



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 108 OF 2018

DANIEL MAUNDU NGEMU.....CLAIMANT

VERSUS

SPECIALIZED POWER SYSTEMS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant has sued the Respondent for summarily dismissing him from his employment without according him due process under the law. The Claimant was employed by the Respondent on or about 1st July 2014, as a welder in Nairobi on a monthly salary of Kshs. 27,500/- until 2nd November 2017 when he was summarily dismissed. The Claimant averred that he was not issued with a written contract of employment. He avers that he was summarily dismissed after the Respondent's deputy found him talking to a colleague who had moved from the cleaning section and came to the welding section. They were then immediately ordered to take off their aprons and leave the Respondent's premises and never to come back gain. The Claimant avers that his termination was without a valid reason, unfair, unlawful and wrongful as he was neither issued with a notice nor was he accorded a hearing by the Respondent. The Claimant avers that he visited the labour offices in an attempt to have the issue resolved but the Respondent snubbed all invitations for discussions by the said office. The Claimant asserts that the Respondent failed to pay him his terminal benefits and compensatory damages without any lawful cause. He thus claimed one month's salary in lieu of notice – Kshs. 27,500/-, payment in lieu of leave not taken – Kshs. 66,634.60/-, and 12 month's compensation for unfair termination – Kshs. 330,000/-. The Claimant thus prays for a declaration that his dismissal was unfair, unlawful and wrongful, terminal benefits as outlined above, general damages for breach of employment contract, certificate of service and the costs of the suit.

2. The respondent in its response to the statement of claim averred that the Claimant was terminated for gross misconduct which involved engaging in the irregular practice of using his mobile phone and idle chatting with other colleagues during working hours contrary to Respondent's terms and conditions for employees and contrary to the Employment Act. The Respondent avers that it summoned the Claimant and accorded him an opportunity to explain himself before making a decision to terminate him. The Respondent avers that it issued the Claimant with a certificate of service but he failed to pick it despite being advised to do so. It asserts that the termination was lawful and as a result of the Claimant's blatant violation of the regulations of the Respondent. It was averred that this was not the first time the Claimant was engaging in such misconduct since he had previously been verbally warned by the Respondent. The Respondent asserts that it invited the Claimant for a disciplinary hearing but he opted not to attend and instead instituted the present proceedings. The Respondent averred that the dismissal was lawful, unbiased and non-discriminatory.

3. The Claimant filed a reply to the Respondent's response to the claim and denied having been issued with an appointment letter. The Claimant further denied having engaged in idle chatting and irregular using of his mobile phone while at work. He denied having been issued with a certificate of service and/or being called upon to pick it. He denied involving himself in any misconduct and also denied that he received any warnings of any misconduct. He averred that he was also not taken through any disciplinary process by the Respondent. The Claimant averred that the Respondent's reply was misdirected, full of falsehoods and ought to be struck out.

4. At the hearing of the case the Claimant testified while the Respondent did not call any witness. The Claimant testified that he was told to leave after he was found talking to Martin the cleaner. He said that he was not given any notice, he was not accorded a hearing to explain his side of the story and that he was also not issued with a certificate of service. He stated that he was not given advance salaries as well and that he was verbally dismissed for talking to a cleaner.

5. The Claimant submitted that his termination was unfair, neither was he given any valid reason for his termination nor did the Respondent follow the laid down procedure when terminating him. He submitted that the Respondent violated Sections 43 and 45 of the Employment Act. The Claimant further submitted that the Respondent apart from alleging that it had invited the Claimant for a hearing which he did not attend, no evidence was produced in court to show that indeed the Claimant was invited but he refused to attend. The Claimant thus contended that his termination was unlawful and that the court should award the reliefs sought in his claim.

6. From the foregoing, the issues for determination are:-

i. Whether there was a valid reason for the termination of the Claimant.

ii. Whether the Claimant's termination was fair or unfair.

ii. Whether the Claimant is entitled to the remedies sought.

7. As to whether there was a valid reason for the termination of the Claimant, it is moot that before an employer can exercise its right to terminate the contract of an employee, there must be valid reason or reasons. The employee ought to be given the procedural and substantive fairness espoused in Section 41 of the Employment Act. Where an employer fails to prove either procedural fairness or valid reasons, the termination is unfair within the meaning of the Employment Act. The Claimant in the instant suit asserts that he was found talking to the cleaner and he was verbally terminated on grounds of chatting and being idle during working hours contrary to the Respondent's regulations. The Respondent on the other hand asserts that it was not the first time the Claimant had been caught chatting, talking on the phone and idling during working hours. The Claimant was just told to leave after he was found talking to a cleaner and in this case, the Respondent failed to discharge its burden of proving the reason for dismissal or that the reason for dismissal was valid. Further the Respondent failed to rebut the evidence of the Claimant and its assertions thus remained mere speculations. Regarding the anticipated hearing prior to dismissal, there is no proof that the Claimant was ever invited to attend a disciplinary hearing and there was no notice issued to show cause why his employment should not be terminated. Due procedure was therefore not followed in the dismissal and Section 41 of the Employment Act was violated.

8. The upshot of the foregoing is that the Claimant is entitled to:-

i. one month's salary in lieu of notice – Kshs. 27,500/-,

ii. payment for leave not taken – Kshs. 66,634.60/-,

iii. compensation for unfair termination for 4 months amounting to Kshs. 110,000/-.

iv. Costs of the suit.

v. The sums in i), ii) and iii) shall be subject to statutory deductions in terms of Section 49(1) of the Employment Act;

vi. Interest on the sums in i), ii) and iii) at court rates from the date of judgment till payment in full.

vii. Certificate of service.

It is so ordered.

Dated and delivered at Nyeri this 23rd day of May 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar