



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1075 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

TITUS SANYA AGWENYA..... CLAIMANT

VERSUS

WESTBUILD GENERAL CONTRACTORS LIMITED.....RESPONDENT

JUDGMENT

The claimant herein was employed by the Respondent as draughtsman in its Survey Department on 4th August 2014. On 1st February 2017, the claimant applied for four days leave which was granted. He was expected to report back to work on 6th February 2017 but did not. After failing to report back the Respondent wrote him a summary dismissal letter on 20th February 2017, which he collected on 15th March 2017. The claimant was paid terminal benefits in the sum of Kshs.50,023/- on 9th June 2017 through a deposit in his bank account in Co-operative Bank.

Aggrieved by his summary dismissal, the claimant filed the instant suit in which he seeks the following remedies: -

a... One month's salary in lieu of notice..... Kshs.45,000

b... Unpaid leave allowance for the period worked

(2 years 7 months)..... Kshs.116,250

c... Service gratuity for the period worked..... Kshs.210,000

d... NSSF not remitted to the institution..... Kshs.2,400

e... Payment for 12 months' salary for unfair

termination..... Kshs.540,000

f... Unpaid salary for the month of January 2017..... Kshs.45,000

g... Certificate of service.

h... Costs and interest since the time of termination.

The Respondent filed a Memorandum of Reply in which it states that the claimant's employment was terminated lawfully after he absconded duty, was served with notice and was paid his dues. The Respondent specifically states that: -

i) The clamant had applied for 4 days leave and not 7 days as alleged

ii) That when the clamant did not report to work after expiry of the leave period the respondent wrote the termination letter dated 20th February 2017 terminating the claimant's employment on ground of absconding his duties

iii) That the claimant despite being called by the Human Resources Manager to come to the office and collect the letter he did not do so until 15th March 2017 when he collected the letter and acknowledged receipt by signing on the respondent's copy

The respondent denies that the termination of the claimant's employment was unfair or that he is entitled to the reliefs sought. It prays that the claim be dismissed with costs.

At the hearing the claimant testified on his behalf. The Respondent called one witness WANGU MBURU, its Human Resources Manager. Both the claimant and Respondent's witness adopted their witness statements during the hearing. Parties thereafter filed written submissions.

Issues for Determination

The issues arising for determination from the pleadings, evidence adduced in Court and the submissions are the following: -

1. Whether the termination of the claimant's employment was fair.
2. If the claimant is entitled to the remedies sought.

Was the termination unfair

Section 41 of the Employment Act provides for the procedure for termination of employment as follows: -

41. Notification and hearing before termination on grounds of misconduct

(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, an 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 grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

Further Section 43 provides for proof of reasons as follows: -

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

Section 45(2) provides that termination of employment is unfair if the employer fails to prove that the termination of employment was for valid reasons and that the employer complied with the requirements for fair procedure.

In the instant case, the claimant avers that he sought leave of 9 days from 1st February 2017 which was extended to 13th February 2017 when he called the office and sought extension. He further states that he did not report to work until 16th February 2017 when the Human Resources Manager sent him back home and asked him to report back on 20th February 2017 when he was issued with the letter of termination.

For the Respondent it is stated that the claimant applied for 4 days leave and was to report back on 6th February 2017 but failed to do so. His Supervisor, the Site Engineer called him but he did not respond. When the Human Resource Manager called him he stated he would not report back. That it is then that the Respondent wrote to the Claimant the summary dismissal letter.

From the documents on record, it is clear that the claimant sought leave of 4 days from 1st February 2017 and was to report back on 6th February 2017 as clearly stated in the leave/off sheet filed by the Respondent at page 3 of the Respondent's bundle of documents. This is corroborated by the letter of dismissal produced by both parties. The letter is reproduced below: -

20th February 2017

Dear Titus Sanya

REF: SUMMARY DISMISSAL FOR ABSCONDING DUTIES

This is in reference to your leave sheet approved from date 1st February 2017 to 5th February 2017 for (4) days which included 3 paid leave days and one unpaid leave day.

The management expected you back on 6th February 2017 for your duties which you didn't.

After a week the management was concerned and contacted you where you promised to report back Monday 13th February 2017 but no efforts were seen.

In view of the above the company had no option but to summarily dismiss your employment on gross misconduct grounds.

Further, you are required to submit company's properties either for your account to be settled.

Thank you.

