



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO 111 OF 2018

LAWRENCE SIFUNA WEKESA.....CLAIMANT

VS

SALSAM ENTERPRISES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant in this case, Lawrence Sifuna Wekesa was an employee of Salsam Enterprises Limited. His claim before the Court is for compensation for unlawful termination of employment and payment of terminal benefits.
2. The claim is captured in a Memorandum of Claim dated 1st March 2018 and filed in court on 2nd March 2018. The Respondent filed a Response on 24th April 2018.
3. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Operations Manager, Henry Kiptum Chirchir. The parties also filed written submissions.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent on 28th October 2014 as a Motor Vehicle Electrician. He worked as such until 31st January 2017 when his employment was terminated. At the time of termination, the Claimant earned a monthly salary of Kshs. 25,000.
5. The Claimant avers that the termination of his employment was without any just cause and was in violation of due process. He adds that he was issued with a termination letter on unfounded and unproved allegations of poor performance.
6. The Claimant states that the Respondent did not give him any explanation and did not avail him an opportunity to respond to the allegations.
7. The Claimant therefore deems the termination to have been unlawful and unfair and now claims the following:

- a) One month's salary in lieu of notice.....Kshs. 25,000

b) 12 months' salary in compensation.....	300,000
c) Rest days.....	65,000
d) Public holidays.....	13,750
e) House allowance.....	135,000
f) Gratuity.....	37,500
g) Certificate of service	
h) Costs plus interest	

The Respondent's Case

8. In its Response dated 19th April 2018 and filed in court on 24th April 2018, the Respondent admits having employed the Claimant as a Motor Vehicle Electrician on 8th October 2014.

9. The Respondent however denies terminating the Claimant's employment without any just cause and in violation of due process.

10. The Respondent states that the Claimant was accorded an explanation as to the reasons why his services were being terminated, key among them being incompetence and gross misconduct.

11. The Respondent cites the following particulars of incompetence and gross misconduct on the part of the Claimant:

a) Exhibiting poor workmanship on 10th December 2016 while working on motor vehicles KCA 516U and KCA 512U. After completion of the work, the vehicles left but along the way all the tail lamps fell and were crushed which led to the Claimant being reprimanded;

b) Exhibiting poor workmanship on 7th December 2016 while working on motor vehicle KBW 354T and KCA 512U. After replacement of the tail lamps, the brake lights failed on the way leading to the arrest of the vehicle at Makindu again leading to the Claimant being reprimanded and warned;

c) Exhibiting poor workmanship on 22nd November 2016. The Claimant replaced both the headlights and tail lamps/brake lights for motor vehicle KBJ 514T which later failed on the way. This forced the Company to hire another wiring person to fix the lights. The Claimant was again reprimanded and warned;

d) Exhibiting poor workmanship on 29th October 2016 while working on motor vehicle KCA 516U. After replacement of the headlight it failed on the way leading to the arrest of the vehicle at Naivasha again leading to the Claimant being reprimanded and warned;

e) On 2nd September 2016, the driver of motor vehicle KBV 421V noted a problem with the starter. Upon assessment, the Claimant took Kshs. 11,000 from the Company to buy a spare part to repair the starter. He later on came with the starter having the same problem with no improvement. He also failed to produce the receipt of the spare part he claimed to have bought and fixed in the starter.

f) Exhibiting poor workmanship on 5th August 2016 while working on motor vehicle KBV 712C. After replacement of the tail lamps they failed leading to the Claimant being reprimanded and warned;

g) Exhibiting poor workmanship on motor vehicle KBW 506E forcing the

Company to hire another electrician to repair break lights at Eldoret on 25th July 2016. This also led to the Claimant being reprimanded and warned;

h) Exhibiting poor workmanship on 30th June 2016 while working on motor vehicle KCA 506E. After replacement of the tail lamps they got lost on the way due to poor fitting again leading to the Claimant being reprimanded and warned;

i) Being rude to superiors and refusing to be supervised.

12. The Respondent further states that the Claimant, who was resident at the Company Yard would often leave during working hours without notifying the office and when called on phone, he would not respond.

13. The Respondent maintains that the termination of the Claimant's employment was in line with Section 45(2) and (5) of the Employment Act since the reasons for it were valid and fair and related to the employee's conduct and compatibility.

