



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1062 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

PAUL MULI KATUTA.....CLAIMANT

-Versus-

NAKUMATT HOLDINGS LIMITED.....RESPONDENT

JUDGMENT

By memorandum of claim dated 26th June 2013, the claimant avers that the respondent wrongfully and unlawfully terminated his employment without notice on 1st September 2011. He prays for the following remedies: -

1. Severance pay for the period employed.
2. Compensation for wrongful dismissal.
3. Unpaid salaries and leave allowance and terminal benefits.
4. Cost of the suit.
5. Interests on (1), (2), (3) and (4).
6. Any other relief as the court may deem just.

The respondent filed a memorandum of response to the statement of claim admitting employing the claimant first as a shop assistant and then as a general clerk but denies that the termination of the claimant's services was unlawful. The respondent further avers that it paid the claimant's terminal dues including payment in lieu of notice and that the claimant has no further claims against it.

The case was heard on 4th April 2017 during the service week in the absence of the respondent after the court satisfied itself that the respondent was properly served with hearing notice by the court registry. The claimant thereafter filed written submissions. The claimant testified on his behalf at the hearing.

The claimant was represented by T. M. Kuria and Company Advocates while the respondent's pleadings were drawn and filed by Nyaberi and Company Advocates.

The claimant testified that he was employed by the respondent as a shop assistant in 2004. He was later promoted to Assistant Section in-charge and finally to a Section in-charge. He was stationed at the respondent's warehouse based at the Headquarters on Mombasa Road, Nairobi. He testified that due to his hard work, he was posted to procurement department as a general clerk trainee and later confirmed as general clerk after serving probation.

The claimant testified that in 2010, the respondent carried out a general stock take of all items at the warehouse and various shops and it took about 3 months to compile the report. The report disclosed both positive and negative variance. He testified that the respondent claimed that there was a variance of Kshs.87 million in furniture department.

The claimant was blamed for the variance and taken to Embakasi Police Station where he was interrogated by officers from the Criminal Investigation Department. The police went to his house for further investigation. He was ordered to surrender his ATM cards, which he did. He was directed to report to Embakasi Police Station daily for 3 months before he was told to stop reporting and advised that he would be called when required. The police informed him that they would prepare a report but he was never given a copy of the report.

The claimant testified that after he stopped reporting, he was summoned by the Human Resource Manager and issued with a show cause letter, which he responded to. He testified that there was a disciplinary committee meeting at which his show cause letter was discussed but he was not invited to attend. After 7 days, he was told to either resign or be terminated. He opted not to resign. In mid-September 2011, the Human Resource Manager called him and issued him with the letter of termination.

The claimant testified that he pleaded with the Human Resource Manager to invite him to the disciplinary hearing or avail to him a copy of the investigation report to no avail. The claimant further testified that he was only involved in furniture department during stocktaking and had never been transferred to work in the department.

The claimant testified that he was never charged with any offence or booked in the OB at Embakasi Police Station. He testified that the termination of his employment was unfair first because he was never called for disciplinary hearing, secondly because he was tortured by being required to report to the police station daily and thirdly because he is unable to get employment elsewhere as Nakumatt is a large company with relations at all major companies.

The claimant testified that he was not paid salary for September 2011 but received his salary up to August 2011.

Determination

I have considered the pleadings in the memorandum of claim, the response thereto filed by the respondent and the claimant's reply to the response. I have further considered the evidence adduced by the claimant in court and the submissions filed on behalf of the claimant. The issues arising for determination are whether the termination of the claimant's employment was fair and if he is entitled to the remedies sought.

Fair Termination

For termination to be fair, an employer must prove that there is valid reason for the termination and that the employee has been taken through fair disciplinary process as prescribed in Section 41 of the Employment Act. Section 45 of the Act provides that should the employer fail to subject the employee to fair procedure or to prove valid reason for the termination, the resultant termination would be unfair.

In the present case, the respondent did not attend court on the hearing date and therefore the claimant's evidence that he was not subjected to a disciplinary hearing has not been controverted. It is also apparent from paragraph 11 of the response that the claimant was not taken through the prescribed disciplinary

procedure. The averments at paragraph 11 of defence are as follows: -

“The respondent denies that the claimant was never notified nor given a chance to be heard and further avers that the termination of the claimant’s employment was lawfully done and that the claimant was given an opportunity to defend himself through a letter to show cause which cause the disciplinary committee did not find acceptable.” (Emphasis added)

On the grounds of termination, the claimant testified that he was a general clerk and was only involved in furniture department for the stocktaking period. The respondent did not adduce any evidence to disprove the claimant’s evidence. Section 47 (5) of the Employment Act provides that –

“For any complaint of unfair termination of employment 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.”

I find that the respondent has not discharged its burden of proving that there was valid reason for termination of the claimant’s employment contract or that it complied with fair procedure. The termination of employment was therefore unfair within the meaning of Section 45 (2) of the Employment Act and I hold and declare accordingly.

Remedies

The claimant prayed for several remedies. He is not entitled to severance pay, which is only available to employees declared redundant as provided in Section 40 (1) of the Act.

The claimant did not adduce any evidence to prove that he had outstanding leave and his prayer for leave is therefore dismissed for want of proof.

He prayed for terminal benefits which he did not specify. Under Section 49 (1), he is entitled to pay in lieu of notice, which I award him as a statutory entitlement.

Having found the termination unfair, I award the claimant 12 months’ salary as compensation taking into account his length of service and the manner in which his employment was terminated.

Although the claimant did not state his last salary in his testimony, he has pleaded in the claim that his last salary was Kshs.34,865 gross, which has not been disputed in the response to the claim.

I therefore award the claimant the following: -

1. One month’s salary in lieu of notice Kshs.34,865/=.
2. 12 months’ salary being compensation for unfair termination at Kshs.418,380/=.

The respondent shall also pay costs of the claim.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF FEBRUARY 2018

MAUREEN ONYANGO

JUDGE