



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

CAUSE NO. 1753 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

DAVID MAKORI ONGERI.....CLAIMANT

VERSUS

AUTOLITHO LIMITED.....RESPONDENT

JUDGMENT

Vide his statement of claim dated and filed in Court on 30th September, 2015, the claimant avers that his employment was unlawfully and unfairly terminated by the Respondent, a registered limited liability company.

His case is that he was employed by the respondent on or about the year 2012 as a general worker earning a daily wage of Kshs.413/- which was equated to a monthly salary of Kshs.11,281/- inclusive of house allowance.

The Claimant further averred that his employment was confirmed to permanent and pensionable terms on 22nd October, 2014 following the successful completion of his probationary terms.

The Claimant contended that during the subsistence of his employment with the Respondent he worked diligently and to the Respondent's satisfaction. He further averred that between the dates 13th to 18th August, 2015 he had been following an assault case at the Embakasi Police Station, which occasioned him to be absent from duty.

The Claimant averred that on 19th August, 2015 he presented a letter from the OCS Embakasi Police Station to his supervisor, who in turn indicated that he would present the same to the Respondent's production manager. The Claimant averred that he was summoned on the same date and was ordered to leave the Respondent's work premises and report after 4 days. He further averred that he was not issued with any suspension letter despite requesting for the same.

The Claimant stated that on 28th August, 2015 he was summoned to report to work and informed to report back on 31st August, 2015 to collect his terminal dues.

The Claimant contended his termination was unlawful and unfair as the Respondent failed to comply with the mandatory provisions of Section 41 of the Employment Act, 2007.

In the memorandum of claim, the claimant seeks the following reliefs:-

a. A declaration that the Respondent's action in dismissing the Claimant from employment was unlawful and unfair.

b. The sum of Kshs.157,934/- particularized below:

- | | |
|--------------------------------------|-------------|
| i. Salary for August, 2015 | Kshs.11,281 |
| ii. 1 month salary in lieu of notice | Kshs.11,281 |
| iii. 12 months' salary for unfair | |

termination (Kshs.11,281 x 12) Kshs.135,372

Total Kshs.157,934

c. Certificate of Service.

d. Costs of this Suit.

e. Interest on the amount awarded at Court rates.

The Respondent in its Memorandum of Reply dated 16th December, 2015 and filed in Court on 17th December 2015 admits having engaged the Claimant herein. It however denies that the Claimant performed his duties diligently and to its satisfaction as contended by the claimant.

The Respondent avers that the Claimant's services were terminated due to indiscipline and absenteeism. The Respondent further avers that it did adhere to the provisions of the Claimant's employment contract and the law in terminating his services.

The Respondent contends that the Claim as filed is bad in law, is defective and an abuse to the Court process. It urged this Court to dismiss the same with costs to the Respondent.

The matter proceeded for hearing on 16th January, 2018 and 11th February, 2019 when the Claimant testified on his own behalf and the Respondent called one witness to testify on its behalf. The parties thereafter filed and exchanged written submissions.

Claimant's Case

The claimant testified that he was attacked by thugs who were known to him on 17th August 2015 and was treated at Riverside Medical Clinic. That he reported the incident at the police station and was issued with a P3.

The claimant testified that he sought permission from the Respondent to follow up on the case at the police station. He testified that he was given a day off but was not issued with any documentation to that effect.

He stated that when he reported back to the Production Manager he was told to go back home and was later terminated. That he was not paid any dues at separation despite asking for the same from the Respondent.

On cross examination the claimant conceded that his salary for August 2015 was paid.

He stated that the termination letter issued to him by the Respondent was dated 2nd September 2015 within his contract period.

On re-examination the claimant insisted that he was given permission to be off duty to attend to his assault case by the Respondent's Production Manager. He further stated that his services were terminated on 2nd September, 2015.

Respondent's Case

RW1, GEOFFREY PAUL NYOIKE, a supervisor of the Respondent testified on its behalf. He adopted his witness statement dated 29th October 2018 and filed in Court on 30th October 2018 as his evidence in chief. In his statement RW1 reiterated the averments made in the Respondent's Memorandum of Reply.

RW1 testified that the Claimant was a habitual absentee as he failed to attend to work on 3rd August 2015, 5th August 2015, 17th August 2015 and 18th August 2015. He further testified that the Claimant stated that the reason for his absence was to attend to an assault case filed by himself.

RW1 that the Claimant's termination was due to his indiscipline.

On cross examination RW1 stated that the Claimant had worked for the Respondent for about 1 year without any complaints against him except in August 2015 when he was absent for 4 days.

RW1 stated that the reason for the claimant's absence as given by the Claimant was that he had an issue he was following up at the police station. RW1 stated that the Claimant's services were terminated for indiscipline.

RW1 testified that prior to his termination, the Claimant was given a chance to explain himself but failed to do so.

Submissions by the Parties

It is submitted on behalf of the Claimant that his termination was unlawful, unfair and wrongful as the respondent failed to follow the mandatory procedure provided for under Sections 41 and 43 of the Employment Act, 2007. The Claimant relied on the Authority of **David Gichana Omuya Vs Mombasa Maize Millers Limited (2004) eKLR.**

The Claimant submitted that the Respondent had no valid reason for terminating his services as it failed to adduce any evidence to support its reason of indiscipline which was cited as the reason for the Claimant's termination.

The Claimant further submitted that his termination was both substantively and procedurally unfair and therefore he is entitled to the reliefs sought in his Statement of Claim.

Having submitted that his termination was unfair and un-procedural the Claimant argued that he is entitled to compensation as provided under Section 49 of the Employment Act, 2007.

The Claimant urged this Court to allow the Claim as prayed.

Respondent's Submissions

The Respondent on the other hand submitted that it had a valid reason to terminate the Claimant's services as he absconded duties on four consecutive days and on his return was rude and demanded payment of his salary for August 2015 which was duly paid.

The Respondent further submitted that the Claimant having absconded lawful duties is not entitled to any of the reliefs sought in his Statement of Claim the same having no legal or factual basis.

The Respondent urged this Court to dismiss the Claim in its entirety with costs to the Respondent.

Analysis and Determination

I have considered the facts of this cause, evidence, submissions and authorities cited and find that the issues for determination are:

1. Whether the termination of the Claimant's employment was valid both procedurally and substantively
2. Whether the Claimant is entitled to the reliefs sought

The Law

Section 41 of the Employment Act provides for the procedure for termination while section 43 of the Employment Act provides that the employer must prove valid reason.

The statutory burden unfair termination of employment or wrongful dismissal is found in Section 47(5) of the Employment Act. The section provides that

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.

In the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** where the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

In the instant suit, RW1 stated under cross examination that there were no complaints against the claimant and that the claimant was only absent for 4 days in August 2015. He further stated that he was aware about the absence and that the reason was because the claimant had a case with the police.

He then went on to state that the claimant was terminated for indiscipline. According to RW1 the indiscipline was because the claimant was told to explain in writing where he was for two days and failed to do so, and started arguing saying he will not go home.

RW1 could not confirm that there was a disciplinary hearing or if it was there, what date it took place.

From the foregoing, I find that there was no valid reason for the termination as the respondent was aware of the claimant's absence and the reason for the absence. RW1 corroborated the claimant's evidence that he sought and was given permission to follow up on his assault case.

From the foregoing the termination was both procedurally and substantively unfair. I find and declare accordingly.

Remedies

Having found that the claimant's employment was unfairly terminated, he is entitled to notice which I award him at **Kshs.11,281** being his consolidated salary for one month.

The claimant prayed for salary for August 2015 but testified that he was paid the same after he filed this suit. He is thus not entitled to the same.

The claimant further prayed for compensation. Having been unfairly terminated he is entitled to the same. However, considering his length of service and the fact that his contract would have expired in November 2015, his prayer for maximum compensation is unreasonable. I award him 3 months' salary as compensation in the sum of **Kshs.33,843**.

The total award is Kshs.45,124.

The claimant will also be issued with a certificate of service. The respondent will pay claimant's costs of this suit and the decretal sum shall accrue interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF FEBRUARY 2020

MAUREEN ONYANGO

JUDGE