



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1422 OF 2016

JOHN MUTINDA MULA CLAIMANT

VERSUS

WINDSCREEN WAREHOUSE LIMITED..... RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent from 10.2.2015 to 5.4.2016. He brought this suit 20.7.2016 contending that he was unfairly dismissed by the respondent and sought the following reliefs:-

a) **A declaration that the claimant's dismissal was irregular, unlawful, unfair, wrongful, procedural without cause or Justification and in breach of the Employment Act.**

b) **Salary underpayments at Kshs. 9,159,80/-**

c) **Notice pay at Kshs. 13,704,60/-**

d) **Four unpaid working days at Ksh.2,108,40/-**

e) **Service/gratuity pay for the period of employment at Ksh.7,906.50/-**

f) **Compensation for unfair termination at Ksh. 94,878.00/-**

g) **Payment in lieu of untaken leave at Ksh. 13,704.60/-**

h) **General damages for breach of contract and wrongful dismissal.**

i) **Punitive damages for victimization of the claimant by the Respondent**

j) **Interest on (b) to (i) above.**

k) **Certificate of service**

l) **Costs of this suit**

m) **Any other/further relief that the Honorable Court may deem fit to grant in the interest of justice.**

a) **The respondent filed defence on 30.8.2016 denying the alleged unfair dismissal of the claimant and averred that the claimant is the one who is the one who deserted work without prior notice from 1st – 5th April 2016. She therefore counter claimed against the claimant one month salary in lieu of notice being Kshs. 13000 per month.**

b) **Both parties tendered evidence and filed written submissions.**

2. The respondent filed defence on 30.8.2016 denying the alleged unfair dismissal of the claimant and averred that the claimant is the one who deserted work without prior notice from 1st to 5th April 2016. She therefore counterclaimed against the claimant's one month's salary in lieu of notice being Kshs. 13000 per month.

3. Both parties tendered evidence and filed written submissions.

Claimants evidence

4. The claimant testified as CW1 and basically adopted his written statement dated 19.7.2016 and produced the documents annexed to the claim as exhibits. In brief, he stated he was employed by the respondent as a fitter and his duties included repair of windscreens. He was not given any written contract but his daily wage was Kshs. 500 payable monthly in arrears. He was not given any leave and he used to work upto the evening.

5. He contended that on 5.4.2016, while going home in the evening he met his boss, an Asian and requested for salary increase. The boss was not pleased and he told him not to report back to work again. No dues were paid to him after the termination and he prayed for the reliefs sought in the suit.

6. He contended that the termination was unfair because his request for salary increase did not warrant dismissal and no hearing was afforded to him. He further denied the alleged desertion and maintained that he was dismissed. He further contended that after the dismissal he sought assistance from the union and served demand letter through Ministry of Labour.

Defence case

7. Mr. Michael Njuguna is the respondent's Human Resource Manager and he testified as RW1. He joined the company in June 2017 and he adopted his written statement dated 2.6.2018 as his evidence. He confirmed that he only knew the claimant through records in the office. He stated that the said records indicated that the claimant absconded duty from 1.4.2016 to 5.4.2016 and gave no reason for his absence. He referred to the letters by Mr. Dalmas Onyango and Mr. Prakash Murji dated 17.5.2016 which indicated that the claimant absconded duty between 1.4.2016 and 5.4.2016. He confirmed that the claimant was earning Ksh. 500 per day and Kshs. 130000 per month. He therefore prayed for one month salary in lieu of notice because the claimant deserted work without serving any prior notice. He admitted that the claimant was never served with any show cause letter warning him that he would be dismissed for absconding. He further admitted that the claimant was never taken through disciplinary hearing before the separation. He admitted also that there was no written contract.

Issues for determination

8. There is no dispute that the claimant was employed by the respondent from 10.2.2015 to April 2016. The issues for determination are:

- (a) Whether he deserted employment or he was unfairly dismissed.
- (b) Whether the claimant is entitled to the reliefs sought
- (c) Whether the counterclaim should be allowed.

Desertion or unfair dismissal

9. The claimant's case is that he was dismissed by his boss for requesting for salary increase because he was being underpaid. The respondent's case is that the claimant deserted work from 1.4.2016. I however find that the contention by the respondent not substantiated. No evidence was tendered by the respondents officers who were present when the claimant allegedly deserted work. The respondent also never produced attendance records to prove that the claimant deserted work from 1.4.2016.

10. The only records produced by RW1 were letters dated 17.5.2016 addressed to "*whom it may concern*" alleging that the claimant deserted work. That evidence in my view, was in reaction to demand letters from the trade union and claimant's lawyer's dated 12.4.2016 and 28.4.2016 respectively. Considering the evidence tendered, especially the demand letters, I find that the claimant has proved on a balance of probability that he was dismissed by the respondent on 5.4.2016.

11. Under section 45 (2) of the Employment Act, termination of the employee's services, is unfair if the employer fails to prove that it was grounded on valid and fair reasons related to the employee's conduct capacity and compatibility or based on the employer's operational requirement and that fair procedure was followed. In this case the claimant contended that the reason for dismissal was because he requested for salary increment. He further contended that he was not accorded hearing before the dismissal.

12. RW1 never denied the foregoing allegations by the claimant. He also never made any effort to justify the dismissal or to prove that the claimant was accorded a hearing. Consequently, I return that the dismissal of the claimant on 5.4.2016 was unfair within the meaning of section 45 of the Employment Act.

Reliefs

13. In view of the foregoing, I make declaration that the claimant's dismissal was irregular, unlawful, unfair, wrongful, and in breach of the Employment Act.

14. Accordingly, I award the claimant salary in lieu of notice plus two months salary compensation for unfair dismissal based on the minimum wage under the relevant General Wage Order. In awarding the compensation, I have considered the fact that the claimant worked for only one year, but also the fact that he did not contribute to the dismissal through misconduct.

15. I award him salary for the 4 days worked in April 2016 as prayed. I also award him service pay for one year at the rate of ½ salary. I also award him 21 days leave per year for the days worked.

16. I, however, dismiss the claim for General damages for breach of contract. I further dismiss the claim for punitive damages for victimization. The said claims lack any basis in law.

17. The claim for Certificate of Service is granted because it is a right under section 51 of the Employment Act.

Counterclaim

18. In view of the finding that the respondent did not prove that the claimant deserted work without notice, I dismiss the counter claim.

Conclusion and disposition

19. I have found that the claimant was unfairly dismissed by the respondent. I therefore enter judgment for the claimant as follows based on the minimum wage of Kshs. 527.10 and Kshs. 13704.60 as prayed.:-

NoticeKsh. 13704.60
CompensationKshs.27409.20
4 days salaryKshs. 2108.40
Service pay.....Kshs. 7906.50
24. 5 leave daysKsh.12913.95
TOTALKsh. 64042.65

The said sum is subject to statutory deductions but in addition to costs and interest at court rates from the date hereof.

Dated, signed and delivered in open court at Nairobi this 24th day of January, 2020.

ONESMUS MAKAU

JUDGE