



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 913 OF 2017

STEPHEN KITHUKA MUTUKU.....CLAIMANT

VERSUS

SUPERIOR HOMES KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant brought this suit on 16.5.2017 seeking the following reliefs against the respondent:

a. Declaration that he had been unlawfully, unfairly and wrongfully dismissed from his employment.

b. The following damages:

i. Salary in lieu of noticeKshs. 14,612.00

ii. Housing allowanceKshs. 83,288.00

iii. Twelve month's compensationKshs. 175,344.00

c. Certificate of service

d. Costs and interest.

2. The Respondent filed defence on 12.7.2017 admitting that she employed the claimant as a General Worker since 2.2.2013 but denied the alleged unfair, unlawful or wrongful dismissal of the claimant from his employment. On the contrary she averred that she dismissed the claimant for absconding work and for negligent performance of his duties contrary to section 44 (a) and (c) of the Employment Act. She further averred that the claimant was given an opportunity to defend himself by being served with a show cause letter but he refused to do so and indicated that he no longer wished to work for her. Finally, the respondent averred that after the summary dismissal of the claimant, she paid him all his terminal dues and as such she prayed for the suit to be dismissed with costs.

3. On 24.9.2018, the parties agreed to dispense with oral hearing and instead opted to rely on their pleadings, written statements and documents on record and file written submissions to dispose of the suit. The claimant filed his submissions on 7.10.2019 but the respondent did not.

Claimant's case

4. The Claimant's written statement was on 16.5.2017 together with his Memorandum of Claim. He stated that the respondent employed him as a General Worker at Green Park Estate on 2.2.2013 for Kshs. 12,000 per month. He further stated that he performed his duties diligently and his salary was increased to Kshs. 14,612 per month. On 6.6.2016, he reported to work as usual and at 3.00 p.m. he was summoned to the office by the respondent's manager Ms. Judith Maroko and on arrival she told him that his performance was not good and he was therefore dismissed from employment.

5. The Claimant denied the alleged poor performance of his duties and contended that just before the dismissal, the respondent had dismissed many other employees and assigned him their duties. He denied ever being given an opportunity to respond to the allegation of poor performance and maintained that his dismissal was unlawful, unfair and wrongful.

6. As regards the reliefs sought, he contended that he was only paid salary for the days worked and the outstanding leave days and therefore prayed for the reliefs sought. He contended there was no agreement between him and the respondent that his salary was consolidated. He filed as exhibits payslips, leave sheet and NSSF statements.

Defence case

7. The Respondent relied on the witness statement dated 12.6.2017 written by Mr. Gerald Kimongo. The statement is made up of one paragraph and it states that the claimant was summoned to the Human Resource Office on 8.6.2017 to explain the reason for not being at his designated place of work and he responded that he did not wish to continue with his employment. Mr. Kimongo further stated that the claimant went ahead and handed over his protective equipment to the stores department and cleared with the company.

8. The Respondent filed as exhibits, show cause letter dated 9.6.2016, leaver's statement dated 4.7.2016.

Issues for determination

9. I have carefully considered the pleadings, evidence and submissions filed. I see no dispute in the fact that the claimant was employed by the respondent on 2.2.2013 as a General Worker and worked until 6.6.2016 when he was dismissed for absconding duty and negligent performance of his duties. The main issues for determination are:

- a. Whether the alleged grounds of termination were valid and fair.
- b. Whether a fair procedure was followed.
- c. Whether the claimant is entitled to the reliefs sought.

10. Under section 43 of the Employment Act, the employer has the burden of proving the reason for the termination in any legal proceedings where the employee challenges the termination and in default the termination is deemed unfair within the meaning of section 45 of the Act. The said section requires that the reason for the termination must relate to the employees conduct, capacity and compatibility or based on the employer's operational requirements.

11. In this case, the claimant denied any wrongdoing and contended that he was made to perform duties of several employees who had been dismissed by the respondent. The Manager who dismissed him did not file any statement to support the allegations in the respondent's defence and to discharge the said burden of proof. The only statement filed was by Gerald Kimongo whose designation was not indicated. All what he alleged was that the claimant was summoned to the Human Resource office to explain his absence from his work station and that later the claimant handed over his protective gear to the stores. He did not explain whether he was present in the Human Resource's office or at the store. The statement was also written before the suit was filed.

12. I have also read the show cause letter and noted that it was purportedly written on 9.6.2016 referring to an incidence of 8.6.2016 and endorsed that the claimant was served on 6.6.2016 and refused to sign. The said letter corroborates the claimant's evidence and pleadings that he was summoned to the Human Resource office on 6.6.2016 and not on 8.6.2016 as alleged by Gerald Kimongo and paragraph 5 of the defence. In view of the above I find that the respondent has not proved on a balance of probability that the claimant absconded duty and negligently performed his duties. It follows therefore that she has failed to discharge the burden of proving a valid and fair reason for dismissing the claimant as required under section 43 and 45 of the Employment Act.

Fair Procedure

13. Under section 41 of the Act, an employer must accord his employee an opportunity to defend himself before terminating his services for misconduct, poor performance or physical incapacity. In this case the Human Resource Officer who allegedly summoned the claimant to explain his misconduct did not give evidence herein and no other persons gave evidence to prove that the claimant was indeed accorded a disciplinary hearing. Consequently, I find and hold that the respondent did not prove that she followed a fair procedure before dismissing the claimant for the alleged offence.

Reliefs

14. In view of the finding that the respondent has failed to prove a valid and fair reason for dismissing the claimant and, that a fair procedure was followed, I make a declaration that the dismissal was unlawful, unfair and wrongful as prayed.

15. Flowing from the foregoing declaration, the claimant is entitled to salary in lieu of notice plus compensation for unfair termination, under section 49 of the Employment Act. However, I decline to award him any monetary relief because he signed a Leavers Statement by which he acknowledged that he had received all his final dues and benefits from the respondent and that he had no other outstanding claims against the respondents whatsoever.

16. In **Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR** the Court of Appeal set aside an award made under section 49 of the Employment Act on the basis of settlement executed by the employee upon separation and expressed itself as follows:-

“In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondent's termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity

of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent's part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties..."

17. On the same ground, the claim for house allowance falls on its face.

18. The claim for certificate of service is allowed. Each party shall bear its own costs.

Dated, signed and delivered in open court at Nairobi this 13th day of March, 2020.

ONESMUS N. MAKAU

JUDGE