



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 41 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

DUNCAN JERUSI KIPTARUS.....CLAIMANT

VERSUS

AGRI PRO-PAK LIMITED.....RESPONDENT

JUDGMENT

The Claimant filed suit seeking damages for unlawful dismissal which suit is premised on an employment relationship between him and the Respondent.

He avers that he was employed on 1st August, 2011 as a mass production machinist for a juice production company called FANAKA at a starting salary of Kshs.6,500 exclusive of allowances which amount graduated over time to Khs. 7,500/= which he earned up to the time of termination.

The Claimant contends that he worked diligently of the Respondent throughout the 2½ years of his employment without ever receiving any warning letter until 11th November, 2013 when the Respondent unlawfully terminated the his services without affording him an opportunity to defend himself. The Claimant further avers that he was not given any notice and neither was he issued with a certificate of service. He also contends that he was underpaid and claims for restitution of the same.

He claims that on November, 2013, he approached the Respondent and reminded him about the recommended minimum wages from 2012 as contained in Legal Notice No. 71 and Legal Notice No. 197 but the respondent declined to effect the same. He urges the Court to allow the claim as drawn.

The Respondent filed a Memorandum of Response wherein it denies ever employing the Claimant under an oral contract or ever paying any allowances as alleged in the Memorandum of Claim. It further denies that it terminated the claimant's employment without payment in lieu of notice, failed to issue him with a certificate of service or underpaying him as alleged in the Memorandum of Claim.

The Respondent contends that due process was followed and thus the Claimant was not unfairly terminated. It is the Respondent's contention that the Claimant was a general labourer and not a mass production machinist, that he was dismissed due to various acts of gross misconduct committed prior to his dismissal which were stated in his dismissal letter.

The Respondent contends that it invited the Claimant on several occasions to defend himself but he declined to do so. It holds the position that the Claim is baseless and the suit should be struck out with costs for failing to disclose a reasonable cause of action.

Evidence

The Claimant led evidence stating that he was employed under an oral contract by the Respondent on 1st August, 2011 with a salary of 7,350 as at the time of termination. That he worked diligently for the 3 years he was in the Respondent's service until 11th December, 2013 when he was accused of theft. He attributes the accusation to the fact that he had previously asked for a pay increase.

He led evidence to the effect that on termination he was not issued with a termination letter and had not received any warning letter prior to termination. He denied receiving the warning letters in the Respondent's documents. He also denied the leave forms attached to the Respondent's list of documents and maintained that he had not been allowed to go on leave even once.

The claimant alleged that he was underpaid for the reason that he was employed in Nairobi then transferred to Kiambu. He claimed for underpayment as set out in the memorandum of claim and compensation for unfair termination. In cross examination he admitted being paid in lieu of leave and denied any misconduct as alleged by the Respondent.

The Respondent did not call any witnesses.

Claimant's Submissions

It is submitted on behalf of the Claimant that he was unfairly terminated as he was not accorded a fair chance of a hearing and thus should be compensated. He cites the case of *Barasa Paul Isaac Vs XFOR Security Solutions (KE) Ltd* where it was held that under section 43 and 45 of the Employment Act, the Employer is burdened to prove that he had availed a fair hearing to the employee.

On underpayments, it is submitted that the Claimant was underpaid in the years 2011 to 2013 and rely on L.N. No.38 of 2006, L.N. No.70 of 2009, L.N. No.98 of 2010, L.N. No.64 of 2011. That the Respondent did not produce any evidence to the contrary.

It is also submitted that leave pay is due as pleaded in the Memorandum of Claim as the documents on record purporting that he Claimant proceeded on leave are a forgery.

The Claimant testified that he was not paid consolidated wages. On this ground he urges the court to award him house allowance for 3 years.

It is also submitted that the Claimant is entitled to gratuity for his 10 years of service to the Respondent being a sum of Kshs.58,394.

