as per section 49(c) of the Employment Act.

i) Certificate of service.

iii. Costs of this Suit

2. The summary of the claimant's case is that the claimant was employed by the Respondent in September, 2012 as a security guard earning a gross salary of Kshs 7,000. That he worked diligently for the Respondent till 20th September, 2014 when he was allegedly unfairly dismissed without any notice or hearing.

3. The Respondent entered appearance on the 1st December, 2016 and filed a response to claim on even date admitting to employing the claimant on the 1st February, 2012 under the terms and payment indicated on the claim and terminating his services on 31st October, 2014 for gross misconduct.

4. It is stated that prior to the termination the claimant had been served with several warning letters which he always admitted his misconduct and promised to change as per the apology letter filed herein.

5. According to the respondent the circumstances leading to the claimant's termination is that the claimant had formed a habit of borrowing

money from the Respondent's guest which act he admitted in the letter dated 28th may, 2013 and the letter dated 13th February, 2014.

6. On 31st October, 2014 the employment came to an end and the claimant reported the termination to the Naivasha sub-county Labour office where the claimant dues were calculated and terminal dues paid to him were a sum of Kshs. 5,747 being his salary for 20 days worked in October, 2014, one-month salary in lieu of notice, pending off and holidays worked, less statutory pay and a salary advance of Kshs 8,640. The respondent therefore contends that it paid the claimant all his terminal dues.

7. The claimant was also issue with a certificate of service dated 17th November, 2014 upon the termination.

Hearing.

8. The claimant appeared as CW-1 and adopted his witness statement filed on 17th October, 2016 which in summary stated that sometimes in September, 2014, he was summoned by Peter, one of the Respondent's directors' and warned of the alleged bowing and then threatened with termination. In the same month he warned of a looming termination by the Respondent's manager on allegation that he was acting on Peter's instructions. He was then given leave as the issue is discussed by the management. After resuming from his leave on 20th October, 2014, his services were immediately terminated and instructed to proceed to accounts office to receive his terminal dues. The accounting officer referred him back to the manager and he was send back and forth till he reported the matter to the labour where the Respondent was summoned for a meeting. He stated that he was not paid his terminal dues.

9. Upon cross examination, the claimant testified that he was terminated without reason and that he never received any warning letter prior to his termination. He denied ever receiving the warning letter listed as the Respondent document number 4, neither did he write the apology letter produced by the Respondent.

10. The Defence case was closed without calling any witnesses.

Claimants Submissions.

11. The claimant submitted that he was dismissed from employment by the Respondent without any reason advanced or being subjected to disciplinary hearing as provided for in the law. It was argued that the claimant testified on how the termination occurred and it was upon the Respondent to give a version of their defence and their failure to testify and produce the documents filed locks out all their documents and therefore they cannot be relied upon by this court. In support of his argument the claimant relied on the case of **CMC Aviation Limited V Cruise Air(1)[1978] KLR 103.**

12. Accordingly, it was submitted that since the termination was not done in accordance with section 41 and 43 of the Employment Act, it was unfair as per the provisions of section 45 of the Employment Act and the claimant therefore urged this Court to allow the claim as prayed.

Respondent's submissions.

13. The Respondent on the other hand maintained that the claimant is tasked to prove his cause on a balance of probability and even though they did not call any witness to advance its case, they filed documents attached to its defence showing that the claimant had committed act of gross misconduct and even admitted the sad actions. The Respondent thus urged this Court to consider the Documents while rendering its judgement and in the end dismiss the claim with costs for lacking merit.

14. I have examined all evidence and submissions filed by the parties herein. The claimant was indeed an employee of the claimant and was terminated on 1/11/2014 vide a letter dated 17/11/2014.

15. Reasons for the dismissal were not assigned in the termination letter.

16. There is also no evidence that the claimant was subjected to any disciplinary hearing.

17. In view of this fact and the fact that the respondent chose to call no evidence, the claimant's case remained uncontroverted.

18. In the circumstances, I find that the claimant was unfairly and unlawfully dismissed and I award him as follows;

1. 1 month's salary in lieu of notice

= 7,000/=

2. Salary worked for and not paid

= 4,667/=

3. House allowance not paid for 2 years

= 15% of 7,000 x 24

= 25,200/=

4. 10 months salary as compensation for the unlawful termination.

= 7,000 x 10 = 70,000/=

TOTAL – 106,867/=

Less statutory deductions

5. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 21ST DAY OF APRIL, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Muthanwa for Claimant – present

Njuguna for Respondent – present

Court Assistant - Fred