



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 686'A' OF 2014

BETWEEN

WILFRED OTAKO SEWE.....CLAIMANT

VERSUS

CLAYWORKS LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Irungu Mwangi, Ng'ang'a T.T. & Company Advocates for the Claimant

J.Ngaii & Gikonyo Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 8th May 2014. He states that he was first employed by the Respondent as a General Labourer, in 1983. He later became a Wages Clerk. By the time of termination on 12th October 2011, the Claimant held the position of Personnel Officer. His last salary was Kshs. 17,000 monthly.

2. He states he was ill on 11th October 2011. He was treated at Kasarani Nursing Home. He presented his medical records to the Respondent's General Manager on 12th October 2011. The General Manager, without giving any reason, terminated the Claimant's employment contract.

3. The Claimant seeks Judgment against the Respondent in the following terms:-

a. 3 months' salary in lieu of notice at Kshs. 51,000.

b. 52 days' salary irregularly deducted from the Claimant's terminal dues, at Kshs. 34,000.

c. Early retirement package, based on 13 years of service left before retirement, at Kshs. 2,652,000

Total...Kshs. 2,737,000.

d. Declaration that termination was unfair and unlawful.

e. Damages for breach of contract.

f. Damages for mental torture, anguish and anxiety.

g. Costs.

4. The Respondent filed its Statement of Response on 30th June 2014. It is not disputed that the Claimant was an Employee of the

Respondent. His contract was terminated by the Respondent due to his frequent absenteeism. He had been warned severally. He was in management, and not entitled to the benefits contained in a CBA negotiated between the Respondent and Kenya Quarry and Mine Workers Union.

5. The Claimant, and Respondent's former Chief Accountant Jacob Babu Okumu, gave evidence, and respective cases rested, on 18th October 2018, during the Court's service week. The Cause was last mentioned before the Hon. Deputy- Registrar at Nairobi on 19th November 2018. The file was forwarded to Mombasa for judgment-writing on the same date, 19th November 2018.

6. The Claimant restated the contents of his Pleadings, in his oral evidence before the Court. He added that other than being a General Labourer, Wage Clerk and Personnel Officer, he was utilized at some point by the Respondent, as a Cashier. He was alleged to have absented himself from the workplace for 60 days, beginning 2nd January 2011. He was not absent without leave. He was paid a net amount of Kshs. 295,790 in terminal benefits. He was to work until he reached the age of 60 years. He was entitled to 1 month salary in lieu notice. There was no operational CBA at the workplace. Cross-examined, the Claimant told the Court he was unionisable before the year 1989. He received various warnings. He was never drunk at work, as alleged by the Respondent. The Respondent normally deducts from Employee's salaries, for days not worked. The Claimant agreed he received Kshs. 295,790 as terminal benefits. Redirected, the Claimant told the Court that termination was based on absenteeism, not alcoholism.

7. Okumu told the Court that he handles human resource issues. He confirmed details and history of the Claimant's employment. There were 3 or 4 warnings, relating to absenteeism and drunkenness. The Claimant would explain that he took to heavy drinking, because he was bewitched. He did not set a good example to other Employees. He was summarily dismissed, and was paid terminal benefits on humanitarian grounds. On cross-examination, the Witness told the Court that the warnings were not documented. The letter of termination does not mention alcoholism. The Claimant would reform, and soon after, regress. The 60 days the Claimant was reported to be absent, are not shown in any attendance register. The Claimant said on several occasions, that he thought he was bewitched.

The Court Finds:-

8. The Claimant worked for the Respondent Company between 1983 and 2011. He worked variously as a General Labourer, Wages Clerk, Cashier and lastly, Personnel Officer. It is not disputed that his contract was terminated by the Respondent on 18th October 2011. Termination was on the ground of absenteeism.

9. The letter of termination is dated 12th October 2010. The correct year is 2011. The Parties agree 2010 was a typographical error. There was a letter from the Respondent to the Claimant dated 15th October 2011, correcting the error. The Respondent alleges in the letter of termination, that the Claimant had failed to report to work, for 60 working days, from 2nd January 2011. For this reason, the Respondent terminated Claimant's contract with effect from 18th October 2011, "*when the sick off leave granted by the Doctors expires,*" the letter states.

10. The letter suggests that the Claimant was absent, at least as of the date of termination, on sick leave. If he had sick-off leave, he cannot have been absent without leave or lawful cause, to justify summary dismissal under Section 44[4] of the Employment Act.

11. On 11th April 2011, Respondent issued the Claimant a memo, warning that the Claimant was found working while drunk. It was also said that the Claimant failed to report for duty, and was seen roaming around elsewhere. The letter of termination is not based on drunkenness.

12. The Respondent was not able to show that the Claimant was absent over a period of 60 days, from 2nd January 2011, without the leave of the Respondent, or without lawful cause. There was no Attendance Register availed to the Court. The Memos issued by the Respondent refer to a Daily Attendance Register. It cannot be disputed that there was a Daily Attendance Register at the workplace. What was the challenge in presenting this Register to the Court, to establish that the Claimant was absent for 60 days? The Claimant furthermore was warned for his absence and had deductions made from his salary, for the days he was said to have been absent. Are these not sufficient forms of punishment, assuming it is true that the Claimant was absent for 60 days without leave?

13. There is no record whatsoever, of any disciplinary hearing, on any allegation, whether absenteeism, or alcoholism. There was no letter to show cause given to the Claimant, calling upon him to answer any allegations. There was no hearing as required under Section 41 of the Employment Act 2007.

14. Termination was faulty. It did not meet the minimum standards of fairness under Sections 41, 43 and 45 of the Employment Act.

15. The Claimant was paid Kshs. 295,790 comprising gratuity over a period of 26 years served; outstanding annual leave days; and notice pay. He acknowledges payment. There is no evidence that he was entitled to work until he turned 60 years. His contract did not have provision for 3 months' salary in lieu of notice. The amount paid to the Claimant included the contractual 1 month salary in lieu of notice. The Claimant was in management, and concedes his terms were not subject to the CBA in place. Termination was unfair on substantive as well as procedural grounds. ***The Claimant is awarded equivalent of 6 ½ months' salary in compensation for unfair termination at Kshs. 110,500.***

16. There is no legal justification for the prayer for "*early retirement package,*" pleaded at a staggering sum of Kshs. 2,652,000. The prayer is not supported by the Claimant's contract or by any other evidence availed to the Court.

17. The prayers for damages for breach of contract and for mental torture, anguish and anxiety similarly have no foundation in law and fact, and are rejected. Compensation has been granted under statute and is sufficient remedy.

18. The Respondent, as observed elsewhere in this Judgment, did not show that the Claimant was absent, without leave or lawful cause, for 60 days, or 52 days pleaded in the Statement of Claim. Deduction of 52 days' salary from the Claimant's terminal benefits was not based on available evidence. ***He is granted the prayer for Kshs. 34,000 being the refund of salary deducted irregularly.***

19. **No order on the costs.**

20. **Interest allowed at 14% per annum from the date of Judgment, till payment is made in full.**

IN SUM, IT IS ORDERED:-

a. It is declared that termination was unfair.

b. The Respondent shall pay to the Claimant, equivalent of 6½ months' salary in compensation for unfair termination at Kshs. 110,500, and Kshs. 34,000 in salary refund- total Kshs. 144,500.

c. No order on the costs.

d. Interest granted at 14% per annum from the date of Judgment till payment is made in full.

Dated and signed at Mombasa this this 5th day of February, 2019.

James Rika

Judge

Dated, signed and delivered at Nairobi this this 15th day of February, 2019.

Maureen Onyango

Principal Judge