



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CASE NO. 119 OF 2017

(Before Hon. Justice Mathews N. Nduma)

COLLINS ONYANGO OTIENO.....CLAIMANT

VERSUS

GENERAL EQUIPMENT (1978) CO. LTD.....RESPONDENT

JUDGMENT

1. The suit was filed on 20th March 2017 in which the claimant prays for a declaration that the summary dismissal of the claimant by the respondent was unlawful and unfair and payment of terminal benefits to wit:

- (i) Service pay for every year worked
- (ii) Three months' salary in lieu of notice
- (iii) Maximum compensation for the dismissal.
- (iv) Costs and interest.

2. The plaint was amended on 27th June 2017. CW1, the claimant testified under oath and adopted a witness statement dated 20th March 2017 as his evidence in chief. CW1 stated that he was employed by the respondent in 2003 as a General Worker and worked continuously until 21st December 2015 when he was summarily dismissed from work. That at the time he earned Kshs. 17,000 a month.

3. That he worked diligently and was of good conduct for 12 years worked and had no record of misconduct at all.

4. CW1 produced list of documents marked '1' to '10' as part of his evidence.

5. CW1 stated that he was dismissed from employment without any valid reason. That he was not given a letter to show cause and was not called to a disciplinary hearing.

6. That he was not paid terminal benefits upon dismissal including December 2015 salary. The claimant prays to be awarded as set out in the statement of claim.

7. RW1 Samson Omondi Adero testified that he was the Administration Manager and had worked for the respondent since 1986.

8. RW1 adopted a witness statement dated 2nd April 2017 as his evidence in chief. RW1 stated that the claimant was not dismissed from work but he absconded work on 23rd December 2015.

9. That on the day, RW1 got information that CW1 had stolen company property of unspecified value. RW1 called CW1 to explain the allegation but the claimant denied the allegations and was hostile to RW1. That CW1 walked away and reappeared back at work sometimes in 2016 demanding to be re-employed and he be compensated for the period he was away.

10. RW1 stated that he did not report the matter of theft to the police but spoke to the claimant on one to one.

11. RW1 stated that the respondent has a disciplinary committee but the claimant was not given a show cause letter nor was he called to appear before the disciplinary committee. That RW1 chaired the committee.

12. RW1 said that he received letter from the Ministry of Labour dated 25th January 2016 in which the Ministry recommended that the respondent should pay terminal benefits to the claimant. RW1 said that the respondent did not pay the claimant any terminal benefits nor did they give the claimant a certificate of service.

13. RW1 insisted that the claimant walked away on 23rd December 2015 and not 21st December 2015. RW1 prays the suit be dismissed.

Determination

14. The issues for determination are:

- (i) Whether the claimant was summarily dismissed from work or he absconded duty.
- (ii) If the claimant was dismissed, whether respondent had a valid reason to do so.
- (iii) Whether the claimant is entitled to the reliefs sought.

15. The court has carefully considered the testimony by CW1 and that by RW1 which is mutually destructive. However, the claimant had worked for the respondent as a general worker for a continuous period of 12 years and the respondent did not provide any record of misconduct by the claimant during that period.

16. To the contrary the claimant came across as a diligent and honest worker and witness before court. RW1 did not provide any tangible evidence before court that the claimant had all of a sudden stolen property of the respondent.

17. Indeed, RW1 did not tell the court what property was stolen, when and where and why if the allegation was true he had not reported the matter to the police.

18. The court believes the testimony by the claimant that he was summarily dismissed from work by RW1 for undisclosed reason and without being subjected to any fair hearing.

19. The claimant was not given notice of dismissal. He was not served with a notice to show cause nor was he called to the disciplinary committee of the respondent which RW1 conceded was in place.

20. The respondent has failed to discharge the onus placed on it under section 43(1) and (2) of the Employment Act 2007 to prove that it had a valid reason to summarily dismiss the claimant. The respondent violated sections 36, 41 and 45 of the Act, in that it did not subject the claimant to a fair due process before summarily dismissing him.

21. The claimant has on the other hand discharged the onus placed on him under section 47(5) of the Act in showing that the summarily dismissal was wrongful and unfair.

22. The court finds that the summary dismissal of the claimant was unlawful and unfair and the claimant is entitled to compensation in terms of *Section 49(1) (c) and 4 of the Act*.

23. In this respect, the claimant had served the respondent faithfully and diligently for a continuous period of 17 years. The claimant had no record of misconduct. The claimant was unlawfully and unfairly summarily dismissed without notice or payment in lieu of notice.

24. The claimant was not paid any terminal benefits and did not contribute to the dismissal. The claimant suffered loss and damage and was not compensated for the same. The claimant wished to be reinstated to work but the respondent declined.

25. The respondent did not heed recommendation by the Ministry of Labour to pay terminal benefits to the claimant. The respondent did not provide certificate of service to the claimant to enable him get alternative employment.

26. The court has considered the case of *Walter Ogal Anuro vs Teachers Service Commission (2013) eKLR*; *Francis Mbugua Boru vs Smart Chop Dynamics Ltd (2017) eKLR* in reaching its finding on liability and the case of *Pay Mumo Kitavi vs Acme containers Limited (2019) eKLR*, in deeming this an appropriate case to award the claimant the maximum compensation of the equivalent of 12 months' salary for the unlawful and unfair summary dismissal in the sum of Kshs. (17,000x12) 204,000.

27. In addition, the court awards the claimant Kshs. 17,000 in lieu of one-month notice.

28. The claimant did not prove that he was entitled to three (3) months termination notice since he had no letter of appointment. The claimant did not also prove that he was entitled to service pay for the 12 years worked by demonstrating that he was not placed on NSSF or any other pension scheme by the respondent during his tenure at work. These claims are dismissed.

29. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:

- (a) Payment of Kshs. 17,000 in lieu of notice.
- (b) Payment of Kshs. 204,000 being compensation for the unlawful dismissal.
- (c) The award is payable with interest at court rates from date of judgment till payment in full.
- (d) The respondent to provide to the claimant certificate of service within 30 days of the judgment.
- (e) Costs to follow the event.

Judgment Dated, Signed and delivered at Kisumu this 15th day of October, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due 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 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. Mwesigwa for claimant

Mr. Oduor for Respondent

Chrispo- Court clerk