



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 895 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

HUMPHERY WETENDE MUSINDE.....CLAIMANT

VERSUS

EPCO BUILDERS LIMITED.....RESPONDENT

JUDGMENT

The claim herein was instituted by the claimant vide his memorandum of claim dated and filed on 28th May 2014 in which he avers that his employment was unfairly terminated by the respondent on or about 28th August 2013. He prays for the following remedies–

- i. One month salary in lieu of notice being..... Kshs.9,360
- ii. Payment in lieu of untaken and unpaid leave for the years
2010 – 2013 being Kshs.9,360 x 3 years Kshs.28,080
- iii. Service/gratuity calculated at the rate of 15 days salary
for every completed year of service being
Kshs.9,360 x 15/30 x 3 years..... Kshs.14,040
- iv. Compensation at 12 months’ gross salary being
Kshs.9,360 x 12 months..... Kshs.112,320

Total Kshs.163,800

The respondent filed a statement of defence in which it admits employing the claimant as a casual labourer at a monthly salary of Kshs.9,360. The respondent states that the termination of the claimant’s employment was lawful.

The Respondent states that:-

- a. It lawfully dismissed the Claimant from employment;
- b. By his conduct, the Claimant had fundamentally breached his obligation under the contract of service and therefore the Respondent was justified in summarily dismissing him from his employment.
- c. The Claimant committed an act of dishonesty akin to the offence of theft against the Respondent and to the detriment of his employers and thus necessitated the dismissal.
- d. The Claimant hid 3 kg of roofing nails in his locker with the intention of stealing them contrary to the Respondent’s rules and regulations.

e. He therefore cannot be heard to make claim for any payment and/or compensation as claimed in the circumstance of this case.

f. The claim for a month's salary in lieu of notice, payment of untaken and unpaid leave and all other claims as enumerated as well as wrongful termination is therefore imaginary, false, far-fetched and ought to be dismissed.

The respondent admits that no notice was issued to the claimant and pleads that the respondent complied with Section 35(1)(a) and 44(1), (3) and 4(g) of the Employment Act. It prays that the claim be dismissed with costs.

At the hearing the claimant testified on his behalf while the respondent called Mr. Bernard Owino, (RW1) the Human Resource Officer of the respondent.

Claimant's Case

The claimant testified that he was employed by the respondent as a loader on 24th February 2010 and sacked on 28th August 2013. He was paid Kshs.320 per day which amounted to Kshs.9,360 per month. He was paid at the end of each month and was issued with a payslip. He was a member of both NSSF and NHIF. He was issued with both a letter of appointment and an employment card.

He testified that on 28th August 2013 he reported to work in the morning and was told by Mr. Manoti, his Supervisor to go home and report the next day. When he reported the next day he was told to go back home until he was called. He was however not called back.

He went to the office of the Manager, Mr. Owino (RW1) but was told work had diminished and he should wait until he is called back, which was not true. He was not given any other reason, and was never called back.

He denied stealing 3 kg of nails as alleged by the respondent. He testified that he had no locker. That the workers, himself included changed clothes in an open room.

He stated he was not issued with a show cause letter or taken through a disciplinary process. He prayed for notice and compensation for unfair termination as the termination of his employment was unfair.

Under cross-examination, he stated that he loaded and unloaded trucks and also packed things in the store.

He testified that Mr. Manoti, his Supervisor sacked him and sent him to Mr. Owino who told him there was no work.

Respondent's Case

Mr. Bernard Owino testified that the claimant was employed as a casual labourer in the respondent's central stores department and was found to be dishonest and untrustworthy. That on 27th August 2013 the claimant was found with 3 kgs of nails inside his locker. He was questioned and his explanation was that he was not the one who put the nails in the locker, that one of his co-workers would have put the nails in his locker to set him up. The claimant's explanation was not satisfactory.

He testified that he learned about the incident when he received a letter dated 28th August 2013 from the claimant's supervisor which was produced as document 3 of the respondent's bundle of documents. He wrote to the management requesting for dismissal of the claimant. He referred to document 1 and 2 of the respondent's bundle. The company's reaction was to dismiss the claimant.

Under cross examination Mr. Owino stated that there was no record of any previous case of misconduct against the claimant that was produced in court. He further stated the claimant was not given notice. That the claimant was given a chance to explain himself, but there was no letter inviting the claimant for disciplinary hearing or minutes of a disciplinary hearing tabled in court.

He stated that the claimant was given a verbal suspension for 3 weeks but never reported back. He denied that the claimant was dismissed on 28th August 2013.

Determination

The issues arising for determination from the pleadings, evidence and submissions of the parties is whether the claimant was a casual employee, whether his dismissal from employment was fair and if he is entitled to the remedies sought.

Casual employment is defined under Section 2 of the Employment Act (the Act) as –

“casual employee” means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time;

Section 37(1) of the Act provides that –

37. Conversion of causal employment to term contract

(1) Notwithstanding any provisions of this Act, where a casual employee—

a. works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

b. performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.

The claimant was not a casual by the definition in the Act. He testified that he worked from 24th February 2010 to 28th August 2013 and was paid a salary of Kshs.9,360/= monthly as reflected in his payslip at annexure (i) of the claimant's bundle of documents filed with the memorandum of claim. The claimant was thus not a casual employee.

The circumstances of the claimant's employment is demonstrated by the three letters in the respondent's bundle of documents as reflected in both the witness statement and testimony of the respondent. The letters are reproduced below –

“To: HR Dept.

