



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE NO. 823 OF 2015

COSMAS MUSUNGU MUSANGALA.....CLAIMANTS

VERSUS

RAMCO PRINTING WORKS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal dues plus compensation for unfair termination of the Claimant's contract of service by the Respondent.

It is the claimant's case that he was arrested and charged with theft after which the respondent suspended him from work without pay until the outcome of the said Criminal Case. It is further claimant's case that upon the Criminal Case being withdrawn on 23.9.2013, he reported back to work but the respondent refused to redeploy him and thereby ending his employment relationship with you.

2. The respondent filed her defence on 4.8.2015 alleging that the claimant misconducted himself by participating in theft from her premises contrary to section 44 of the Employment Act, which provided for justification for drastic action by the employer. She averred that in view of the said misconduct, she suspended the claimant's services pending the outcome of the criminal case. She however denied that after the claimant's acquittal she refused to redeploy him. She denied the alleged failure on her part to comply with section 41 before terminating the claimant's services and denied the reliefs sought.

3. The suit was heard on 19.12.2018 when the claimant testified as Cw1 but the respondent did not attend Court to prosecute her defence. The claimant adopted his written statement dated 7.6.2018 and the list of documents annexed to the statement of claim as his evidence in chief. In brief, he reiterated the averments in the statement of claim that he was employed by the respondent in September 2008 as a Messenger/Rider earning Kshs.9,380 which was later increased to Kshs.12,380 per month. That on 24.2.2012, he was arrested from the respondent's office and charged in Court with theft. That on the same date, 24.2.2012, he was served with a letter suspending him without pay until the outcome of the said Criminal Cause. That on 23.9.2013 his charges were withdrawn and he reported back to work but the respondent refused to reinstate him. That he thereafter served demand letters but they were dishonoured and he brought this suit. He therefore prayed for the reliefs sought in his suit.

4. After the hearing, again only the claimant filed written submissions. In summary, he submitted that his evidence has not been controverted by the defence because she never tendered any evidence. He contended that termination of employment is unfair if done without prior notice and hearing as provided under section 41 of the Employment Act, or if the reasons for the termination are not valid as envisaged in section 43 of the Act or section 46 of the Act.

5. He submitted that the respondent commenced disciplinary proceedings by suspending him by the letter dated 24.2.2012 pending the outcome of the criminal charges against him but after the acquittal, she failed to reinstate him but terminated his services without according him any hearing as required by section 41 of the Act. He contended that failure to accord him prior hearing rendered the termination procedurally unfair. He relied on *Mary Chepn'eno*

Kiptui Vs Kenya Pipeline Co. Ltd [2014]eKLR to fortify the foregoing submissions.

6. In addition to the said procedural unfairness, the claimant submitted that the termination was substantively unfair because it was grounded on any valid reason. He contended that under section 43 and 45, the employer bears the burden of proving valid and fair reason for terminating his employee's services and in default the termination is unfair. He contended that apart from the suspension letter dated 24.2.2012; the respondent never served him with any termination letter stating the reason for the termination. He therefore submitted that he was terminated for no valid reason and relied on Walter *Ogal Anuro Vs Teachers Service Commission [2013]eKLR*.

Analysis and determination

7. There is no dispute that the claimant was employed by the respondent from September 2008 as per the appointment letter dated 6.9.2008. There is also no dispute that the claimant worked until 24.2.2012 when he was suspended pending the outcome of the Criminal Case against the claimant who had been charged with theft at the respondent's premises. There is also no dispute that the said criminal case was withdrawn on 23.9.2013 but he was not allowed back to work by the respondent. The issues for determination are:-

- (a) Whether the claimant's contract of service was unfairly terminated by the respondent.
- (b) Whether the claimant is entitled to the reliefs sought.

Unfair termination

8. Under section 45(2) of the Employment Act, termination of employment of an employee is unfair if the employer fails to prove that it was grounded on valid and fair reason and that a fair procedure was followed. Valid and fair reason must relate to the employee's conduct, capacity or capability, or based on the employers operational requirements. Fair procedure on the other hand includes, but not limited to, according the employee a fair hearing before the termination.

Reason for the termination

9. The respondent never served any termination letter citing the reason for the termination. In her defence, she pleaded that the claimant participated in theft at her premises and that was misconduct under section 44 of the Employment Act, which justified drastic action by the employer. She further plead that even if the claimant was acquitted in the Criminal Case that did not automatically absolve him from the gross misconduct under the provisions of the Employment Act because the standard of proof in civil proceeding is different from criminal proceedings.

10. The foregoing pleadings have however not been supported by any evidence. No evidence was tendered to prove on a balance of probability that the claimant misconducted himself contrary to section 44 of the Act. Consequently, I return that the respondent has not proved the reason for terminating the contract of service and that rendered the termination substantively unfair.

Procedure followed

11. The claimant's evidence that he was terminated without prior notice or hearing as required by section 41 of the Act was not rebutted by the respondent. The respondent did not tender any evidence to prove that she accorded the claimant a fair hearing before terminating his services for gross misconduct under section 44 of the Act. Section 41 of the Act, provides that before terminating the contract of service of an employee on ground of misconduct, poor performance or physical incapacity, he shall explain to the employee, in a language he or she understands and in the presence of another employee or shop floor union official of his choice, the reason for which termination is considered and thereafter invite the employee and his chosen companion to air their representation, which must be considered before the termination is decided. Failure to follow the said statutory procedure renders the termination unfair procedurally.

12. Having found that the respondent has failed to prove on a balance of probability that the termination of the claimant services was grounded on valid and fair reason and that a fair procedure was followed, I return that the termination was unfair and unjustified

Reliefs

13. In view of the foregoing holding, I make a declaration that the termination of the claimant's contract of service by the respondent was unfair and wrongful. Flowing from the foregoing declaration, I award the claimant damages under section 49(1) of the Employment Act being one month salary in lieu of notice plus 10 months' salary compensation for the unfair termination. In awarding the said compensation, I have considered the fact that the claimant had served for 5 years and did not contribute to the termination through misconduct.

14. I further award the claimant salary for the period he was in suspension from 24.2.2012 to 23.9.2013 when the outcome of the criminal case against him was withdrawn, equalling to 20 months. However, the claim for salary after the 23.9.2013 is dismissed. It is the court's view that the employment relationship did not continue after the said date.

Conclusion and disposition

15. I have found that the termination of the claimant's contract of service by the respondent was unfair and wrongful. I have further found that the claimant is entitled to some of the reliefs sought. Consequently, I enter judgement for him, in the following terms based on fixed salary of Kshs.16,740 as per the payslip for November 2011 produced as exhibit:-

Notice.....Kshs. 16,740

Compensation.....Kshs.167,400

Salary during suspension.....Kshs.334,800

Total.....Kshs.518,940

=====

The claimant will also have costs plus interest at Court rates from the date hereof. The decreed sum is subject to statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 14th day of June, 2019.

ONESMUS N. MAKAU

JUDGE