



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAKURU**

**CAUSE NO.107 OF 2017**

**JAMES SULUMETI ONGARIAH.....CLAIMANT**

**VERSUS**

**STYLE INDUSTRIES LIMITED.....RESPONDENT**

**JUDEMENT**

The claimant was employed by the respondent as a general worker from 3<sup>rd</sup> February, 2014 and issued with a renewable contract of 3 months each up and until 3<sup>rd</sup> August, 2016. Thereafter the claimant worked without a contract until 11<sup>th</sup> November, 2016.

On 11<sup>th</sup> November, 2016 the claimant reported to work at 7am but was denied access into the premises where the security guards informed him that the human resource manager Mr Evans had given instructions not to allow him into the premises. No reasons were given. At 8.10am the manager arrived and informed the claimant that the production manager Mr Hammad Ataya had issued instructions that the claimant should not be allowed into the premises and the claimant was to report to him on 3<sup>rd</sup> December, 2016 for clarifications.

On 3<sup>rd</sup> December, 2016 the claimant was informed that his employment had been terminated with immediate effect. Such was without justification and was unlawful. The summary dismissal was unfair.

The claims made are for;

- a) Notice pay at ksh.10,108.00;
- b) Annual leave for 2 years ksh.14,151.20;
- c) Pro rated leave 9 months ksh.5,306.70;
- d) Off duty for 33 months Ksh.88,950.40;
- e) Compensation; and
- f) Costs.

The claimant testified that he was employed on 3 months contracts. There was renewal upon lapse. The last written contract ended in august, 2016 and he continued at work until 11<sup>th</sup> November, 2016. His employment was then terminated without notice or being given reasons. No terminal dues were paid. The defence that the claimant refused to be subjected to a routine security check is not correct. There are CCTV cameras which can confirm this.

The claimant also testified that at the end of each contract he was paid his dues. in the pay slips, each has an end of contract payment. In his last months he was dismissed without notice or being issued with a notice to show cause and the allegations that he refused to be checked is not correct.

Defence

The defence is that the claimant was on fixed term contracts of 1 year each and renewed depending on availability of work. The last contract ended on 30<sup>th</sup> January, 2016. The claimant was earning a consolidated wage of Ksh.11, 624.00 per month.

On 10<sup>th</sup> November, 2016 the claimant was supposed to undergo routine security check at the gate while leaving work in the evening but he refused to be checked as was normal practice for every employee. He was issued with a notice to show cause.

The claimant failed to report to work the following day and the respondent made effort to reach him on phone to no avail. He was required to pick the show cause letter following the incident the previous day but he could not be reached.

On 21<sup>st</sup> November, 2016 the respondent issued the claimant with better of summary dismissal for gross misconduct with effect on equal date. The claimant had a past disciplinary record of unbecoming behaviour and not being at his place of work and using abusive language to his superiors and had been issued with warning letters.

The respondent had a justifiable and good cause to dismiss the claimant. His conduct was bound to be of bad influence to other employees and job security and checks at the gate were common practice due to the nature of the respondent's business. The claims made should be dismissed.

Daniel Owino Ongoya testified that he is the industrial relations officer for the respondent and worked with the claimant who had 3 months contract renewable and at the end of each contract he was paid his dues. The claimant was dismissed for gross misconduct when he refused to be searched at the gate on 10<sup>th</sup> November, 2016 and the next day he failed to report to work where a notice to show cause was to issue. After making great effort to reach him, his whereabouts could not be established and a letter of summary dismissal was issued. The claimant had a record of being rude and abusive to his supervisor and had been issued with several warning letters.

The claimant filed written submissions.

Section 10 of the Employment Act, 2010 allow parties in an employment contract to engage through fixed term contracts. Section 10(3) (c) provides;

*(c) where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;*

In this regard, the claimant was under fixed term contracts with regard to his employment with the respondent. The claimant has attached payment statements which clearly show that he was paid his full dues with each term contract and which included leave pay, overtime pay, and house allowance all as part of his gross wage each month. There is also a bonus payment in the December, payment statement.

Few sampled months which demonstrate payment of annual leave dues;

February, 2014 Ksh.702.00;

March, 2014 Ksh.763.00

April, 2014 Ksh.768.00;

May, 2014 Ksh.764.00

June, 2014 Ksh.768.00

July, 2014 Ksh. 768.00

February, 2015 Ksh.656.21.00

March, 2015 Ksh.714.35

April, 2015 Ksh.768.34;

July, 2016 leave paid Ksh.859.00;

September, 2016 Ksh.823.33;

October, 2016 Ksh.860.55;

With leave paid each month, the claims with regard to the same in the Memorandum of Claim lack justification.

Equally the overtime paid was under two separate categories. Overtime pay 1 and overtime pay 2. This was explained by the respondent as covering normal overtime work and work during public holidays and off days. This evidence is not challenged. This removes the claims for off duty pay as claimed.

Section 44(4) of the Employment Act, 2007 allow an employer to summarily dismiss the employee who fails to abide lawful instructions. Where due to the nature of the respondent's business the claimant was required to undergo a search after work, such requirement having been

a practice to all employees, it was fair, reasonable and justified. There is nothing set out by the claimant that this violated his constitutional rights or that he was placed at a disadvantage on the requirement to undergo a routine check as part of security detail within the work premises.

In this case, the defence is that on 10<sup>th</sup> November, 2016 the claimant declined a search and did not attend work the next day. The letter issued for him to attend and show cause was not served upon him as he failed to attend work and could not be traced. This notice is attached to the defence. It was not challenged by the claimant. The court takes it that the claimant was aware that he had grossly misconducted himself on 10<sup>th</sup> November, 2016 and thus failed to attend to avoid facing the consequences.

Such conduct cannot be justified by application of constitutional rights under Article 50 of the Constitution, 2010. To do so would be to avoid the inevitable and misapplication of the very purpose of the constitution.

The court finds the summary dismissal of the claimant following workplace gross misconduct and failure to abide lawful instructions by the employer was justified. No compensation is due.

Where summary dismissal is found justified, notice pay is not due.

**Accordingly, the clam is hereby dismissed. Costs to the respondent.**

Delivered at Nakuru this 10<sup>th</sup> day of July, 2019.

**M. MBARU JUDGE**

In the presence of:

Court assistants: ..... & .....

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