



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

CAUSE NO. 186 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

WYCLIFFE MWAKHA MURUNGA.....CLAIMANT

VERSUS

KENYA HORTICULTURAL EXPORTERS (1977) LIMITED..RESPONDENT

JUDGMENT

By his memorandum of claim dated and filed on 14th February 2014 the claimant avers that he was unfairly terminated/dismissed by the respondent who also failed to pay his terminal dues and compensatory damages. He seeks the following prayers –

(a) A declaration that the Respondent's inordinate delay and/or refused to recall the Claimant to work amounted to constructive dismissal of the Claimant's employment.

(b) A declaration that the Claimant is entitled to payment of his terminal benefits and compensatory damages as pleaded.

(c) An order for payment of the Claimant's terminal dues and compensatory damages totalling to Kshs.336,474/= as tabulated below –

i. One month's Salary in lieu notice..... Kshs.12,462

ii. Salary arrears for 15 days worked in June 2013

15/30 x 12,462.00..... Kshs.6,231

iv. Payment in lieu of untaken and unpaid leave for the entire duration

of employment being 5 years x 12,462..... Kshs.74,772

v. Unpaid salary from 15th June 2013 to February 2014 being

(12,462 x 7 months) + Kshs.6,231..... Kshs.93,465

vi. 12 months' compensation being

Kshs.12,462 x 12 months..... Kshs.149,544

Total claim **Kshs.336,474**

(d) An order for the Respondent to pay cost of this suit plus interest thereon.

The respondent filed a statement of response denying the averments in the memorandum of claim and prays that the claim be dismissed with

costs.

At the hearing the claimant testified on his behalf while the respondent called two witnesses GEORGE MULENYU GACHERU, a Senior Human Resource Officer at the time material to this suit and RACHAEL NJERI GATHIA. The parties thereafter filed and exchanged written submissions.

Claimant's Case

The claimant testified that he was employed by the respondent as a labourer in February 2018. He initially worked as a cleaner then he was transferred to the stores to keep records. He worked from Monday to Saturday. His reporting time varied, but was mainly from 10 am to 9 00 pm. He signed in the register upon reporting to work which register was kept at the reception. His salary was Kshs.12,462. There was deduction of NSSF but he had no card.

The claimant testified that on 15th June 2013 he reported to work as usual. He was called by his Manager, a Mr. George who asked why he had not reported for work for 3 days. He responded that he was sick and had telephoned the supervisor, Mary Akumu who told him it was ok. He was then told by the Manager that he was no longer an employee. He left the premises and did not return. The claimant testified that he went an instructed an advocate who sent a demand letter to the respondent.

The claimant prayed for judgment as set out in the memorandum of claim.

Under cross-examination he testified that he had asked for permission for the 3 days that he did not report to work. He denied that he was caught with stolen property and absconded duty after the respondent went to call the police. He stated there was security at the gate and he left after he was kept waiting at the gate for a long time after he had been told that he was no longer an employee.

Under re-examination, he stated that he did not steal anything.

Respondent's Case

The respondent called two witnesses. RW1, GEORGE MULENYU GACHERU and RACHAEL NJERI GATHIA, RW2 both of who relied on their witness statements.

RW1 in his witness statement states that he was employed as senior Human Resource and Administration Manager by the respondent in October 2010. That the claimant who was employed in October 2009 as a General Worker on casual terms worked for the respondent intermittently until December 2012 when he was employed on a 3 months' contract which expired on 28th February 2013. That after a break of 17 days the claimant was issued with another 3 months' contract which expired on 17th June 2013.

That on the evening of Wednesday, 12th June 2013 shortly after 6 pm while the claimant was leaving for home, he was caught by a security officer at the respondent's gate trying to leave with some farm produce from the respondent's pack house. That the following day Thursday, 13th June 2013, the claimant did not show up for work. After being absent for 3 days he reported to work at 10 am. He was asked to sit at the reception so that he could see either the respondent's Group Human Resource Manager or the Human Resource Officer for purposes of investigation but he left before he could be seen by either officer. That the next time the claimant was heard of was after he had filed the present suit.

Under cross examination, RW1 stated that no report was made to the police after the claimant was arrested because this was an internal matter. He testified that the claimant was never charged. That he never contacted the claimant after the claimant disappeared from work. He stated he did not make a report to the Labour Officer about the claimant absconding duty because the claimant filed suit almost immediately. That the claimant did not give the respondent an opportunity to interrogate him, issue him with a notice to show cause or to hear him.

RW2 stated in the witness statement that she was a security guardette with Security Group Limited, having joined the company in April 2006. That she was assigned to work at Kenya Horticultural Exporters (1977) Limited at the main gate from 2011. That on 12th June 2013 she was on duty at around 6 pm. That while conducting security checks with a male colleague the claimant was caught with 6 kg of farm produce from the pack house in sealed transparent bags. They interrogated the claimant with other guards on duty and found that the claimant had no authority to carry the produce. They confiscated the produce and kept it at the main gate as the respondent's office was closed. She then booked the incident in the Occurrence Book (OB).

In the morning of 13th June 2013 she handed the matter over to her colleague Mercy Kawira who reported to work at 6 am in the morning.

Under cross-examination RW2 stated they observed the claimant who was not working normally, that her colleague who was a man searched the claimant and found him with the produce.

