



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1104 OF 2015

(Consolidated with 1105 of 2015)

(Before Hon. Justice Hellen S. Wasilwa on 6th February, 2019)

SAMMY MBUVI MUTHANGA &

MICHAEL IRERI NDWIGA.....CLAIMANTS

VERSUS

SOKO SWEETY LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimants, Sammy Mbuvi Muthanga and Michael Ileri Ndwiga, filed suit through the firm of Ayieko Kangethe Advocates on 26th June, 2015, seeking damages for unfair termination of employment.
2. Sammy Mbuvi avers that he was employed by the Respondent on or about January 2008 until May 2015. He was stationed at the Respondent's Company performing duties as an importer and distributor of sweets and confectionary earning a monthly salary of Kshs. 17,500/-.
3. Michael on the other hand was employed by the Respondent on or about September 2009, until May 2015, performing duties as an importer and distributor of sweets and confectionary earning a salary of Kshs. 12,000/= per month.
4. That he worked for the Respondent until 12th May, 2015, when the Claimants were involved in an accident while on board a company motor vehicle registration number KAZ 774L Suzuki Maruti. They contend that the Managing Director of the Respondent one Mr. Kamlesh Shah informed them to stay away from work as they were investigating the circumstances of the accident.
5. The Claimants aver that the dispute began after they went to obtain police abstracts and medical reports from Kasarani police station in order that they may follow on the issue of compensation from the Respondent's insurers.
6. That the Claimants served the Respondent's Managing Director with the letter from the labour officer requiring him to pay the Claimants but he refused on the ground that the Claimants had absconded duty. Thereafter the Respondent terminated the Claimants' services without giving them any notice as required by the law.
7. They allege that the Respondent's decision to terminate them was orchestrated by the fact that they were persistent in asking for compensation for the injuries they suffered and the fact that they reported the Respondent to the labour officer for refusing to pay their salary for May, 2015. That the termination was unfair for the reasons that they were never issued with any notice of intention to terminate their services, they were not given any explanations as to the reason of termination and they were not given a hearing prior to termination.
8. They pray for salary for the month of May, 2015, one month's salary in lieu of notice, 12 months' pay for unfair termination, severance pay, annual leave and letter of service.
9. The Respondent in their Defence deny unfairly terminating the Claimants and state that indeed the Claimants were involved in a car accident after which the Respondent's Managing Director accepted the Claimants' request for a few days sick-off granted to them by the doctor. That the Claimants reported back to work on 20th May, 2015, and were requested by the Respondent to submit all receipts and medical reports required by the Respondent's insurer for purposes of compensation which the Claimants submitted.

10. The Respondent avers that they paid for all the Claimants' medical expenses and even offered to send the Claimants to Nairobi for further check-up and treatment if required at the Company's cost to which the Claimants responded that they had recuperated well and had no complaints requiring a further visit to the doctor.

11. They informed the Claimants that they were required to visit the Respondent's insurer's brokers in Nairobi, this being a matter of policy by the Insurance company to record their statement and fill in some claim forms for compensation arising from the injuries sustained in the accident, since the Respondent had a comprehensive insurance cover for all its employees, and return to work soon thereafter.

12. They contend that the Claimants left the Respondent's offices and failed to return to work since then and any efforts to reach them were futile as the Claimants' phones were switched off. That after 20th May, 2015, the Claimants appeared in the Respondent's offices on 4th June, 2015, after visiting the Respondent's insurance brokers.

13. That the Claimants were required to report to work on 22nd May, 2015 after visiting the insurance brokers but they failed to do so and that notwithstanding the Respondent has not terminated the Claimants' services to date. They contend that they are ready and willing to pay the Claimants' salary for the days worked in May, 2015, and sick-offs granted in the same month.

14. The Respondent further contends that the Claimants are not entitled to the prayers sought save for the certificate of service which the Respondent is willing to issue. That all statutory deductions were remitted to the respective bodies and therefore the claim does not lie. They pray for the claims to be dismissed with costs.

15. The Respondent have included counterclaims in their Defences wherein they claim for Ksh. 17,500/= and Kshs. 12,000/= respectively being one month's salary in lieu of notice from the Claimants for allegedly terminating employment without notice.

Evidence

16. Both Claimants testified as set out in their pleadings. Sammy Mbuvi in addition to what was stated in his Memorandum of Claim denied absconding from duty and stated that in 2015 he had not taken any leave. He urged the Court to allow his claim.

17. Michael Ireri in addition to the averments in his pleadings admitted to having taken all his leave days. He denied absconding duty and that he had never received any warning prior to termination.

18. The Respondent called 3 witnesses who led evidence that they did not terminate the Claimants but they absconded from duty and have not returned to date. They urged the Court to dismiss the case with costs.

Submissions

19. The Claimants avers that the Respondent terminated them unfairly without due regard to the law and they were not paid any terminal dues. They urge the Court to allow their claim.

20. The Respondent on the other hand submit that they did not terminate the Claimants at all but that they are the ones who absconded duty in May, 2015, and have not returned to date. They urge the Court to dismiss the Claims and allow the counterclaims of Kshs. 17,500 and 12,000/= respectively for the Claimants terminating employment without notice.

21. I have examined all the evidence and submissions of both parties. The issues for determination by this Court are as follows:-

- 1. Whether the Claimants were terminated or they absconded duty.***
- 2. If the Claimants were terminated, whether the termination was lawful and fair.***
- 3. Whether the Respondent's Counter claim is proved.***
- 4. What remedies to grant in the circumstances.***

22. On the 1st issue, the Claimants aver that they were terminated because they were keen on pursuing compensation for the accident claim. The Claimants avers that they were told to stay away after the accident on 12/5/2015 but were never called back by the Respondent. To drive this point home, the Claimants stated that they reported the matter to the labour officer and the officer wrote a letter to the Respondents on 16.6.2015 asking them to appear before him for a conciliation meeting. The letter is attached to Claimants' documents.

23. The Claimants also attached a claim form to the Directorate of OSHA signed by Respondents on 5/6/2015. The duration within which these events are happening from the accident date, to the time of filing claim form and reporting to the labour officer shows that the Claimants were always available.

24. There is no indication that the Respondent sought for the Claimants who they allege had absconded. No notice to show cause why they should be terminated or dismissed for absconding duty was ever served upon them. It is therefore my finding that the Claimants were dismissed but never absconded duty.

25. On the 2nd issue, the Respondent admitted employing the Claimants. There is no indication as to how this relationship was severed. The

Claimant aver that they were told to wait to be called back to work and this was never to be. There was any disciplinary hearing nor were there any valid reasons to dismiss the Claimants.

26. In the circumstances, I find the Claimants' dismissal by the Respondent was unfair and unjustified as per Section 45(2) of Employment Act which states as follows:-

(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..".

27. The Respondent had prayed for an equivalent of 1 month salary in lieu of notice from the Claimants but in view of my findings above, I find the counter claim not tenable and I dismiss it accordingly.

28. As for the prayers sought by the Claimants, I find for the Claimants and I award them as follows:-

1st Claimant – Sammy Mbuvi Muthanga

1. 1 month salary in lieu of notice = 17,500/=.

2. 8 months' salary as compensation for unfair termination = $17,500 \times 8 = 140,000/=$.

3. Claimant's May salary upto 12th May 2012 = $12/30 \times 17,500 = 7,000/=$.

4. Prorata leave pay for 2012 = $5/12 \times 17,500 = 7,292/=$

TOTAL= 171,792/=

5. Issuance of a Certificate of Service.

2nd Claimant – Michael Ireri Ndwiga

1. 1 month salary in lieu of notice = 12,000/=.

2. 8 months' salary as compensation for unfair termination = $12,000 \times 8 = 96,000/=$.

3. Claimant's salary for 12 days in May 2015 = $12/30 \times 12,000 = 4,800/=$.

4. Prorata leave pay for 2015 = $5/12 \times 12,000 = 5,000/=$

TOTAL= 117,800/=

5. Issuance of a Certificate of Service.

29. The Claimants are also entitled to the costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 6th day of February, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wesonga holding brief Kiprof for Respondent – Present

Odaga holding brief Ayieko for Claimants – Present