



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 353 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

MICHAEL MUGWE MWANGI.....CLAIMANT

VERSUS

CEABUD ENGINEERING SERVICES LIMITED.....RESPONDENT

JUDGMENT

By his memorandum of claim dated 26th January 2015 the claimant avers that the respondent unlawfully and illegally terminated his employment without notice and without settling his terminal dues. He seeks the following remedies–

a) Payment of Kshs.744,800/=as particularized below

- i. Salary for the month of September 2014..... Kshs.42,560
- ii. One month’s leave pay for the year 2012 – 2013..... Kshs.42,560
- iii. Three (3) months’ salary in lieu of notice..... Kshs.27,680
- iv. Severance pay for one (1) year worked at 15 days per year..... Kshs.21,280
- v. Compensation (damages) for loss of earnings for twelve
(12) months..... Kshs.510,720

Total Dues Kshs.744,800

b) Costs of this suit

c) Interest on prayer (a) above at court rates from the date of filing this suit till payment in full.

d) Any other relief that this court may deem fit to grant in the circumstances.

The respondent filed a reply to memorandum of claim in which it admits employing the claimant as an excavator operator in January 2012 until 10th September 2013 when the claimant absconded duty without notice. The respondent admits owing the claimant 10 days’ pay for September 2013 in the sum of Kshs.11,538.

The respondent however counterclaims for one month’s salary in lieu of notice which after set-off leaves the claimant with a balance of Kshs.18,462 which is the amount claimed in the counterclaim together with costs.

The claimant filed a reply to the response and defence to counterclaim denying the averments in the defence and counterclaim.

At the hearing the claimant testified on his behalf while the respondent called WILBUR OMONDI MURANGE, its Finance and Administration Manager, who testified on its behalf. Parties thereafter filed and exchanged written submissions.

Determination

From the evidence on record, it is not in dispute that the claimant was employed by the respondent as excavator operator from January 2012 to 10th September 2013. What the parties do not agree on is whether the claimant absconded duty as alleged by the respondent or he was terminated as pleaded in the memorandum of claim and as averred in the testimony of the claimant in court. This therefore is the first issue for determination.

The second issue for determination is whether the claimant is entitled to the prayers sought.

The claimant testified that the respondent's Site Engineer in Muhoroni Moses Otieno accused him of working on a non-working day and dumping murrum on the roadside off site on 9th September 2013. The claimant testified that he denied the accusations whereupon Moses Otieno sent him to report to the overall Engineer in the main office in Kisumu, Engineer Fred Odundo on 10th September 2013. Fred Odundo sent him back to Muhoroni site but instructed him not to report for duty. That he was not allowed to work until 13th September 2013. When he reported to Moses the site Engineer to find out what was happening he was told he was not supposed to be on site. He testified that it became expensive for him to pay for a house and eat without an income so after waiting a few more days he decided to leave, since there was no communication from the respondent.

These facts were not rebutted by RW1 who only testified that the claimant failed to report for duty and after being absent for 7 days his name was removed from the payroll according to the policy of the respondent.

From the forgoing it is evident that the respondent terminated the claimant's employment without subjecting him to a disciplinary hearing in terms of Section 41 of the Employment Act and without giving him a termination letter or even informing him that his employment had been terminated. The claimant was right in mitigating his losses by moving away from site to avoid spending money on accommodation and food without an income.

I find and declare the termination of the claimant unfair procedurally and also substantively as the reason for termination was not proved in the manner provided in Section 43 or 47(5) of the Employment Act.

No evidence was adduced in support of the counterclaim. The same is accordingly dismissed.

Remedies

Having been unfairly terminated the claimant is entitled to pay in lieu of notice. His prayer for three months' notice is without justification either in law or by contract. I award him one month's salary in lieu of notice in terms of Section 35(1) and 49(1) of the Employment Act. The claimant is further entitled to salary for the month of September 2013 as prayed and admitted by the respondent. In view of the fact that the respondent did not formally terminate the claimant's employment and let him stay on site and decide himself when to leave, I will award him salary for the whole of September 2013.

The respondent did not deny that the claimant is entitled to leave for the period worked or prove that he took leave. I award him pay in lieu of annual leave for 21 months worked at 1.75 days per month being 36.75 days, and not three years as claimed.

The claimant is not entitled to severance pay, as he was not declared redundant.

Having found that he was unfairly terminated I award him three months' salary as compensation as the 12 months' salary he prayed for is not commensurate with the length of service he worked for the respondent. I have in awarding the compensation considered the length of service, the manner in which his employment was terminated without payment of salary and terminal dues and the nature of his work. I have further taken into account that the claimant was not subjected to any disciplinary process or given a formal discharge by the respondent.

Conclusion

In conclusion I enter judgment of the claimant against the respondent as follows –

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| 1. Pay in lieu of notice | Kshs.30,000 |
| 2. Salary for September 2013 | Kshs.30,000 |
| 3. Pay in lieu of annual leave for 21 months | Kshs.36,750 |
| 4. Compensation three months' salary | <u>Kshs.90,000</u> |
| Total | Kshs.186,750 |
| 5. Costs of both the suit and the counterclaim. | |
| 6. Interest from date of judgment. | |

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

MAUREEN ONYANGO

JUDGE