



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 574 OF 2016

ERICK MUNGAI PHORO.....CLAIMANT

VERSUS

CORRUGATED SHEETS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The dispute before me arises from an employment relationship between Erick Mungai Phoro as the Claimant and Corrugated Sheets Limited (Pickling Division) as the Respondent.
2. The Claimant’s claim is contained in a Memorandum of Claim dated 29th July 2016 and filed in court on 2nd August 2016. The Respondent filed a Memorandum of Response on 28th June 2017.
3. The matter went to full trial where the Claimant testified on his own behalf and the Respondent called its Supervisor, Mwambeyu Ngome. The parties further filed written submissions.

The Claimant’s Case

4. The Claimant pleads that he was employed by the Respondent on 20th June 2014, as an effluent treatment plant operator (Fitter) earning a daily rate of Kshs. 450.
5. The Claimant worked for the Respondent until 27th October 2015, when his employment was terminated. He avers that the termination was without justifiable cause and adds that the Respondent recruited another employee to perform the task previously performed by the Claimant. The Claimant further avers that he was not afforded an opportunity to be heard.
6. The Claimant claims to have been underpaid throughout his period of employment and adds that he was not paid his terminal dues.
7. The Claimant now seeks the following from the Respondent:

- a).... 1 month’s salary in lieu of notice..... Kshs.19,344
- b).... Leave pay for 1 year and 3 months Kshs.19,530
- c).... Service pay for 1 year and 3 months..... Kshs.167,400
- d).... Underpayment..... Kshs.90,012
- e).... 12 months’ salary in compensation..... Kshs.232,128
- f).... Costs plus interest

The Respondent’s Case

8. In its Memorandum of Response dated 23rd June 2017 and filed in court on 28th June 2017, the Respondent admits having employed the Claimant.

9. The Respondent however denies terminating the Claimant's employment and states that the Claimant himself deserted duty in early November 2015, without any formal notice or reason.

10. The Respondent admits having received a demand letter dated 13th November 2015, from the Claimant's Advocates, demanding the sum of Kshs. 627,564 as compensation for alleged wrongful dismissal.

11. In its response dated 17th December 2015, the Respondent directed the Claimant to report back to work. The Respondent avers that the Claimant failed to return to his place of employment and instead served another demand letter dated 23rd February 2016 demanding a lesser figure of Kshs. 528,414 as compensation for alleged wrongful dismissal.

12. The Respondent denies that the Claimant was underpaid and states that he was paid in line with all statutory provisions during the period of his employment.

Findings and Determination

13. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case of wrongful dismissal;
- b) Whether the Claimant is entitled to the remedies sought.

Wrongful Dismissal?

14. Section 47(5) of the Employment Act assigns the burden of proof in claims arising from termination of employment as follows:

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

15. An employee cannot therefore simply walk to court and complain of unfair termination or wrongful dismissal; they must lay believable grounds for their complaint before the Court.

16. In the instant case, the Claimant claims to have been verbally terminated by an unnamed person, following an alleged theft of a pneumatic pump. Conversely, the Respondent accuses the Claimant of absconding duty.

17. Upon receiving a demand letter from the Claimant's Advocates, the Respondent, through its Advocates, invited the Claimant to go back to work. The Claimant told the Court that he did not go back because he had another job. What then is the Claimant's complaint?

18. It is important for employees to recognise that the compensatory awards provided under Section 49 of the Employment Act are just that; compensatory. They are intended to cushion employees against the vagaries of unexpected and unjustifiable job loss. These awards are therefore not available to an employee who simply refuses to go to work.

19. In the final submissions filed on behalf of the Respondent on 5th July 2021, reference was made to the decision in ***Daniel Mueke v Bhogals Auto World [2014] eKLR*** where my brother **Radido J** held that an employee who had left his place of work, without explanation, could not be said to have discharged the burden placed on them by Section 47(5) of the Employment Act.

20. On a balance of probability, the Court rejects the Claimant's assertion that his employment was terminated verbally and adopts the Respondent's version that the Claimant walked away from his job.

21. In the result, the claims for compensation and notice pay must fail.

Other Claims

22. Regarding the claims for leave pay and notice pay I have this to say; the employer, being the custodian of employment records, ought to have availed records to show that the Claimant had exhausted his leave entitlement and that he was a contributing member of the National Social Security Fund (NSSF). In the absence of such records, these claims succeed and are allowed.

23. The claim for underpayment was not proved and is dismissed.

24. Ultimately, I enter judgment in favour of the Claimant as follows:

- a)... Leave pay for 1 year (450 x 21 x 1)..... Kshs.9,450

b)... Prorata leave for 3 months (450 x 1.75 x 3)..... Kshs.2,363

c)... Service pay for 1 year (450 x 15)..... Kshs.6,750

Total..... Kshs.18,563

25. This amount will attract interest at court rates from the date of judgment until payment in full.

26. The Claimant will have the costs of the case.

27. Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY SEPTEMBER 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Salim for the Claimant

Miss Obonyo h/b Mr. Onyony for the Respondent