



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1619 OF 2015

(Before Hon. Justice Mathews N. Nduma)

GORDON JAMES OYUGI.....CLAIMANT

VERSUS

GULSAN CONSTRUCTION.....RESPONDENT

JUDGMENT

1. The claimant prays for grant of maximum compensation for unlawful and unfair termination of employment and payment of one month salary in lieu of notice. The claimant testified that he was employed by the respondent as a tipper driver and earned a monthly salary of Kshs. 37,070. That on or about February 2014, he suffered a snake bite in the course of employment along Merille River – Marsabit Road project. That the claimant was released to seek medical attention at Nairobi. That the claimant received a letter of termination while on sick leave.

2. The claimant produced a police abstract report from Marsabit police station dated 17th January 2014 and a copy of Doctor’s report dated 17th January 2014. The claimant also produced a doctor’s report dated 26th January 2014 in which was recommended further treatment. The claimant testified that termination was after 7 days absence only. That he was still sick and could not come back to work immediately. The claimant states that the dismissal was unlawful and unfair and that he be compensated as prayed.

3. RW1 Michael Nyakundi testified that he was a Personnel Officer employed by the respondent. That the claimant was employed as a tipper driver by the respondent. That the claimant had served the respondent for over three months. RW1 confirmed that the claimant had a swollen leg when he saw him on 4th January 2014. That the claimant requested for off days to be treated in Nairobi and the request was granted. RW1 testified that he could not remember if the sick leave was extended. That the claimant had been given 7 days sick leave. That the claimant came back two months later. That the claimant stated he was on medication and RW1 requested him for medical report but he did not have any. That the claimant requested to be paid his dues. RW1 stated that he summarily dismissed the claimant on 13th April 2014 for insubordination. That the claimant was not co-operative and failed to attend a meeting to resolve the matter. The respondent prays the suit be dismissed with costs.

Determination

4. The issue for determination is whether the summary dismissal of the claimant was for a valid reason and effected in terms of a fair procedure. The respondent corroborated evidence by the claimant that he was bitten by a snake in the course of employment on 9th January 2014, was treated at a local hospital and referred to be further treated at Nairobi since his leg was swollen.

5. The respondent produced copy of a leave form which shows the claimant was granted leave to get treatment for snake bite from 27th January 2014 to 3rd February 2014, a period of 7 days. The respondent produced a letter of summary dismissal dated 13th April 2014 for failure to obey a lawful and proper command. The letter did not explain what lawful and proper command was given to the claimant which he had failed to honour. The claimant was not given a show cause letter nor did the respondent produce any letter written to the claimant to attend a disciplinary hearing in respect of any charges levelled against him.

6. The respondent has in the circumstances failed to satisfy the requirement of *Section 41 and 43 of the Employment Act*, by demonstrating that it had a good reason to dismiss the claimant from employment and that it had applied a fair procedure to give the claimant opportunity to explain why his employment ought not to be terminated.

7. In terms of *Section 30 of the Employment Act, 2007* an employee is entitled to at least 7 days of paid sick leave and a further period of 7 days on half pay sick leave per year. This leave is more deserved where the sickness or injury was sustained in the course of employment. The claimant had a justifiable reason to be treated at Nairobi for the snake bite sustained in the course of employment until he got better. The employer had a discretion to extend the sick leave with or without pay but not to summarily dismiss the claimant without written notice, notice to show cause or invitation to attend a disciplinary hearing.

8. Accordingly the respondent violated *Section 30, 36, 41, 43 and 45 of the Employment Act*. The summary dismissal of the claimant was wrongful and unfair. The claimant is entitled to compensation in terms of *Section 49(1) (c) and 4 of the Employment Act 2007*.

9. In this respect the claimant had served the respondent from 12th December 2013 up to the date of summary dismissal on 14th April 2014, a period of four (4) months. The claimant wished to continue working. The claimant did not contribute to the dismissal. The claimant on the contrary sustained a snake bite in the course of employment and deserved a more sympathetic treatment by the respondent. The claimant was not paid in lieu of notice nor was he compensated for the loss of his job. The claimant suffered loss and damage as a result of the sudden dismissal from employment.

10. The court relies on the case of *Harrison Ephantus Mucoya vs Beveva parts and accessories Limited (2015) eKLR* which had similar circumstances as the present case and the case of *Raphael Wellington Okonji vs Sunthesis Limited (2012) eKLR* to find that the claimant is entitled to compensation equivalent to two (2) months' salary in compensation of the unlawful and unfair dismissal and payment in lieu of one month notice.

11. RW1 testified that the claimant's basic monthly salary had rose to Kshs.22,440 per month. The claimant is entitled to house allowance at the rate of 15% of the basic monthly pay. The court therefore finds the gross monthly salary of the claimant was Kshs. 25,806. The total award to the claimant is therefore equivalent of three months gross salary in the sum of Kshs.77, 418.

12. In the final analysis judgment is entered in favour of the claimant as against the respondent in the sum of **Kshs.77, 418/=**.

13. Interest at court rates from date of judgment till payment in full.

14. Costs of the suit.

Dated and Signed in Kisumu this 14th day of November 2019

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 22nd day of November 2019

Maureen Onyango

Judge

Appearances

M/S Mburu for claimant.

Mr. Kilonzo for Respondent

Chrispo – Court Clerk