



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

SUIT NO. 2266 OF 2014

DANIEL MUASA NDAKA..... CLAIMANT

VERSUS

TECHPAK INDUSTRIES LIMITED..... RESPONDENT

JUDGMENT

1. The Claimant filed suit on the 18th December 2014 and averred that he was employed by the Respondent as a general worker sometimes in the year 2003 and was a packing supervisor at the time of dismissal. He averred that he worked on 24th February 2014 and was dismissed on 26th February 2014 after the factory manager of the Respondent Mr. Vijesh asked him to write a resignation letter alleging that there was a mislabelling of disposable plates on the night of 24th February. He declined and was dismissed by Vijesh from his employment with the Respondent. He averred that the Respondent did not notify him of any wrong doing on his part and that at the time of termination he earned Kshs. 38,557/- a month. It was averred he was not shown any disposable plates that were wrongly labelled and was not accorded any hearing. He thus sought a declaration that the termination was unlawful; unpaid leave days; salary for the balance of the contract period; salary in lieu of notice; service pay; damages for unlawful termination; compensation damages for abrupt and traumatising loss of employment; and such other relief as the honourable court may deem fit to grant.

2. The Respondent filed a defence and counterclaim on 15th May 2015. In it, the Respondent averred that the Claimant was employed as a packing supervisor for a period of two years on 1st November 2012. The Respondent averred the Claimant earned a gross salary of Kshs. 16,000/- plus house allowance of Kshs. 2,400/-. It was averred that on or about 24th February 2014, whilst working in the night shift and in disregard of his duties and responsibilities caused disposable plates to be mislabeled occasioning loss to the Respondent. The Respondent averred that the Claimant never reported to work thereby breaching the Employment Act 2007 by failing to give one month's notice. The Respondent averred that the Claimant was not entitled to any of the reliefs sought. In the counterclaim, the Respondent averred that the Claimant did not give notice and was liable to it for the sum of Kshs. 18,400/- being the one month salary in lieu of notice. The Respondent thus sought a declaration that the Claimant's unilateral termination of employment contract was not fair and did not follow the law; the Claimant's claim be dismissed; an award be entered for the Respondent for the sum of Kshs. 18,400/-; costs of and incidental to the cause including the counterclaim; interest on the sums claimed at court rates; and such further order or relief as the Honourable Court may deem fit and just to grant.

3. The Claimant testified on 19th October 2017 and stated that he was employed as a general worker and later promoted to packing supervisor. He stated that he had a 2 year contract which was until 31st October

2014 and that by the time he left, he earned Kshs. 38,585/- inclusive of overtime. He testified that he was asked by Nr. Vijesh to write a resignation letter because of some poorly executed work and that he was told to leave and not return. He admitted writing the commitment letter to the Respondent instead of a resignation letter. He stated that he did not admit any wrongdoing. He testified that he did not refuse to come to work but was told to go. He thus sought the order for payment of notice, balance of the contract and the costs of the case and 12 months compensation.

4. In cross-examination, he testified that there was a contract between him and the company. He stated that there was notice period provided for in the contract. He admitted that he received a warning letter in the past and indications when he erred. He recalled being at work on 24th February and that when he came back to work on 25th was not told of any error. He stated that he was told to go away on 26th February and admitted that he did not write letter complaining about being banned from returning. He testified that he did not refuse to work.

5. In re-exam, he stated that there was notice provided for and that he did not get any notice. He testified that he did not get any warning letter on 26th February.

6. The Respondent called Mr. Peter Wanjama Mwangi the HR manager of the Respondent who testified that the Claimant was employed on a contract from 1st August 2012 and that the Claimant had been employed previously on several contracts. He stated the Claimant was a supervisor packing section and his role was to oversee packaging of disposable food packing containers. He testified that the Claimant was on night shift on 24th February and never reported to work on 25th February henceforth. He stated the Claimant never came to explain why he absconded duties and that the Respondent asked him of his whereabouts and also wrote to the labour officer. He testified that there were some products that were mislabeled by the Claimant and the Claimant was to come and explain why and show cause. He testified that the Claimant made a note apologizing, committing himself to abide by work procedures and avoiding mistakes again. He stated that there were warnings issued whenever the Claimant made a mistake. The Respondent thus sought the dismissal of the Claimant's claim and an entry of judgment for the Respondent for the 18,400 being salary notice.

7. In cross-exam, he testified that there was no record that the Claimant received the letter written by the Respondent seeking an explanation. He stated that had the Claimant turned up he would have been given a chance to defend himself.

8. In re-exam he testified that the Claimant never came back after being asked to explain and that the Claimant was being asked to explain and he could have been heard if he had come back. He stated that the Claimant could not be reached in any way hence the letter may not have reached him.

