



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.5 OF 2016

JACKSON OTINYA.....CLAIMANT

VERSUS

FOR YOU CLOTHING LIMITED.....RESPONDENT

JUDGEMENT

In January, 2009 the claimant was employed by the respondent as a loader at a wage of ksh.250 per day and which changed to ksh.1, 500 per week. In the May, 2010 the wage was increased to Ksh.300 per day and paid ksh.7, 800 per month. In May, 2013 the wage was increased to Ksh.9, 024 basic wage and ksh.1, 353 house allowances and the claimant was issued with a pay slip.

Work hours were 8am to 7am daily and without payment of overtime. On Saturday work hours were 8am to 1pm.

The claimant worked until 20th May, 2015 when his employment was unfairly terminated. The claim is that on 24th May, 2015 when the respondent was installing CCTV cameras in their store the claimant knocked one of the pipes covering the wires and the respondent's director one Kayu who was present quarrelled the claimant to the effect that he was not happy with the installations.

On 26th May, 2015 the claimant worked at the respondent's shop in Nakuru town.

On 25th May, 2015 the claimant was taken to work in the respondent's store at industrial area and he was instructed to remove some goods in the upper goods, stalks where Kayu was and kept on following the claimant and when he went for short call, Keyu followed him to see what he was doing and when the claimant returned Keyu called the director, Mikeshe to the store. Before the employees could go for lunch the claimant was directed to undress but this would have left him naked. The driver and colleague to the claimant advised him to comply which he did but he was not found with anything. The claimant was sent away and told not to return to the premises.

The claimant was only paid Ksh.8, 000 and his employment terminated.

The claimant was not given a hearing and this resulted in unfair terminated of employment and claims the following dues;

- a) Notice pay ksh.10,496.90;
- b) Annual leave for 4 years and 5 months ksh.38,522.00;
- c) Underpayments from the year 2009 to 2015 ksh.17,459.40;
- d) Overtime from 2009 to 2015 Ksh.292,392.90;
- e) Public holidays Ksh.26,392.90; and
- f) Costs.

The claimant testified to support his claims that he was employed as a loader but had no written contract but one has been attached to the defence filed by the respondent. He was paid ksh.1, 500 per week from the year 210 and which was increased gradually over the years lastly earning Ksh.9, 024, a house allowance at ksh.1, 354 and overtime pay.

The claimant also testified that on 25th May 2015 his employed was terminated by the respondent after he was accused of deliberately damaging the CCTV camera which was done by accident when he was picking goods which made his supervisor Keyu to suspect that he did

not want the CCTV cameras and before he left for lunch he was told to undress which he declined but the driver advised him to do so and nothing was found on him and he was sent away and was not allowed back at work.

The claimant also testified that on 26th May, 2015 he asked the respondent to pay his dues and this was done at Ksh.8, 000 only. This was not in full settlement as the claimant had unpaid overtime, annual leave, public holidays, underpayments and costs.

The defence is that the claimant was employed as a general worker from 1st May, 2013 to 25th May, 2015 and issued with letter of appointment dated 28th April, 2013. The claimant deserted his employment on 25th May, 2015 and there was termination by the respondent.

On 25th May, 2015 the claimant was asked to undergo routine pat-down search that all members of staff go through, he refused and walked away. Earlier in the day the claimant had acted in a suspicious manner when he deliberately damaged wires to the newly installed CCTV cameras an incident which he admitted was a mistake but this was meant to cover theft and idling which would have been captured by the CCTV.

Under the provisions of section 44(4) of the Employment Act the respondent was justified to dismiss the claimant but he opted to abscond duty and demanded for his terminal dues. In reply to the claimant's demands the respondent urged the claimant to resume duty but he declined.

Notice pay is not due upon desertion of duty. The claimant took all his due annual leave days. The claimant ended his own employment and not entitled to compensation. The claimant was paid within the applicable wage orders and there was no underpayment. The claimant work hours were 8.30am to 5.30 with a lunch hours and on Saturday worked until 1pm and rested on Sunday. On all public holidays the respondent remained closed and issued notice to clients and employees.

The claims made are not justified and should be dismissed with costs.

Keyur Sumaria testified in support of the defence that the claimant was employed by the respondent sometime in the year 2008/2009 as a casual and paid daily and when there was work at ksh.250. In May, 2013 the claimant was employed on monthly basis and paid in accordance with the applicable Wage Orders for a general worker. The claimant was issued with an appointment letter dated 28th April, 2013.

On 25th May, 2015 the claimant did not report to work after lunch. Earlier the respondent had installed CCTV cameras to check on all employees and the claimant damaged the CCTV camera and when he questioned left and never reported back to work. The claimant went to his advocates and demanded for payment of his dues and the respondent replied and asked him to resume duty but he did not take heed.

Mr Sumaria also testified that the claimant ended his employment and was paid his dues as he confirmed to court.

The claimant took all his leave days for the duration of employment and he singed for his leave days. The claims made are without foundation as the respondent complied with the law in effecting the due wages in accordance with the wage orders and the suit should be dismissed with costs.

The respondent also files the work records.

At the close of the hearing both parties filed written submissions.

The claim is premised on the facts that on 25th May, 2015 the claimant was searched by the respondent officers and he protested to being directed to undress which did not and the driver advised him to comply and since nothing was found on him he was sent away and this resulted in unfair termination of employment. That he was not allowed back at work and is demanding for the payment of his terminal dues from the year 2009 to 2015.

