



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 179 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

JOSEPH OUKO LWAMBE.....CLAIMANT

VERSUS

ROYAL GARMENT INDUSTRIES EPZ LIMITED.....RESPONDENT

JUDGMENT

The Claimant in his Memorandum of Claim dated and filed on 14th February 2014 alleges that the Respondent herein unfairly/unlawfully dismissed him from his employment and failed to pay his terminal dues and issue him compensatory damages. The Claimant seeks the following remedies:

- i. A declaration that the Respondent's decision to dismiss the Claimant from employment was unlawful and unfair and that the Claimant is entitled to payment of his due terminal benefits and damages.
- ii. An Order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totalling to Kshs.160,137 plus interests from the date of filing suit until payment in full.
- iii. An Order for the Respondent to pay the Claimant's costs for this case plus interest thereon.

The Respondent filed its Memorandum of Reply to the Claimant's Claim

dated 30th September, 2015 and filed in Court on 6th November, 2015, in which it is admitted that the Claimant was its employee on a year to year Contract. However, it is denied that the Claimant worked diligently and to its satisfaction as alleged in the memorandum of Claim.

The Respondent avers that the Claimant was not dismissed but rather he absconded duty and that the Respondent was under no obligation to look for the Claimant upon failing to report to work for engagements.

It is further contended that the claimant's memorandum of claim has no basis and that the claimant is not entitled to the reliefs sought in his memorandum of claim. The respondent urges the court to dismiss the claim with costs.

On 10th May, 2017, the Claimant (CW1) testified on his behalf. In his testimony he stated that he was employed by the Respondent on 8th February, 2012 as a machine operator. That he worked for the Respondent for a total period of 1 year and 8 months.

It was his evidence that he worked diligently and to the satisfaction of the Respondent. He further stated that he was earning a monthly salary of 12,600/=.

He further testified that on 30th September 2013 he was injured while working at the Respondent's chemical department which work he was not familiar with. That after the accident he reported to the Company Nurse for medical attention and was issued with a sheet to attend Kitengela Medical Centre where he was referred to see an ENT doctor.

CW1 avers that he was examined by the ENT doctor and was given sick off for 1 month. A copy is annexed to his statement of Claim as Annexure III. The doctor recommended that he be removed from the chemical department.

It was CW1's evidence that he took the letter to HR department where he was informed that he was not productive and was asked to leave the company.

The claimant further stated that he was not paid in lieu of notice and that the termination of his employment was unfair. He seeks the reliefs as prayed in his statement of claim.

On cross examination CW1 stated that he had a three months contract and that no other contract was signed between himself and the Respondent Company.

On further cross examination CW1 averred that he did not abscond duty but was away on sick off and had in-fact availed all the documentation for the HR department. Further that he worked for the Respondent for a total of 18 months, did not proceed on leave and was not paid in lieu of such leave. He also stated that he was not paid his salary for the month of September prior to his termination.

On re-examination CW1 confirmed that he worked for a total period of 1 year and 8 months despite the fact that no contract was signed to that effect. He further stated that he was terminated unfairly.

The Respondent's case was heard on 3rd July, 2018, RW1 **Samuel Otieno Mwai**, Human Resource Manager at Respondent Company gave evidence on behalf of the Respondent.

It was his evidence that the Claimant used to abscond duty, for instance from 9th June 2012 to 31st December 2012 during the subsistence of the 1st Contract of employment. RW1 further stated that no disciplinary action was taken against the Claimant for allegedly absconding duties.

RW1 testified that on 22nd October, 2012 the Claimant's supervisor informed RW1 that the Claimant had differences with the shop steward which almost turned physical. RW1 after investigating the incident found the Claimant culpable and asked him to write a letter of apology to that effect. The same is annexed as exhibit No. 2 to the Respondent's documents.

RW1 stated that the Claimant absconded duty on several other occasions as evidence by the attendance register with no proper documentation for his absenteeism. RW1 avers that the Claimant was not dismissed as alleged that he in-fact absconded duty. He stated that he had no documentation in Court to support the evidence that the Claimant absented himself from duty on the dates indicated.

On further cross examination RW1 stated that the Claimant absconded duty on several occasion but was never issued with any warning letters for absconding duty.

