



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA

CAUSE NUMBER 413 OF 2017

BETWEEN

FREDRICK OTIENO ODUOR.....CLAIMANT

VERSUS

KENYA MARINE CONTRACTORS [EPZ] LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Okanga & Company, Advocates for the Claimant

Mwakireti Ndumia & Company, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 15th May 2017. He states, he was employed by the Respondent as Plate Yard Foreman on 29th December 2009. His contract was terminated by the Respondent unfairly, on 17th February 2015. His last salary was Kshs. 33,648 monthly. He was not given a hearing. There was no reason given justifying termination. He was not paid terminal benefits. He prays for Judgment against the Respondent for:-

- a. 1 month salary in lieu of notice at Kshs. 33,648.
- b. Salary for the month of March 2015 at Kshs. 33,648.
- c. 12 months' salary in compensation for unfair termination at Kshs. 403,776.

Total....Kshs. 471,072.

- d. Costs.
- e. Interest.
- f. Any other suitable relief.

2. The Respondent filed its Statement of Response on 5th September 2017. Its position is that the Claimant was employed on casual terms, between 29th December 2009 and 9th June 2010, a period of 6 months. Thereafter, he was employed on short term contracts. The last expired on 31st March 2015. He was summarily dismissed by the Respondent, after he unilaterally extended his annual leave. He did so to avoid arrest, having been involved in theft of Respondent's welding machine valued at Kshs. 82,170. He returned on 16th February 2015, and was arrested after interrogation. He was charged and the criminal case was still pending in Court, at the time of filing the Statement of Response. He was paid terminal benefits comprising salary for January 2015 at Kshs. 33,648, 17 days' salary for the period between 1st February 2015

and 17th February 2015 at Kshs. 19,562, and 13 days of pending annual leave at Kshs. 15,167. He did not work in the month of March 2015. The Respondent prays the Court to dismiss the Claim with costs.

3. The Claimant gave evidence on 30th July 2019. Respondent's Security Manager Benard Ogoe gave evidence on the same date, as did in part, Personnel Officer Damaris Mwelu. The latter completed giving evidence on 4th November 2019, closing the hearing.

4. The Claimant told the Court he was employed for 1 year initially. He was placed on different 3 months' contracts thereafter. He affirmed his last monthly salary was Kshs. 33,648.

5. He was alleged to have gone on leave without permission. His Grandmother was ailing. He was granted 4 days' leave by the Manager. His Grandmother died. He asked for extension of 10 days. The Manager granted extension, advising the Claimant to fill the leave form on return. When the Claimant reported back, he was arrested, and told he was involved in theft of Respondent's machine. He was charged and placed in custody at Shimo La Tewa Prison. He was set free on bail. He was handed the letter of termination when he reported back upon release. He was told he had absented himself without the leave of the Respondent. He was charged in Mombasa Chief Magistrate's Criminal Case Number 313 of 2015. He was acquitted. He was not heard at the workplace.

6. On cross-examination, the Claimant told the Court he worked from December 2009 to February 2015. Termination was on the ground that the Claimant was absent without leave. Leave form, dated 17th February 2015, was not signed by the Human Resource Officers. The Claimant did not agree that his leave was unauthorized. He was told at the Police Station that the welding machine was missing. He used the machine. He used to take care of it. He did not take custody of the machine, but took care of it. The criminal case collapsed because the Respondent did not avail Witnesses. He was not tried in full and declared innocent. Acquittal was in the year 2018. The Claimant signed acknowledgment on receipt of terminal dues.

7. Redirected, the Claimant told the Court the reason stated on the letter of termination was that he was absent without the leave of the Respondent; it was not that he stole Respondent's welding machine.

8. Ogoe told the Court that the Claimant was one of Respondent's Supervisors, in the welding department. The Respondent deals with ship maintenance. There was a ship under repair at the material time. The Claimant was one of the Employees assigned the task at African Marine shipyard. After 2 weeks, the task was completed. One welding machine, assigned to the Claimant, was not returned. He was the Supervisor, and overall in-charge of the working tools.

9. Ogoe called the Claimant who explained that, he brought the welding machine back to Respondent's premises, using his personal vehicle. He was not able to give the registration number of the car, but insisted that the welding machine was at Respondent's premises. He promised to avail the registration number of the car, but did not. Ogoe reported the matter to the Police. The Police Officers investigated, and confirmed the machine was not at Respondent's premises. After leave of 4 days granted to the Claimant expired, he was not traceable. Police advised the Claimant reports to their Station, when he returned. He returned on 17th February 2015. He did not avail registration number of the car he used to transport the machine. The Claimant was arrested and charged. Ogoe was not aware of the outcome of the criminal case. He was dismissed for extending his leave, and secondly, for stealing the welding machine.

10. Mwelu confirmed that the Claimant was employed by the Respondent. He applied for 4 days' leave and was to return to work on 5th February 2015. He did not. He extended leave without authorization. He returned on 17th February 2015, explaining that a relative had died. He was questioned on the welding machine. He was arrested and arraigned in Court. Mwelu told the Court that the criminal case is still pending in Court. The Claimant was paid his terminal dues. The Claimant signed Clearance Certificate. He did not work in March 2015. He received his Certificate of Service.

