



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1362 OF 2015

JEPHAS OMONDI ONYANGO.....CLAIMANT

VERSUS

SAIFEE SILVERING COMPANY LIMITED....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 6.8.2015 contending that his employment contract was unfairly terminated by the respondent on 12.8.2014 and prayed for the following reliefs-

- (a) A declaration that the Respondent's aforesaid actions to summarily actions to summarily dismiss the Claimant from employment amounted to unlawful and unfair dismissal.
- (b) A declaration that the Claimant is entitled to payment of their terminal dues and compensatory damages as pleaded.
- (c) An order for the Respondent to pay the claimant his due terminal benefits and compensatory damages totaling to Kshs.233,632/=
- (d) Interest on (c) above from the date of filing suit till payment in full
- (e) Cost of this suit plus interest thereon.

2. The respondent filed her defence on 14.9.2015 denying the alleged unfair termination and averred that the termination was fair because the claimant refused to undertake duties and tasks assigned by his supervisor and verbally insulted him and threatened to quit the job. She further averred that under section 44 of the Employment Act, the claimant was not entitled to a disciplinary hearing for his misconduct.

3. The suit was heard on 13.2.2018 when the claimant testified as Cw1 and the respondent called Mr. Denis Wafula Wanyonyi and Mr. Joseph Kikwatu Katuva as Rw1 and Rw2 respectively. Thereafter both parties filed written submissions which have considered carefully herein alongside the evidence tendered.

Claimant's Case

4. Cw1 testified that he was employed by the respondent as a General Labourer for a salary of Kshs.11,920 under a one year contract starting 1.3.2013 till 28.2.2014. The contract was renewed again for one year from 1.3.2014.

5. Cw1 further testified that on 12.8.2014, a woman asked him where his colleague, Mr. Makau was and he showed her Mr. Khaleel, his Supervisor was not happy with that and started to insult him. That on that day Mr. Khaleel had instructed him and Rw1 to load glass in a vehicle and never refused to do the job.

6. Cw1 further testified that at 12 p.m the same day he was called to the office where he found his services already terminated and his salary for 12 days worked in August 2014 ready plus salary for one month salary in lieu of notice. He deemed the termination unfair, served a demand letter and filed this suit seeking the reliefs set out in the statement of claim.

7. On cross examination Cw1 contended that he was not dismissed according to the law since he was not served with a prior notice and he was not given a chance to defend himself. He further contended that he never refused to do any work assigned to him.

Defence Case

8. Rw1 testified that on 12.8.2014 he and the claimant were assigned the duty of loading glass to a vehicle by the Rw2 but the claimant refused alleging that the task was dangerous and it required at least 4 people to do. That even when the Manager Mr. Khaleel argued with the claimant, the latter refused to do the job unless some other person was added. That thereafter the claimant was dismissed and he never saw him again.

9. On cross examination, Rw1 admitted that 2 people could not do the work of loading the glass to the vehicle. He further stated that the claimant refused to do the job contending that it was risky if done by 2 people and that he would rather leave the employment. He concluded by stating that after refusing to load the vehicle, the claimant was called to the office and he never saw him again.

10. Rw2 testified that on 12.8.2014, he instructed the claimant and Rw1 to load glass on to a vehicle but the claimant refused unless they were 4 people stating that the work was risky. Thereafter Mr. Khaleel found the claimant just standing by and directed the claimant to comply with the instructions to load the glass. However the claimant started arguing that loading was not part of his job description. He then stated that he was then quitting the job and demanded his dues. That as a result he was summarily dismissed and his salary for the days worked in August 2014 plus one month salary in lieu of notice on humanitarian grounds.

Analysis and Determination

11. There is no dispute that the claimant was employed by the respondent as a General Labourer from 1.3.2013 till 12.8.2014 when he was summarily dismissed. The issues for determination are:(a) Whether the dismissal of the claimant was fair;

(b) Whether he is entitled to the reliefs sought.

Unfair dismissal

12. Under section 45(2) of the Employment Act, termination of employee's contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. Valid and fair reason is one that relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements. Fair procedure refers basically giving the employee an opportunity to defend himself in accordance with equity and justice.

Reason for termination

13. In this case the reasons cited are refusal to obey a lawful command from his supervisor and use of abusive and threatening words to the supervisors contrary to section 44(4) (d) and (e) of the said Act, Rw2 testified that he instructed the claimant and Rw1 to assist in loading glass onto a vehicle but the claimant refused alleging that it was not part of his job description, and it was a risky job to be done by 2 people. Rw1 confirmed that Rw2 gave the said instructions and the claimant refused to comply.

14. Both Rw1 and Rw2 further confirmed that their Manager Mr. Khaleel also instructed the claimant to comply with the instructions by Rw2 but the claimant again refused and an argument ensued between him and Mr. Khaleel after which the claimant was summoned into the office and fired. The claimant denied the alleged refusal to do the task assigned and maintained that the job was risky. Rw1 admitted in evidence that the loading of glass was dangerous if done by 2 people. The foregoing notwithstanding, claimant never denied the fact that he argued and used abusive words to his Manager Mr. Khaleel. Consequently, I return that the claimant committed gross misconduct against his supervisor and that

constituted a valid and fair reason for his summary dismissal under section 44(4) (d) of the Act, which entitles the employer to dismiss if:

“(d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;”

The procedure followed

15. The claimant contended that he was not accorded any opportunity to defend himself before the termination. The respondent pleaded in her defence that the offence committed by the claimant did not warrant a hearing before the summary dismissal. That pleading was a clear violation of the claimant’s right to hearing before dismissal for misconduct.

16. Under section 41 of the Employment Act, before dismissing an employee on ground of misconduct, poor performance, or physical incapacity, the employer must first explain the reason to the employee in a language he understands and in the presence of a fellow employee or shop floor union official of his choice. That thereafter the employee and his chosen companion must be accorded an opportunity to air their representations for consideration before the termination is decided. The respondent admitted through her pleadings that the claimant was not accorded a disciplinary hearing before the dismissal and as such return that the dismissal of the claimant on 12.8.2014 was unfair within the meaning of section 45 of the Act.

Reliefs

17. In view of the foregoing finding, I make declaration the summary dismissal of the claimant was unfair and unlawful. Flowing from the foregoing, I award the claimant one month salary in lieu of notice plus 3 months salary compensation for the unfair dismissal. In awarding the said compensation, I have considered the fact that the claimant had worked for fairly short period but also that he had a reasonable expectation to working and earnings for the remainder of the fixed contract term. I have also considered that he contributed to the dismissal through misconduct.

18. The claim for salary for the reminder of the contract term and salary after the dismissal is dismissed because it would amount to unjust enrichment.

Conclusion and Disposition

19. I have found that the summary dismissal of the claimant was grounded on a valid reason. I have however found that the procedure followed before the dismissal was unfair and that rendered the dismissal unfair and unlawful. Consequently I enter judgement for him in the following terms

(a) Notice11,920
(b) Compensation.....35,760

47,680

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The said sum will be paid less statutory deductions. I also award the claimant costs and interest at court rates from the date hereof.

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of January 2019

ONESMUS N. MAKAU

JUDGE