Yours Faithfully

SIGNED

A.W. NDEGWA

HUMAN RESOURCE MANAGER

WESTBUILD GENERAL CONTRACTORS LTD”

From the foregoing and the Respondent's witness statement it is evident that the claimant absconded duty. That he was contacted on 13th February 2017 and promised to report back but had not reported back by 20th February 2017 when the letter of dismissal was issued.

I thus find that there was valid reason for dismissal of the claimant.

Was there fair procedure?

The Respondent did not ask the claimant to show cause and/or to explain why his employment should not be dismissed for gross misconduct. The claimant was also not invited for a disciplinary hearing as required under Section 41 of the Employment Act. I thus find that the Respondent failed to comply with fair procedure. For this reason, the summary dismissal was procedurally unfair. Section 45(2) provides that there must be both valid reason and fair procedure for termination of employment to meet the fairness test. Refer to the decisions in **Richard Michosi Mwasaru v Beverly Schools of Kenya Limited (2020) eKLR** and **Alphonse Maghanga Mwachanya v Operation 680 Limited**.

Is the claimant entitled to the Remedies sought?

(i) Notice

Having found the summary dismissal procedurally unfair, the claimant is entitled to pay in lieu of notice as provided in Section 49(1)(a) of the Employment Act.

(ii) Unpaid leave

The claimant admitted during cross examination that he used to go for paid leave during the period he was in employment. According to the leave forms produced by the Respondent, however, the claimant had taken only 9 days' leave. There is no explanation of how or when the other days of leave were taken. Section 10(3)(a)(i) provides: -

(3) The statement required under this section shall also contain particulars, as at a specified date not more than seven days before the statement, or the instalment containing them, is given of—

(a) any terms and conditions relating to any of the following—

(i) entitlement to annual leave, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated);

The respondent having failed to produce leave records showing how all leave days were taken other than the 9 days, the claimant is entitled to the difference which is for the period worked of 30 months from 4th August 2014 to 4th February 2017. At 21 days per year, this is 52.5 days less 9 days taken leaving a balance of 43.5 days.

(iii) Service gratuity

The claimant has not proved that his terms of employment provided for service gratuity. Further, he was a member of NSSF as reflected in the NSSF statement filed by the claimant. He is therefore not entitled to service pay by virtue of Section 35(5) as read with 35(6) of the Employment Act.

(iv) NSSF Not Remitted

NSSF Act provides for collection of NSSF dues directly by the institution. Any unremitted NSSF contributions should therefore be paid by the employer directly to the institution and not to the claimant. The claimant is directed to take up the issue of unremitted dues with NSSF. The prayer thus fails.

(v) Payment of 12 months' salary compensation

The claimant having been unfairly terminated is entitled to compensation under Section 49(1)(c) of the Employment Act. However, taking into account the fact that there was valid reason for termination of the claimant's employment and the circumstances under which his employment was terminated, I decline to award him any compensation.

(vi) Unpaid Salary for January 2017

The claimant admitted having received payment of Kshs.50,023/-

being salary for January 2017 and 4 days worked in February. The prayer therefore fails and is dismissed.

(vii) Certificate of Service

The claimant is entitled to a certificate of service in terms of Section 51 of the Employment Act and the Respondent is directed to issue the same to him.

(viii) Costs

In view of the circumstances of this case, I award the claimant only 50% of taxed costs.

Interest shall accrue from date of judgment.

(ix) Rate of Pay

The claimant testified that his last salary was Kshs.45,000/-. The Respondent however insisted that he was earning Kshs.40,000/- per month.

The Respondent's witness statement and witness however stated that the claimant's last salary was Kshs.50,023/- for January and 4 days worked in February 2017. Worked backwards, this works to Kshs.45,000/- per month.

It was the Respondent's responsibility to produce the claimant's last payslip which it did not. The payslips produced by the claimant were for November 2014, September 2015 and October 2015. There was no payslip for 2016 or 2017 therefore the possibility of an increment of salary is not farfetched.

I therefore find that the claimant was earning Kshs.45,000/- per month at the time of his summary dismissal.

Conclusion

In conclusion, I enter judgment for the claimant against the Respondent as follows: -

- 1... Pay in lieu of notice..... Kshs.45,000.00
- 2... Annual leave (43.5 days)..... Kshs.75,288.50
- Total Kshs.120,288.50**
- 3... Costs at 50% of taxed costs.
- 4... Interest from date of judgement.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF MARCH 2021

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE