



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1065 OF 2013

(Before Hon. Justice Mathews N. Nduma)

JAMES MUTUKU ISIKA.....CLAIMANT

VERSUS

ASHUT ENGINEERING LIMITED.....RESPONDENT

J U D G M E N T

1. The Claimant was employed by the Respondent as a welder and grinder in 2003. He was paid a daily rate of Kshs.650 per day. He worked 6 days a week and worked continuously until April, 2013. He states that he reported to work daily at 7 am and knocked –off at 7 pm in the evening. He rested on Sundays. He contributed to NSSF and produced a statement marked ‘v’.

2. In October 2012, the Claimant got sick and went to hospital in Athi River. He had suffered T.B and was admitted for two weeks. The claimant stated he informed the Respondent that he was sick. Mr. Singh told the Claimant not to weld until he completed taking his medication. He was however asked to continue working until he started bleeding internally. He returned to hospital and was given off by Mr. Singh. He was admitted for another one week. He returned to work on 8th April, 2013 but was prevented from entering the gate. One Mr. Lube told him to return home. The Claimant was not paid any terminal benefits. He did not get a letter of termination and was not given any reason for termination.

3. The Claimant prays as follows:-

a) Notice Pay Kshs.19,550.

b) Leave pay Kshs.195,500 for the period served and compensation for unlawful and unfair termination of employment.

4. The Claimant withstood well, cross examination by Mr. Baabu for the Respondent. His credibility was not dented in court’s view. He insisted that he was unlawfully terminated, was not given annual leave for the entire period he served the Respondent and is entitled to payment in lieu of notice.

5. The Claimant prays to be awarded accordingly with interest and costs.

Response

6. The Respondent filed a statement of defence on 20th August, 2013 in which it admitted having employed the Claimant. The Respondent however stated in the statement of defence and vide testimony of RW 1 Wilson Maina Mutahi, a supervisor in the production department of the Respondent that the Claimant was employed as a casual labourer. That he worked from the year 2003 until the year 2013. That the Claimant absconded work. The Respondent waited for the Claimant for 7 days from 22nd March, 2013. That on 4th April, 2013, the Respondent wrote to the Claimant informing him that he had absconded work. RW 1 testified that the Claimant was a very good employee and was a union member. The letter was sent through the Union. He came back upon receipt of the letter and reported that he was sick. The Claimant did not produce a letter from a Doctor giving him off. The claimant was asked to bring one. He left and never came back. RW 1 confirmed that at the time the Claimant earned a daily rate of Kshs.650 per day. He was however paid at the end of the month. NSSF dues were deducted and remitted on his behalf. That the Claimant was paid in lieu of leave. He worked from 7 pm to 4 am. Later he worked from 7.30 am to 4 pm. He worked 8 hours per day. The Claimant did not work overtime. The Claimant worked Monday to Saturday according to RW 1. On Saturdays he worked up to 12 am. RW 1 confirmed that the Claimant had been infected by T.B and was admitted in October 2012. RW 1 denied that the Claimant went to hospital in March 2013 since he did not produce any documentation. RW 1 confirmed that the Claimant used to attend Athi River Shalom Hospital.

7. RW 1 prays that the Claims made by the Claimant be dismissed with costs.

Determination

- (i) Was the Claimant a permanent employee or a casual?
- (ii) Was the employment of the Claimant terminated by the Respondent or did he abscond work?
- (iii) Is the Claimant entitled to the reliefs sought?

Issue i

8. The evidence before court shows that the Claimant was initially employed as a casual but had upon expiry of 30 days converted to a permanent employee in terms of section 37 of the Employment Act, 2007. In terms of part V and VI of the Act, the Claimant was protected by the Employment Act, and was entitled to all work rights provided in the Act, including annual leave, payment for medical bills and the employment to only be terminated for a valid reason following a fair procedure. The question is answered in the affirmative.

Issue ii

9. The next issue is whether the Claimant was summarily dismissed from employment or he absconded work. The court beliefs the credible and undented testimony by the Claimant that he was prevented from accessing work premises when he came back from hospitalization for T. B. RW 1 confirmed that the Claimant was a T.B patient and had attended treatment in the past to his knowledge. RW 1 told the court that the Claimant was a very good worker. There is no plausible reason offered by the Respondent as to why the Claimant would abscond work. Indeed the Claimant confirmed working even when he was very sick and having internal bleeding. T.B. being a contagious disease, the Respondent ought to have granted the claimant prolonged off until when he was well. Instead, they simply prevented him from accessing work indefinitely.

10. The court is satisfied that the Claimant was summarily dismissed due to sickness. This is not a valid reason to dismiss an employee without affording him an opportunity to be heard and to stay home on paid or unpaid leave to recover.

11. The Respondent violated sections 41, 43 and 45 of the Act, and the Claimant is entitled to compensation for the unlawful and unfair dismissal from work.

12. The Claimant had served for over 10 years. RW 1 confirmed that he was a very good employee. He was summarily dismissed without payment of terminal benefits. He was treated as a casual for over 10 years and was not granted any annual leave as a result. The Respondent failed to produce any evidence of payment in lieu of leave and the Claimant is entitled to payment in lieu of leave as claimed. This is also an aggravating factor since the Claimant was a sickly person suffering from TB and was victimized for attending hospital notwithstanding that he was not given annual leave for 10 years.

13. This is indeed a proper case for the court to award the Claimant who did not contribute to his dismissal the maximum equivalent of 12 months' salary in compensation for unlawful dismissal.

14. In answer to issue III the court enters judgment in favour of the Claimant against the Respondent as follows:-

- a) 12 months salary in compensation for the unlawful and unfair dismissal in the sum of Kshs.234,600.
 - b) Kshs.19,550 in lieu of one month notice.
 - c) Three months' salary in lieu of leave days not taken for 3 years Kshs.58,650. The rest of the claim is time barred.
- Total award Kshs.312,800.
- d) Interest at court rates from date of Judgment in respect of (a) above and from date of filing suit in respect of (b) & (c) above till payment in full.
 - e) Respondent to pay costs of the suit.

Dated and Signed in Kisumu this 20th day of December, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 18th day of January, 2019

Maureen Onyango

Judge

Appearances

Mr. Namada for Claimant

Mr. Mbabu for Respondent

Daniel Ngumbi – Court Clerk