



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 708 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

JOSEPH OMONDI OWINO.....CLAIMANT

VERSUS

EPCO BUILDERS COMPANY LIMITED.....RESPONDENT

JUDGMENT

The Claimant, Joseph Omondi Owino, instituted this claim by a Memorandum of Claim dated 15th May 2013 seeking compensation for unfair termination of his employment, payment of his terminal dues and compensatory damages against the Respondent, EpcO Builders Company Limited.

He avers that he was employed by the Respondent as a Painter from October 2010 and worked continuously and diligently to the satisfaction of the Respondent and that his last salary was computed at a daily rate of Kshs.350.00/= paid per week. That on 9th February 2013, the Respondent’s supervisor one Jackson instructed him and three of his colleagues to report to the manager’s office. Upon reaching the said office, the manager, Mr. Ramji, dismissed them on the grounds that he was reducing the number of employees to cut costs of the company’s operations. That he was subsequently ordered to leave his phone number and that he tried to get feedback from the Respondent on his employment status, he has never been recalled.

He further avers that he was not offered a hearing or explanation, there were no valid reasons to dismiss him and that fair labour practice as envisaged by the constitution and rules of natural justice were not adhered to by the Respondent in its decision to dismiss him. That this amounted to unlawful, unfair and inhumane termination of his employment aggravated by the fact that the Respondent refused to pay his terminal benefits which he now demands as hereunder:-

- i).. One month’s salary in lieu of notice (350 x 30 days)..... Kshs.10,500
- ii). Payment in lieu of untaken leave for the entire service period
being (10,500 x 2 years)..... Kshs.17,000
- iii) Compensation for loss of income, trauma and inability to meet
- iv) continuing obligations being (10,500 x 12 months)..... Kshs.126,000

He prays for judgment against the Respondent for:

- a) A declaration that the dismissal or termination 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 damages totalling to Kshs.157,500/=
- c) Costs of this suit plus interest thereon.

The Respondent filed a Memorandum of Defence dated 18/06/2013 admitting it had employed the Claimant as a casual labourer but that the Claimant exhibited arrogance, was generally uncooperative and whimsically received instructions. That the Claimant was asked to leave the

premises as a disciplinary measure since it was against the company's rules and regulations to engage in unbecoming conduct and that when he left, he absented himself from work thereafter to date. That the Claimant was not dismissed on account of reduction of its employees. That his actions constituted gross misconduct and he cannot therefore claim for any payment and/or compensation and further, that he did not work on 9th February 2013 after refusing to follow instructions at work, became violent and threatened to beat up his supervisor. It avers that the Claimant's claim is untenable as he alleges the reason for the termination of his employment is redundancy whereas such particulars have not been cited and consequently no ground to warrant the declaration sought has been made out. It prays the Claimant's suit be dismissed with costs to the Respondent.

The Respondent filed a Witness Statement on 22nd October 2015 dated 26th November 2014 by Bernard Owino, its Human Resource Manager who states that the Claimant had a weekly wage of Kshs.2,100/= for 6 days and worked as a painter under Steel Fabrication Workshop Department. He also states that the Claimant on several occasions refused to obey lawful instructions issued by his immediate supervisor.

The Claimant testified that he was not given leave nor paid in lieu and that he was never issued with any warnings while working for the Respondent. That the termination of his employment was painful and unfair as he had to take his children home and they missed school for one year, that he could not pay house rent. That it is not true that he was disobedient stating that the manager only had contact with them when the supervisor was absent as they only dealt with the foreman or supervisor. He denied that he threatened the manager or dealt with the HR stating that he only went to the HR after his termination. He testified that he went to report to the labour office where after a letter was sent to the Respondent but which was ignored. In cross-examination, he confirmed that he was paid for all days worked while in re-examination he stated that the Respondent never gave them annual leave.

RW1, **Bernard Owino**, produced in court Mr. Ramji's report on the events of the said day of 9th February 2013 as evidence during the hearing stating that the claimant was told by the supervisor to go home and cool off and report back to work the following day. That the Respondent has termination procedures that it adhered to including a disciplinary process and that therefore the Claimant could not have been dismissed just like that as he claimed. That he was never invited to the Labour Office for conciliation and has never seen the letter referred to by the claimant, and that they could not trace the Claimant anywhere after he absconded duty. In cross-examination, he confirmed that he had no records in court to prove that the Claimant went on leave.

Claimant's Submissions

The Claimant submits that the Respondent through its witness in court failed to prove his misconduct and absconding of duty by not availing any records showing he was charged with any such allegations and requiring him to show cause why disciplinary action should not be taken against him. That the letter dated 6th June 2013 was drafted 4 months after his dismissal and not immediately after the alleged offence on 9th February 2013, that he could not have wilfully walked away from his source of livelihood of more than two years. That fair procedure was not applied as per Section 45 of the Employment Act and his dismissal was therefore unfair and unlawful. He relies in the case of Kenya Union of Domestic, Hotels, Educational Institutions & Hospitals Workers -v- Mombasa Sports Club, Cause No. 440 of 2013 where Radido J. observed at page 5 that no employer shall terminate the employment of an employee unfairly and that termination of employment is unfair if the employer fails to prove that the reason for the termination is valid and for a fair reason.

Further, that in the case of Donald Odeke -v- Fidelity Security Ltd, Cause No. 1998 of 2011, Ndolo J. equally observed at page 3 that an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against the employee and it does not matter what offence the employee is charged with, that if the employee is not heard, the termination is ipso facto unfair.

He submits that since he has proved his case to the required standards, his claim for notice is valid and payable under Section 36 of the Employment Act and that he is also entitled to leave as per Section 28 of the Employment Act since the Respondent failed to adduce any leave applications and approval, that an employer ought to keep employment records. That his employment was the only source of livelihood for his family and he is yet to find a befitting job to date owing to the current hard economic times and considering the Respondent did not issue him with a Certificate of Service. That he is therefore entitled to an award of the full 12 months' gross salary in compensation and for his claim to be allowed as prayed and that this Court should be persuaded by Cause No. 229 of 2014, Jacob Joseph Onyango -vs- John Ndungu Mureithi & Anor (2015) eKLR.

Respondent's Submissions

The Respondent submits that the Claimant's actions of defying orders, use of abusive language towards his supervisor and threatening to assault the said manager and absconding of duty amounted to gross misconduct as provided in Section 44(4)(a), (d) and (e) of the Employment Act warranting the disciplinary measure taken to have him leave its premises temporarily. That this was espoused in **Bamburi Cement Ltd —vs- William Kilonzi [2016] eKLR** where the learned Judge while commenting on Section 44 on what amounts to gross misconduct stated that the list is not exhaustive and that there will be other instances not enumerated under Section 44. That in **John Nyamage -vs- Searite Holdings Ltd [2013] eKLR**, the Judge stated that, "*It is not something the Court would condone if there was a threat of physical violence on staff at Enchanting Africa that would have been reason for dismissal.*"

The respondent further submits that the Claimant failed to prove whom he was following up with about his absence at work and that he admitted to not having written to the Respondent to offer his reason for not attending work. It relies in the case of **Joseph Njoroge Kiama -vs- Summer Limited (2014)** where the court noted that an employee has an obligation to inform the employer of any reason he or she is unable to be at work and that the obligation on the part of the employer to contact the employee is not a rule of law but out of best practice.

It submits that the Claimant was not dismissed as there was no notice of termination given to him as evidence of his termination and that he was duly paid on 9th February 2013. That his testimony was not backed before court by any of the three employees and neither did he prove that he was dismissed on the grounds he alleges. That the suit is premature and made in speculation of a termination that never took place and that the Claimant is therefore not entitled to any relief for unfair termination. That should the court however find otherwise, it submits that

the Claimant was not a permanent but a casual employee. Further, that Section 35(1)(a) of the Employment Act provides that **where the contract is to pay wages daily, a contract is terminable by either party at the close of any day without notice.**

It is submitted by the Respondent that should the court find that the Claimant is entitled to compensation, it should consider the case of **Yusuf A.K. Busienei -vs- Canken International Ltd (2018) eKLR** where the Claimant who was under employment on a daily wage of Kshs.300/= had worked for eight (8) years and the court awarded him 6 months' salary compensation. That the Claimant in this case having worked for only two (2) years solely contributed to the alleged termination and as such, he should not be seeking any compensation whatsoever but if so, a compensation of 2 month's salary of Kshs.15,400/= being (7,700/= x 2 years) should be more than sufficient.

Determination

The first issue for determination is whether the termination of employment of the Claimant was unfair. The second issue is whether the Claimant is entitled to the orders sought.

It is the claimant's submission that he was verbally and unfairly dismissed while the Respondent's evidence is that the Claimant is guilty of gross misconduct as enumerated under Section 44 (4) of the Employment Act and that he simply deserted work while claiming he was terminated. It is my opinion that the Claimant was converted to a permanent employee having worked for the Respondent for 2 years as provided under Section 37 (1)(a) of the Employment Act and in the same breathe, is entitled to a notice of termination as stipulated in Section 35 (1)(c) of the Employment Act. In that regard, the termination of the Claimant's employment was unfair and unlawful since the Respondent did not follow due procedure by also affording the Claimant adequate opportunity to respond to any charges before action was taken against him as was observed in the case of **Donald Odeke -v- Fidelity Security Limited, Cause No. 1998 of 2011** above

The Claimant is therefore entitled to notice pay and leave. As for the claim for compensatory damages, and relying on the case of **Yusuf A. K. Busienei -vs- Canken International Limited (2018) eKLR** above, I award him 3 months' salary, taking into account all the circumstances of termination of his employment as well as the length of service.

In summary I award the claimant the following –

1. Notice (350 x 3) Kshs.10,500
2. Leave for 2 years (42 days) Kshs.14,700
3. Compensation Kshs.31,500

The respondent shall pay the claimant's costs of the suit.

Decretal sum shall attracts interest at court rates from the date of judgment.

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

MAUREEN ONYANGO

JUDGE