



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

CAUSE NUMBER 1002 OF 2013

DANIEL MAINGI KISINA.....CLAIMANT

VERSUS

SETMAX TRADER LTD.....RESPONDENT

JUDGEMENT

1. The claimant averred that he was employed by the respondent in June, 2006 and worked until 16th August, 2012 when the respondent summarily dismissed him telling him that there was no more work. According to the claimant, the dismissal was unlawful, oppressive and unconstitutional. The claimant further averred that upon dismissal the respondent never paid him his terminal dues.

2. The respondent on its part admitted employing the claimant as a casual labourer and later as a general labourer. In March, 2011 the claimant wilfully left employment after being paid all his dues. In May, 2011 the claimant pleaded with the respondent to reinstate him and after he was reinstated, he worked upto 10th October, 2011 when again he resigned. In July, 2012 the claimant once more requested to be reinstated and he was once more reinstated and worked for one and a half months upto 15th August, 2012 when he once more left. The respondent therefore denied that he summarily dismissed the claimant.

3. In his oral evidence in Court, the claimant stated that he was employed to work as a sales person and worked for 6 years. He stated that he was dismissed without notice and was never paid his terminal dues. The claimant further testified that in 2011 he got injured at work, was treated and stayed away from work for three months. He was called and asked to resume work. He further stated that he sued the respondent for compensation for personal injuries and the matter was amicably settled and he continued working. He worked for a week and misunderstanding developed. He stated that after the injury he sustained in the head he could not get orders clearly. He further stated that he was dismissed verbally and was paid for the month worked.

4. In cross-examination he admitted signing document No 1 dated 29th March, 2011 in the respondents bundle of documents where he acknowledged receipt of Kshs 25,809. He further stated that he resumed work in May, 2011. This was evidenced by annexure 3 in the respondent's bundle of documents. He further stated that he worked for ten days in October, 2011 and was paid Kshs 28,067. He then left employment.

5. He came back in July 2011 and it was in the month of July when he got injured. According to him he was employed afresh after he recovered from his injuries and worked for 15 days in August, 2012.

6. The respondent's witness Mr Malde Lalji testified that the claimant was a general worker and that he started to work in 2008 and worked until 2011. He then left employment. In May, 2012 the claimant once more sought employment and worked until October, 2012 and left saying he was not felling well. He was paid his dues and issued with clearance certificate. In cross-examination he stated that the claimant resigned three times.

7. The claimant herein averred that he was summarily dismissed by the respondent and without being paid his terminal dues. However, from his own testimony and evidence tendered by the respondent which he never denied, it would seem that the claimant had a history of walking in and out of his employment with the respondent. Both parties seem to have been having a very cordial relationship where an employee would leave employment at will and return and be rehired.

8. The claimant admitted signing document 1 in the respondent's bundle of documents where he received Kshs 25,809 in full and final settlement of terminal dues. Document 4 of acknowledging receipt of Kshs 28,067 and document 5 "clearance certificate" where he stated he had received all his dues and had no further claim against the respondent.

9. The burden of proof that an unfair termination or wrongful dismissal has occurred rests with the employee. The employer's burden is to

prove or justify the reason for the dismissal. In this particular case, the claimant has alleged he was summarily dismissed yet his own evidence show the contrary. This is supported by the respondent's evidence and documents which showed the claimant had a history of walking in and out of work and on each occasion he was paid his dues in full and final settlement which he acknowledged.

10. The court in the circumstances finds the claim without merit and hereby dismisses the same with costs.

11. It is so ordered.

Dated at Nairobi this 23rd day of February, 2018

Abuodha J. N.

Judge

Delivered this 23rd day of February, 2018

In the presence of:-

.....for the claimant

.....for the Respondent

Abuodha J. N.

Judge