



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1830 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 3rd July, 2019)

KEVIN OUMA OTIENO.....CLAIMANT

VERSUS

PLASTICO INDUSTRIES LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed suit through the firm of Namada and Company Advocates seeking damages for unlawful termination of employment and payment of his terminal dues.
2. He avers that he was employed by the Respondent on 10th January, 2016 as a Machine Assistant whereat he states that he served continuously, diligently and to the Respondent's satisfaction until his dismissal on 24th May, 2017.
3. He claims that he worked for 7 days a week and never took his off days and annual leave and was never paid in lieu thereof. Further, that he even worked on public holidays and would be paid the normal working rate instead of the statutory double rate pay.
4. That on 15th January, 2016, the Claimant sustained injuries while working for the Respondents and subsequently instituted Court proceedings for recovery of compensatory damages against the Respondents. On 24th May, 2016 the Respondent received summons from the Claimant's advocates in respect of Civil Case No. 1617/2017.
5. That upon receiving the said Court Summons and Pleadings, the Respondent's Manager, one Mr. Menon verbally informed him that he stood dismissed on account of having instituted Court proceedings against the Respondent and was ordered to leave the premises immediately. That his salary as at the time of termination was Kshs. 12,599/=.
6. That his dismissal was unlawful and in express violation of the Constitution and the Employment Act, 2007, the principles of natural justice, the tenets of good labour relations and practice as he had done nothing wrong and due process was not followed in terminating his employment.
7. He prays for salary in lieu of notice, payment in lieu of untaken/unpaid leave for the duration of service, payment in lieu of off days not taken but worked for the duration of service and payment in lieu of untaken/unpaid public holidays for the entire duration of service.
8. He says that as a result of the abrupt termination of employment he suffered abrupt loss of income and trauma and inability to meet his continuing obligations. He seeks compensation for the said loss.
9. The Respondent filed a reply to the Memorandum of Claim wherein they admit the employment relationship and that the Claimant was earning Kshs. 12,599/= at termination. They however deny that the reason for termination is as stated in the Memorandum of Claim but rather that the Claimant was terminated on account of absconding duty and due to his misconduct. That they paid the Claimant all his terminal benefits in terms of the applicable law and terms of service.
10. They aver that the Claimant took all his off days and annual leave and whenever he worked on public holidays he was compensated accordingly. The Respondent urge the Court to dismiss the Claim with costs.

Evidence

11. On the day for hearing, the Respondent nor his advocate attended Court despite being served with a notice for hearing. The matter thus proceeded ex-parte.

12. The Claimant reiterated the facts as set out in the Memorandum of Claim and denied ever absconding duty as alleged by the Respondent and asked the Court to allow his claim.

Submissions

13. It is submitted that the Claimant was terminated after the Respondent received summons to enter appearance in relation to a claim for injuries sustained by the Claimant while on duty. That the Respondent did not dispute this fact and did not prove the absenteeism alleged in the reply to the Memorandum of Claim.

14. That the termination of employment of the Claimant was unlawful as it was contrary to section 45 of the Employment Act, 2007. Furthermore, that the Claimant was never accorded a hearing to defend himself against any allegations levelled against him. The Claimant cites the case of **Kenya Union of Domestic, Hotels, Educational Institutions & Hospitals Workers Union Vs Mombasa Sports Club, Cause No. 440 of 2013** where it was held:-

“No employer shall terminate the employment of an employee unfairly. Further, termination of employment is unfair by an employer if the employer fails to prove the reason for the termination is valid and that the reason for termination is a fair reason.”

15. That notice having been not been given, the Claimant is entitled to one month’s salary in lieu of notice and the unpaid leave, off days and public holidays. That damages are also due as a remedy under Section 49 of the Employment Act and pay for 12 months salary as compensation.

16. I have considered the evidence and submissions of the Claimant. The Respondent offered no evidence before Court and therefore the Claimant’s case remained unchallenged.

17. There is no valid reason submitted before Court to indicate why the Claimant was terminated. No disciplinary hearing was also conducted before the Claimant was dismissed. It is therefore my finding that the Claimant’s dismissal was unfair and unjustified as provided for under Section 45(1) of the Employment Act which states as follows:-

1. **“No employer shall terminate the employment of an employee unfairly”.**

18. Given that the dismissal was unfair and unjustified, I find for the Claimant and I award him the following prayers:-

1. **1 month salary in lieu of notice = 12,599/=**

2. **12 months’ salary as compensation for unfair termination = 12 x 12,599 = 151,188/=**

3. **Unpaid leave for 1 year = 12,599/=**

TOTAL = 176,386/=

4. **The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.**

Dated and delivered in open Court this 3rd day of July, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties