



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1542 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

RICHARD NYANDIKA OMECHI..... CLAIMANT

VERSUS

REAL CAREERS LIMITED.....RESPONDENT

JUDGMENT

Vide his memorandum of claim dated 1st August 2016 and filed on 5th August 2016, the claimant seeks the following remedies from the respondent –

- a) One month salary in lieu of notice..... Kshs.14,000
- b) Unpaid leave allowances..... Kshs.14,000
- c) Service of the period worked..... Kshs.93,333
- d) National Social Security Fund deducted from salary but no remitted..... Kshs.6,400
- e) 12 months compensation Kshs.168,000
- f) Certificate of service
- g) Interest on (a to d) above at court rates
- h) Costs of this suit

It is the claimant's averment that he was employed by the respondent as a casual workers in September 2014 earning a monthly salary of Kshs.14,000. That his employment was terminated in March 2016 without notice and the respondent refused to pay his terminal dues. He avers that the termination of his employment was unfair as the respondent failed to explain the reasons for termination to him or to give him an opportunity to be heard in his defence. Her further avers that he was never issued with any warning letter.

The respondent filed a response to the memorandum of claim on 29th March 2017 denying the averments in the memorandum of claim. The respondent avers that the claimant absconded work without official leave or notice. That when he reported back to work he was requested to show cause why he was away without leave but refused to do so. That this was the reason for his summary dismissal on grounds of refusal to obey a lawful order.

The respondent avers that the claimant's supervisor, Mr. Mugo explained to him the reasons for dismissal in Kiswahili, that the claimant was given an opportunity to defend himself and that the respondent was under no obligation to issue him with a warning letter before summarily dismissing him.

It is the respondent's case that it had valid reason to dismiss the claimant as provided under Section 44(4)(e) of the Employment Act. It further avers that it paid the claimant's his dues up to the last day he worked and does not owe the claimant anything.

The respondent prayed that the claimant's suit be dismissed with costs.

When the suit came up for pretrial the parties opted to explore out of court settlement. The parties however failed to agree and requested to

proceed by way of written submissions relying on pleadings, witness statements and documents filed.

The claimant submitted that there is no evidence that he absconded duty, that the termination was due to a disagreement he had with Mr. Peterson Mugo, his Supervisor. It is submitted that he is thus entitled to terminal dues as prayed.

The claimant relies on the case of **Angela Shikuru Kondaya –V- Airtel Network Kenya Limited (2018) eKLR** and **Daniel Kiplagat Kipkeibut –V- SMEP Deposit Taking Micro Finance Limited (2016) eKLR**.

The respondent on its part submitted that at one time it required

its employees to work the whole night to meet targets of 140 tonnes per night. That 15 employees were required to be on duty to meet the target. That the claimant failed to report for duty for one week without notifying the respondent. When he reported back, he went to the Supervisor's office and was asked to wait and explain the reason for absconding duty to a disciplinary committee but he failed to give reason or provide any documentation to justify his absence.

The respondent relied on the South African case of **SACWU -V- Dyasi (2001) 7 BLLR 731 (LAC)** where the court held that desertion amounts to repudiation of the contract of employment which the employer is entitled to accept or reject. Further that the acceptance of repudiation amounts to dismissal if the employee fails to render service. That failing to contact the respondent constitutes unexplained absence from the period the claimant was away.

Determination

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

Unfair Termination

Section 41 provides for the procedure for fair termination while Section 43 provides that the employer must give a valid reason for the termination. Section 45 provides that the failure to comply with either Section 41 or Section 43 would constitute unfair termination of employment.

In the instant suit the claimant states in his witness statement that he reported for duty on 24th March 2016 as usual and was assigned duty. He worked until 11 am when he was called by Mr. Mugo who asked him to remove his uniform and go home and see him on 2nd April 2016. That when he reported on 2nd April Mr. Mugo again sent him home and asked him to report back on 5th April. On 5th April he was told that his employment had been terminated. That he demanded his terminal dues but the respondent refused.

The respondent did not file a witness statement and there is no evidence of the averments in the submissions.

It is trite law that submissions are not evidence and a party cannot adduce evidence through submissions. On the other hand, parties had agreed to adopt the pleadings which included the claimant's witness statement.

From the foregoing, there is no evidence that the claimant absconded duty as averred by the respondent. There are no documents filed by the respondent to prove that the claimant absconded duty, or that he was subjected to a hearing.

Section 10 and 74 of the Employment Act require an employer to keep records, including a record of warning letters or other evidence of misconduct of an employee. None has been produced by the respondent to controvert the averments of the claimant.

Section 10(7) further provides that in any legal proceedings if an employer fails to produce written particulars prescribed therein, the burden of proving or disproving an alleged term of employment shall shift to the employer. Further, Section 47(5) provides as follows –

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

From the evidence on record, I find that the claimant has discharged his burden under Section 47(5) while the respondent has not. There is no proof that the claimant absconded duty or that he was subjected to a disciplinary hearing in the manner contemplated in Section 41 of the Act.

For the foregoing reasons, I find the termination of the claimant's employment unfair and declare accordingly.

On remedies, the claimant is entitled to pay in lieu of notice. He is further entitled to annual leave not taken and service pay as there is no proof that he was a member of NSSF or any other gratuity or retirement scheme. He is further entitled to certificate of service and compensation for unfair termination.

I thus enter judgment for the claimant against the respondent as hereunder –

(i) Notice pay Kshs.14,000

(ii) Leave for 19 months at 1.75 days per month being 33.25 days being Kshs.17,904

(iii) Service pay Kshs.7,000 having worked for only complete year.

(iv) Compensation equivalent to 4 months' salary in the sum Kshs.56,000 taking into account the length of service and the manner in which the claimant's employment was terminated as well as all the relevant factors under Section 49(4) of the Act.

Total amount awarded is Kshs.94,904.00

The claimant did not prove that any NSSF was deducted from his salary and not remitted to NSSF. The prayer for refund of Kshs.6,400 on account of NSSF deductions therefore fails and is dismissed.

The respondent is directed to issue a certificate of service to the claimant.

The respondent will pay claimant's costs and interest will accrue at court rates from date of judgment till payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF DECEMBER 2019

MAUREEN ONYANGO

JUDGE