



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 24 OF 2015

ANTONY IMBAYI ATOLWA.....CLAIMANT

VERSUS

YOSHITAKA ENDO.....RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the Respondent as a gardener and a cleaner and worked from 18th April 2005 until 15th August 2014 when he was summarily dismissed for suing the Respondent in Civil Suit 3233 of 2014 for the injuries suffered while mowing the lawn. He therefore filed the instant suit on 26.1.2015 alleging that the termination of his employment was wrongful, unfair and unlawful and prayed for the following reliefs-

- a. Overtime payment since 25th of April 2005 in the sum of KShs. 1,300,000.00.
- b. Underpayment since 25th April 2005 in the sum of KShs. 50,000.00.
- c. Compensation for unlawful termination of KShs. 117,371.00.
- d. Salary in lieu of notice of KShs. 9,780.95.
- e. Salary for August 2014- half month pay of KShs. 4,890.50.
- f. Service pay of KShs. 63,450.00.
- g. Certificate of Service.
- h. Costs of this suit.
- i. Interest on (a), (b), (c), (d) and (e).
- j. Any other relief this court will deem it fit.

2. The Respondent filed his reply on 5.8.2015 denying the alleged summary dismissal of the Claimant and contended that the Claimant continued working for him despite the subsistence of the suit until the time when he chose abscond his duties. He further averred that the Claimant was fully compensated for his labour in addition to being given food, gifts and even loans. Finally, he raised a counterclaim for the sum of KShs. 23,500.00 being the loan advanced to the Claimant.

3. The main issues arising from the pleadings are whether the Claimant's services were unfairly terminated, whether he is entitled to the reliefs sought and whether the Respondent is entitled to the counterclaim of KShs. 23,500.00. When the suit came up for hearing, the Claimant gave his testimony as CW1 and the Respondent as RW1. Thereafter, both parties filed their submissions.

The Claimant's Case

4. The Claimant adopted his witness statement as his evidence. He led evidence that he was currently a gardener at Parklands but before that, he had worked for the Respondent from 2005 as a gardener and cleaner. He started with a gross salary of KShs4500 per month but it was reviewed up to KShs7000 per month. He testified that he was working from 6 am to 6 pm.

5. He further testified that his employment was unfairly terminated by the respondent on 15.8.2014 for the reason that he had sued the Respondent for the injuries he had suffered while on duty, which case, was still before court. He contended that the respondent was reacted harshly and ordered him to leave his premises within 30 minutes and failed to pay his terminal dues.

6. He further testified that he was never paid for the accrued leave days or overtime yet he worked from 6 AM to 6PM. He also stated that he was never registered for NHIF and NSSF even after issuing his employer with the requisite details. He concluded by urging this Court to award him his terminal dues and compensation for unfair termination.

7. During cross examination, he testified that his letter of appointment stipulated that his salary would be reviewed annually depending on his performance. He admitted that the salary was being increased by KShs. 500.00 per year until 2010 when it stagnated. He contended that after suffering the said injuries the respondent indicated on the appointment letter that he would increase the salary to KShs.9,000.00, he continued paying the said KShs.7,000.00.

8. He admitted that the respondent was a good employer because he used to give him food, bought for him a bicycle and even lend him money. He further admitted as at the time of the separation he had had an outstanding loan balance of KShs. 23,500.00 from the respondent.

9. In re-examination, he contended that the loan was being deducted from his salary.

The Respondent's Submissions

10. The Respondent adopted his written statement filed on 23.5.2019 in which he admitted that he had employed the claimant for the period pleaded in his suit. He further stated that he paid him his salary strictly in accordance with his contract and the law and denied the claim for underpayment. He further denied the claim for overtime contending that despite the fact that the claimant was reporting to work at 6 am and leaving at 6 pm, he had four hours break in between for breakfast, lunch and 4 o'clock which was provided for free.

11. He denied dismissing the claimant after suing him for the injury suffered while at work and contended due to strained relationship he mutually agreed with the claimant to separate pending the outcome of the said injury claim. He therefore denied that the claimant is entitled to compensation for unfair termination.

12. He further stated that the Claimant owed him KShs. 23,500.00 being loan advance which was issued to him for rebuilding his house in Kakamega.

13. During cross-examination, he admitted that the Claimant was required to work from 6AM to 6PM but maintained that the claimant enjoyed 3 breaks during the day. He admitted that the claimant was a good employee but contended that sometimes he would arrive late or leave early without informing him. He conceded that the letter of appointment did not make provisions for these breaks. It was his testimony that he could not remember the Claimant's salary when he left employment but indicated that the Claimant's pay was his gross salary. He contended that the claimant had already registered for the NSSF scheme before joining him and that he remitted contribution for him during his employment. He however did not have any records to prove the same.

14. He also maintained that the decision to have the Claimant leave employment until the suit was resolved, was mutual. He admitted that he did not pay the Claimant his terminal dues since the services had not been terminated.

The Claimant's Submissions

15. The Claimant submitted that on 15th August 2014, the Respondent summarily dismissed him for filing civil suit 3233 of 2014 without the issuance of a notice. In his view, the Respondent's assertion that he absconded duty was not proven as the Respondent did not meet the threshold set out in *Godfrey Anjere vs. Unique Suppliers Limited [2015] eKLR* where the Court held that an employer is required to show what steps it took to inform the employee that he would be dismissed if he did not report back to work.

16. He further submitted that the procedure laid down in section 41 of the Employment Act was not followed because he was not given the opportunity to challenge the correctness of the accusation. He relied on the decisions in *Walter Ogal Anuro vs. Teachers Service Commission [2013] eKLR* and *Patrick Asuma vs. Arm Cement Limited [2019] eKLR* which are to the effect that for the termination of employment to be fair, it must be procedurally fair and substantively justified.

17. The Claimant submitted that he is entitled to the reliefs sought in his Claim. As regards the claim for overtime, he submitted that he was working from 6AM to 6PM and as such under rule 5 of the Labour Institutions Act Regulation of Wages (General) Order he was entitled to the overtime payments stipulated in Rule 6 of the Regulations. The Claimant also submitted that the Claimant paid him below the wages stipulated in rule 3 of Regulation of Wages (General) Amendment Order and was therefore entitled to payment of KShs. 84,491.00.

18. It is the Claimant's submission that he is entitled to service pay as stipulated in section 35 (1) of the Employment Act as he was not a member of the NSSF or a pension or provident fund scheme. He relied on the case of *Martin Ileri Ndwiga vs. Olerai Management Company [2017]eKLR* where the Court was of the opinion that where an employer fails to show that he has made the necessary statutory deductions to KRA in respect of NSSF and NHIF, then the Claimant is entitled to a claim for service pay.

19. The Claimant submitted that he is entitled to salary in lieu of notice as the Respondent failed to issue him with a notice as required under

his contract of employment. He further submitted that he is entitled to half salary for the month of August as the Respondent had admitted to failing to pay him his half salary for the month of August. He further submitted that he is entitled to payment for the leave days not taken for the duration of his employment amounting to KShs. 67,592.70.

20. The Claimant also submitted that he was entitled to 12 months' compensation for wrongful termination, his employment having been summarily dismissed. He relies on the decisions in Elizabeth Njeri Njenga vs. Waiganjo Investments Limited [2019] eKLR and Albert Owino Otieno vs. Director, Flamingo Camp Limited [2013] eKLR.

The Respondent's Case

21. The Respondent submitted that the claimant has failed to prove the alleged dismissal and contended that she had proved that the parties herein mutually agreed to part ways until the conclusion of the injury claim filed by the claimant. Accordingly, he contended that the Claimant has failed to prove unfair termination of his employment as required under section 47 (5) of the Employment Act.

22. He further submitted that the Claimant is not entitled to overtime payment because he failed to prove the same. He relies on the decisions in Samuel Omutoko Mabinda vs. Riley Services Limited [2019] eKLR and Rogoli Ole Manadigi vs. General Cargo Services Limited [2016] eKLR. It was his further submissions that the claim for overtime was time barred as per section 90 of the Employment Act 2007.

23. On the issue of underpayment, the Respondent adopted the arguments put forth regarding overtime but added that the Claimant admitted to earning more than the statutory minimum wage. In addition, he contended that the evidence the Claimant relied upon to support this claim is inadmissible. As such, the claim has not been proven and ought not to be awarded.

24. As regards the issue of service pay, the Respondent relied on the case of Samson Buluma Mumia vs. DPL Festive Limited [2012] eKLR to submit that there was no evidence before this Court to indicate how the calculation was arrived at.

25. Regarding the claim for compensation for unfair termination, he submitted that if the Court finds that the Claimant's employment was unfairly terminated, an award of one month salary would be sufficient. He referred the court to the reasoning in Elizabeth Washeke and 62 Others vs. Airtel Networks (K) Limited & Another [2013] eKLR for emphasis.

Analysis and Determination

26. There is no dispute that the claimant was employed by the respondent as a Cleaner and gardener from 2005 to August 2014 when employment was terminated. The main issues for determination are-

- a. Whether the Claimant's employment was unfairly terminated by the respondent or the parties mutually agreed to separate.
- b. Whether the Claimant is entitled to the reliefs sought.
- c. Whether the Respondent is entitled to the amount counter-claimed.

Termination of the Claimant's Employment

27. The Claimant testified that the Respondent summarily dismissed him for the reason that he sued the employer for injuries suffered while on duty. However, the Respondent contended that the termination was temporary and done through mutual agreement between him and the Claimant after their relationship became strained by the said suit.

28. After careful consideration of the evidence by the two sides, I find that the claimant has proved on a balance of probability that his employment contract was terminated by the respondent and through mutual agreement as alleged by the respondent. In arriving at the foregoing decision, I have considered the admission made by the respondent under oath that he was not happy when he realized that the claimant had filed suit against him and because he was working inside his house and they allegedly mutually agreed to part until the suit was resolved. That admission corroborated the evidence by the claimant that, the respondent was angry with him and verbally gave him 30 minutes to leave his premises, after realizing that he had sued him.

29. Under section 45 of the Employment Act, termination of the employee's employment is unfair if the ground upon which it stands is not valid and fair and if a fair procedure was not followed. A reason is valid and fair if it relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements. Fair procedure, on the other hand refers to, but not limited to, affording the employee an opportunity of being heard before the termination. Under section 47(5) of the Act, the burden of proving unfair termination lies with the employee.

30. The reason cited for the termination according to both parties herein was the filing of a suit by the claimant against the respondent for the injuries suffered in the course of his employment by the respondent. That reason was not a fair reason under section 46 of the Employment Act which states that:

"46. The following do not constitute fair reason for dismissal or for the imposition of a disciplinary penalty-

(a) ...

(h) an employee's initiation of or proposed initiation of a complaint or other legal proceedings against his employer, except

where the complaint is shown to be irresponsible and without foundation.”

31. The respondent has not shown that suit for work related injuries filed by the claimant against him was irresponsible and without foundation. Consequently, the court finds that the claimant has discharged his burden of proof under section 47(5) of the Act by demonstrating that the termination of his contract of employment was not grounded on a valid and fair reason and as such, the termination was unfair within the meaning of section 45 of the Act.

Reliefs Sought by the Claimant

32. In view of the foregoing finding, I award the claimant one month's salary in lieu of notice plus ten months' salary compensation for the unfair termination under section 49(1) of the Employment Act. In awarding the said compensation, I have considered the fact that the claimant served for about ten years and that he did not contribute to the termination through misconduct.

33. The claim for overtime is however dismissed for lack particulars. Other than indicating that he worked from 6AM to 6PM, he did not give evidence to justify the amount claimed. The same being a special damages, it ought to have been particularized and specifically proven which was not done herein. As such, I concur with the holding in Rogoli Ole Manadiegi vs. General Cargo Services Limited [2016] eKLR where the Court held as follows-

The Court is not able to agree with the Appellant on this ground. It is true the Employer is the custodian of employment records. The Employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the Employer bringing to Court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the Employee. The Claimant did not show in the Trial Court when he put in excess hours, when he served on public holidays or even rest days. The evidence on record does not even separate normal overtime from overtime on rest days and public holidays. The rates of compensation are different. He did not justify the global figure claimed in overtime, showing specifically how it was arrived at, based on the Regulation of Wages [Protective Security Services] Order 1998. He correctly argues on the application of the Order, but gave no consistent evidence showing the hours worked, and how these hours gave rise to the figure of KShs. 222,350 claimed as the overall overtime.”

34. Likewise, the Claim for underpayment fails for lack of particulars and evidence to show how the sum sought was arrived at.

35. The claim for salary the 15 days worked August 2014 has not been controverted by the Respondent and as such it is granted based on the minimum wage under the General Wage Order for 2013 as prayed by the claimant. I therefore award him kshs.4890.50 as prayed.

36. The claim for service pay is dismissed for lack of particulars and evidence to show how the sum sought was computed.

37. The Respondent is however directed to issue the Claimant with a Certificate of Service as required under section 51 (1) of the Employment Act.

The Respondent's Counter-Claim

38. During cross examination, the Claimant admitted to owing the Respondent the sum of Kshs.23,500.00 being a loan balance. Consequently, I allow the counterclaim of Kshs.23,500 against the claimant.

Conclusion and disposition

39. I have found that the claimant's contract of employment was unfairly terminated by the respondent and awarded him compensation plus terminal dues. I have further found that the respondent is entitled to his counterclaim of Kshs.23,500 against the claimant. Consequently, I enter judgment for the claimant against the respondent as follows:

- a. One month notice Kshs. 9,780.75
- b. Ten months salary compensation Kshs.97,807.50
- c. Half salary for August 2014 Kshs. 4,890.50

Total Kshs. 112,478.75

Less counter claim Kshs. 23,500.00

Kshs. 88,978.75

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40. The said award is subject to statutory deductions but in addition to costs plus interest at court rates from the date hereof. The claimant will also be issued with a Certificate of Service.

Dated, Signed and Delivered in Open Court at Nairobi this 18th day of October, 2019

ONESMUS N. MAKAU

JUDGE