Respondent's Submissions

It is submitted on behalf of the Respondent that due process was followed in terminating the Claimant's services and therefore the Claimant has no factual basis for alleging breach of section 45 of the Employment Act. That the Claimant was issued with warning letters attached on page 10 -13 of the Respondent's list of documents and he was informed that if he was found stealing again he would be dismissed.

It is also submitted that a termination in line with the contract of employment cannot be said to unlawful. The respondent cites the case of *Muthuri Vs National Industrial Credit Bank Limited (2003) KLR 145* where it was held:

"The Plaintiff's contract having been terminated strictly in accordance with Clause 5(b) of the Contract of Service, the Plaintiff was lawfully dismissed."

The Respondent urges the Court to dismiss the suit with costs.

Issues for Determination

Whether there was a valid reason for termination

The Claimant in his evidence stated that he was accused of stealing and immediately thereafter he was terminated without being afforded a hearing.

Section 43 of the employment act is to the effect that:

43. Proof of reason for termination

1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

The Respondent did not present any evidence to prove the reason for termination. Furthermore, no proof was presented to the Court by the Respondent of the procedure followed in terminating the Claimant's services thus the Claimant's termination was also procedurally flawed. There is a termination letter dated 11th December, 2013, annexed to the Respondent's supplementary list of documents as Exhibit 4 reads:

"RE: TERMINATION OF EMPLOYMENT

Your employment with Agri Pro-Pak Limited has been terminated with immediate effect, further to your misconduct regarding continuous stealing of Company property.

Further to the final warning that was issued to you on 6th November 2013, you have once again been caught stealing several cartons of juice on a daily basis.

Yours sincerely

Management

Agri Pro-Pak Limited”

The Claimant allegedly signed on the said letter acknowledging receipt of the letter which was copied to the Ministry of Labour.

The Respondent also attached a number of warning letters with one dated 6th March bearing a signature acknowledging receipt. The Claimant denied knowledge of these letters stating the same were forgeries. Unfortunately the Respondent did not put up any witness for cross examination on the veracity of the said documents.

The court finds the procedure for termination unlawful. Having found no valid reason and no fair hearing the court finds the termination of the claimant unfair. .

Whether the Claimant is entitled to the remedies sought

Notice pay

Having found the termination of the claimant’s employment unfair, he is entitled to pay in lieu of notice.

Unpaid salary

The Claimant claims that the Respondent did not pay him for days worked in December, 2013. In the Respondent’s list of documents there is a payslip for December 2013, which was not disputed in evidence. The slip shows the Claimant took an advance in the month of December of Kshs.3,500 and he thus received zero pay in December. The Claimant is entitled to the balance of salary for days worked in December at Kshs.3,850 which I award him.

House Allowance

Section 31 of the Employment Act provides that:

“An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.”

The contract of employment annexed to the Memorandum of response indicates that the amount paid to the Claimant was a gross salary. The claimant is thus not entitled to a separate house allowance. The claim for house allowance thus fails and is desisted.

Leave Pay

The Claimant has pleaded pro rate leave of 1.75 days for 5 months. He did not lead evidence of the specific months he was pleading for. The Respondent attached some pay slips indicating that the Claimant had been paid in lieu of leave. Leave pay is a special damage, it is not enough to plead it, it must be specifically proved which in the instant case is wanting. The claim for leave thus fails.

Underpayments

The Claimant alleges that he was employed as a mass production machinist, whereas the Respondent in the response alleges that the Claimant was a general labourer. The letter of appointment and the payslips are silent on the duties of the Claimant. The claimant did not adduce any evidence to prove that he was a production machinist and not a general labourer. This is a special damage and the Claimant needed to be specific in pleading and proving. There is nothing to aid the Court in awarding underpayments as alleged. The claim therefore fails.

Damages for unlawful termination

Having found that the Claimant was unlawfully terminated, for want of due process the Court finds that he is entitled to damages thereof. I award him three (3) months’ salary taking into account the circumstances under which he left employment and the totality of his case. This works out at Kshs.22,050.

Conclusion

In conclusion I award the claimant Kshs.24,900. The respondent shall pay claimant’s costs and interest shall accrue at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE