



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO.24 OF 2018

(Before D.K.N.Marete)

DAVID GITUMA KIRERA.....CLAIMANT

VERSUS

MAJANI GARDENS LIMITED.....RESPONDENT

JUDGMENT

This matter was originated by way of a Statement of Claim dated 28th April, 2021. The issue in dispute is therein cited as;

The wrongful and unfair termination of the Claimant

The Respondent in a Respondent's Response to Claim dated 20th June , 2018 denies the same and prays that it be dismissed with costs.

The Claimant's case is on or about the year 1989 he was employed by the Respondent.

The Claimant's further case is that he rose through the ranks to the position of manager earning a salary of Kshs.33,800.00 as at the time of termination of his services on 30th April, 2015. The termination was wrongful and unfair.

The Claimant's other case is that he was not issued with notice of his termination and claims thus;

- Three months salary in lieu of notice
- Service pay for 26 years at the rate of Kshs.33,800.
- Terminal benefits.
- Damages for wrongful/unfair termination

He prays as follows;

- a) Three months salary in lieu of notice at the rate of Kshs.33,800 per month.
- b) Service pay for 26 years at the rate of Kshs.33,800 per year.
- c) Terminal benefits.
- d) Damages for wrongful/unfair termination.

The Respondent's case is that the claimant was initially an employee of Stephen Mutai M'Imanyara as a casual labourer but was subsequently paid through the Respondent where the said M'Imanyara was a director.

The Respondents further case is that the claimant absconded duty from 1st April, 2015 and this was reported to the County Labour office vide a letter dated 10th May, 2015. He was therefore the author of his misfortunes and cannot reap thereon.

The Respondent's other case comes out thus;

The Respondent's other case is that the claim is *in toto* unfounded and lacks basis. He occasioned his misery by absconding duty and therefore cannot sustain a case of unlawful termination, let alone termination in any manner. This is as follows;

8. *Moreover the respondent has annexed in his list of documents dated 27.6.2019 a termination letter which was addressed to the county labour office Meru and received on 5/5/2015 and duly stamped on the face. The said letter terminated the claimant's employment on the basis that he absconded and/or absented himself from work on 30th April 2015 and never came back to work.*

She therefore prays that the claim be dismissed for lack of merit.

The matter came to court variously until the 2nd June, 2021 when the parties agreed on a determination by way of written submission.

The issues for determination therefore are;

1. Whether there was a termination of the employment of claimant by the Respondent?
2. Whether the termination, if at all, was wrongful, unfair and unlawful?
3. Whether the Claimant is entitled to the relief sought?
4. Who bears the costs of the cause?

The 1st issue for determination is whether there was a termination of the employment of claimant by the Respondent. The Claimant in his written submissions dated 30th April, 2021 reiterates his case of unlawful termination of employment. This is as follows;

...the respondent in a bid to cover up any wrongdoing, it has annexed a letter dated 3/5/2015 ostensibly written to the County Labour Officer Meru stating that it had terminated employment of the claimant.

I must pause here and submit that the said letter was not addressed to the claimant and neither was he called to defend himself. He did not receive it. It is puzzling that that the letter is dated 10.3.2015 while the claimant was terminated from employment later on the 30.5.2015. The respondent is trying to belated justify his conduct and unlawfully so.

Further,

...the respondent did not vanish to court any evidence that he summoned the claimant to show cause why he should not be terminated. Instead the respondent states that he absconded but did not tender evidence in that regard and whether he summoned him. I rely on the decision of Mutunga Nyamai v Chancery Restaurant Limited T/A China Plate (2020) eKLR where the court noted "for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination."

The Respondent's in her written submissions dated 10th May, 2021 faults the claimant for not rebutting the averments on desertion and absenteeism and therefore fortifying the same as uncontroverted evidence. She therefore justifies her case of dismissal of her claim.

None of the parties to this case come out clearly to establish and concretise their respective cases. The Respondent brings in a case of desertion of duty on the part of the claimant. This necessities and leads to termination. The claimant denies this. The Claimant rubbishes the letter of desertion and absconding duty as swiftly by questioning why this was not addressed to him and in any event, why he was not addressed on his desertion. This is a credible query.

This is a clear case of your case against mine. The parties come out with overlapping versions of the case of termination and stand as such. It is for this court to evaluate the same and make a fair and just conclusion of the parties cases.

In this scenario, the test of balance of probabilities comes in to make sense of the situation. The Claimant's case is to me, the more probable of the two. It is the more convincing. Why? The Respondent had in his disposal more latitude to involve in the matter and find a concrete resolution of the issue of termination by involving the claimant. He did not.

The Respondent does not explain her laxity in the resolution of this issue. She was the senior partner, being the employer. She should have involved further in facilitating a determinate case for termination for employment, either way.

Further, the law at Sections 9 and 10 of the Employment Act, 2007 involves the employer as developer and custodian of employment records. If this was had and produced the evidence, the matter would be clear and visible. This is not so. This burdens the respondent.

I am therefore inclined to allow the claim and award relief as follows;

- i) One (1) months salary in lieu of noticeKshs.33,800.00

ii) Two (2) months salary as compensation

for unlawful termination of employment..... Kshs.67,600.00

Total of Claim.....Kshs.101,400.00

iii) The parties shall bear their costs of the claim.

Dated and delivered at Nyeri this 19th day of July, 2021.

D.K.Njagi Marete

JUDGE

Appearances

- 1. Mr.Mwanzia instructed by Muia Mwanzia & Company Advocates for the Claimant.**
- 2. Mr. Muriuki instructed by Mbogo & Muriuki Advocates for the Respondents.**