



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1900 OF 2015

FRANCIS NZOKA MUSANGO.....CLAIMANT

VERSUS

CREATIVE CLEANING SERVICES LIMITED.....RESPONDENT

JUDGMENT

Introduction...

1. This is a claim for:

- (i) A declaration that the respondents actions complained of in the claim amounted to summary dismissal of the claimant from his employment and which dismissal was unlawful and unfair.
- (ii) A declaration that the claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
- (iii) An order for the respondent to pay the claimant his terminal benefits and compensatory damages totaling to Kshs.262,199.52/=.
- (iv) Interest on (iii) above from the date of filing suit until payment in full.
- (v) Cost of this suit plus interest thereon.

2. The respondent never filed defence to the claim despite being served with the summons and the claim. Consequently, the Court directed that the matter proceeds by formal proof. After the hearing the claimant filed written submissions.

Evidence

3. The claimant testified that he was employed by the respondent as a cleaner from 15.2.2012 and was issued with a staff card, which he produced as exhibit 1. He also produced bank statement to prove that he was being paid salary for the services rendered to the respondent.

4. He further testified that in February 2015, he fell sick while on duty and his supervisor, Mr. Alex permitted him to go to Hospital and rest for 7 days. After the 7 days he was still sick and had to seek for more leave from the HR Manager Mr. Dennis but he was denied and was asked to go home and wait to be called in a months' time. The call never came and he reported back to the office to see the HR Manager. However things turned hostile for him since the HR Manager sent the Supervisor Mr. Alex to tell him to go away.

5. The claimant further testified that the termination of his services was unfair because he had not committed any offence and he was not given any chance to defend himself. That his demand for terminal dues was dismissed.

6. He contended that salary for the 14 days worked in February 2015 was not paid. He further contended that he never went for his annual leave for the 3 years he worked for the respondent and prayed for cash in lieu of the accrued leave. He further contended that he used to work from 6 a.m to 6 p.m daily including public holidays without any overtime pay. He therefore prayed for overtime as prayed in the statement of claim in addition to the other reliefs pleaded in his claim.

Claimant's submissions

7. The claimant submitted that he had done nothing wrong to justify his dismissal and the procedure followed to dismiss him was unfair and

contrary to section 41 of the Employment Act because he was not accorded any hearing before the termination. He relied on Walter Ogal Anuro v Teachers Service Commission [2013]eKLR, Donald Odeke vs Fidelity Security Ltd [2012]eKLR and Kenfreight (E.A) Ltd vs Benson K. Nguti [2016]eKLR to fortify his submission that termination of employment contract by the employer is unfair if he fails to valid and fair reason to justify the same, and that fair procedure was followed before the termination was decided.

8. He further submitted that he is entitled to the reliefs sought in his claim including unpaid salary for February 2015, accrued leave for 3 years computed under section 28 of the Employment Act, overtime at the rate of 2 hours per day for the entire period of his service, and compensation under section 49 of the Act since he has not secured any other job since the date he was dismissed.

Analysis and determination

9. There is no doubt that the claimant was employed by the respondent until February 2015 when he fell sick and eventually dismissed by the respondent a month or so later. The issues for determination are:

- (a) Whether the said termination was unfair
- (b) Whether the claimant is entitled to the reliefs sought.

Unfair termination

10. Under section 45(2) of the employment Act, termination of an employee's contract of service, is unfair if the employer fails to prove that it was grounded on a valid and fair reason related to the employee's conduct, capacity and compatibility or based on the employer's operational requirement; and that a fair procedure was followed. The said burden of proof has not been discharged by the respondent herein because she never filed any defence and tendered evidence to controvert the claimant's pleadings and evidence.

11. On the other hand the claimant has pleaded and tendered evidence to the effect that he was dismissed for no valid and fair reason and without being accorded any hearing as required by section 41 of the Act. Consequently, I am satisfied that the claimant has proved on a balance of probability that he was unfairly dismissed from his employment contrary to section 45 of the Employment Act.

12. The foregoing finding is fortified by the precedent cited by the claimant in his written submissions which are unanimous that failure by the employer to prove substantive fairness as well as procedural fairness renders the termination of an employee's contract of service unfair within the meaning of section 45 of the Act.

Relief

13. In view of the foregoing finding, I make declaration that the actions by the respondent against the claimant amounted to unfair and unlawful dismissal. Under section 49(1) of the Act, the claimant is awarded one month salary in her of notice plus 4 months' salary compensation for the unfair termination based on a Kshs.12,000 monthly salary. In awarding the said compensation I have considered that the claimant did not contribute to the dismissal through misconduct. I have considered his 3 years' continuous service without disciplinary issues.

14. The claim for salary for 14 days' worked in February 2015 is allowed.

The contention that he fell sick in February while on duty is not contested and it remains convincing.

15. The claim for accrued leave for 3 years is also allowed at the rate of 21 leave day, per year pursuant to section 28 of the Employment Act.

16. The claim for overtime and public holidays worked is however dismissed for lack of evidence. The claimant should have called a colleague to confirm the alleged continuous service which amounted to unfair labour practice.

Conclusion and disposition

17. I have found that the dismissal of the claimant was unfair and that he is entitled to remedies. Consequently I enter judgment for him in the following terms:-

NoticeKshs. 12,000.00
Compensation (12,000 x 4 months).....Kshs.48,000.00
Leave (12,000 x 3 years x 21/26).....Kshs.29,076.90
Unpaid salary for 14 days worked in
February 2015 (14/28 x 12,000).....Kshs. 6,000.00

TOTAL

Kshs.95,076.90

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Dated, Signed and Delivered in Open Court at Nairobi this 31st day of July 2019

ONESMUS N. MAKAU

JUDGE