Submissions

The claimant submitted that the Occurrence Book was not produced in court, that the claimant was never arrested by police for the alleged theft or charged with the offence in any court.

That there is no record in court of what happened. That the respondent had the claimant's contracts and should have contracted him and also written a notice to show cause for absconding duty to the claimant. That the respondent should have invited the claimant to a disciplinary

hearing.

The claimant relies on the case of **Kenya Union of Domestic, Hotels, Educational Institutions and Hospitals Workers –V- Mombasa Sports Club, Cause No. 440 of 2013** where Radido J. observed at page 5 stated that “no employer shall terminate the employment of an employee unfairly. He further went ahead to state that termination of employment is unfair by an employer if the employer fails to prove (a) that the reason for the termination is valid: (b) that the reason for the termination is a fair reason....”

Further that in the case of **Donald Odeke V Fidelity Security Ltd, Cause No. 1998 of 2011** where Ndolo J. equally observed at page 3 that –

“an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them.

... it does not matter what offence the employee is charged of. If the employee is not heard, the termination is ipso facto unfair.”

The claimant submitted that the termination was unfair.

For the respondent it is submitted that the burden of proving the claimant’s allegations lay with him as was stated in **Kennedy Maina Mirera –V- Barclays Bank of Kenya Limited (2018) eKLR** where the court held –

“It is the court’s considered view that Sections 43(1) and 47(5) of the Employment Act, must be construed so as not to nullify the conventional and accepted all on the burden of proof..”

It is submitted that the claimant failed to adduce proof of his allegations that he was sent home by the respondent on grounds that work had reduced.

The respondent further relied on the case of **Lear Shighadi Sinoya –V- Avtech Systems Limited [2017] eKLR** it was held that: -8

“On the question of constructive dismissal, this is a case where an employee is placed by the employer under intolerable conditions forcing her to resign from employment. The duty is upon the employee to demonstrate such intolerable circumstances and conditions for the court to make a finding that indeed, placed under such conditions, the employee was justified in tendering resignation. Such a claim must be pleaded and evidence advanced to this effect.”

The respondent submitted that the claimant was not constructively dismissed relying on the case of **Simon Ngugi Kamau –V- Silpack Industries Limited (2015) eKLR**, the case of **Maria Kagai Ligaga -V- Coca Cola East and Central Africa Limited, Cause No. 611(N) of 2009** and the case of **Marete -V- Attorney General (1987) KLR 690**.

Determination

I have considered the pleadings, evidence and submissions by the parties. The issues for determination are whether the claimant was unfairly terminated and if he is entitled to the prayers sought.

Section 10 and 74 of the Employment Act requires an employer to keep records including date of termination of employment,. Section 44 of the Employment Act provides for dismissal on grounds of gross misconduct.

In the present case the claimant states she was verbally dismissed and not constructively dismissed as presumed in the submissions of respondent. The respondent led evidence to the effect that the claimant absconded duty, but was not issued with any letter because he did not give the respondent an opportunity to do so.

The question that this begs is whether the claimant had to be physically present for the respondent to issue a show cause letter, or invite the claimant for a hearing.

Among the records an employer is required to keep is the contact address for its employees. No such records have been produced. All that the respondent did is deny the averments by the claimant.

Section 45 provides that where the employer is unable to prove either reason for termination or procedural fairness the termination of employment is unfair. In the present case, I find that the respondent has not proved that the claimant absconded duty. The respondent has not even proved that the claimant was found with produce of the respondent that he had no authority to remove for the workplace. The respondent has not disproved the claimant’s averments that he was verbally dismissed by RW1 then asked to report, that when he reported he was kept at the reception for an inordinately long period causing him to leave after waiting for too long.

For these reasons, I find the termination of the claimant’s employment unfair.

On remedies the claimant testified that he started working for the respondent in February 2008 and was verbally dismissed on 15th June 2013. No evidence was produced to support the respondent’s averment that the claimant was a casual employee who worked intermittently. Even if he worked intermittently over such a long period, his employment terms would have converted to monthly contracts by virtue of Section 37(1)(b). In any event, the respondent admits that it issued the claimant with three months’ contracts, the last of which had not expired.

By virtue of Section 10(6) and (7), I find that the respondent has failed to controvert the claimant's averments leaving the court with the option of accepting the claimant's version.

For these reasons, I find that the claimant was verbally dismissed by the respondent without notice or justification. Taking into account the length of service years and all other relevant factors, I award the claimant 6 months' salary as compensation. I further award him one month's salary in lieu of notice.

The respondent did not adduce any evidence on the issue of claimant's leave. I therefore award him leave for the 5 years, 4 months worked being 112 days' leave.

The claimant is further entitled to salary up to 15th June 2013. He is however not entitled to any salary after 15th June 2013, as he did not render any service to the respondent after 15th June 2013.

Conclusion

I conclusion I award the claimant the following –

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| 1) Compensation | Kshs.66,372 |
| 2) Pay in lieu of notice | Kshs.11,062 |
| 3) Pay in lieu of leave | Kshs.40,226. |
| 4) Salary up to 15 th June 2013 | <u>Kshs.6,231</u> |

Total	Kshs.123,891
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The respondent shall also pay claimant's costs of this suit. The decretal sum shall attract interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE