



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1694 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

WILLY KANUNA.....CLAIMANT

VERSUS

CAPITOL LAUNDRY LIMITED.....RESPONDENT

JUDGMENT

Vide his statement of claim dated 18th September 2015 and filed in Court on 23rd September 2015, the claimant herein avers that his employment was wrongfully and unfairly terminated by the Respondent, a registered limited liability company. The Claimant further avers that the Respondent has wrongfully and unfairly withheld his dues.

His case is that he was verbally employed by the respondent on or about May, 2013 in the position of Driver/Mechanic earning a monthly salary of Kshs.23,000.

The Claimant averred that during the subsistence of his employment contract with the Respondent he performed his duties diligently and to the Respondent's satisfaction until 7th April 2015 when he was denied access to the Respondent's premises after Easter Holidays purportedly on the grounds that he had been summarily dismissed.

The Claimant contends that at the time of his dismissal the Respondent without any justifiable cause had withheld his salary amounting to Kshs.20,500 for the month of March, 2015 as well as his tool box. He further contends that the Respondent despite making statutory deductions from his salary for NSSF and NHIF failed to remit the same to the said statutory bodies.

In his Memorandum of Claim the Claimant seeks the following reliefs:

- a) Kshs20,500 being the balance of his salary illegally withheld by the Respondent for the month of March 2015.
- b) Kshs.23,000 being one month's salary in lieu of notice
- c) Leave allowance for two (2) years not given
- d) General damages for loss of employment.
- e) The immediate release of the Claimant's toolbox illegally withheld by the Respondent.
- f) To be issued with certificate of service.
- g) Any other relief that this Court may deem fit and just to award.

The Respondent in its Statement of Defence and Counter Claim dated and filed in Court on 8th April 2016 admits having engaged the Claimant in 2013 as a motor vehicle mechanic as and when the need arose until the year 2014 when he was placed on probation and later confirmed on a permanent basis. The Respondent maintained that despite the permanent employment the Claimant was only engaged when there was a breakdown in any of the motor vehicles in its fleet.

The Respondent further averred that the Claimant's remuneration was not Kshs.23,000 per month as alleged as he was engaged on a contractual basis and was paid as per work done and not on a monthly basis.

The Respondent further denied that the Claimant performed his duties diligently as stated by the Claimant maintaining that the Claimant was a perpetual absentee, was incompetent and would at times steal the Respondent's properties. It is further averred that the Claimant carried out his duties negligently and consequently caused the Respondent to suffer loss and damages in the sum of Kshs.103,635 which it holds the claimant liable for.

The Respondent further contended that the Claimant's services were not unfairly terminated as alleged but rather he absconded duties and left his tool box at the Respondent's premises. The Respondent further averred that the Claimant would later resurface in May 2015 demanding payment of his salary yet the same was already paid.

The Respondent maintains that it did not withhold any salary as alleged by the Claimant and insisted that it did pay the Claimant all his dues for the days worked. It is further the Respondent's position that it did not withhold the Claimant's tool box insisting that the same is available for his collection at their premises.

The Respondent maintained that the Claimant has no sustainable claim against it and urged the Court to dismiss the instant claim with costs.

In its Counter claim the Respondent contends that on 1st April, 2014 it did assign the Claimant to carry out repairs on its Motor Vehicle Registration Number KAG 423B.

The Respondent averred that it did seek an opinion of another mechanic to inspect the said motor vehicle after it developed mechanical problems after the claimant repaired it who confirmed that the repair works carried out by the Claimant were faulty and defective thus occasioned it loss and damages for repair works in the sum of Kshs.103,635.

The Respondent therefore urged the Court to allow its Counter Claim as against the Claimant for the sum of Kshs.103,635/. The Respondent further prayed for costs of the Claim as well as for the Counter Claim together with interest thereon at Court rates.

Evidence

The suit proceeded for hearing on 2nd July, 2019 with the Claimant, testifying on his own behalf and the Respondent calling two witnesses to testify on its behalf.

Claimant's Case

The claimant testified that he was first employed by the Respondent in March 2013 in the position of mechanic on casual terms and was subsequently employed on permanent basis after 3 months.

He testified that on 7th April 2015 he was assigned to work on a Motor Vehicle KAG 423B that had stalled for about 3 weeks before Easter. He testified that he did repair the Motor Vehicle before handing the same to the driver after testing it. The Claimant avers that he later proceeded for Easter holiday.

That he was called and informed that the Motor Vehicle had developed mechanical problems.

The Claimant avers that when he resumed duties he was informed that the Motor Vehicle had already been repaired and that the Respondent did not require his services.

The claimant testified that the Respondent's contention of negligence in his duties is not true. He testified that he was never given a hearing or notice prior to his termination.

He testified that he was not paid his salary for March 2015 to date. He also stated that he did not proceed for any leave for the entire period he worked for the Respondent.

He further averred that at the time of his separation with the Respondent he discovered that the Respondent did not remit his NSSF and NHIF contributions as required by law despite the fact that it made deductions for the same. He produced his NSSF statement printed on 28th May 2015.

The claimant urged the Court to allow his Claim as prayed.

On cross examination, the claimant confirmed that he was engaged by the Respondent in 2013 and prior to that he was engaged on a casual basis. He maintained that he was paid a salary as evidenced by the Bank statement that confirmed he was paid a salary regularly by the Respondent from 12th November 2014.

On further cross examination the claimant testified that the repair works carried out on Motor Vehicle KAG 423B were done in a professional manner and that he handed over the vehicle after testing it and it was in good condition before he proceeded for Easter holidays.

The claimant stated that he reported back to work on 7th May 2015 and after 4 days his services were unfairly terminated for the faulty

engine without any notice or hearing.

Respondent's Case

RW1, MOHAMED IQBAL, a mechanic adopted his witness statement dated 8th April 2016 as his evidence in chief. In brief RW1 in his statement stated that he was contracted by the Respondent sometime in April 2015 to carry out repair works on motor vehicle Registration Number KAG 423B.

He further stated that on checking its engine he realized that the same had been overhauled and even noticed new engine parts. That the engine was however wrongly mounted and as a result it knocked.

RW1 further stated that he was paid to do a complete overhaul on the said motor vehicle at a cost of Kshs.55,000 inclusive of his labour charges.

RW2, PETER KIPKEMBOI SAMOEI, the Respondent's General Manager adopted his witness statement dated 8th April 2015 adopted as his evidence in chief. In his statement RW2 stated that the Respondent engaged the Claimant on a permanent basis in the year 2014 at a salary of Kshs.20,000 which was later revised to Kshs.23,000 as from July, 2014.

RW2 further stated that the Claimant was on 1st April, 2015 assigned to repair one of the Respondent's Motor Vehicles Registration Number KAG 423B that had engine problems. That the repairs carried out by the Claimant were not properly done and led to the Claimant deserting his duties when he was confronted.

RW2 maintained that the Claimant was never summarily dismissed as alleged but rather absconded duties. RW2 further maintained that as a result of the Claimant's negligence the Respondent lost Kshs.103,635. He urged this Court to enter Judgment in the Respondent's favour for the said sum as prayed in the counterclaim.

On cross examination RW2 stated that there was no record to prove that the Claimant stole from the Respondent or that he was a habitual absentee and pleaded in the defence and counterclaim.

Submissions by the Claimant

It is submitted on behalf of the Claimant that his termination from the Respondent's employment was wrongful, unfair and unlawful as he was neither informed of the reason for his termination nor given an opportunity to defend himself of any wrongdoing prior to his termination. The Claimant further submitted that his termination was contrary to the provisions of Sections 41 of the Employment Act, 2007. The Claimant relied on the cases of **Liz Ayany v Leisure Lodges Limited (2018) eKLR** and **Patrick Asuma v Arm Cement Limited (2019) eKLR**.

The Claimant submits that he is entitled to the reliefs sought in his Memorandum of Claim. That he is entitled to his withheld salary of Kshs.20,500 by dint of Section 25 of the Employment Act as no evidence had been tendered by the Respondent to rebut this assertion.

On the Counter claim the Claimant submitted that the Respondent is not entitled to the same as it failed to prove the same. The Claimant further maintained that it is only the amount of Kshs.55,000 that is admitted by the Respondent's witness as the cost of repair inclusive of labour charges.

In conclusion the Claimant urged the Court to allow his Claim as prayed.

Respondent's Submissions

The Respondent submitted that the issue before this Court is not

one of unfair summary dismissal but one of desertion by the Claimant. It is further submitted that no evidence was adduced by the Claimant to prove that he reported to work on 7th April 2015.

The Respondent further submitted that the issue of issuance of a notice to show cause does not arise as the Claimant deserted duties.

The Respondent maintained that all statutory deductions were duly remitted as required by law not just for the Claimant but also other employees. It further maintained that statutory contributions are not owed to the individual but to the statutory body. It is on this basis that the Respondent urged the Court to

dismiss this claim.

The Respondent submitted that the Claimant is at liberty to collect his tool box from its premises.

The Respondent distinguished the authorities cited by the Claimant maintaining that the same are not applicable in this matter as they relate to dismissals unlike the instant case which is on desertion.

The Respondent submitted that the Claimant has failed to prove his Claim as against it on a balance of probabilities and therefore urged this

Court to dismiss the same with costs. It further submitted that it has proved its counter claim as against the Claimant and urged the Court to allow the same as pleaded. The Respondent relied on the case of **Pius Machafu Isindu v Lavington Security Guards Limited (2017) eKLR** where the Court held that the employee has a duty to prove not only that his services were terminated but also that the termination was unfair or wrongful.