On Re-examination RW1 stated that the Claimant had informed the management that he had a hearing problem but did not avail any certificate from the doctor to substantiate the same.

The parties then filed and exchanged written submissions.

Claimant's Submissions

In the written submissions the Claimant reiterated the contents of the Memorandum of Claim and CW1's oral evidence in Court.

The Claimant submitted that the Respondent's action to terminate his services was unfair as it contravened the provisions of Section 45 of the Employment Act which provides that an employer must not only prove that the reason for termination is valid and fair but also that the employment was terminated in accordance with fair procedure.

The Claimant for emphasis relied on the authority of **Kenya Union of Domestic, Hotels, Educational Institutions & Hospitals Workers Versus Mombasa Sports Club, Cause No. 440 of 2013** where Radido J. held that No employer shall terminate the employment of an employee unfairly. He further went ahead to state that termination of employment is unfair by an employer if the employer fails to prove (a) that the reason for the termination is valid: (b) that the reason for the termination is a fair reason.

The Claimant further submitted that he is entitled to the reliefs sought in his Memorandum of Claim as provided by the provisions of Section 10(3), (7), 28, 35, 49 and 74 of the Employment Act, 2007.

The Claimant submitted that under Section 51 he is also entitled to a certificate of service. He submitted that his Claim be allowed as drawn.

Respondent's Submissions

It is submitted that the Claimant's act of absconding duty was contrary to Clause 4 of the Employment Contract as read together with Section 44 (4) of the Employment Act.

The Respondent further submitted that the onus was on the Claimant to prove that he was ill and unable to resume his duties at his station as and he required to do so. The Respondent relied on the authority of **Banking, Insurance & Finance Union (Kenya) Versus Barclays Bank of Kenya Limited Cause 1660 of 2013**.

It is submitted that it is trite law that absence from work without permission entitles an employer to summarily dismiss an employee as

provided for under Section 44(4) of the Employment Act. The Respondent relied on the case of *Joseph Njoroge Kiama Versus Summer LIMITED Cause No. 37 of 2012* where the Court held that:

“...the Claimant absconded duties and his services became summarily terminated by operation of law on the 21st September 2011 when he demanded payment of his terminal dues thereby evidencing his intention not to return to the Respondent’s employment...”

It is further submitted that the Claimant has not satisfied the threshold under Section 47(5) of the Employment Act that he was unfairly and un-procedurally summarily dismissed. The Respondent relied on the Authority of *Daniel Mueke Versus Bhogals Auto World Cause No. 65 of 2014*.

The Respondent avers that the Claimant is not entitled to the reliefs sought in his Memorandum of Claim. On the certificate of service the respondent submitted that the same has always been ready for collection at the respondent’s premises.

The Respondent submitted that the instant claim be dismissed with costs to the Respondent.

Determination

Having considered the facts of this cause, evidence, submissions and authorities cited by the Claimant the following are the issues for determination:

1. Whether the claimant was unfairly terminated or absconded duty.
2. Whether the termination of the Claimant’s employment was valid both procedurally and substantively
3. Whether the Claimant is entitled to the reliefs sought

The Law

The law relating to fair termination is contained in Section 41, 43 and 45 (2) of the Employment Act.

The Claimants submitted that the Respondent’s action to terminate his services was unfair as it contravened the provisions of Section 45 of the Employment Act that provides that an employer must not only prove that the reason for termination is valid and fair but also that the employment was terminated in accordance with fair procedure.

The Respondent on the other hand submitted that the Claimant absconded duties without notice and/or permission from his superiors. Further that the Respondent attempted to contact the Claimant through his last known address and telephone contact to no avail.

The Respondent further submitted that it was entitled therefore to summarily dismiss the Claimant as provided for under Section 44 (4) of the Employment Act.

RW1 did not deny that the claimant was in employment from 8th February 2012 or that he worked continuously for 18 months. RW1 testified that the claimant absconded duty severally but was never warned, and that he was not dismissed. He had no records to show for it.

Absconding duty is a ground for summary dismissal under Section 44(4)(1) of the Employment Act. Under Section 10(6) and 10(7) where an employer fails to submit prescribed records such as disciplinary records the burden of controverting the averments of the employee lie with the respondent.