9. The Respondent filed submissions on 14th December 2017 and submitted that the issues for determination were three:-

1. Whether the Claimant terminated employment without notice,
2. Whether the Claimant has proved his case on a balance of probabilities
3. Whether the Claimant is entitled to the prayers sought.

The Respondent submitted that it was a juristic person and that its witness was a competent witness in terms of Section 125 of the Evidence Act. It was submitted that the Claimant had a responsibility to monitor packaging process to ensure all the processes are within the defined production and quality standards. The Respondent submitted that the Claimant while working on the night shift in total disregard for his duties and responsibilities caused the disposable plates being made to be mislabeled thus occasioning loss to the Respondent. The Respondent submitted that the Claimant absconded from work thereby breaching his employment contract as read with Section 35(5) of the Employment Act. It was submitted that the proof required in such cases was a balance of probabilities and that in the case of **JRS**

Group Limited v Kennedy Odhiambo Andwak [2016] eKLR, Majanja J. stated that the degree of burden of proof is a reasonable degree of certainty but not so high as required in a criminal case. The Respondent submitted that when a court is faced with two probabilities it can only decide the case on a balance of probability if there is evidence to show that one probability was more probable than the other. It was submitted that there was no way that the Claimant was dismissed without a warning letter or a show cause notice and it was for this reason the Respondent had written a letter to the District Labour Officer informing the Officer of the Claimant who had absconded duty. The Respondent submitted that it was probable the Claimant was embarrassed by the mistake he made and that the embarrassment caused him to abscond duty. The Respondent submitted that the Claimant was so embarrassed by the mistake he made that he did not show up at work on the 25th February 2014 despite being required to report to work on each day of the week as he was required to work on every day of the week. The Respondent submitted that under Section 47(5) of the Employment Act, 2007 requires that for any complaint of unfair termination of the employee 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. The Respondent submitted that the Claimant had not discharged the burden that he was unfairly terminated. Reliance was placed on the cases of **Mary Mutanu Mwendwa v Ayuda Ninos De Africa-Kenya (Anidan K) [2013] eKLR** **Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR** where Radido J. opined that an employee cannot be granted an award of damages for the remainder of the unserved term of the contract. The Respondent also cited the case of **Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR** where Rika J. held that an employment relationship is not a commercial relationship but a special relationship which must be insulated from the greed associated with the profit making motives inherent in commercial contracts. The Respondent submitted that service pay is not payable in instances where an employee is a member of NSSF and cited the case of **Peter Mucha Gachoka v Protocol Solutions Limited [2017] eKLR** and Section 35(5) and (6) of the Employment Act. On the award of damages, the Respondent relied on the cases of **Joseph Aura v China Jiangxi International (K) Limited [2017] eKLR** and **Rift Valley Textiles Limited v Edward Onyango Oganda [1994] eKLR** for the position that compensation, if any, should not exceed the remaining months which were eight (8) months.

10. The Claimant in his case asserts that he was dismissed from employment as a result of allegations that there were products that were mislabeled under his watch. The Respondent on its part asserts that the Claimant went missing after being asked to admit fault for the mislabeling during the night shift on 24th February 2014. It is clear that from the pleadings before me and the evidence adduced by the two witnesses for the Claimant and Respondent, there was an allegation that certain products were mislabeled. The Claimant testified that he was asked to admit to wrongdoing and when he declined he was asked to leave and never return. He named the person who issued the directive. The Respondent's witness confirmed that the Claimant was asked to account for the mislabeling and thereafter did not return to work. I agree that in such cases, it is the balance of probabilities that would be relied on as held in the case of **JRS Group v Kennedy Andwak (supra)**. The probability that the Claimant was dismissed orally is more probable than the probability that the Claimant absconded work. The explanation by the Claimant was captured in his handwritten letter of 26th February 2014. In the letter, the Claimant states that he had committed himself that on any export order or local order with wrong labels, he would be answerable to the management and that it would not happen in his presence. There was no letter of warning after this letter, nor was any letter seeking an explanation or show cause exhibited. What was the Claimant responding to? It is very probable that the letter was in response to Vijesh's oral threats after which an oral dismissal took place hence the lack of documentation of the process expected under Section 41 of the Employment Act.

11. In the final analysis, the Claimant proved his case on a balance of probabilities and is entitled to the following:-

- i. One month salary in lieu of notice, Kshs. 20,976/-
- ii. Two months' salary as compensation Kshs. 41,952/-

iii. Costs of the suit

iv. Interest on the sums in i), ii) from the date of filing suit till payment in full.

v. Certificate of service

The Respondent's counter claim against the Claimant is hereby dismissed with no order as to costs.

It is so ordered.

Dated at Nairobi this 27th day of December 2017

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 16th day of January 2018

Radido Stephen

JUDGE