



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC NO. 359 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 23rd January, 2019)

ELIJAH KIOKO KITAVICLAIMANT

VERSUS

ALLIED PLUMBERS LIMITEDRESPONDENT

JUDGEMENT

1. The Claimant, Elijah Kioko Kitavi, filed this claim on 10/03/2014 vide a Memorandum of Claim dated 07/03/2014 for unlawful and unfair dismissal of his employment and seeking payment of his terminal dues and compensatory damages against the Respondent, Allied Plumbers Limited.

2. He avers that he was employed as a Foreman by the Respondent on 01/07/2008 and worked as such continuously, diligently and to the satisfaction of the Respondent and that his last salary was Kshs. 35,889/= per month.

3. He states that on 26/10/2013, he declined to follow the instructions by the Respondent's storekeeper to release 25 pipes from the Respondent's worksite to the workshop because it was unprocedural and that he could only release the pipes on direct instructions from his immediate supervisor. That the following day, he explained to the Managing Director, Mr. Jandu why he had declined to deliver the said pipes but who in turn informed him that his services had been terminated with immediate effect.

4. That he was later served with a dismissal letter dated 28/10/2013 and states that he had done nothing wrong to warrant disciplinary action against him and that no charges were put before him for him to answer. That there was no fair hearing that took place before the decision to summarily dismiss him was reached and that ultimately, due process was not followed.

5. He avers that the Respondent initially refused to pay him his October 2013 salary claiming that he had to apologise first before the said salary could be released to him. That he was forced to write an apology letter on 12/11/2013 for a mistake he had not done and that the October 2013 salary was thereafter released to him. That the Respondent forcing him to apologise to access his rightful salary amounted to unfair labour practice considering it was way after he had been dismissed. That the Respondent also declined to pay him his terminal benefits which he claims as follows:-

i) One month's salary in lieu of notice.....Kshs. 35,889/=

ii) Service pay calculated at 15 days salary for every completed year of service (15/30 x 35,889/= x 5years).....Kshs. 89,723/=

iii) Compensation for abrupt loss of income, trauma and inability to meet continuing obligations (35,889/= x 12months)Kshs. 430,668/=

6. He prays for judgment against the Respondent for:-

a) A declaration that the dismissal of the Claimant's employment was unlawful and unfair and that the Claimant is entitled to payment of his terminal dues and compensatory damages.

b) An order for the Respondent to pay the Claimant his due terminal benefits and compensatory benefits totalling to Kshs. 556,280/= plus interest thereon from the date of filing suit until full payment.

c) Costs of this suit plus interest thereon.

7. The Respondent filed a Reply to Claimant's Memorandum of Claim dated 14/05/2014 on 15/05/2014 stating that it employed the Claimant on 01/03/2011 on a salary of Kshs. 13,065/= plus a House allowance of Kshs. 2,613/=. It denies that the Claimant was diligent in his work and avers that he was culpable of gross misconduct as particularised below:-

a) Refusing to obey a lawful and proper command within the scope of his duty to obey and issued by three senior staff in authority over him.

b) Being in a state of drunkenness whilst on duty.

c) Unable to carry out duty by virtue of being constantly drunk during working hours.

8. That it complied with **Section 41 of the Employment Act** when it explained to the Claimant at the meeting on 27/10/2013 the reason for which they were considering terminating his employment and that it gave him an opportunity to make representations on charges against him. That it followed due process before the Claimant was summarily dismissed stating that the dismissal was lawful and for a fair reason and that it met the requirements of the Employment Act, principles of natural justice and the Constitution of Kenya.

9. The Respondent states that the mentioned apology letter was voluntary and consciously authored by the Claimant after a meeting with members of the Kenya Building Construction, Timber, Furniture and Allied Industrial Employees Union and that the Claimant was further paid all his dues upon termination of his employment. It also denies that the Claimant is entitled to compensation and prays that his suit is dismissed with costs.

10. Despite being served by a court processer as is shown in the Affidavit of Service sworn by Peter Ngeno and dated 11/06/2018, the Respondent did not attend court for the hearing and the suit proceeded in their absence. The Claimant testified in the absence of the Respondent or its counsel on 30/07/2018 that when a vehicle came from the workshop, he stopped them from offloading the pipes because he had not been informed. That he had never been involved in any form of misconduct and was not given any notice before his dismissal. He stated that he relied on his documents filed in Court.

Claimant's Submissions

11. The Claimant submits that the Respondent as the employer ought to avail to this court an employment record proving the date of his employment was not 01/07/2008 and that in the absence of such record, his evidence remains undisputed.

12. That no other Respondent's officer in higher authority over him instructed him on that particular day and he failed to honour insisting there was protocol to be followed lest he is accused of attempting to steal from his employer. That the allegations of drunkenness while on duty were false, unsubstantiated and not proved before court and that it was illogical to retain him in employment for 5 years or even the alleged 2 years if he could not deliver due to being drunk.

13. Further, that this should have been sufficient reason to subject him to a disciplinary process at the earliest instance and that the Respondent did not prove that he was unwilling or incapable to perform his duties. He relies in the **ELR Cause No. 7 of 2015, John Rioba Maugo -vs- Riley Falcon Security Services Ltd** where Lady Justice Maureen Onyango observed that:-

"...drinking alone or smelling alcohol par se is not a ground for summary dismissal. Section 44(4) (b) specifically provides that the employee is liable for dismissal if; 'during working hours, by becoming intoxicated, an employee renders himself unwilling or incapable to perform his work properly'."

14. He submits that he was not given any Notice to Show Cause to any accusations levelled against him and that failure of the Respondent to issue such notice breached his employment rights to be informed of the accusations against him. That in contravention of **Sections 41 and 45 of the Employment Act**, he was not given any chance of a hearing and the Respondent failed to prove that the reason for his termination was valid, fair and in accordance with fair procedure. That it can only therefore be concluded that his dismissal was unfair, unlawful and inhumane and invites this Court to find the same.

15. It is submitted by the Claimant that the claim for *payment in lieu of notice* is payable to him under **Section 35 of the Employment Act** having proven that his termination of employment was unfair. That he is entitled to *service/ gratuity* as prayed since the Respondent did not remit his NSSF dues and also because he does not fall within the exceptions set out in **Section 35(6) (d)**.

16. That since he was the sole breadwinner of his family and is yet to find another befitting job after serving the Respondent for 5 years, he is entitled to damages for unfair and unlawful dismissal to the full extent of 12 months gross salary. He finally prays that his claim be allowed as prayed together with costs of this case and interest thereon.

17. I have examined the evidence and submissions before me. I note that the Respondents were served with a hearing notice on 8/6/2018 to attend Court on 30/7/2018. On the day of hearing on 30/7/2018, the Respondents failed to attend Court and therefore this claim proceeded undefended without the Respondent submitting any evidence. In **CMC Aviation Limited vs Cruisair Limited (NO1) 1978) KLR 103., (1976-80) 1 KLR 835** Madan J (as he then was) rendered himself thus:-

"Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them, or any of them, by the parties, they are not evidence. Evidence denotes the means by which an alleged matter of fact, the

truth of which is submitted for investigation, until their truth has been established or otherwise, they remain unproven. Averments in no way satisfy for example, the definition of "evidence" as anything that makes clear or obvious ground for knowledge, indication or testimony, that which makes truth evidence or renders evident to the mind that it is truth".

18. The Court of Appeal suiting in Nairobi In Civil of Appeal No. 140/2008 **JJA Visram, Mwilu (as she then was) and Otieno Odek** also rendered similar findings and rendered themselves as follows:-

"in Der Raj Sharma vs Reginam 1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marled for identification and that the few exhibits should be confirmed to articles which have been fairly probed and admitted in evidence. In the Nigerian case of Michael Hausa vs the State (1994) 7-8 SCANJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial Judge and the Judge cannot use the document as evidence".

19. It is therefore my finding based on the above authorities that the Respondents have not rendered any evidence in Court and therefore the Claimant's claim remain uncontroverted.

20. The Claimant informed Court that he had an employment relationship with the Respondent which position remains. He was never issued with any contract but from Claimant's Appendix II the Respondent admitted the existence of the relationship only stating that the employment of the Claimant was lawfully terminated.

21. The payslip submitted by the Claimant indicate that his gross salary was 15,678/=. Appendix V is the summary dismissal letter, which indicate that the Claimant was dismissed for refusing to take instructions from Management and having informed the habit of reporting to site under influence of alcohol.

22. The Claimant denied these allegations. There is no evidence presented to Court that these reasons for dismissal indeed existed. There is also no evidence that the Claimant was subjected to a fair disciplinary process before his dismissal.

23. Section 45(2) of Employment Act 2007 states as follows:-

(2) "A termination of employment by an employer is unfair 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:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure".

24. There being no valid reason for dismissal and there being no evidence of due process, I find the dismissal of the Claimant unlawful and unjustified.

25. In terms of remedies, I award him as follows:-

1. 1 month salary in lieu of notice = 15,678/=

2. 8 months' salary as compensation for unlawful dismissal = 8 x 15,678 = 125,424/=

3. Unremitted NSSF dues for 2012 = 9 x 400 = 3,600/=

TOTAL = 144,702/=

4. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this Judgement.

Dated and delivered in open Court this 23rd day of January, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties