



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 168 OF 2018

THOMAS KALUME KAZUNGU.....CLAIMANT

VERSUS

CHINA ROAD & BRIDGE (K) CORPORATION LTD.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated and filed in court on 26th March 2018, the Claimant sued the Respondent for compensation for unfair termination of employment and payment of terminal dues. The Respondent filed a Replying Memorandum on 1st September 2020 to which the Claimant responded on 11th September 2020.
2. The matter went to full trial where the Claimant testified on his own behalf. The Respondent did not call any witness.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a plumber in the General Work and Operations Department from June 2015 until February 2017, when his employment was terminated. He earned a monthly salary of Kshs. 27,708.80.
4. The Claimant avers that on 18th January 2016, he suffered serious burn injuries, while at work. The Claimant claims that the accident was as a result of the Respondent's failure to put in place safety measures at the work place.
5. Following the accident, the Claimant was admitted at Bomu Hospital. The Respondent continued paying his salary in addition to offering him some medical assistance. This continued until February 2017 when the salary was stopped and the medical assistance ceased. The Claimant claims that this was after he demanded compensation for the injuries he had sustained while at work.
6. The Claimant's case is that the Respondent's actions amounted to unlawful and unfair termination of employment. The Claimant therefore seeks the following remedies:
 - a. A declaration that the termination of his employment was unfair
 - b. 1 month's salary in lieu of notice.....Kshs. 27,708
 - c. 12 months' salary in compensation.....332,496
 - d. Certificate of service
 - e. Costs plus interest

The Respondent's Case

7. In its Replying Memorandum dated 27th August 2020 and filed in court on 1st September 2020, the Respondent admits having employed the Claimant on 14th July 2015.

8. The Respondent however states that the Claimant was hired on need basis based on availability of work. The Respondent adds that the Claimant was paid a daily wage of Kshs. 824.
9. The Respondent states that on average, the Claimant worked for a maximum of eight (8) hours for every working day of the week.
10. Regarding the Claimant's claim on the accident of 18th January 2016, the Respondent states that it endeavoured to provide all its employees with the appropriate protective gear which included boots, gloves, helmets, machine user guides and reflector shirts.
11. The Respondent therefore avers that the burn injuries suffered by the Claimant were as a result of his own negligence. The Respondent adds that the subject accident was not recorded in the daily Occurrence Book.
12. While denying the Claimant's claim of unlawful termination, the Respondent states that it lawfully terminated the Claimant's employment on account of desertion of duty. The Respondent adds that the Claimant was paid his terminal dues in full.

Findings and Determination

13. There are two (2) issues for determination in this case:
 - a. Whether the Claimant has made out a case of unlawful termination of employment;
 - b. Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

14. The Respondent's defence to the Claimant's claim of unlawful and unfair termination is that the Claimant himself deserted duty.
15. It is now firmly settled that an employer alleging desertion against an employee must demonstrate efforts made to reach out to the employee, with a view to putting them on notice that termination of their employment on this ground is being considered.
16. In its written submissions filed on 4th October 2021, the Respondent made reference to the decision in *Godfrey Anjere v Unique Suppliers Limited [2013] eKLR* where it was held:

“In a dismissal on account of absconding duties, the employer is required to show what steps it took to inform the employee that his or her dismissal would result if they did not report back to work.”

17. The Respondent further referred to the decision in *Felistas Acheha Ikatwa v Charles Peter Otieno [2018] eKLR* where the following was held:

“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”

18. The Respondent did not adduce evidence to demonstrate any efforts made to reach out to the Claimant and its line of defence is therefore rejected. The corollary is that the Claimant's testimony that his employment was terminated without justifiable cause and in violation of due procedure is adopted.

Remedies

19. I therefore award the Claimant twelve (12) months' salary in compensation for unlawful and unfair termination of employment. In arriving at this award, I have taken into account the Claimant's length of service accentuated by the diminished chances of securing alternative employment as a result of incapacitating injuries suffered at work. I have also factored in the Respondent's unlawful conduct in the termination transaction.

20. I further award the Claimant one (1) month's salary in lieu of notice.

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

- a. 12 months' salary in compensation.....Kshs. 332,496
 - b. 1 month's salary in lieu of notice.....27,708
- Total.....360,204**

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

23. The Claimant is also entitled to a Certificate of Service plus costs of the case.

24. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OCTOBER, 2021

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JUDGE

Appearance:

Miss Kitoo for the Claimant

Mr. Onyango h/b for Mr. Agwara for the Respondent