I find that the respondent has not proved that the claimant absconded duty and therefore accept the claimant’s averments that his employment was terminated as stated by him in his testimony in court.

Whether the claimant was unfairly terminated

The statutory burden for a complaint of unfair termination of employment or wrongful dismissal is contained in section 47(5) of the Employment Act. The section provides that –

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

An employee therefore has the burden of proving that an unfair termination of employment has occurred while the employer’s burden is justify the reasons such termination.

What then amounts to an unfair and/or wrongful termination?

An unfair termination could be because no notice was given as required by section 35(1); no reasons were given or because the employee was not afforded a hearing as required by section 41 of the Act. The reasons can be various based either on failure to comply with the statute

or the terms of the actual employment contract.

From the foregoing I opine that the termination of the Claimant's services was unfair for the reason that he was not taken through the disciplinary process as set out in Section 41 of the Employment Act, 2007 no evidence was availed to the Court to support there having been a disciplinary process that was followed or notice issued prior to the termination.

In the case of **Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR** the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

In Francis Mbugua Boro –Vs- **Smartchip Dynamics Ltd (2017) eKLR** it was held:

“...It was mandatory for the respondent to conduct a hearing (either through correspondence or face to face) as part of procedural fairness in terms of Section 41(2) of the Employment Act 2007 AND Missing that essential ingredient and a hearing the court teaches the conclusion that the summary dismissal of the claimant was procedurally unfair.”

Similarly in the case of **David Njoroge Muiru -vs- Elsa Limited (2014) eKLR** it was held that:

“It is obvious that the claimant was not given notice of misconduct or a hearing before the termination. The court finds that the dismissal was unfair under Section 41 of the Employment Act 2007. The reason for removal has not been shown to have been established to exist at the time of termination.”

Remedies

The Claimant claims for the following:

a) One Month's salary in lieu of notice **Kshs.11,862**

The Claimant is entitled to the above Claim under the provisions of Section 36 of the Employment Act, 2007

b) The earned but unpaid salary for the month of September 2013 **Kshs.11,862/=**

The Claimant in his pleadings and evidence stated that he worked in the Month of September, 2013 but was not paid which fact was not disputed by the Respondent. The Respondent in pleadings, evidence of its witness indicated that the Claimant was paid his salary for the month of September 2013.

A look at the Claimant's payslips attached to the Respondent's List of Documents dated 3rd October, 2017 and filed in Court on 5th October, 2017 at page 7 is for the month of September 2013 notably is another payslip for October 2013 yet all evidence points out to the fact that the Claimant did not work for the Respondent past 30th September, 2013.

The question then follows is the payslip conclusive evidence of payment of salary?

In my view the answer is NO. The Payslip is a document prepared by the Respondent Company indicating the amount payable as salary for work done on a given period. There is no evidence as to whether the Claimant received the salary and the fact that there is a payslip for October, 2013 builds a lot of doubt as to whether the same is a true reflection of what transpired.

I opine that the Claimant's claim for unpaid salary be allowed in the circumstances.

c) Payment in lieu of untaken leave between February 2012 and February 2013 being **Kshs.11,862/=**

The Claimant in his pleadings, evidence and submissions stated that during the period he was employed by the Respondent Company he never went on leave, and that the Claim is payable under Section 28 of the Employment Act.

The respondent did not rebut this evidence. The claimant is therefore entitled to this claim for the entire period work of one year, 8 months.

d) Compensatory Damages for wrongful, unlawful and unfair dismissal from employment calculated at 12 months gross salary being **Kshs.11,862 x 12 Months being Kshs.142,344/=**

The Claimant having worked for a period of one year and seven months compensation for 3 months shall be reasonable compensation.

11,862/= x 3 total being **Kshs.35,586.**

In summary I award the claimant the following –

(a) One month's salary in lieu of notice Kshs.11,862/=

(b) Earned unpaid salary for September 2013 Kshs.11,862/=

(c) Pay in lieu of leave Kshs.11,862/=

(d) Compensation Kshs.35,586/=

Total – Kshs.71,172/=

(e) Certificate of Service.

The respondent shall further pay costs to the claimant and interest shall accrue at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF JANUARY 2019

MAUREEN ONYANGO

JUDGE