



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 800 OF 2015

FREDRICK ONYANGO OTIENO.....CLAIMANT

-VERSUS-

EMCO BULLETS AND STEEL LIMITED.....RESPONDENT

JUDGMENT

1. The claimant brought this suit on 13.5.2015 seeking 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 Ksh. 484,730.77 particularized in paragraph 16 of the claim.
- (c) Certificate of service
- (d) Costs of this suit
- (e) Interest on the amount awarded at court rates.

2. The respondent filed defence on 18.8.2015 admitting that she dismissed the claimant from employment but denied that the dismissal was unfair and unlawful. She averred that she dismissed the claimant just 32 days before the lapse of his 2 months probationary contract because he was found asleep and intoxicated next to a high voltage machine. Finally, she contended that she paid the claimant all his dues after the separation and prayed for the suit to be dismissed.

3. On 28.11.2019 both parties tendered evidence and thereafter filed written submission.

Claimant's case

4. The claimant testified as CW1. He stated that he was employed by the respondent as a Machine Operator on 13.7.2013 earning Kshs. 30,000.00 per month exclusive of house allowance. He contested that he was not given any written contract itemized payslip. He was also working from 7 a.m. to 7 p.m but no overtime was paid to him and he never went for any annual leave for the entire period of his service.

5. He further testified that on 17.3.2015 at around 2.30 p.m. he felt dizzy and unwell while on duty and sat down for a rest. However, within 5 minutes, the respondent's Finance Controller, Mr. Saroya passed by and saw him and angrily shouted at him to go home. He, however, stood up and continued with work until 4.30 p.m. when Mr. Saroya called him to his office together with the HR Manager to compute terminal dues. He further stated that after the dues were computed, Mr. Saroya tried to force him to write an apology letter and when he refused Mr. Saroya ordered the HR Manager to escort him out of the company premises and instruct the guards not to allow him back.

6. He contended that there was no valid reason for terminating his services and prayed for his terminal dues plus compensation as set out in the statement of claim.

7. On cross-examination the claimant admitted that the machine he was operating is a leather machine which is dangerous. He contended that on 12.3.2015, he was found sitted near the machine by the Manager. He further contended that he was sick and he had reported to Workshop-in-Charge. He admitted that he was called to the office by the Manager together with HR Manager and after the meeting he was dismissed and was promised that his dues would be paid through his bank.

8. He admitted that in March 2015 he was paid Kshs. 30,00.00. He contended that he was being employed on contracts of 3 months. He however reiterated that he never went for annual leave for the whole period of his service and contended that he is entitled to the claim for leave.

Defence Case

9. Mr. Joab Mwangi, the respondent's HR Manager testified as RW1. He confirmed that the claimant was employed by the respondent on fixed term contracts of 2 months. He produced copies of the contracts among other documents to substantiate his allegations. The last contract ran from 14.2.2015 to 14.4.2015. He contended further that the claimant's salary was Kshs. 25,500.00 plus House allowance of Kshs. 4,500 equalling the Kshs. 30,000.00 per month but subject to NHIF and NSSF deductions.

10. RW1 further testified that on 12.3.2015, the claimant was found sleeping next to a high-voltage machine due to intoxication, which conduct posed a danger to him and other employees. He was then called to the office where he was accorded an opportunity to explain his behaviors but he did not offer any. As a result he was dismissed 32 days before the expiry of his contract and all his rightful dues were paid to him. He contended that the dismissal was justified and prayed for the suit to be dismissed with costs.

11. On cross-examination RW1 relied on the copy master roll filed as exhibits as evidence that the claimant was paid Ksh. 45077 as terminal dues after the dismissal. He contended that the claimant joined the company in 2013 but left when he returned in 2014 he was engaged on fixed term contracts. He reiterated that the claimant was dismissed because he was found asleep and intoxicated. He admitted that the dismissal was verbally done the same day he was found asleep. He further admitted that the claimant was not being issued with any payslip but contended that the payroll was the proof of the payments to the claimant. He admitted that the claimant never went for his leave but contended that he was paid cash instead.

Issues for determination

12. I have carefully considered the pleadings, evidence and the submissions by both parties. There is no dispute that the claimant was employed by the respondent as a machine operator under 2 months fixed term contracts the last one starting on 14.2.2014 and expiry on 14.4.2014. Although the said contracts were titled probation contract, the parties agreed in evidence that they were fixed term contracts. There is further no dispute that the claimant was dismissed before the lapse of the said contract. The issues for determination are:

- (a) Whether the reason for the termination was valid and fair.
- (b) Whether a fair procedure was followed
- (c) Whether the claimant is entitled to the reliefs sought.

Reason for the termination

13. The reason cited for the dismissal was that the claimant was found asleep near a dangerous machine due to intoxication. The claimant contended that he was sick and dizzy and therefore he decided to sit down to rest. No medical evidence was adduced to prove the alleged illness, and that the claimant had reported the illness to his supervisor. He also never went to hospital after the dismissal.

14. The respondent has also not adduced any evidence to prove the alleged intoxication while on duty. However the claimant's admission that he felt dizzy and decided to take a rest corroborates the defence case that he was found asleep next to a dangerous machine. The evidence on record confirms that the claimant was found sitting, again corroborating the alleged offence of sleeping while on duty. Having found that the claimant did not prove that he was sick on the fateful day, I return that the respondent has proved a valid and fair reason that justified the dismissal of the claimant as required by section 43 and 45 (2) of the Employment Act.

15. Under section 44(4) (c) of the said Act, it is an offence warranting summary dismissal, for an employee to willfully neglect to performance or carelessly performs work which is his duty under his contract of employment. In this case the claimant deliberately sat down to take a rest without permission from his employer and as such his dismissal was justified.

The Procedure followed

16. Section 41 of the Employment Act requires that, before dismissing an employee for misconduct, the employer must first explain the reason to the employee in the presence of fellow employee of his choice and thereafter accord them an opportunity to air his defence, which must be considered before the separation is decided.

17. In this case, the claimant admitted that he was called by Mr. Saroya to his office in the presence of the HR Manager and after the meeting he was dismissed. He did not give details of the meeting but RW1 testified that the claimant was given opportunity to explain his misconduct but he became uncooperative and gave no explanation.

18. After carefully considering the evidence and submissions I return that the claimant was accorded fair hearing before the dismissal and as such a fair procedure was followed as required by section 45(2)(c) read with section 41 of the Act. He was given an opportunity to explain why he was sleeping next to a dangerous machine, and he declined and become uncooperative.

Reliefs

19. In view of the fact that the respondent has proved that she had a valid reason for dismissing the claimant and that a fair procedure was followed, I decline to declare that the dismissal was unfair and unlawful. Accordingly, I return that the claimant is not entitled to salary in lieu of notice and compensation for unfair termination.

20. The claim for accrued leave is also dismissed because the payroll produced as exhibits by RW1 confirms that the claimant encashed his leave. Likewise, the claim for House Allowance is dismissed because according to the contracts employments signed by the claimant and produced as exhibits the salary of Kshs. 30,000.00 included House Allowance of Kshs. 4000.00. However, the claim for certificate of service is granted because it is a right under section 51 of the Employment Act.

Disposition

21. The dismissal of the claimant was fair and lawful and as such the suit is dismissed with costs save for the prayer for Certificate of Service

Dated, signed and delivered in Nairobi this 26th day of June, 2020.

ONESMUS N. MAKAU

JUDGE