The defence is that the claimant was employed in May, 2013 and issued with a letter of appointment and previously had been employed as a casual worker and paid daily when work was available. On 28th April, 2013 he was employed and issued with letter of appointment. On 25th May, 2015 the claimant damaged CCTV cameras at the shop floor to avoid supervision and then conducted himself in a suspicious manner. As a routine there was a spat-on but the claimant refused to undergo the same and walked off and did not resume duty. He made demands through his advocates for payments and despite being advised to resume duty he failed to oblige. The claimant had been employed.

It is common cause that the respondent installed CCTV camera at the shop floor to aid supervision of work. On 25th May, 2015 the claimant damaged the wires.

I take it the purpose for the CCTV cameras thus compromised the respondent resulted to spat-on of the employees while exiting work place.

Employers use various modes of security checks of employees in and out of the shop floor. Such depend on the nature of business and operations subject to respect to the person and dignity.

What the claimant contests is that his supervisor Keyu kept on following him on this day even when he was going for his short call. This went on and when he was leaving for lunch he was directed to take the spat-on, he declined and the driver convinced him to oblige.

What is apparent to the court is that the respondent had installed the CCTV cameras to assist in operations and which was compromised after

the claimant damaged the same. It thus became necessary to specifically monitor him for motive. The claimant testified that when leaving for lunch he was directed to undress and he declined. He only did so when the driver advised him. It was not the respondent officers who undressed him as alleged.

It is also apparent to the court that after this lunchtime incident the claimant did not return to work.

The claimant testified that on 26th May, 2015 he demanded for the payment of his dues. The respondent paid ksh.8, 000.

By letter dated 9th June, 2015 the claimant's advocates wrote to the respondent demanding for the payment of terminal dues over alleged unfair termination of employment and which included notice pay, untaken leave days, service pay, off days, overtime and damages for unfair termination of employment. The respondent replied on 15th June, 2015 noting the claimant's employment had not been terminated and had refused to undergo routine check with other employees. The respondent further replied that if the claimant wished to work he was at liberty to report back to work.

On this invitation to return to work, the claimant did not attend and in his evidence in court he failed to address his reasons as to why he declined to return to work.

Section 47(5) of the Employment Act, 2007 the employee has the duty to prove there is unfair termination of employment and upon which the employer has the duty to justify the reasons leading to termination of employment. In this case the claimant had not discharged his legal duty and the respondent has no burden requiring justification and termination of employment. See **Kenfreight (E.A) Limited versus Benson K. Nguti [2019] eKLR** and in the case of **George Okello Munyolo versus Unilever Kenya Limited [2019] eKLR** that an employee who has committed acts of gross misconduct has the burden to prove unfair termination of employment.

In the case of **Thomas Sila Nzivo versus Bamburi Cement Limited [2014] eKLR** where the court in amplification of the import of section 47(5) and 44 (4) (g) held that;

The Respondent had reasonable and sufficient grounds to suspect the Claimant of having acted to the substantial detriment of the Respondent and its property, and was justified in summarily dismissing the Claimant under Section 44 (4) (g) of the Employment Act, 2007. The Employer was not required to have conclusive proof of the Claimant's involvement; it was only expected to have reasonable and sufficient grounds.

In the claimant's case, the court finds no case of unfair termination of employment. By abandoning his employment and failing to return upon invitation by the respondent he frustrated his own employment, he failed to give notice and cannot claim compensation of notice pay thereof.

On the claims made, the respondent filed defence on 15th March, 2016 and attached various documents and work records. These records are not challenged by the claimant.

Part of the documents filed in the letter of appointment issued to the claimant and dated 28th April, 2013. I take it this is the letter commencing formal employment of the claimant with the respondent and which employment he frustrated by his conduct on 25th May, 2015.

Employment effectively commenced vide letter of appointment dated 28th April, 2013 and any other claims existing prior to such date cannot be urged within the provisions of section 90 of the Employment Act, 2007 and there is no prove of continuing injury.

On the claims for underpayments, the claims made for the period of 1st May, 2013 to 30th April, 2015 the claimant was earning ksh.9,024 plus house allowance of ksh.1,354 and overtime pay which pay is commensurate with the applicable Wage orders for a general worker. There is no underpayment.

On the claim for overtime and off days' pay, the claimant was working for 6 days per week and of which Saturday he worked from 8.30am to 1pm. The work records filed by the respondent has log in time and exit time and are all signed by the claimant and largely the claimant would report to work at 9am and exit at 6.40 or 6.35pm and which covered 8 work hours each day with half day work on Saturday.

On the filed payment statements there is an overtime pay/allowance. This takes into account any overtime work. The claimant was well compensated for his time at work.

The claimant admitted in evidence that he was not at work during public holidays.

There is a record of the claimant taking his annual leave during the period of his employment by the respondent 1st May, 2013 to 25th May, 2015 his last annual leave being from 5th April, 2015.

Accordingly, the claims made are without merit and are hereby dismissed.

Costs to the respondent.

Dated and delivered electronically this 4th June, 2020 at 1200 hours.

M. MBARU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in reference of the directions issued by his Lordship the Chief Justice on 15th March, 2020 and on given consent, the Judgement herein is delivered via e – mail;

Issued electronically this 4th June, 2020.

M. MBARU

JUDGE