28th August 2013

RE: RECOMMENDATION FOR DISMISSAL OF HUMPREY WETENDE MUSINDE

I hereby bring to your attention of an incident that occurred on 27/08/2013 at central stores godown.

During my routine duty I found about 3 kg of roofing nails hidden in one of the worker's locker in the godown. Since I could not identify the owner of the locker I laid (sic) a trap and waited until the workers finished work for the day.

I went to the lockers when they were changing and found that the locker belonged to Humphrey W. Musinde. When I enquired why the roofing nails were in his locker he denied putting them in the locker and claimed that his co-worker might put them in his locker to set him up.

We have been losing materials in the stores at alarming rate and since his explanation was not satisfactory, I hereby recommend that he be dismissed with immediate effect.

From: supervisor central stores.”

SIGNED

JAMES KIOKO”

The second letter reads -

“TO: MANAGEMENT

29th August 2013

RE : RECOMMENDATION OF SUMMARY DISMISSAL OF HUMPHREY WETENDE MUSINDE

I hereby bring to your attention of an incident that occurred on 27th August 2013 at Central Stores Godowns.

I received a report from the supervisor of Central Stores department, requesting for dismissal of above mentioned employee. It alleged that roofing nails was found in his locker at the godown.

After investigating the matter with our security officer it was established that the employee deliberately put the nails in his locker with the intention of stealing. We have been losing a lot of materials through theft involving workers at Central Stores.

Since his explanation was not acceptable as to why the nails were found in his locker we held him responsible intending to steal.

Therefore I recommend that disciplinary action should be taken against him by summary dismissal, so as to act as a lesson to other employees might be having similar intentions.

SIGNED

H.R. Officer”

Thereafter there is a summary dismissal letter although there was no evidence that it was issued to the claimant.

“Our Ref: EP/EMP/4372013/08/04

31st August 2013

Humphrey Wetede Musinde

Central Stores

EPCO Builders Limited.

NAIROBI

Dear Musinde,

RE: SUMMARY DISMISSAL

It was established after investigations that on 27th August 2013 at Central Stores godown you hid 3 kg of roofing nails in your locker with the intention of stealing them.

Since your explanation of the incident was not acceptable the management is very much disappointed by your fraudulent deeds and hold you responsible for being part of employees who have been stealing goods from Central Stores.

Therefore as a result the management has summarily dismissed

you from work with immediate effect. We wish you well in your future endeavours.

Yours faithfully,

EPCO BUILDERS LTD

SIGNED

SIGNED

R. D. VARESANI

B. OWINO

H. R. OFFICER”

It is clear from the letters that there was no proof of grounds of dismissal as Mr. James Kioko did not establish that the claimant was the one who placed the nails alleged to have been hidden in a locker with the intention of being stolen. The claimant denied that he was the one who put the nails in the locker.

The foregoing is further evidence that the decision to dismiss the claimant was made by JAMES KIOKO and that the claimant was never given a hearing or asked to show cause. It is further evident from the testimony of both the claimant and RW1, Mr. Owino that the letter of termination was never issued to the claimant. It is also evident that Mr. Owino’s testimony that the claimant was given a hearing, or an opportunity to defend himself, or that he was suspended verbally but did not report back for duty thereafter, was all not true.

The claimant’s testimony that he was dismissed by the Supervisor then sent to Mr. Owino is more probable from the letters.

It is therefore manifestly clear that the dismissal of the claimant was unfair. I accordingly find and declare the termination of the claimant’s employment unfair.

The claimant prayed for notice which I award him at one month’s salary in lieu of notice.

The claimant further prayed for annual leave which was not denied by the respondent and which by virtue of Sections 28, 10(30(a)(i) and 74(1)(f) as read with Section 10(6) and (7) he is entitled to and which I award him at 1.75 days for the 43 months he worked being 75.25 days.

The claimant is not entitled to service pay or gratuity as he was a member of NSSF as admitted in his evidence and reflected in his payslip. Further, no gratuity was provided for in his terms of employment.

Having been unfairly terminated and taking into account the circumstances under which he was terminated and the length of service, and the fact that he was not paid any terminal dues, I award him six (6) months’ salary as compensation.

The claimant was paid Shs.9,360 per month. According to the Regulation of Wages (Amendment) Order, 2013, the minimum wage of a general labourer was Kshs.9,780.95 basic with 15% house allowance of Kshs.1,467.14 making a total of Kshs.11,248.10. I will use this figure to tabulate the claimant’s terminal dues on the basis of the provisions of Section 3(6) and 26 of the Employment Act and Section 48(1)

of the Labour Institutions Act which require this court to apply the statutory minimum rates where the employee is paid less by the employer. The sections are reproduced below –

3(6) Subject to the provisions of this Act, the terms and conditions of employment set out in this Act shall constitute minimum terms and conditions of employment of an employee and any agreement to relinquish, vary or amend the terms herein set shall be null and void.

26. Basic minimum conditions of employment

1. The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.

2. Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.

48. Wages Order to constitute minimum terms of conditions of employment.

(1) Notwithstanding anything contained in this Act or any other written law?

a. the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order apply and may not be varied by agreement;

b. if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.

Orders

In the final analysis, I declare termination of the claimant's employment unfair both procedurally and substantively and award him the following –

- 0. One month's gross salary in lieu of notice..... Kshs.11,248.10
- 0. Pay in lieu of 75.25 leave days..... Kshs.32,554.60
- 0. Compensation 6 months' gross salary..... Kshs.67,488.60

Total Kshs.111,291.30

The respondent will pay claimant's costs.

Decretal sum shall attract interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE