



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 51 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

DICKSON OMWOYO OKONG'O.....CLAIMANT

VERSUS

BOBMIL INDUSTRIES LIMITED..... RESPONDENT

JUDGMENT

1. By his memorandum of claim dated and filed on 20th January 2015, the Claimant seeks the following orders from the Court –

i) THAT the Honourable court do issue orders that the Respondent to” **REINSTATE**” the Claimant without loss of benefit and position instantly.

ii) THAT, **alternatively** the honourable Court do issue orders that the Respondent “**PAYS**” to the Claimant herein this matter all his benefits as tabulated herein below –

a) Pay in lieu of notice..... Kshs.21,268.00

b)..... 12 Months’ compensation for unlawful

termination..... Kshs.255.216.00

c). General damages emoluments at the discount of

15% of the total amounts

(2,764,848 x)..... Kshs.235,011.40

Grand Total Amount.. Kshs.511,495.00

iii) That the Honourable court do issue orders compelling the Respondent to issue the Claimant with his “**CERTIFICATE OF SERVICE**” within the meaning of Section 51 of the Employment Act No. 11 of 2007, Laws of Kenya.

iv) THAT, the costs of this application be provided for by the Respondent.

2. It is the averment of the Claimant that he was employed by the Respondent, a limited liability company registered and operating in Kenya, on or about 13th March 2012 as Machine Operator at a starting salary of Kshs.14,100/= and a house allowance of Kshs.2,150/=.

3. It is the Claimant’s further averment that he worked diligently and was never involved in any disciplinary issue up to the date of his leaving the employment of the Respondent.

4. It is the Claimant’s averment that he was absent on 6th July 2014 and had asked his colleague one Robert Achoki to work his shift. However, the said colleague did not turn up hence his absence. The Claimant avers that this arrangement was made with the concurrence of his Supervisor.

5. Upon reporting back on 7th, the Claimant explained verbally and was asked to write a letter explaining what transpired on 6th July 2014. In the letter he also requested to be placed on night shift to enable him undertake studies that he had enrolled for during the day.

6. According to the Claimant, he was sent home by the Respondent's then Human Resource Manager who told him to go home and wait until he was contacted by the Respondent. However, the Respondent did not contact him. He later learned that his employment had been terminated.

7. It is the Claimant's averment that the termination of his employment is unfair as there was no valid reason for the termination and he was never taken through any disciplinary process. He further alleges he was never paid his terminal benefits.

8. The Respondent entered appearance and filed an answer to memorandum of claim dated 20th April 2015, wherein the Respondent avers that the Claimant absconded duty from 30th June 2014. It avers that on 7th July 2014, the Claimant wrote to the Respondent admitting that he had been absent without leave and explained the reason therefore to be due to school commitments. That the Claimant further indicated in the letter that due to school commitments he would not be able to continue working for the Respondent. That the Respondent resolved to accept the Claimant's resignation.

9. The Respondent avers that it paid the Claimant's dues in the sum of Kshs.11,047 which were credited to his account number xxxxxxxx on 30th July 2014. That the dues consisted of two years gratuity of Kshs.20,019 and 7.5 days accrued leave of Kshs.4,692 making a total of Kshs.24,711.00 less deductions of Kshs.13,664, thus leaving a balance of Kshs.11,047.

10. The Respondent avers that in the circumstances the termination of the Claimant's employment was lawful and fair, that the claim is malicious and made with the intention of unjust enrichment. The Respondent denies all averments in the claim and prays that the same be dismissed with costs.

11. The Claimant filed a reply to the Respondent's statement of defence in which he denies that he was absent from 30th June 2014. He denies that his letter of 7th July 2014 was an admission of absence without permission. He further denies that his letter intimated that he was absent due to school commitments and refers the Court to the contents of his letter attached to the memorandum of claim.

12. The Claimant clarifies that on 7th July 2014 he was summoned to explain where he was on 6th July 2014 which he did verbally and was directed to do so in writing. He further insists that he was absent for only one day and that the absence was a result of miscommunication with his colleague Robert Achoki. He denied that his letter of 7th July 2014 was a resignation. The Claimant further denied that his terminal dues were ever settled as alleged by the Respondent.

13. The case was heard on 27th January 2020 when the Claimant, who was unrepresented, testified and was cross examined by Counsel for the Respondent Mr. Mureithi holding brief for Mr. Gathu. On 26th May 2020 when the Respondent's case was to be heard the Court did not sit due to the outbreak of the COVID 19 pandemic.

14. The case was mentioned on 29th July 2020 and fixed for hearing on 16th November 2020, when it did not take off as parties or one of them was absent.

15. The Respondent's case was eventually heard on 23rd February 2021. Mr. DAVID WAKOLI WEKESA, the Respondent's Human Resources Manager testified on its behalf. He informed the Court that he joined the Respondent on 2nd March 2015 and was not an employee of the Respondent when the Claimant's employment was terminated. Parties thereafter filed and exchanged written submissions.

