



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 965 OF 2014

DUNCAN MWAGOGO MWAVISWA.....CLAIMANT

v

ADIX PLASTICS LIMITED.....RESPONDENT

JUDGMENT

1. On 5 June 2014, Duncan Mwagogo Mwaviswa (Claimant) instituted legal proceedings against Adix Plastics Ltd (Respondent) contending that his dismissal through a letter dated 1 July 2014 was unfair. He also alleged breach of contract (Claimant sought a total of Kshs 1,086,391/-).

2. In its *Response*, the Respondent asserted that the dismissal of the Claimant from work because of gross misconduct and negligence, and was fair.

3. The Claimant joined issue with the Response on 31 August 2015 and the Cause was heard on 22 January 2019 (the Court had directed the parties to file *Agreed Issues* on or before 30 March 2018 but the same were not filed. Respondent did not file witness statements).

4. Although served with a hearing notice on 11 January 2019 (affidavit of service on record), the Respondent was not represented during the hearing.

5. The Claimant filed his submissions on 8 February 2019.

6. The Court notes that the Respondent had earlier on been invited on 22 November 2018 to attend the registry for fixing of a hearing date but it did not appear.

Procedural fairness

7. The Claimant gave sworn testimony and stated that he was issued with a show cause dated 27 June 2014 and that he responded to the show cause on 28 June 2014.

8. The allegations in the show cause were that the Claimant had carelessly performed his work by stopping a *chiller* without any reason and that he had damaged a mould and failing to report the damage.

9. The Claimant asserted that he was not afforded an opportunity to be heard nor given a notice of termination.

10. In so far as the Claimant was informed of the allegations to confront and was afforded an opportunity to respond, the Court is satisfied that the Respondent was substantially in compliance with the provisions of sections 35(1)(c) and 41 of the Employment Act, 2007.

Substantive fairness

11. The Claimant testified that the *chiller* stopped because of a power failure over which he had no control.

12. The Respondent did not attend Court to rebut or interrogate the testimony of the Claimant.

13. Further, in terms of sections 43 and 45 of the Employment Act, 2007, the Respondent had the burden of proving the reasons for dismissing the Claimant, and that the reasons were valid and fair.

14. The Respondent did not discharge that obligation and the Court therefore concludes that the reasons for the dismissal of the Claimant were not valid and fair.

Compensation

15. In light of the Claimant's 2 year of service, the Court is of the view that the equivalent of 2 months gross wages as compensation would be appropriate (Claimant's proved gross pay for June 2014 was Kshs 18,371/-).

Pay in lieu of notice

16. The Court also finds that the Claimant is entitled to 1 month pay in lieu of notice in terms of section 35(1)(c) as read with section 36 of the Employment Act, 2007 (basic pay was Kshs 11,100/-).

Breach of contract

Salary for June 2014

17. The Claimant admitted that he was paid earned wages for June 2014.

Leave

18. An employee is entitled to at least 21 days annual leave after every 12 months service.

19. The Claimant's assertion that he did not go on leave from 2012 to 2014 was not rebutted.

20. However, the copy of pay slip he produced show an item called leave encashment.

21. The Court will therefore not allow this head of claim.

Unpaid holidays

22. The Claimant did not disclose particulars of the holidays he worked and was not paid. The Court finds this head of claim as not proved.

Days off

23. Under this head, the Claimant sought Kshs 117,579/- for off days during the tenure of the employment. This being in the nature of a special damage, the Claimant did not prove it to the required standard.

Overtime

24. The copy of pay slip produced by the Claimant show that overtime work was compensated. The Court therefore declines to find for the Claimant.

Conclusion and Orders

25. The Court finds and declares that the dismissal of the Claimant was unfair and awards him

(a) Compensation Kshs 36,742/-

(b) Pay in lieu of notice Kshs 11,100/-

TOTAL **Kshs 47,842/-**

26. The Court finds and declares that the Claimant failed to prove breach of contract.

27. Claimant to have costs on half scale.

Delivered, dated and signed in Nairobi on this 1st day of March 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Mulaku instructed by Namada & Co. Advocates

For Respondent J.O Juma & Co. Advocates

Court Assistant Lindsey