11. Cross-examined, Mwelu told the Court she serves as Personnel Officer, not Human Resource Manager. She confirmed that the Claimant was summarily dismissed, for extending leave. He was arrested on 17th February 2015, when he returned to work. He was invited for disciplinary hearing on 17th February 2015, but did not turn up. Redirected, Mwelu reiterated that the Claimant did not work in March 2015. The Claimant himself states this, at paragraph 8 of his Statement of Claim.

The Court Finds:-

12. The Claimant worked for the Respondent Marine Company, between 29th December 2009 and 17th February 2015.

13. He worked on a contract of 1 year initially, and 3 months' contracts later. He worked in continuity.

14. His last salary as captured in his last contract dated 1st January 2015, was Kshs. 33,648 monthly.

15. He was summarily dismissed by the Respondent, through a letter dated 17th February 2015. The Respondent states in the letter, that the Claimant applied for and was allowed 4 days' leave, expected to report back on 5th February 2015. He did not report back as scheduled. He was dismissed specifically under Section 44 [4] [a] of the Employment Act, for being absent without leave of the Employer, or other lawful cause.

16. There is no other reason given in the letter of summary dismissal. The evidence about a stolen welding machine, the criminal trial and acquittal of the Claimant, are in the view of the Court not relevant to termination. A specific reason is stated in the letter of summary dismissal, as affording justification to the Respondent for its decision. The Court must confine itself to this reason, and answer these questions: whether this was a valid termination reason; whether the decision was executed fairly; and whether the Claimant merits the

remedies sought.

17. It is common ground that the Claimant asked for 4 days of leave to attend to his ailing Grandmother. He did not return at the end of the 4 days. He left on 31st January 2015, and was to return on 5th February 2015. His leave application form is exhibited.

18. He explained that his Grandmother died, compelling him to extend his leave. He called his Head of Department seeking extension. He was granted extension, and advised to fill the form, on return. When he returned he was instead arrested by the Police, and summarily dismissed by the Respondent.

19. The Claimant did not provide proof that his Grandmother died; that it was necessary to extend leave; and importantly, that he sought and was granted extension through phone, by his Head of Department.

20. The extension was in the nature of absence without the leave of the Employer, amounting to gross misconduct punishable through summary dismissal, as was punished by the Respondent, under Section 44 [4] [a] of the Employment Act.

21. The death of the Claimant's Grandmother, if communicated to the Respondent, and instructions given by the Head of Department that the Claimant extends his leave to bury her, could have resulted in lawful cause. The problem the Court has with Claimant's explanation, is that he did not establish that his Grandmother died while he was on leave of 4 days granted by the Respondent, and that he was compelled to stay on, extend the days, until she was buried. He ought to have supplied the Court with evidence of his Grandmother's death, and of his communication with his Head of Department, where extension was approved. He did not disclose when his Grandmother died and when he asked for extension. He does not appear to have communicated anything to the Respondent in writing, about his extended stay at home. In particular, nothing seems to have passed on to Mwelu and her team at Human Resource Department, concerning the leave extension.

22. Without this evidence, the Court can only conclude that the extension of leave by 10 days, was absence without leave of the Employer, or other lawful cause.

23. Summary dismissal was justified under Sections 43, 44[4] [a] and 45 of the Employment Act. It was fair on this count.

24. Was it carried out in accordance with Sections 41 and 45 of the Employment Act? The Claimant availed himself on 17th February 2015. The Respondent did not confront him with any charges. He was not asked to show cause, why he should not be disciplined, for his prolonged unauthorized absence, or even for involvement in loss of the welding machine. Instead the Respondent simply called in the Police. The Claimant was arrested, arraigned, bailed, tried and subsequently acquitted. There was adequate opportunity for the Respondent to investigate the allegations against the Claimant, and take him through a process of disciplinary hearing, before summarily dismissing him. He returned to work after his absence, and was available after he was released from Shimo La Tewa Prison. The Respondent did not initiate disciplinary hearing.

25. The Claimant was not accorded a fair process, as required under Sections 41 and 45 of the Employment Act. To this extent, termination was unfair.

26. Notice is not payable as the Respondent has established the Claimant was involved in an act of gross misconduct, which warranted summary dismissal under Section 44 [4] of the Employment Act.

27. Compensation is merited under Section 49 of the Employment Act and Section 12 of the Employment and Labour Relations Court Act.

28. In what measure? The Claimant worked for a period of 5 years and about 2 months. He was a Supervisor, designated as Plate Yard Foreman. He worked under fixed term contracts, which were renewed after expiry. They were renewed from 2009 to 2015 without fail. The circumstances of termination were largely, of the Claimant's own making. He extended his leave, without clear authorization of the Respondent. He was paid salary for January 2015, 17 days worked in February 2015, and 13 days of pending leave. Termination was fair on substance, but flawed on procedure. **He is granted equivalent of 5 months' salary, in compensation for unfair termination, at Kshs. 168,240.**

29. He, by his own pleading, left employment on 17th February 2015. His letter of summary dismissal, exhibited by the Claimant is clear termination took effect on 17th February 2015. He was paid salary up to this date. What is the rationale for his prayer for salary for the month of March 2015? The prayer is declined.

30. No order on the costs and interest.

IN SUM, IT IS ORDERED:-

a. Termination was unfair on procedure.

b. The Respondent shall pay to the Claimant equivalent of 5 months' salary in compensation for unfair termination at Kshs. 168,240.

c. No order on the costs and interest.

Dated and delivered at Mombasa this 27th day of February 2020.

James Rika

Judge