



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

CAUSE NUMBER 429 OF 2017

BETWEEN

DAVID OKENO ONAYA.....CLAIMANT

VERSUS

NELION TRADING COMPANY LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Munyari & Company Advocates for the Claimant

Gikera & Vadgama Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 31st May 2017. He states he was employed by the Respondent Company as a Welder, on 24th February 2012. He was summarily dismissed by the Respondent on 7th May 2016, on the allegation that he was suspected of stealing Respondent's goods and hiding the goods in Respondent's workshop. His last salary was Kshs. 25,000 monthly. He was not heard, or notified of termination. He did not steal any goods from the Respondent. He prays the Court to find termination was unfair and unlawful, and grant the following orders: -

- a) 1 month salary in lieu of notice at Kshs. 25,000.
- b) 12 months' salary in compensation for unfair termination at Kshs. 300,000.
- c) Salary for 7 days worked in May 2016 at Kshs. 6,730.

Total...Kshs. 331,730

Less Paid...Kshs. 25,000

Balance...Kshs. 306,730

- d) Costs.
- e) Interest.

2. The Respondent filed its Statement of Response on 19th July 2017. It is conceded that the Claimant was employed by the Respondent as a Welder, and summarily dismissed on account of gross misconduct. He pilfered goods belonging to the Respondent. He was found to have

stored Terex Spares in Trailer Boxes at the back of Respondent's Workshop. Investigations revealed the Claimant was the sole custodian of the keys to the boxes in which the stolen items were hidden. He was on leave. He was called back and given an opportunity to defend himself. He was unable to explain himself and was placed on compulsory leave. The offence was reported to Changamwe Police. The Claimant accepted responsibility. The Parties resorted to amicable settlement, whereof the Director of Public Prosecutions withdrew charges against the Claimant, and the Claimant was issued with termination notice dated 28th April 2016. Termination was fair. The Respondent prays the Court to dismiss the Claim with costs.

3. The Claimant filed a Reply to the Statement of Response on 25th July 2017. He reiterates that he did not steal any items from the Respondent. The Trailer Boxes were always open. There were many Mechanics working for the Respondent, with access to tools which were stored in the Trailer Boxes. There was no disciplinary hearing in any form.

4. On 3rd October 2018, the Respondent asked for adjournment to allow Parties to negotiate at their own level. The Court directed that Claimant's evidence is recorded, with Respondent's case adjourned for 14 days, to allow Parties negotiate as proposed by the Respondent. The Claimant gave evidence and rested his case. On 4th December 2018, the Respondent informed the Court that Parties were still negotiating and needed more time. The Directors of the Respondent were said to be out of the Country. The Claimant objected to adjournment, on the ground that no formal offer for settlement had been made by the Respondent. The Court gave Parties another 10 days to come up with settlement. On 13th December 2018, the Court recorded the following orders with the consent of the Parties:-

- Respondent's case is closed.
- Claimant to file and serve his Submissions within 21 days.
- Respondent to do so within 21 days of service.
- Mention on 12th February 2019.

5. It was confirmed at the last mention in Court that the Claimant filed his Submissions. There was no compliance on the part of the Respondent.

6. In his evidence, the Claimant adopted his Pleadings, Documents and Witness Statement on record. The contents are summarized at paragraphs 1 and 3 of this Judgment.

7. He added that he was issued a letter of termination dated 28th April 2016, which he was required to sign by Hussein, the Workshop Manager. He did not sign the letter, because he did not steal anything from the Respondent. He was at the time on leave. He was not taken before the Police. The Workshop is a large area. Each Trailer has a toolbox. No toolbox was locked. There were about 7 Welders with access to the place where the items were allegedly found. At no time was the Claimant taken through a disciplinary hearing. He was not paid any benefits.

8. Cross-examined, the Claimant told the Court he has not secured alternative work after termination. He took leave on 7th April 2016, and returned on 7th May 2016. He was not on suspension. Dismissal was on 7th May 2016. He was on leave at the time the items were allegedly stolen. Redirected, he told the Court that Welders were not allowed to deal with toolboxes; this was an area of Mechanics. He did not sign the letter of termination because it contained falsehoods.

The Court Finds:-

9. There is no evidence adduced by the Respondent, to support the contents of its Statement of Response, or discredit the evidence given by the Claimant.

10. The Court is satisfied that: the Claimant was employed by the Respondent as a Welder on 24th February 2012; he was summarily dismissed by the Respondent on 7th May 2016 on allegation of theft; he was not taken through a disciplinary hearing; and he left employment without any terminal benefits.

11. The Respondent has not shown reason or reasons justifying termination as required under Sections 43, 45 and 47 of the Employment Act. Procedure did not meet the minimum statutory standards under Section 41 and 45 of the Employment Act 2007. Termination was unfair.

12. The Claimant was entitled to 1 month salary in lieu of notice, which is indicated to have been paid. Nothing turns on notice pay.

13. He is entitled to compensation for unfair termination. In assessing the level of compensation, the Court has taken into account that the Claimant had worked for 4 years. His identity card on record shows he was around 25 years old, at the time of termination, with many productive years ahead of him. He testified he was not able to secure another job after termination. He was not shown to have contributed in any way, to circumstances leading to termination. **He merits and is granted equivalent of 12 months' salary in compensation for unfair termination at Kshs. 300,000.**

14. The Claimant was on leave from 7th April 2016 to 7th May 2016. He upon return, found the letter of termination dated 28th April 2016, which he was asked to sign. He declined to sign. He was still an Employee of the Respondent, until the letter of termination was brought to his attention. He ought to have received salary for 7 days in employment, for the month of May 2016. **He is granted salary for 7 days salary for the month of May 2016, at Kshs. 6,730.**

15. **Costs to the Claimant.**

16. *Interest allowed at 14% per annum from the date of Judgment till payment is made in full.*

IN SUM, IT IS ORDERED: -

a) It is declared that termination was unfair.

b) The Respondent shall pay to the Claimant, equivalent of 12 months' salary in compensation for unfair termination at Kshs. 300,000 and salary for 7 days worked in May 2016 at Kshs 6,730- total Kshs. 306,730.

c) Costs to the Claimant.

d) Interest allowed at 14% per annum from the date of Judgment until payment is made in full.

Dated and delivered at Mombasa this 21st day of June 2019.

James Rika

Judge