



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 82 OF 2013**

**KALIO KOMU.....CLAIMANT**

**VERSUS**

**BASTA & SONS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a claim for unfair termination of employment and refusal to pay terminal dues. The Claimant avers that his services were unfairly terminated by the Respondent on 20.8.2012 and denied his terminal benefits contrary to the law. The Respondent has however denied the alleged unfair termination and averred that it is the Claimant who voluntarily deserted his employment after it was alleged by his fellow employee that he had stolen goods belonging to her. The suit was heard on 30.3.2017 and 23.11.2017 when the Claimant testified as Cw1 and the Respondent's director Mr. Paulo Basta testified as Rw1. Thereafter both parties filed written submission, which I have carefully considered herein.

**Claimant's Case**

2. The Claimant testified that he was employed by the respondent as a Welder from December 2009 earning Kshs.700 per day but paid weekly in arrears equaling to 16800 per month. He worked continuously until 22.8.2012 when he fell sick and notified his Foreman Mr. Hamisi. On 23.8.2012 he never reported to work because he was still sick and he notified his said foreman. On 24.8.2012, he received a call from his cousin Mr. Kimanzi telling him that he had been involved in a serious accident and he needed his assistance. He then notified RW1 by SMS that he would not attend work due to his cousin's issue but he never responded.

3. He never reported to work until 28.8.2012 when the security guard told him that he should stay away until he was called back. He didn't receive any call for a week prompting him to write SMS to RW1 apologising and requesting to be allowed back to work. The SMS was also not responded to until 3.9.2012 when he reported the matter to the District Officer (DO)Kongowea. The DO wrote a letter to the Respondent and she replied in writing alleging that he had stolen metals from her on 28.8.2012 and deserted work. He however denied that he committed the alleged offence and deserted work and contended that if indeed he had done so the employer would have pursued and caused his arrest because he knew his address.

4. He further stated that later in the same month of November 2012 the respondent finally met him at the DO's office and promised to pay the terminal dues him by January 2013 but before then the respondent instructed a lawyer to stop any further proceedings before the DO. He therefore contended that his employment was unfairly terminated without any lawful cause and without being paid his terminal dues.

5. The Claimant prays for one month salary in lieu of notice, accrued leave, service pay and compensation for unfair termination. He however admitted that he had borrowed a loan of Kshs.15,000 and repaid Kshs.10,100 through salary deduction leaving a balance of Kshs.4,900.

6. On cross examination, CW1 maintained that his last day at work was 22.8.2012. He admitted that on 22.8.2012 and 23.8.2012 he never notified Rw1 or his partner that he was sick and could not attend work but he repeated that he notified his foreman. He further explained that he was to report back on 24.8.2012 but he received sad news from his cousin at Malindi. He notified RW1 by SMS that he would be away to attend to the cousin until the following Monday but he never responded to confirm that permission was granted.

7. He denied ever deserting employment and contended that he reported back on 28.8.2012 but he was barred entry. He denied stealing any metals and contended that he was away on the alleged date. He admitted sending SMS apologizing to the RW1 for the said offence but contended that he was apologizing for sending SMS to him at night after learning from the guard, Mr. Wilfred, that RW1 was unhappy

because of the night SMS while he was asleep. He concluded by stating that he missed work for 4 days after notifying his employer and when he reported back he was barred.

### **Defence Case**

8. RW1 confirmed that he is the MD of the respondent and that he employed the claimant from 2009 to 2012. He however contended that the employment was on casual basis for KShs.700 per day but paid on weekly. He testified that on 28.8.2012, he was away from the office when he was called by his wife at around 5 pm telling that the claimant was carrying away bags full of pieces of metal and when he was called back he left the bags outside and went away. Thereafter he never reported to work and he never sought leave of absence from him. He denied ever dismissing the claimant from employment and maintained that it is him who voluntarily deserted his job.

9. On cross examination, RW1 admitted that he employed the claimant under an oral contract. He further admitted that there is an Attendance register which shows the days attended by the claimant and the payment to the Claimant which he acknowledged by signing. He contended that the Claimant was not consistently on duty in August 2012 and the last day he attended work was on 28.8.2012 when he stole. He admitted that the Claimant wrote to him SMS on 24.8.2012 asking to be away for 3 days and confirmed that he had no issue with that request. He however maintained that the Claimant was on 28.8.2012 seen carrying away a sack full of items. He clarified that by the time he was seen he was already outside his gate. He however confirmed that he never reported the matter to the police until November 2012.

10. RW1 further explained that few days after the incidence he called the Claimant back to explain what he did but he Responded on 3.9.2012 by SMS apologizing and requesting to return to work but he never responded to the SMS request. He further contended that from the time the Claimant send him SMS saying that he went to Malindi, he never resumed work and only served a demand letter through the chief. He admitted that he had the claimant's contact being telephone through which they communicated.

### **Analysis and Determination**

11. There is no dispute that the Claimant was employed by the respondent as a welder from June 2009 to 22.8.2012 when he absented himself from work for 2 days on account of sickness a further 2 days on account of relative who had a serious accident. There is further no dispute that he was never subjected to any disciplinary action for the said absence from work. The issues for determination are:

(a) Whether the Claimant was unfairly terminated from 22.8.2012 or he voluntarily deserted his employment from 28.8.2012 after allegedly being seen stealing pieces of metal from the respondent.

