



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 003 OF 2016

GEORGE OCHIENG OKEYO.....CLAIMANT

VERSUS

FOR YOU CLOTHING LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein filed a Memorandum of Claim dated 5th January, 2016 on 11th January, 2016 through the firm of Ndeda and Associates advocates claiming unfair termination, underpayment, unpaid leave and overtime pay from the respondent and sought the following reliefs;

- a) That the termination be found to be unfair.
- b) That the claimant be paid one month salary in lieu of notice.
- c) That the claimant be paid 5 days worked during the month of June, 2015.
- d) That the claimant be paid the 9 years and 9 months' annual leave for the 9 years.
- e) Underpayment wages from August 2003 up to April, 2013.
- f) The claimant be paid off duties and overtime worked.
- g) That the respondent to pay the costs of this suit.
- h) That the respondent to pay the claimant compensation in the meaning of section 49 (1)(c) of the Employment Act, 12 months' gross salary.
- i) That the respondent to issue the claimant with a certificate of service in the meaning of Section 51 of the Employment Act.

2. The Claimant avers that he was employed by the respondent as a loader in its stores sometimes in August 2003 with a salary of Kshs 150/- per day which was cumulatively paid on weekly basis. That when he was employed the respondent did not issue him with any letter of appointment or any employment testimonials.

3. He states that he worked for the respondent diligently and his salary was increased to Kshs. 200 per day in April, 2004, Kshs. 250 in the year 2007, Kshs. 300 in the year 2010. That he continued receiving his daily wages per week until May 2013 when his salary was increased to Kshs. 9,024/- which was now paid on monthly basis and the respondent also began issuing him with pay slips as evidence in His exhibit GOO-2 to GOO-7.

4. He stated that during his tenure at the respondent employ he was issue with only one warning letter on 5th June, 2015 which culminated to his verbal termination when the respondent's director one Mr. Mukesh Ordered the Claimant not to go to work and that he never wanted to see him again.

5. The claimant avers that he was not paid for the 5 days worked in the month of June, 2015. Further that actions of the respondent violated his employment rights having worked for the respondent for 11 years and 9 months.

6. The respondent entered appearance on 17th February, 2016 via the firm of Githiru and company advocates and filed a memorandum of response on 15th March, 2016 and states as follows;

a) The respondent avers that the claimant herein was employed by the respondent as a general worker from 1st March, 2012 till 5th June, 2015 and not year 2003 as alleged and produced a letter of offer marked as Exhibit RE-1.

b) It was averred that the claimant was issued with a warning letter on 5th June, 2015 for reporting to work late and the claimant took the letter and worked away in essence deserting his employment.

c) That after one week of the claimant's absence from work, the respondent informed the County labour office of the claimant's desertion by its letter of 11th June, 2015 and received by the labour office on 12th June, 2016 herein marked as exhibit-3

d) That on 9th June, 2015 the claimant through the firm of Momanyi Michuki and Co Advocates demanded for payment of the claimant due on alleged termination which respondent replied by its letter of 15th June, 2015 and affirmed that the claimant's services were never terminated and urged the advocate to advice the claimant to report to work if he was still interested with work. The said letters are marked as Exhibit 4 and 5 respectively.

e) The respondent states that the reporting time set by it was 8:30 am which was complied with by all other employees save for the claimant who reported late to work almost all the time as seen in the muster roll marked as Exhibit 7.

f) The respondent thus avers that the claimant was never terminated from employment and therefore is not entitled to any due sought in his memorandum of Claim

Hearing

7. The claimant's case proceeded for hearing on the 6th November, 2018 where the claimant (**CW-1**) testified and reiterated his pleadings and stated that he worked for the respondent from 2003 and that he was not issued with any appointment letter as alleged. That on 5th June, 2015 he received a call from one of his colleague, Tony Irungu who asked him to rush to work as they were to offload a lorry that was to leave for Nairobi. That upon arrival at the respondent's store he was confronted by the Respondent's director Son, One Mr. Keyur who asked him why he was late to report to work and soon after he was issue with a warning letter and ordered not to continue with work by the Respondent's Director Mr. Mukesh.

8. He testified that the reporting time was usually 9:00am and not 8:30 as indicated by the respondent. Also that when the respondent had a lot of work he would report as early as 5:40 am and leave at 6:30pm and work overtime.

9. He testified further that he explained himself to Mr. Mukesh who refused to listen to him and even wrote a letter dated 23rd June, 2015 requesting for a hearing which respondent did not reply.

10. That the respondent' director or manager has never called him since the dismissal on 5th June, 2015 and therefore the alleged letter to the labour office is not genuine as they ought to have contacted him as well in accordance with the law.

11. On cross examination, the claimant testified that he was directed by his father to seek for employment at the respondent who employed him in 2003. Further that on 5th June, 2015 he was issued with a warning letter and not a termination letter. On the letter asking him to report back to work, the claimant testified that he was not informed about the contents of the said letter that is why he never reported to work.

12. The respondent's case came up for hearing on 16th March, 2021 with the respondent calling one witness, Mr. Keyur Sumeria(**RW-1**), the managing director of the Respondent, who adopted his witness statement filed in Court on 22nd November, 2018 and together with the document file on behalf of the respondent.

13. He testified that the claimant was never terminated from employment but that he was issued with a warning letter date 5th June, 2016 which the claimant received and deserted the respondent employment. He stated the claimant through his advocates demanded for his terminal benefits which the respondent replied and asked the claimant to report back to work as he was not terminated.

14. He testified that the claimant was given leave when requested and never worked overtime and that any overtime worked was duly paid for. DW-1 avers that the respondent never received the claimant letter dated 23rd June, 2013. He thus urged this Court to dismiss the claimants claim as he was never terminated but deserted employment.

15. On cross examination, he testified that the letter of appointment was not signed similar to the warning letter received by the claimant. Further that the respondent tried to call the claimant but he refused to pick his calls.

Claimant's Submissions

16. The Claimants advocate, submitted that the claimant herein was employed by the respondent as pleaded in August, 2003. He argues that the claimant has given a chronology of his pay increase from 2003 when he was paid Kshs. 150 on a daily basis till 2012 when he was paid on a monthly basis. It was submitted that the employment of the Claimant was verbal which employment is recognized under part III section 8 of the Employment Act. Counsel submitted that the letter of employment dated 24th February, 2012, produced by the Respondent alleging

that the claimant was employed in 2012 is defective since the respondent has failed to indicate the terms of service as envisioned under clause 9 of the Employment Act, further that the claimant has not signed the same as provided for under subsection 3 of the said clause.

17. It was submitted that the respondent dismissed the services of the Claimant verbally and when the claimant demanded for his terminal due on 9th June, 2015 the respondent rushed to absolve itself from liability by informing the labour office of the alleged desertion instead of contacting the claimant if they genuinely did not terminate the claimant's services, more so now that the claimant had an advocate as a contact person.

18. Counsel therefore urged court to find in favour of the claimant and grant the prayers sought in the memorandum of claim.

Respondent's submissions.

19. The respondent maintains that the claimant was employed in the year 2012 and not 2003 as alleged. Counsel argues that the letter of appointment dated 24th February, 2012 clearly conforms with the requirements of section 9 of the Employment Act and therefore it was upon the claimant to produce evidence or call witnesses to affirm that indeed he was employed by the respondent in the year 2003. Counsel points out to the NSSF statement that shows that the NSSF dues were remitted February, 2003 and the same stopped till June, 2013 and argues that if indeed the claimant was genuine that he was employed by the respondent in the year 2003 he should have prayed for the said NSSF deductions not remitted.

20. Counsel submitted that the respondent issued the claimant with a warning letter due to his chronic lateness and that the respondent never terminated the service of the claimant. He argues that the claimant herein deserted work despite it asking him to return to work by the letter addressed to his advocates then on record. Counsel argues that the claimant's termination is justified as envisaged under section 44(4) of the Employment Act and buttressed his argument by relying on the reasoning in the case of **Philomena Kiprotich Kirui- versus- Lessos Veterinary Suppliers Ltd[2016] eKLR** where the court stated that;

“an employer who terminates the services of an employee on grounds of desertion has to demonstrate and prove that the employee had no intention of resuming work.”

21. Counsel submitted that the claimant deserted work therefore termination notice was impossible to give. On the prayer for unpaid leave, counsel submitted that the claimant took his leave as evidenced in the musters roll on 3/1/2014 to 26/1/ 2014 and also on 5/3/2015 to 30/3/2015. Therefore the prayer for unpaid leave ought to fail.

22. Counsel urged this court to dismiss the claimant's cause with costs to the respondent.

23. I have examined all evidence and submissions of the parties herein. From the evidence of the claimant he was employed from 2003 whereas the respondents insist that he was employed from March 2012. From the NSSF statement produced by the claimant, there is an indication that he was employed on 1/9/2002 though the name of the employee is not indicated.

24. The claimant also produced salary vouchers which run from 2012 and though he was not issued with an appointment letter, there is no any other evidence that he was in employment of the respondent before 2012.

25. I will then take 2012 to be the date of employment. As concerning whether the claimant deserted duty or was terminated, the claimant has averred that he was verbally dismissed.

26. The respondent on the other hand insist that he deserted duty. The respondent sought to rely on their exhibit 2 & 3 which is the warning letter and a letter to the County Labour Officer respectively.

27. There is no indication that these letters were served upon the claimant nor copied to him.

28. On 9/6/2015, the claimant counsel wrote to the respondent demanding the respondent makes good for dismissing the claimant. The respondent even replied to this letter through their counsel.

29. They were therefore aware of how to get the claimant. In the reply the respondents indicated that the claimant had not been terminated and was free to return to work. Of course the claimant didn't choose to return to work.

30. There is however no evidence that at the time the claimant alleges he was verbally terminated, he had been subjected to any disciplinary hearing. There is also no evidence that the respondent sought him out before they received a demand notice from his counsel. I will therefore take it that he had already been constructively dismissed and without any disciplinary hearing.

31. I thus find that the claimant was unfairly and unprocedurally dismissed. I find for claimant and enter Judgment for him as follows;

1. I month salary in lieu of notice 10,496.90

2. 5 days pay for June 2015

= 5/30 x 10,496 = 1,749/=

3. Leave pay for 3 years the rest of the claim being considered as time barred

= 3 x 10,496 = 31,488

4. 9 month's salary as compensation for unlawful termination.

= 10,496 x 9 = 14,464

TOTAL = 155,727.9 Less statutory deductions

5. The claimant be issued with a certificate of service. Claim for overtime and holiday pay not payable as was paid as indicated in claimant's payslip.

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 3rd day of JUNE, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Awuor for claimant – present

Githiru for respondent – present

Court Assistant - Fred