



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 609 OF 2017

OPIYO BENARD OWINO.....CLAIMANT

VS

WEICHAJ POWER SERVICES &

SPARE PARTS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is an employment dispute brought by the Claimant against the Respondent. The claim is documented by a Memorandum of Claim dated 11th July 2017 and filed in court on 27th July 2017.
2. The Respondent filed a Memorandum of Response on 21st August 2017 but did not attend the trial despite due notification. The Court therefore heard the Claimant *ex parte* on 20th September 2018.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a panel beater at a monthly salary of Kshs. 35,000 effective 19th October 2016. He worked as such until 25th April 2017, when his employment was terminated.
4. The Claimant's case is that the termination of his employment was unlawful and unfair and he was not paid his terminal dues. His claim is as follows:

- a) 1 Month's salary in lieu of notice.....Kshs. 40,250
- b) House allowance for 6 months.....31,500
- c) Unexpired contract (44 months).....1,771,000
- d) 12 months' salary in compensation.....483,000
- e) Costs plus interest

The Respondent's Case

5. In its Memorandum of Response dated 19th August 2017 and filed in court on 21st August 2017, the Respondent states that on various occasions, the Claimant reported to work very intoxicated and was therefore unable to perform his work effectively.
6. The Respondent further states that the Claimant portrayed lack of civility towards his seniors and did not adhere to laid down rules and regulations as set out in his contract of employment.
7. The Respondent maintains that the Claimant's dismissal was proper and the Claimant was well aware of his ill-mannered behaviour.

Findings and Determination

8. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

9. The Claimant's employment was terminated by letter dated 25th March 2017 stating as follows:

"RE: NOTICE FOR TERMINATION OF EMPLOYMENT

Reference to the above;

Kindly note that we will not be needing your services as from 25th April 2017. Also note that you will be required to report to work as usual as you serve for the one month notice before dismissal.

Note that you are to perform your duties as required by the management diligently.

Any further correspondences should be done in writing. Thank you.

YOURS FAITHFULLY,

(Signed)

LIU WEI

GENERAL MANAGER."

10. This letter does not disclose the reason for the termination. However, in its Memorandum of Response, the Respondent accuses the Claimant of intoxication while at work, lack of civility towards his seniors and failure to adhere to rules and regulations set out in his employment contract. Again, the Respondent did not give particulars of the breaches attributed to the Claimant.

11. On his part, the Claimant told the Court that his employment was terminated because the Respondent's General Manager, Liu Wei accused him of failure to promptly respond to his call, which the Claimant attributed to a noisy work environment.

12. Section 43 of the Employment Act requires an employer to establish a valid reason for termination of employment. To my mind, the general statements made by the Respondent in its Response cannot pass for such a reason. Additionally, the Respondent did not afford the Claimant an opportunity to defend himself as required under Section 41 of the Employment Act.

13. It is therefore evident that the Respondent not only failed to establish a valid reason for terminating the Claimant's employment but also failed the procedural fairness test set by Section 41 of the Act. For this reason, the Court finds and holds that the Claimant is entitled to compensation.

Remedies

14. Further to the foregoing findings, I award the Claimant three (3) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service as well as the Respondent's callous conduct in effecting the termination.

15. The Claimant also claims house allowance. However, he himself told the Court that he earned a consolidated salary and the Court did not find any evidence of underpayment. The Court therefore finds no basis for the claim for house allowance which is disallowed. Similarly, no basis was established for the claim for salary for the unexpired contract term which consequently fails and is dismissed. The claim for notice pay was abandoned at the trial.

16. In the end, I enter judgment in favour of the Claimant in the sum of Kshs. 105,000 being three (3) months' salary in compensation.

17. This amount will attract interest at court rates from the date of judgment until payment in full.

18. The Claimant will have the costs of the case.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF FEBRUARY 2019

LINNET NDOLO

JUDGE

Appearance:

Miss Osore for the Claimant

No appearance for the Respondent