



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1491 OF 2012 CONSOLIDATED WITH

CAUSE NO. 1339 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

JACKSON MAUNDU MUNYAO.....CLAIMANT

VERSUS

ROLMILL LIMITED.....RESPONDENT

JUDGMENT

The Claimant filed his Memorandum of Claim on 7th August 2017 seeking the following the reliefs:

- a) A declaration that the Respondent's dismissal of the Claimant from employment was illegal and unlawful and that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded
- b) An order for payment of the Claimant's terminal dues and compensatory damages totalling to Kshs.101,250.
- c) An order for the Respondent to pay cost of this suit plus interest thereon.

This Claim was consolidated with Cause 1491 of 2012 in which the Claimant herein seeks similar reliefs but for damages totalling to Kshs.301,866.

The Respondent filed its Reply to the Memorandum of Claim denying the averments in the Memorandum of Claim.

Claimant's case

The Claimant avers that he was employed by the Respondent from 19th August 2009 to 25th October 2011 as a driver. At the time of his dismissal he was on a 6 months contract.

During the hearing the Claimant testified that his contract was initially renewed on an annual basis and thereafter on a six months basis. The Claimant testified that he earned a salary of Kshs.24,745.85.

The Claimant testified that on 8th October 2011 he was involved in an accident as a result of which he was hospitalized. Upon reporting back to work on 26th October 2011 he was informed that there was no work for him and was denied access to the Respondent's premises. He was neither charged nor invited for a disciplinary hearing and therefore the Respondent did not comply with the law.

In cross-examination the Claimant testified that he was neither arrested nor charged in Court after the accident. He testified that the respondent settled his hospital bills. He further testified that his basic salary without overtime was Kshs.11,966 and that he was not claiming NSSF.

The Claimant clarified in re-examination that he was not drunk at the time of the accident and that the Respondent did not pay NSSF.

Claimant's Submissions

In the submissions filed on behalf of the Claimant, it is argued that under Section 45 of the Employment Act, the employer must not only prove that the reason for termination is valid and fair but also that the employment was terminated with fair procedure. The Claimant submitted that he had done nothing wrong to warrant his dismissal. That fair procedure was not applied hence the dismissal was unfair and unlawful. The Claimant relied on the case of *Kenya Union of Domestic, Hotels, Educational Institutions & Hospitals Workers v Mombasa Sports Club [2014] eKLR*. The Claimant further relied on *Donald Odeke v fidelity Security Ltd [2012] eKLR* where Ndolo J. held:

“...it does not matter what offence the employee is accused of. If the employee is not heard the termination is ipso facto unfair. If the employee is not heard the termination is ipso facto unfair.”

The Claimant submitted that under Section 49 of the Employment Act an employer who unfairly and unlawfully dismisses an employee must not go unpunished. The Claimant submitted that he is entitled to 12 months' salary as compensation, notice pay as provided under Section 36 of the Employment Act, accumulated leave and allowances for the entire period payable under Section 28 of the Employment Act that were not paid and which claim was not controverted by the Respondent. The Claimant further submitted that Service/Gratuity is payable since the Claimant does not fall within the exceptions set out in Section 35(6) of the Employment Act and that he is entitled to a certificate of service.

Respondent's submissions

The Respondent submitted that the only issue for determination is whether the Claimant is entitled to the orders sought. The Respondent submitted that the Claimant seeks one month salary in lieu of notice being an equivalent of Kshs.16,875 but the claim for this amount cannot stand as the Claimant's pay slip indicated that his gross pay was Kshs.13,163.

The Respondent submitted that the Claimant is only entitled to one year equivalent of leave by virtue of Section 28 (1) Employment Act as an employee is only entitled to leave after 12 months of service. The Respondent further submitted that the Claimant has not given any justification for the payment of salary for the remaining term of the contract thus this claim should not be awarded

In respect of Cause 1491 of 2012 the Respondent submitted that the Claimant is entitled to Kshs.11,965 as indicated in his pay slip for the month of June 2010. The Respondent further submitted that the Claimant is entitled to leave not taken amounting to Kshs.1,000 as indicated in his pay slip.

The Respondent further submitted that the Claimant is not entitled to service pay as the Claimant's pay slip indicates that he was a member of NSSF and NHIF. In addition, the claim for the balance of the contract period was not justified.

Issues for Determination

- a) Whether the Claimant was unfairly terminated.
- b) Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant was unfairly terminated.

The Claimant filed two separate claims involving the same incident and seeking similar reliefs but with a variance in the amount of the damages sought and the dates in the occurrence of events. Cause No. 1339 of 2012 is dated 6th August 2012 and Cause No. 1491 of 2012 is dated 27th August 2012.

The Claimant was summarily dismissed vide the letter dated 25th October 2011 which stated thus:

“Reference is made to an incident which happened on 21st October 2011 when you were required to escort goods to Cementers Ltd. The incident is contrary to your terms of service and the management has decided to take the following action against you. You are hereby summarily dismissed with effect from 26th October 2011 under [the] Employment Act 2007 section 44 clause 4 (G) read together with (C).”

In his testimony the Claimant stated that he did not know if the accident was reported to the police and that he did not record any statement regarding the accident. The Respondent did not call any witness to controvert the Claimant's evidence. This is despite annexing an abstract from the police, a certificate of examination and test of vehicle and a cash bail receipt relating to the accident.

Section 44(4)(c) and (g) of the Employment Act which provides:

(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

Section 45 of the Employment Act provides:

(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.

The Claimant's termination was unfair for failing to give sufficient reasons for the Claimant's summary dismissal. The incident referred to in the Respondent's summary dismissal letter was ambiguous since it did not refer to its loss of property or the exact reason for the reference to the incident. Further the claimant was not subjected to a hearing as provided in Section 41 of the Act.

Compensation

Having worked for 7 years it is my opinion that 8 months' salary is reasonable compensation taking into account the length of service, the manner in which the claimant left service and all relevant factors as set out in Section 49(4). I award him Kshs.105,304 as compensation.

Accumulated leave

The Claimant had served a total of seven years with the Respondent and is therefore entitled to leave under Section 28 of the Employment Act. The respondent did not specifically deny the claimant's prayer for leave or produce records showing he took leave. I award the claimant leave for two years in the sum of Kshs.21,263.30.

Service/Gratuity

The claim for service/gratuity should fail as it was not sufficiently proved. The Claimant produced his NSSF statement which shows that the Respondent did not remit the Claimants monthly contribution from the month of August 2004 to October 2006. In view of the fact that this was a period before the enactment of the Employment Act 2007 which introduced service pay, the respondent is directed make good the claimant's records at NSSF.

Payment for the remainder of the contract

The Claimant was yet to serve 3 months of the remainder of his contract and seeks payment for these months. This claim must fail since the Employment Act envisages that the 12 months' compensation is sufficient for the damages payable as held in **Mary Mutanu Mwendwa v Ayuda Ninos De Africa-Kenya (Anidan K [2013] eKLR** :

"My answer is that indeed loss of earnings/income is a damage which can be awarded by the Court but such damage is capped at the equivalent of twelve months gross wages irrespective of the duration of a particular contract. I do not see any policy or legislative reason why those on fixed term contracts should be treated any differently from those on definite contracts with a retirement age being treated differently. It would not be fair to award those on fixed term contracts loss of earnings for balance of unserved contract and deny those in definite or 'permanent' contracts who are unfairly or wrongfully dismissed, say with a balance of thirty years to retirement differently."

Certificate of Service

The claimant is entitled to a Certificate of Service.

Costs of the suit

The Respondent shall bear the costs of the suit and interest shall accrue from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF JANUARY 2019

MAUREEN ONYANGO

JUDGE