



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 233 OF 2016

DANIEL MASEKI MAKAU.....CLAIMANT

VERSUS

MULJI DEVRAJ & BROTHERS LTD.....RESPONDENT

JUDGMENT

INTRODUCTION

1. This is a claim for unfair termination of employment and refusal to pay terminal dues. The twin issues for determination are whether the termination of claimant's contract of service was unfair and whether the Claimant is entitled to the reliefs sought. The respondent has denied liability for unfair termination and averred that it is the claimant who voluntarily deserted her employment. The parties dispensed with the hearing and agreed to dispose of the suit by written submission on the basis of their filed record.

Claimant's Case

2. The Claimant's case is that he was employed by the respondent as a Machine Operator from June 1986 starting with a daily wage of Kshs.35 which was later increased to a maximum Kshs.18,720 per month. He worked continuously until 2.7.2015 when he fell sick. From then he missed work until 7.7.2017 when he reported back to work but upon giving treatment note to the respondent's director, Mr. Hintera, and explaining that he was too sick to attend work, he was summarily dismissed and the treatment note rejected. He produced copy of the treatment not as exhibit and contended that the said dismissal was unfair because the reason for the same was not justified and he was denied a prior fair hearing.

3. The claimant prays for one month salary in lieu of notice, leave for 29 years, leave travelling allowance for 29 years, service pay for 29 years, maximum compensation for unfair termination, certificate of service and costs.

Defence Case

4. The respondent admits in her pleadings that she employed the Claimant as a Carp Machine Operator from 3.6.1986 until 2.7.2015 when he absented himself from work on allegation that he was sick. The defence further pleads that the claimant finally reported back to work on 16.7.2015 and he was asked by the respondent's director to go and bring a medical certificate to prove that he lacked capacity to work from 2.7.2015 to 16.7.2015. It is the defence case that the Claimant left immediately and he never returned to work again. It is further defence case that as soon as the Claimant produces the medical certificate confirming his incapacity as requested he will be allowed back to work because he is still considered as the respondent's employee.

5. However the written testimony by the two defence witnesses Mr. Ziki Gunga Karisa and Ms Nelly Kibwaga are agreement that the Claimant missed work for only one week and reported back only to be send away to bring medical certificate. They also contended that the claimant had formed the habit of absenting himself frequently from 2014.

6. On the other hand the respondent has contends that this court lacks jurisdiction to determine this suit because it is brought by a member of a trade union prematurely and in breach of a Collective Bargaining Agreement (CBA). She therefore prayed for the suit to be dismissed or struck out with costs.

Analysis and Determination

7. There is no dispute that the claimant was employed by the respondent as a Machine Operator from June 1986 to 2/7/2015 when he

absented himself from work for one week on allegation of being sick. There is further no dispute that when reported back to work he had continued with his work until the director stopped him and thereafter he never came back to work.

8. The issues for determination are:

- a. Whether the Claimant was unfairly terminated or he voluntarily deserted his employment.
- b. Whether she is entitled to the reliefs sought.

Unfair termination or desertion

9. Under Section 47(5) of the Employment Act, the burden of proving unfair termination of employment is upon the employee who alleges that she was unfairly dismissed. In this case, the Claimant alleges that he was summarily dismissed by the respondent's director Mr. Hintera on 7.7.2015 after resuming duty after sickness. According to the claimant he returned to work carrying his treatment notes but the Director rejected them, dismissed him and directed the security guards not to allow him back to the work place.

10. The said director has not filed any statement or affidavit to deny the alleged encounter with the claimant on 7.7.2015. The security officers were also not called as witnesses to deny the allegation that they were charged not to allow the claimant back to the workplace. It follows therefore that the Claimant's allegation that he was dismissed on 7.7.2015 by the director has not been rebutted. It is in fact corroborated by respondent's secretary Ms Nelly Kibwaga and a Painter Mr. Ziki Gunga Karisa who recorded witness statements, admitting that the Claimant missed work for only one week. In addition the said defence witnesses confirmed that when the claimant resumed duty after one week of absence, and the director send to bring medical certificate, he never came back to work.

11. The foregoing defence evidence sharply contracts the allegation pleaded in the defence that the Claimant missed work from 2.7.2015 upto 16.7.2015 when he reported back and again disappeared for good after being send to bring medical certificate to prove that he was incapable of working for all that time. The said contradiction is material and can only be resolved in favour of the Claimant. On a balance of probability, therefore I find and hold that the Claimant never deserted work upto 16.7.2015 but he was dismissed by the director of the respondent on 7.7.2015.

12. The question that arises is whether the dismissal was unfair. Under Section 45(2) of the Act, termination of employment by the employer is unfair if he fails to prove that it was not done on valid and fair reason and that it was done after following a fair procedure.

Reason for the termination

13. In this case, the claimant was absent from work for one week due to sickness. He never notified the employer about the illness until 7.7.2015 when he reported back without any medical certificate but treatment notes from the hospital he attended on 7.7.2015. In my view, the continued absenteeism without leave or notice of the illness to the employer was a valid and fair reason for terminating the claimant's services. Section 44(4) (a) and (e) of the Act entitles the employer to summarily dismiss his employee for absencing himself from work without leave or lawful cause.

14. As regards the procedure followed, it is my opinion that it was not fair within the meaning of Section 41 of the Act. Under the said Section before the employer terminated the services of his employee on ground of misconduct, physical incapacity or poor performance, the employer must first explain the reason for the intended termination to the employee in a language he understands and in the presence of fellow employee or shop floor union representative of his choice, and thereafter invite the employee and his chosen companion to air their defence for consideration before the termination is decided.

15. In this case the director never invited the Claimant to any hearing as contemplated by Section 41 of the Act and as such, the termination on 7/7/2015 was unfair. All what he did was to talk to the Claimant alone and rejected his treatment notes, send away and charged security guards not to let him into the work place again.

Reliefs

16. In view of the finding herein above that the termination of the Claimant's contract of service was unfair, I award to him, under Section 49 of the Act, Ksh.18,720 being one month salary in lieu of notice plus Kshs.224,640 being 12 months' salary as compensation for the unfair termination. In awarding the said compensation, I have considered the fact that the claimant served the respondent for over 29 year

17. The claim for leave is dismissed for lack of particulars. It is has not been shown how the sum of Kshs.439,734.92 being claimed was arrived at. Similarly the claim for service pay is dismissed because under section 35 (6) of the Act, the claimant being a contributor of the National social security fund, was disqualified from that benefit.

18. The claim for certificate of service is however granted as prayed because it is his statutory right under section 51 of the Act.

Disposition

19. For the reasons that the termination was unfair, I enter judgment for the Claimant in the sum of Kshs.243,360 plus costs and interest.

Dated and signed at Nairobi this 18th day of January, 2018

ONESMUS MAKAU

JUDGE

Delivered at Mombasa this 22nd day of February, 2018

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JUDGE