Analysis and Determination

16. From the pleadings, evidence and submissions of the parties, the issues that arise for determination are the following: –

- i) Whether the Claimant absconded duty, whether he resigned or was unfairly terminated;
- ii) Whether the Claimant is entitled to the remedies sought.

17. The Claimant has insisted that he did not abscond duty. That he was only absent on 6th July 2014, when he had sought permission from his Supervisor and agreed with his colleague, Mr. Achoki to cover for him. The Respondent on the other hand has averred that the Claimant absconded duty from 30th June 2014. That when he was contacted and reported on 7th July 2014, he insisted he could only work night shift as he would be attending classes during the day, a request that the Respondent rejected on grounds that it was not possible for the Claimant to do a night shift after attending class for the whole day without getting enough sleep.

18. The letter written by the Claimant on the 7th July 2014 which the Respondent avers it deemed as a resignation, is reproduced below –

“Dickson Omwoyo Okong’o

Phone No: 0716 375 886

P. O Box 630 – 40200, KISII

7th July 2014

To: Human Resource Office,

Bobmill Industries Limited

P. O Box 48876 – 00100

NAIROBI

Dear Sir/Madam

REF: REASON FOR ABSENTEEISM

I want to take this opportunity to be sorry for the inconvenience I caused the company for the absent I made of one day.

It was due to miscommunication with my fellow operator, Robert Achoki. He had promised me to work on that day so that the following day I compensate him.

I also wish to request the management to allow me work during night shift so that I have time for my classes during the day.

Hope and trust that you will consider my request. Thanks in advance.

Yours Faithfully,

SIGNED

Dickson Omwoyo Okong'o”

19. It is clear from the letter that the Claimant was only absent on 6th July 2014 and had asked his colleague to cover for him. It is further clear that the letter is not a resignation. The Claimant specifically uses the words “I also wish to **request** the management to allow me work during night shift ...”

20. The response of the Respondent to the letter is reproduced below –

23rd July 2014

REF: BIL/HR/TERMIN/PPT/14

DICKSON OMWOYO OKONG'O – P/No.: 483

P.O BOX 630

40200 KISII

Dear Dickson

RE: TERMINATION

We note that you have absented yourself from work from 30th June 2014 to date without permission from your Head of Section and/or HR office. You have written a letter to us on 7th July 2014 that you wish to pursue your studies. We have no objection and accordingly you are relieved from the services of this company.

Consequently, we are settling your dues by month end. You may collect your final dues at the end of July 2014.

SIGNED

GENERAL MANAGER”

21. There is no evidence that the Claimant was absent from work from 30th June 2014. No letter was written to the Claimant to ask his whereabouts or explain his absence. Pursuit of education is not a ground for termination of employment. It is also clear that the Claimant's letter only requested to be allowed to work night shift so that he could attend to his studies during the day.

22. If the Respondent did not wish to allow the Claimant to work night shift, all it needed to do was decline his request and let the Claimant chose whether to continue working day shift or abandon his job to pursue his studies. The Claimant was never given that opportunity.

23. From the foregoing, I find that the Claimant did not resign from employment.

24. The Respondent's witness testified that there were no minutes of a disciplinary hearing because there was no disciplinary offence by the Claimant deciding to pursue a course of his choice. It is clear from the Respondent's evidence that the Claimant was never subjected to a disciplinary hearing.

25. As provided in Section 45(2) of the Employment Act, a termination is unfair if the employer cannot prove either or both valid reason and fair procedure. In the instant suit, there was no hearing or valid reason. I therefore find the termination of the Claimant's employment unfair.

Remedies

26. The Claimant prayed for reinstatement. This is not available to him for several reasons. First, it is more than three years since he left employment. Secondly, he did not prove exceptional circumstances as required under Section 49(4) of the Employment Act. Lastly, he did not indicate his desire to be reinstated during the hearing.

27. The Claimant is entitled to pay in lieu of notice having been unfairly terminated. I award him the same at **Kshs.21,268/=**.

28. The Claimant prayed for maximum compensation. Taking into account the manner in which his employment was terminated and his length of service, I award him compensation equivalent to five months' salary at **Kshs.106,340/=**.

29. The Claimant prayed of general damages. He did not adduce any evidence to justify the award of general damages in addition to compensation for unfair termination. The prayer is **rejected** as it was not proved.

30. **The Respondent is directed to issue a certificate of service to the Claimant.**

31. **I therefore award the Claimant a total of Kshs.127,608/=.**

32. **The Claimant having been unrepresented, is awarded costs assessed by the Court at Kshs.20,000/= to cover reasonable expenses and disbursements associated with prosecution of the suit.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF DECEMBER 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE