



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 532 OF 2016

PATRICK MAELO TULUKU.....CLAIMANT

VERSUS

CORRUGATED SHEETS 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 from February 2009 as a Nail Machine Operator and later as a cleaner earning Kshs.550 per day. He worked continuously from Monday to Saturday including public holidays until October 2015 when he was summarily dismissed from employment. On the said date, CW1 fell ill and sought money from his supervisor Mr. Rauji to go hospital but the Supervisor insulted him telling him that he looked like an Aids patient and that he should not be seen again in the work place. He then ordered the security guard Mr. Andrew to search him and escort him to the gate and bar him from getting back to the premises. CW1 contended that the he was unfairly terminated and prayed for service pay, terminal dues, plus compensation for the unfair termination.
4. 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 dated 3.11.2015. On cross-examination, CW1 maintained that he was insulted and dismissed. He admitted that he was called by the RW1 who offered him a reinstatement on condition that he drops this suit but declined.

Defence Case

5. RW1 adopted his written statement dated 5.12.2016 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 that he looked for him in vain after the desertion. Thereafter he wrote a letter to the union on 3.11.2015 and copied to him and later he called the Claimant to the office in the presence of a Union Official but declined the request to resume work. However, he never accused Mr. Rauji of the alleged insults.
6. On cross-examination, RW1 admitted that the claimant was not a member of a trade union and that he was not sure whether a copy of the letter dated 3.11.2015 to the union was served on the Claimant. He further admitted that before terminating an employee, the supervisor must give the reason and the call the employee to a hearing and if the employee is found guilty, he is served with a termination letter. Finally, he admitted that the foregoing procedure was never followed in this case because the claimant is the one who deserted work.
7. RW2 stated that he received a letter dated 3.11.2015 from the respondent accusing the Claimant of desertion and he tried in vain to reach him over his mobile number so as to resolve the problem. He however admitted that the Claimant never paid any subscription to the union and that he never served a copy of the respondent's letter dated 3.11.2015 on the Claimant.

Analysis and determination

8. There is no dispute that the claimant was employed by the respondent as a Cleaner from 2009 and worked until October 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. Rauji in October 2015 for looking sickly like an Aids and HIV patient. 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. Rauji as a witness to deny the claimant's allegation that he is the one who dismissed him for looking sickly and directed the security officer Mr. Andrew to remove from the premises and bar his access to the workplace. The respondent has also deliberately failed to call the said security officer to contest the allegation that he was ordered to enforce the dismissal orders by evicting the Claimant from the premises. 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 allegations the Claimant that he was told not to report back until further notice. Consequently, I find and hold that the Claimant has proved on a balance of probability that he was dismissed from employment by the respondent through her Supervisor, Mr. Rauji.

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 admitted through RW1 that she never gave any hearing to the claimant before the termination and accused the claimant of deserting work.

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 that 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.14,300 being one month salary in lieu of notice plus Kshs.143,000 being 10 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 6 years and that he did not contribute to his termination through proven misconduct.

14. The claim for leave is also awarded as prayed being $Kshs.550 \times 21 \text{ leave days} \times 6 \text{ years} = Kshs.69,300$. 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.226,600 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