(b) Whether she is entitled to the reliefs sought.

### **Unfair termination or desertion**

12. 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 terminated. In this case, the Claimant alleges that he fell ill on 22.8.2012 while on duty and before leaving in the evening he notified his foreman about his condition. The following day he was still unwell and he notified the foreman that he could not make it to work until the following day 24.8.2012. However, on 24.8.2012 he received sad news of his cousin who had been injured in a serious accident at Malindi and who requested for his assistance. He then asked for 3 days off from Rw1 to attend to his injured cousin. However when he reported back to work the following Monday, 28.8.2012, he was barred entry by the guard who informed him to stay away until he was called back to work. He was however never called back and all his SMS to Rw1 requesting to be allowed back to work were never responded to. He therefore contended that his employment was terminated effective 22.8.2012 when he last attended work.

13. On the other hand the Rw1 has denied ever dismissing the Claimant and contended that after being allowed 3 days off to go Malindi, he resumed duty and worked upto 28.8.2012 evening when he was seen carrying bags full of pieces of metal and when he was called back he left the bags outside the gate never to be seen again. He further explained that when he called him to explain what he did, he responded on 3.9.3012 by SMS apologizing and requesting to be allowed back to work.

14. After careful consideration of the evidence and the submissions presented to the court, I find that the Claimant's case consistent and he has on a balance of probability proved that he did not desert his employment but rather he was terminated by the Respondent. His contention that he last worked for the respondent on 22.8.2012 has not been rebutted by the defence by evidence say Attendance Register. In deed that fact was corroborated by the Rw1 when he stated that after the Claimant requested for 3 days off to go to Malindi he never reported back to work.

15. In addition the evidence by the Claimant that he reported back to work on 28.8.2012 but he was denied entry by the respondent's guard one Mr. Wilfred was not rebutted by the defence. RW1 was absent from the office on 28.8.2012 when the claimant alleges that he reported back but he was denied entry by the guard. The said guard was also not called as a defence witness to contest the evidence by the Claimant that he reported to work on 28.8.2012. The wife of the RW1 who alleged that CW1 was on duty on 28.8.2012 and stole metals at 5 pm did not testify to confirm the hearing evidence by RW1.

16. The SMS logs produced exhibits is proof that the Claimant sent SMS on 24.8.2012 at 04.50 hours asking to be away for 3 days but when he reported back to work he was denied entry. Thereafter the logs show 4 SMS texts by the Claimant to RW1 requesting to resume work but they were never responded to until 28.11.2012 when Rw1 send SMS text summoning the Claimant to Nyali Police Station. The said SMS was in reaction to the letters written to him by the DO Kongowea demanding payment of terminal dues to the Claimant.

17. The question that follows is whether the termination of the claimant's employment by the respondent 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**

18. The reason cited for the termination was theft of the Respondent's pieces of metal from his work premises. The Claimant denied the alleged offence. Under section 43 and 47(5) of the Act, in any legal proceedings like this one, the employer has the burden of proving and justifying the reason for terminating the services of his employee. In this case, however the Respondent has failed to prove on a balance of probability that the Claimant stole pieces of metals from her work premises. As observed herein above the RW1 has only given hearsay evidence on the alleged theft by the claimant. No eyewitness was called to testify in support of the alleged theft. Consequently, the failure by the Respondent to prove the reason for terminating the services of the Claimant rendered the termination unfair within the meaning of section 45 of the Act.

#### **Procedure followed**

19. 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.

20. In this case, the director never invited the Claimant to any hearing as contemplated by Section 41 of the Act but only notified him of an indefinite suspension until he was called back. Such suspension was without notice of the offence committed and without pay and as such, it amounted to a repudiatory breach, which entitled the claimant to deem that he had been constructively dismissed from work without being heard.

#### **Reliefs**

21. In view of the finding herein above that the termination of the Claimant's contract of service was unfair, I award him Ksh.16,800 being one month salary in lieu of notice plus Kshs.100,800 being 6 months' salary as compensation for the unfair termination under section 49 of the Act. In awarding the said compensation, I have considered the period of service and also the conduct of the Respondent at the time of the termination.

22. The claim for leave is dismissed for lack of particulars and evidence. It has not been shown how the sum of Kshs.66,400 being claimed was arrived at. Similarly, the claim for service pay is granted as prayed at the conventional rate of 15 days pay per completed year of service. Based on the salary pleaded and admitted by the defence, two years' service pay is Kshs.16,800 but the Claimant will get Kshs.16,000 as per his pleadings.

#### **Disposition**

23. For the reasons that the termination was unfair, I enter judgment for the Claimant in the sum of Kshs.133600 plus costs and interest.

**Dated and signed at Nairobi this 2th day of March, 2018**

**ONESMUS MAKAU**

**JUDGE**

**Delivered at Mombasa this 12th day of April, 2018**

**LINNET NDOLO**

**JUDGE**