The Respondent urged the Court to dismiss the Claim in its entirety with costs and enter Judgment in its favour for the sum of Kshs.103,635 for repair costs on Motor Vehicle Registration KAG 423B.

Analysis and Determination

Having considered the facts of this cause, evidence, submissions and authorities cited by the parties, I 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

The law relating to fair termination is contained in Section 41, 43 and 45(2) of the Employment Act

The Claimant submitted that the termination of his services was unfair as the Respondent failed to give any notice prior to the termination or to invite him for a disciplinary hearing.

The Respondent on the other hand in his Reply to the Claim pleaded that the Claimant had been issued with several warnings which included verbal and written warnings but failed to avail any evidence to support this assertion.

It is further the Respondent's contention that the instant case is one of desertion and not one of unfair dismissal as maintained by the Claimant. No evidence was adduced by any unauthorised absence. RW2 testified that the claimant was away for 3 weeks but the claimant testified that he was away for only 4 days during Easter. There was no evidence adduced by the respondent of any action taken against the claimant for his absence. Under cross examination RW1 stated "*The way he (claimant) was talking he had deserted duty*".

Based on the facts at hand I find that the Respondent failed to show any steps taken to accord the Claimant a chance to explain the circumstances surrounding the repair works on Motor Vehicle Registration Number KAG 423B prior to his alleged termination. The respondent further failed to prove that the claimant deserted work.

The statutory burden for a person complaining of 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 **Godfrey Anjere v Unique Suppliers Limited (2015) eKLR** the court held that:

"Where an employer seeks to dismiss an employee on account on abandonment or desertion, the employer is required to show steps it took to inform the employee that dismissal would result if they did not report to work."

In the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** 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."

Further in the case of **Francis Mbugua Boro v Smartchip Dynamics Ltd (2017) eKLR** it was held that: -

"...It was mandatory for the respondent to conduct a hearing (either through correspondence or face to face) as part of procedural fairness in terms of Section 41(2) of the Employment Act 2007 AND Missing that essential ingredient and a hearing the court teaches the conclusion that the summary dismissal of the claimant was procedurally unfair."

From the foregoing I find that the Respondent has failed to prove that it had taken any steps to conduct any disciplinary hearing contrary to the mandatory provisions of Section 41 of the Employment Act, 2007. I find that the Claimant's termination was indeed unlawful and unfair.

Whether the Claimant is entitled to the reliefs sought

(i) Withheld Salary for the month of March, 2015

It is not denied that the Claimant worked in March 2015. He is therefore entitled to salary for the said month in the sum of **Kshs.23,000** and I award him the same.

(ii) Kshs.23,000 being one month's salary in lieu of notice

Having found that the Claimant was unfairly terminated, he is entitled to this relief by dint of Section 36 and 49(1) of the Employment Act, 2007. I thus award him **Kshs.23,000** being one month's salary in lieu of notice.

(iii) Leave pay for 2 years not taken

The Claimant in cross examination maintained that he did not proceed on leave during the period of his employment with the Respondent and that he did not receive any payment in lieu of such leave. RW2 confirmed the same in cross examination. The claimant is entitled to 42 days' pay at the rate of 21 days leave per year which add up to **Kshs.37,154**.

(iv) General damages for loss of employment

Taking into account the claimant's length of service and the Respondent's conduct in the termination transaction, I award him 4 months' salary as compensation in the sum of **Kshs.92,000**

(v) Release of Claimant's toolbox allegedly withheld by the Claimant.

The Respondent stated that the toolbox is available for collection at its offices. The Claimant is therefore directed to collect the tool box from the Respondent's office.

(vi) Issuance of a certificate of service

The claimant is entitled to certificate of service by dint of Section 51 of the Employment Act, 2007.

Respondent's Counter Claim

The Respondent raised a counter claim for judgment to be entered in its favour as against the Claimant for the sum of Kshs.103,635 being the cost of repair works on the Motor Vehicle Registration Number KAG 423B.

The Claimant maintained that the repair works were conducted in a professional manner and that he is not liable to pay the sum alleged. He further maintained that the said Motor Vehicle was tested after repair works and that it was functioning well.

The Respondent however failed to attach relevant evidence in terms of receipts to prove the sums pleaded. In the circumstances the Counter claim is dismissed with costs to the Claimant.

I therefore enter judgment for the claimant against the respondent as follows:-

- (i)... Withheld Salary for the month of March, 2015..... 23,000
- (ii)... One month's salary in lieu of notice..... 23,000
- (iii)... Pay in lieu of leave not taken..... 37,154
- (iv)... 4 months' salary compensation..... 92,000

Total Kshs.175,154

- (v)... Costs of the suit and counter claim

Interest shall accrue at court rates from date of judgment till payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF MAY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by

His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They 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, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE