



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NO. 366 OF 2015

JOSHUA GITAU WACHIRA.....CLAIMANT

VERSUS

PROFESSIONAL CLEAN CARE LTD.....RESPONDENT

JUDGMENT

1. The Claimant through Messers Mutonyi Mbiyu and Company Advocates filed this claim vide a Memorandum of Claim dated 16th November, 2015, alleging wrongful dismissal and unlawful termination from employment and non-payment of terminal dues against the Respondent and seeks the following orders:-

a. A declaration that the Claimant is entitled to payment of his terminal dues as pleaded.

b. An order for the respondent to pay the claimant his terminal dues benefits and compensatory damages totaling to Kshs. 335, 453/-.

c. Interest on (b) above from the date of filing this suit till payment in full.

d. Cost of this suit plus interest thereon.

2. The summary of the claimant's case was that he was employed by the respondent on permanent and pensionable terms in April 2009 as a cleaner earning a monthly salary of Kshs. 5,600/- which was revised in January, 2013 to Kshs. 7,000/-.

3. The claimant avers that he was first posted to Tumutumu Hospital in Nyeri then later transferred to Nakuru Eveready limited in January, 2011 which she worked continuously till 7th September, 2013 when his employment was terminated without any notice or payment of his terminal dues.

4. According to the claimant he was underpaid at the respondent's employment contrary to Labour institutions Act legal Notices number 98 of 2010, 64 of 2011, 71 of 2013 and a197 of 2013, therefore he contends that the underpayment for year 2010 may to April, 2011 amounts to Kshs. 7,452; May 2011 to April, 2012 is Kshs. 16,788; May 2012 to December, 2012 is Kshs. 27,392 and year 2013 January to September, 2013 is Kshs. 18,216 all amounting to Kshs. 69,848/= as underpayments.

5. The claimant also prays for payment of one-month salary in lieu of Notice of Kshs. 9,024 and the unpaid House allowance for the 54 months worked at the Respondent employ amounting to Kshs. 146,188/- together with the seven days worked for the month of September 2013 of Kshs. 2,105/-.

6. The respondent filed a memorandum of response through the firm of Kagucia and company advocates on 3rd February, 2016 and affirmed that the claimant was employed by the respondent in April, 2009 and deployed to Tumutumu Hospital in Nyeri and later transferred to Eveready Limited in Nakuru.

7. That the claimant was engaged on permanent and pensionable terms from 3rd January, 2011 and worked for Eveready East Africa Limited Premises in Nakuru until 4th September, 2013 when he absconded duty and failed to report back to duty despite warning notices send to him by the Respondents manager.

8. The respondent alleges that the claimant was a problematic worker who habitually reported to work drunk and often absented himself from

work without leave and was even issued with a warning letter dated 29th October, 2010 which he became remorseful and requested for transfer to be near his family which was granted and transferred from Nyeri to Nakuru.

9. The respondent avers that the Claimant was engaged in theft in September 2011 of a scrap metal at the respondent's clients yard and on 23rd November, 2011 he stole 2 spoons from the respondent client's yard which the respondent issued him with subsequent warning letters of 1st December, 2011, 10th May, 2012, 20th July, 2012, 5th March, 2013 and the last one on 5th September, 2013 which was issued after the claimant failed to report to work immediately after collecting his August salary.

10. The respondent avers that the claimant worked for only 3 days in September, 2013 and deserted employment as such the issuance of notice was untenable and the entire claim as prayed is misconceived as the respondent did not dismiss the claimant but that the claimant stopped going to work on his volition.

Hearing.

11. This cause proceeded for hearing on 21st January, 2021 where the Claimant (CW-1) Joshua G. Wachira testified that he was employed by the Respondent in the year 2009 and deployed to Nyeri earning a salary of Kshs. 5,000 which was later increased to Kshs. 7,000 in the year 2013. He adopted his witness statement filed on 17th March, 2017. He testified that he was underpaid as illustrated in paragraph 5 of his witness statement and that he was never given notice before his termination. He further testified that he was never paid house allowance for the 54 months he worked for the Respondent. Finally, he prayed for payment of his September salary for the 4 days worked and 12 months' salary for unfair termination.

12. On cross examination, he testified that that he was employed in April, 2009 but was not given his pay slips for 3 months. He denied ever receiving any warning letter from the respondent neither was he aware of the handwritten letter by his supervisor one Mr. Karuri addressed to the head office. He further testified that there is an error in paragraph 4 of his statement of claim and avers that his October, 2011 pay slip indicates that he was paid Kshs. 7,000/. He further testified that his pay roll number is 10265 which was changed to PF01679 when he was transferred to Eveready. Finally, he avers that, he was not subjected to any disciplinary hearing before his termination.

13. The respondent's case proceeded for hearing on 23rd March, 2021 with the respondent calling two witnesses; Fredrick Oballa(RW-1) and Joseph Muriambo Karuri(RW-2).

14. RW-1, testified that he is the General Manager of the Respondent and adopted his witness statement dated 4th February, 2016 together with the respondent list of documents filed on 18th February, 2016.

15. On cross examination he testified that the claimant was employed in the year 2009 as a casual employee earning a salary of Kshs, 5600 which was increased to 6,200 when the claimant was retained on permanent basis. That he was the one that issued the claimant with the letter of transfer to Nakuru.

16. RW-2, testified that he was the claimant's supervisor when he was working in Tumutumu Hospital in Nyeri. He equally adopted his witness statement dated 8th March, 2019 and sought to rely on the respondent's documents filed on 18th February, 2016.

17. On cross examination, RW-2 testified that the claimant was employed in April, 2009 and left employment in September, 2013 when in Eveready Limited Nakuru. He avers that he was not aware of what happened in Nakuru to lead to the termination but that while the claimant was in Nyeri he used to report to work drunk leading to his transfer to Nakuru on his request following his absenteeism and drunkenness.

Claimant's submissions

18. The claimant's Advocate submitted that the claimant was not given any reason for termination but that the Respondent only instructed the claimant to go away as such his services were illegally terminated. He argues that when the respondent failed to give him reasons for termination and or Notice for termination he acted contrary to express provisions of sections 35(1) and 41 of the Employment Act and further buttressed his arguments by citing the case of **Zuhura Nyokabi 5-v- Reinman Company Limited (2015) eklr** where this Court held that reasons for termination must be given.

19. Counsel therefore submitted that the claimant was terminated without following due procedure which amounted to unfair termination within the meaning of the Employment Act and prayed that the claim be allowed as prayed.

Respondent's submissions

20. The respondent's Counsel on the other hand submitted that the claimant herein was never terminated from employment as testified by RW-1 and RW-2 but that he absconded duty after receiving his August 2013 salary and never reported to work to date. Counsel argues that the burden of proving the unfair termination rests with the claimant as contemplated under section 47(5) of the Employment Act. He further buttress his argument by citing the case of **Kennedy Maina Mirera -v- Barclays Bank of Kenya [2018] eklr**.

21. It was submitted further that the claimant had several warning letters issued to him and the Respondent would have summarily dismissed him from employment as empowered under section 44(a)(b) of the Employment Act and affirmed by Justice M. Mbaru in **Nakuru ELRC Cause number 474 of 2017; Consolata Kemunto Aming'a -v- Milimani High School.(UR)**.

22. On the prayer for pay in lieu of Notice, it was submitted that the claimant was not dismissed by the respondent as alleged but absconded duty therefore the prayer is untenable.

23. On underpayments, the respondent submitted that the claimant was employed and deployed to Tumutumu Hospital which is a town under Column 4 of the regulation of wages Order 2010 as such he was paid over and above what he ought to have received. Further that the Claimant's documents indicate that he was paid Kshs. 7,000 from October, 2011 to his termination in 2013 as such the underpayment prayer ought not to be sustained.

24. On the prayer for house allowance, it was submitted that the salary paid to the claimant was a cumulative salary inclusive of house allowance therefore no sum is owing to the claimant.

25. Counsel concluded by submitting that since the claimant absconded duty he is not entitled to the claim sought and therefore urged this Court to dismiss the claimant claim with costs.

26. I have examined all evidence and submissions of the parties herein. The claimant averred that he was wrongfully terminated when he was sent away and informed that his services were no longer needed.

27. The respondents on the other hand insisted that the claimant absconded duty. RW1 told court that he is the one who issued the claimant with his transfer letter to Nakuru.

28. RW2 on the other hand indicated that he didn't know what transpired to the claimant in Nakuru. No witness actually testified to how the claimant absconded duty because RW1 was not in Nakuru and he indicated that he was informed that the claimant had absconded duty. The informant didn't testify on this issue.

29. It is therefore apparent that there was no evidence produced by the respondents to counter what the claimant testified above.

30. Despite the respondent insisting that the claimant absconded duty, there is also no indication that they tried to seek him out through his last known address in an attempt to have him show cause why his services should not be terminated for abscondism.

31. It is therefore my finding that there is no reason established as to why the claimant was dismissed and even no indication that he was subjected to due process before the dismissal.

32. I therefore find the termination of the claimant unfair and unjustified as provided for under Section 45(2) of the Employment Act 2007 which states as follows;-

45. (1).....

(2) A termination of employment is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

33. The claimant has also established that he was underpaid during the tenure of his employment.

34. The payslips produced in court show that he was neither paid per the minimum wage nor paid his house allowance. I therefore find for the claimant and award him as follows;-

1. I month salary in lieu of notice = 9,024/=

2. Salary arrears due to underpayment as submitted from year 2010 to 2013 = 69,848/=

3. Unpaid house allowance for 3 years the rest of the years being time barred = 15 % x 9,024 x 36

= 487,296/=

4. 10 month's salary as compensation for unlawful dismissal = 10 x 9,024 = 90,240/=

5. Unpaid salary for 7 days in September 2013 $\frac{3}{30} \times 9,024 = 902$ /=

TOTAL - 218,744/=

Less statutory deductions

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

DATED AND DELIVERED IN OPEN COURT THIS 17TH DAY OF JUNE, 2021

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mbiyu for claimant - present

Mburu Kaguccia for respondent – present

Court Assistants – Fred and Wanyoike