



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET**

**CAUSE NO 40 OF 2017**

**EMMANUEL MAKANDA OSUNDWA.....CLAIMANT**

**VERSUS**

**MALIK MARVINDA.....RESPONDENT**

**J U D G E M E N T**

1. The Claimant herein pleaded that he was around the year 2012 employed by the respondent as a machine operator at a monthly salary of Kshs. 5,000/=. His salary was later increased to kshs. 8,000/= and further to kshs. 10,000/= in 2014. The Claimant further alleged that he worked as such until November, 2015 when he was summarily dismissed from employment.
2. The Claimant complained that the termination from employment was unlawful un procedural and irregular and contrary to section 45(2) of the Employment Act.
3. The Claimant further pleaded that upon termination the respondent refused and or neglected to pay him his terminal dues.
4. The respondent on its part pleaded that thee existed no employment relationship between himself and the Claimant. In the alternative the respondent averred that if at all there was contractual relationship as alleged, there was wholly to blame for his dismissal.
5. That is to say the Claimant without leave or other lawful cause absented himself from work contrary to section 44(a) of the Employment Act. The Claimant further neglected to perform his duties and failed or refused to obey lawful and proper command from the respondent.
6. At the oral hearing the Claimant testified among others that he recorded a witness statement on 8<sup>th</sup> July, 2019 which he sought to adopt to his evidence in chief. He also adopted the documents filed with the claim as his exhibits in the case.
7. He further stated that he was employed in 2013 as a machine operator earning a salary of Kshs. 10,000/= per month at the time of termination.
8. According to him he was terminated in November 2015 and no reason was given. He denied also absconding duties. Upon termination he was paid Kshs. 20,000/= in bits. He accepted he was given the money but not Kshs. 111,500/=. He denied the handwriting on the respondent's Supporting documents was his.

9. In cross-examination he stated that he learnt motor vehicle mechanics at Jua Kali. He used to repair tyres and that he used to operate a tyre changing machine. He further stated that the NSSF statement showed he stated working in 2013. It was further his evidence that he used to report to work at 8.00 am and would leave anytime late in the evening. He worked on Saturdays but never on Sunday. The Claimant further stated that when he went for his daughter's funeral, he stayed for one week and was given Kshs. 10,000/= when he lost his child. He never paid back the money. He denied that he took Kshs. 111,500/= and denied the signature on the voucher was his.

10. The respondent's witness Mr. Malvinder Singh informed the Court that he worked at Ikolni Traders, the respondent according to him the Claimant was a general worker and that he was brought by a Pastor to be assisted.

11. It was his evidence that the Claimant resigned and left in October, 2015. During the period the Claimant worked he used to be paid Kshs. 8,000/= per month and that he stated working in 2013 November and was working from Monday to Friday. The respondent never worked on weekends and public holidays further the Claimant went on leave during the period he worked.

12. Mr. Singh further stated that when the Claimant's son died, he paid for him hospital bills and further the Claimant took a loan from him when his son died and never came back as agreed after the burial but one day he came back and said he was resigning. He gave the Claimant Kshs. 21,000/= but he never repaid the money. When he resigned the respondent further paid him Kshs. 111,500/= as final dues after discussions. The Claimant signed for the money.

13. In cross-examination he stated that he did not know who Malik was. He further stated that in retreading one needs help and that the Claimant had no special knowledge on retreading. He never handled any machine.

14. He maintained that he gave the Claimant a loan and that the handwriting on the petty cash voucher and supporting documents was Claimant's. The Claimant wanted Kshs. 150,000/= but after meeting with the Labour Officer they got an idea of what the claimant should be paid.

15. The onus of proof that unfair termination of employment took place is on the employee while the burden of proof of reasons for termination is on the employer.

16. The Claimant alleges he was summarily dismissed by the respondent without a hearing and that upon dismissal he was never paid his dues. The Claimant however in his pleadings did not come clear on the issue of summarily dismissal. The Claimant however stated that when his daughter died, he was away for a week he did not say whether it is upon his return that the respondent summarily dismissed him. The respondent on the other hand stated that the Claimant did not return to work from the burial as agreed. That the Claimant returned after some time and said he was resigning.

17. The respondent did not allege or produce any evidence showing attempts were made to seek the whereabouts of the Claimant as required on allegation of an employee absconding work.

18. Both parties in the suit therefore did not discharge the evidentiary burden cast upon them by the Employment Act. In the circumstance it becomes difficult to apportion blame or establish under what circumstances the parties herein parted ways.

19. Concerning payment of terminal dues, the Claimant never established sufficient background how these arose. They were simply pleaded as conclusions. Further during the oral hearing, the Claimant never led any evidence or allude to these heads of claim. The main focus was on whether he received Kshs. 20,000/= or Kshs. 111,500/= when his service got terminated as alleged. For instance, no special skill possessed by the Claimant was pleaded or proved to justify claim for underpayment. Besides no gazetted wage order was exhibited to show what the official wages for the Claimant ought to have been making it difficult for the Court to ascertain if there was any underpayment.

20. To this extent the Court finds the claim as filed not proved as required by the Act and hereby dismisses the same but with no order as to costs.

21. It is so ordered.

**Dated at Eldoret this 6th day of November 2020**

**Abuodha Jorum Nelson**

**Judge**

**Delivered this 6th day of November 2020**

**Abuodha Jorum Nelson**

**Judge**

**In the presence of:-**

.....**for the Claimant and**

.....**for the Respondent.**

**Abuodha J. N.**

**Judge**