14. The Respondent adds that the Claimant was given a loan of Kshs. 25,000 which, together with the cost of lost accessories, were deducted from his notice pay.

Findings and Determination

15. There are two (2) issues for determination in this case:

a) Whether the termination of the Claimant's employment was lawful and fair;

b) Whether the Claimant is entitled to the remedies sought.

The Termination

16. The Claimant's employment was terminated by letter dated 31st January 2017 stating as follows:

"Dear Lawrence

Termination of your employment

With great regret I have to inform you that your employment agreement with Salsam Enterprises as from today 31st January 2017 stands terminated on account of the following reasons:

- For poor performance.*
- For not cooperating with your immediate Supervisor.*

We consider that your actions constitute serious misconduct warranting summary dismissal.

Please note that the loan given and accessories for KCA 512U & KCA 516U lost will serve as notice compensation.

Yours sincerely,

General Manager

SALSAM ENTERPRISES"

17. According to this letter, the Claimant's employment was terminated on account of poor performance and misconduct. Both accusations, if proved, would be valid grounds for terminating employment.

18. With regard to poor performance, an employee should be made aware of their shortcomings and allowed reasonable opportunity to improve (see *Kenya Science Research International Technical and Allied Workers Union (KSRTAWU) v Stanley Kinyanjui and Magnate Ventures Ltd Cause No 273 of 2010*))

19. If the employee does not improve and the employer decides to terminate employment on this ground, then the employee is entitled to a capability hearing within the confines of Section 41 of the Employment Act.

20. Similarly, in cases of gross misconduct, the employee is entitled to prior notification of the exact charge(s) accompanied with adequate opportunity to prepare and present their defence.

21. In its Response, the Respondent sets out a litany of accusations of poor performance and misconduct against the Claimant.

22. There was however no evidence that any of these charges were presented to the Claimant for his response, prior to the termination of his employment.

23. Indeed, the Respondent's Operations Manager, Henry Kiptum Chirchir, who was the Claimant's immediate supervisor, told the Court that he did not issue the Claimant with any warning letter nor did he call the Claimant to any meeting to discuss the Claimant's performance.

24. In the result, I find and hold that none of the allegations levelled against the Claimant were tested at the shop floor and the ensuing termination was therefore unfair within the meaning of Section 45 of the Employment Act.

Remedies

25. I therefore award the Claimant five (5) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondent's unlawful conduct in terminating the Claimant's employment.

26. In the termination letter and also in its Response, the Respondent admits having appropriated the Claimant's notice pay in settlement of an alleged outstanding loan balance as well as a surcharge of motor vehicle accessories allegedly lost through the Claimant's carelessness.

27. The Claimant, while admitting having taken a loan from the Respondent, testified that he had fully repaid the said loan. The Respondent did not adduce any evidence to support the alleged outstanding loan balance of Kshs. 25,000.

28. Further, in light of the finding that the charges of poor performance and misconduct were not proved, there was no legal basis for the Respondent to make any recoveries on account accessories allegedly lost through the Claimant's carelessness.

29. Overall, I find and hold that the Respondent's action of appropriating the Claimant's notice pay was unlawful. I therefore allow the claim for one (1) month's salary in lieu of notice.

30. In response to the claim for house allowance, the Respondent states that the Claimant was housed. The Claimant himself told the Court that he was housed by the Respondent for only three months, after which he moved out of the Respondent's premises and rented a house. The Claimant did not however tender any documents to support his assertion in this regard. The claim for house allowance is therefore disallowed.

31. The claims for rest days and public holidays were not proved and are dismissed.

32. In similar fashion, no basis was established for the claim for gratuity which also fails.

33. In the end, I enter judgment in favour of the Claimant in the following terms:

a) 5 months' salary in compensation.....Kshs. 125,000

b) 1 month's salary in lieu of notice.....25,000

Total.....150,000

34. This amount will attract interest at court rates from the date of judgment until payment in full.

35. The Claimant is also entitled to a certificate of service plus costs of the case.

36. Orders accordingly.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 21ST DAY OF MAY 2020

LINNET NDOLO

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, this judgment has been delivered to the parties electronically, with their consent. The parties 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, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

LINNET NDOLO

JUDGE Appearance:

Mr. Jumbale for the Claimant

Mr. Thuku for the Respondent