



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 533 OF 2016

MBARAK MWABEGA.....CLAIMANT

VERSUS

STANDARD ROLLING MILLS LTD.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for unfair termination of employment and refusal to pay terminal dues. The Respondent denies liability for unfair termination and avers that it is the claimant who voluntarily deserted his employment. The issues for determination are whether the claimant was unfairly terminated or he voluntarily deserted employment; and whether the claimant is entitled to the reliefs sought.

2. The suit was heard on 23.10.2017 when the claimant testified as CW1 and the respondent called her Personnel Officer Mr. Jason Laibuta as RW1 and a trade union official Mr. John Masika as RW2. Thereafter the Claimant filed written submission.

Claimant's Case

3. The Claimant testified that he was employed by the respondent on 5.3.2012 as a Mechanic Fitter earning Kshs.206 per day, which was increased to Kshs.460 in September 2013. He worked continuously from Monday to Sunday including public holidays until 21.11.2015 when at the day's work his Shift Manager Mr. Simon Mwaniki told him not to report to work again until further notice. CW1 further stated that, the shift manager told him that the decision to fire him was made by the Manager Mr. Sadeep and the reason was that there some items stolen from the store. CW1 sought audience with Mr. Sadeep but he refused and told him to look for a job elsewhere. He therefore prayed for the reliefs sought in his suit.

4. On cross-examination CW1 maintained that he was dismissed together with a Mr. Jonathan by the management and the dismissal was endorsed on the Attendance Register. He further maintained that he was never called back by the respondent until January 2017 when he was offered a reinstate by the Rw1 on condition that he drops this suit but declined because he had another job already. He denied that he was a member of a trade union and further denied that he was served with a copy the respondent's letter to the Kenya Engineering Union.

Defence Case

5. RW1 adopted his written statement whereby he alleged that the claimant was employed by Respondent as a Cleaner. He further denied the alleged unfair termination of the Claimant's employment and contended that it is the Claimant who voluntarily deserted his employment without any reason or prior notice and only heard again from him when he brought this suit alleging that he had been unfairly terminated. RW1 contended when he called the Claimant in the presence of Union Official and asked him to resume work but he refused saying that he could only resume work if he is transferred to another department. RW1 denied that the Claimant was dismissed on ground of theft and maintained that if that was the case, the police would have been called.

6. On cross-examination, RW1 admitted that the Claimant was not a member of a trade union. He further admitted that Mr. Simon Mwaniki was the supervisor while Mr. Sadeep was the Branch Manager for the Respondent. He concluded by contending that the supervisor Mr. Simon Mwaniki followed the proper procedure before terminating the Claimant.

7. RW2 stated that the Claimant deserted work and he was called to meeting with him to persuade him to resume but he refused. He however confirmed that the claimant was not a member of any union and he was not paying any union subscriptions. He could also not prove that his union served the Claimant with a copy of the respondent's letter dated 7.12.2015.

Analysis and determination

8. There is no dispute that the Claimant was employed by the Respondent as a General Labourer from 15.10.2015 and worked until 21.11.2015. 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 Supervisor Mr. Simon Mwaniki on 21.11.2015 when he told him to not to report to work again until he was called back. According to the Claimant, the reason cited for the termination of his employment was theft of some items from the store and the employer never called back as promised until he filed this suit. He therefore submitted that his employment was unfairly terminated by the Respondent for no valid reason and without prior hearing as required under section 41 and 45 of the Act.

10. On the other hand, the Respondent alleges that it is the Claimant who voluntarily terminated his employment without prior notice. However, I find that allegation without merits because it is not supported by evidence. The Respondent has not called Mr. Simon Mwaniki and Mr. Sadeep as a witness to deny the Claimant's allegation that he is the one who told him not to report to work the following Monday until he was called back. In fact, Mr. Sadeep has not denied the allegation that he told the Claimant to look for a job elsewhere. In my view if the Claimant was lying about the said two officers, nothing was easier than calling them as witnesses to deny that the allegation that they told the Claimant not to report back until further notice. Consequently, I find and hold that the Claimant has proved on a balance of probability that he never deserted work from 21.11.2015 but he was terminated by the Respondent through her Supervisor, Mr. Simon Mwaniki on the said date.

11. 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. In this case, the respondent has not given any evidence herein or in any manner tried to prove and justify the reason for the termination as required by section 41, 43, 45 and 47 of the Act. She has also not proved that she followed a fair procedure before terminating the services of the Claimant.

12. Section 41 of the Act requires in mandatory terms that, 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. Consequently, I find and hold that the termination of the Claimant's employment was unfairly terminated by the respondent.

Reliefs

13. In view of the finding herein above that the Respondent has not proved and justified the reason for the termination of the Claimant's contract of service and she has also not proved that she followed a fair procedure, I make a declaration that the termination was unfair and unjust as prayed. Under section 49 of the act I award him Kshs.11,960 being one month salary in lieu of notice plus Kshs.95,680 being 8 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 3 years and that he did not contribute to his termination through proven misconduct.

14. The claim for leave is also awarded as prayed being Kshs.460 x 21 leave days x 2 years = Kshs.19,360. However, the claim for overtime and public holidays worked are dismissed for want particulars and evidence.

Disposition

15. For the reasons that the termination was unfair, I enter judgment for the Claimant in the sum of Kshs.127,000 plus costs and interest.

Dated and signed at Nairobi this 10th day of January, 2018

ONESMUS MAKAU

JUDGE

Delivered at Mombasa this 22nd day of February, 2018

LINNET NDOLO

JUDGE