



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 372 OF 2017

(Before Hon. Justice Mathews N. Nduma)

JEPHTER RIOBA NYAUNCHUBACLAIMANT

VERSUS

ABBYSINIA IRON AND STEEL LTDRESPONDENT

JUDGMENT

1. The suit was filed on 22nd August 2017 by the claimant praying for an order in the following terms:
 - a. Respondent to pay claimant's terminal dues set out in the Memorandum of Claim.
 - b. Provision of a certificate of service.
 - c. Costs of the suit.
2. The terminal benefits sought comprise underpayments in the sum of Kshs. 185,502, three months' salary in lieu of notice and maximum compensation for wrongful termination.
3. CW1, the claimant testified under oath that he worked for the respondent as puncture repairer and mechanic from June 2011 until the year 2015. CW1 adopted a witness statement dated 31/8/2017 as his evidence in chief and produced documents attached to the statement of claim as his exhibits.
4. CW1 stated that he was paid Kshs. 500 per day instead of the minimum daily wage of a mechanic in the sum of Kshs. 683 per day. The claimant prays for the difference. CW1 further stated that he did not go on leave. That on 9/3/2015 he was suspended from work and told to return after 48 hours. The claimant said that he kept coming back but was not given work. The claimant was accused of not going to see the boss which he was summoned to do so.
5. CW1 said on the day he was repairing a tyre and so he delayed to go and see the boss a bit. CW1 said that he was questioned about it and he explained accordingly. CW1 was given show cause letter to respond to within 48 hours which he did. CW1 was not called back to work. He was not given letter of dismissal. CW1 said the dismissal was unlawful and he be compensated.
6. Under cross examination CW1 said he responded to the show cause letter on 11/3/2015. That he apologized in the response for not going to see the boss. He had delayed a bit as he finished to repair a tyre. He had earlier apologized for coming to work late and he had continued working.
7. CW1 stated that he was not called to a disciplinary hearing. He said he did not get the letter calling him to attend a disciplinary hearing dated 20/3/2015.
8. The claimant prays for underpayments, notice pay, compensation and certificate of service.
9. RW1, Ian Muliu testified for the respondent. RW1 stood in for the former Human Resource Officer Mr. Onesmum Mwinzi and relied on his written statement.
10. RW1 did not have firsthand information about the case but relied on human resource record of the claimant. RW1 testified that the record showed that the claimant was allocated work to do by the General Manager and refused to do it.

11. The claimant was called by the General Manager to explain why he did not do the work and he refused to go. The General Manager informed Mr. Mwinzi who summoned the claimant to explain. RW1 stated that the claimant had no good explanation for the omission. The claimant was issued notice to show cause to which he responded admitting the mistake and apologized. He requested to be allowed back to work.

12. CW1 was invited to a disciplinary hearing but he did not turn up and never returned to work again. A reminder was sent to the claimant but he did not come either. The letters were produced as exhibits "2b and 2c" respectively.

13. RW1 pointed out the discrepancies in the letter of demand by the claimant as compared to his evidence in chief.

RW1 said that the claimant demanded payment of Ksh. 550 daily whereas in Court he said he was paid Kshs. 500 daily.

14. RW1 testified that the claimant was paid Kshs. 550 per day which equated to Kshs. 16,500 per month. RW1 denied that the claimant was underpaid stating that the minimum wage was Ksh. 527 per month and it was increased by 50% in 2018.

15. RW1 added that the claimant was not dismissed but he failed to come for a disciplinary hearing and absconded work.

16. Under Cross examination RW1 stated that the claimant had no letter of appointment. That he had a verbal and written warning dated 30/5/2014. That CW1 had apologized for his mistakes. RW1 added that there are other written warnings not before court. RW1 denied that CW1 was suspended and said that he was given a show cause letter to which he responded by an admission and apology.

17. RW1 further denied that the claimant did not receive letter to attend disciplinary hearing. RW1 said claimant refused to take the invitation letter and left.

18. RW1 said CW1 was given a certificate of service on 14/5/2015. The certificate was produced before court.

Determination

19. The issues for determination are:-

I. Whether the claimant was dismissed from work or he absconded work.

II. Whether the claimant is entitled to the reliefs sought.

20. The court shall deal with the two (2) issues together. The claimant testified that he was summoned by the General Manager on 9/3/2015 but delayed to go since he was repairing a tyre. That he was suspended for 48 hours and given a show cause letter to explain his failure to obey the General Manager and had replied to the letter admitting the mistake and apologized.

21. The claimant denied that he was subsequently summoned to appear before the disciplinary hearing. He states that he was not recalled back to work thereafter and so he was unlawfully dismissed from work and is entitled to the reliefs sought, including payment of underpayments, and notice pay.

22. RW1 on the other hand produced the show cause letter dated 9/3/2015 to which the claimant had responded to by admitting the mistake of delaying to go to the General Manager and he apologized.

23. RW1 produced invitation letter subsequently written to the claimant dated 11/3/2015 to attend a disciplinary hearing on 16/3/2015 for insubordination of senior staff and neglect of work. RW1 testified that the claimant was given the letter but he declined to take it and did not attend the disciplinary hearing.

24. RW1 produced a further letter dated 2013/2015 to remind the claimant to attend a disciplinary hearing scheduled for 24/3/2015. RW1 testified that the claimant did not attend the hearing again and he did not return to work.

25. RW1 testified that the claimant had absconded work and was not dismissed but was given a certificate of service later when he came for it.

26. RW1 testified that the claimant was not underpaid since he was paid Kshs. 550 per day which amounted to Kshs. 16,500 per month yet the minimum wage was Kshs. 527 per day.

27. RW1 Stated that the claimant is not entitled to the reliefs sought.

28. In terms of section 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya, the plaintiff has the onus of proving on a balance of probabilities that which he alleges is true.

29. In the present case it is apparent that the claimant was summoned to appear to a disciplinary hearing twice to which he failed to do. Furthermore, it is also apparent that the claimant had admitted to the offence of insubordination and neglect of duty due to his failure to report to the General Manager to upon being asked to do so.

30. The respondent also demonstrated that the claimant did not have a clean record at work since he had at least two warnings one being verbal and another written one for late coming.

31. It is the Court's considered view that the claimant has failed to prove on a balance of probabilities that the respondent dismissed him from work. To the contrary the Court is satisfied that the claimant failed to attend a disciplinary hearing twice and absconded work. The claim for unlawful dismissal is therefore dismissed.

32. Consequent to the finding that the claimant was not dismissed from work, the claims for compensation and payment in lieu of notice are dismissed.

33. Regarding the claim for payment of underpayments, again the Claimant bears the onus of proving that he was underpaid. It is apparent that the claimant received a daily wage of Kshs. 550 paid at the end of the month. By the time the claimant left employment in the year 2015, the minimum daily wage for a mechanic was Kshs. 527 while the claimant received Kshs. 550.

34. The claimant was paid a monthly wage of Kshs. 16,500. Therefore, the claimant has failed to prove that he was underpaid and this claim is also dismissed.

35. The Court is also satisfied that the claimant received a certificate of service dated 14/5/2015. He had come for the same much later after he had absconded work.

36. In the final analysis the suit by the claimant is dismissed in its entirety for lack of merit.

Judgment Dated, Signed and delivered at Nairobi this 11th day of June, 2020

Mathews N. Nduma

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 ruling has been delivered to the parties online with their consent. 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 18 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.

Mathews N. Nduma

Judge

Appearances

Mr. Arikho for Claimant

Mr. Abande for Respondent

Chrispo – Court Clerk