



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

Cause No. 290 Of 2017

REUBEN ABUYA OROBA.....CLAIMANT

VERSUS

MAYFAIR HOLDINGS.....RESPONDENT

JUDGMENT

1. Reuben Abuya Oroba (the Claimant) sued Mayfair Holdings (the Respondent) on 27 June 2017, and he stated the Issue in Dispute as:

Unlawful termination of the Claimant's employment contract in contravention of his employment rights and unpaid terminal dues.

2. The Respondent filed a Response to the Memorandum of Claim on 1 August 2017, and the Cause was heard on 5 March 2020 and 2 December 2020. The Claimant and a Deputy General Manager with the Respondent testified.

3. The Claimant filed his submissions on 26 January 2021 (should have been filed/served on or before 10 January 2021), while the Respondent had filed its submissions on 21 January 2021.

4. The Court has considered the pleadings, evidence and submissions and condensed the Issues for determination as examined hereunder.

Unfair termination of employment

5. The Claimant was employed as a Stores Clerk by the Respondent on 30 January 2013.

6. On the circumstances leading to separation, the Claimant testified that on 28 February 2017, his employment was terminated without the giving of any reasons.

7. Sections 35(1)(c), 41, 43 and 45 of the Employment Act, 2007 contemplates the existence of valid and fair reasons for the termination of an employment contract.

8. The letter issued to the Claimant did not give any reasons for the dismissal, and the Court is therefore satisfied that the Claimant has satisfied the test expected of him by section 47(5) of the Act to demonstrate that there occurred an unfair termination of employment, thus shifting the burden to the Respondent to justify the dismissal.

9. The Respondent contended that the termination of the Claimant's contract was fair. It produced a warning letter dated 19 September 2016 and a Performance Evaluation conducted for the period July 2016 to December 2016.

10. The Respondent's witness in his testimony attributed the termination of the Claimant's employment to the performance evaluation. He stated that one of the recommendations in the evaluation was that the Claimant was disinterested in storekeeping, and since the Respondent did not have any alternative work for the Claimant, it decided to terminate the contract.

11. The Court finds the warning letter not relevant to the Claimant's employment termination as by itself, it was already a sanction or penalty.

12. On the performance evaluation, the Court has noted that there was a recommended plan of action to remedy the Claimant's alleged poor performance. Two of the recommendations called for further training for the Claimant.

13. The Respondent did not disclose why it did not take up the training recommendations or put the Claimant on a performance improvement plan. It is also noteworthy that it was recognised that the Claimant had not been issued with a job description during the evaluation.

14. Nevertheless, under section 41(1) of the Employment Act, 2007, the Respondent should have granted the Claimant an opportunity to make representations on why he should not have been dismissed on the ground of performance while accompanied by a colleague of his choice. Termination of employment on account of performance requires a disciplinary hearing just as termination on the ground of misconduct and physical incapacity.

15. The Court finds that the termination of the Claimant's employment was unfair.

Compensation

16. The Claimant served the Respondent for about 4 years, and on account of the length of service, the Court is of the view that the equivalent of 5-months gross wages as compensation would be appropriate.

Accrued leave 2013 to 2017

17. The Claimant sought Kshs 141,000/- on account of untaken leave.

18. However, the Claimant did not disclose whether he applied for annual leave and was denied or whether he carried the leave forward with the Respondent's permission.

19. Despite the lack of disclosure, the Court notes that among the dues paid to the Claimant included accrued leave for 2016/2017.

20. Considering the payment, and section 28(4) of the Employment Act, 2007, which circumscribes how much leave can be carried forward, the Court finds that this head of the claim should be declined.

Conclusion and Orders

21. From the foregoing, the Court finds and declares that the termination of the Claimant's employment was unfair, and the Claimant is awarded:

(i) Compensation **Kshs 135,000/-**

22. The Claimant did not file submissions within agreed timelines, and no explanation was tendered. He is denied costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 17TH DAY OF MARCH 2021.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant Mr Odhiambo instructed by K'Owino & Co. Advocates

For Respondent Mr Yogo/Ms. Namusubo instructed by Otieno, Yogo, Ojuro & Co. Advocates

Court Assistant Chrispo Aura