



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 520 OF 2016

KAZUNGU KATANA KOI

SHIDA KAINGU KOMBE.....CLAIMANTS

VERSUS

JAMES TSOFA (CHAIRMAN)

KATANA NGALA (ASSISTANT CHAIRMAN)

ELLSTON SWIDA KONDE

ALI KIRIBA

MARIAM JABALI (sued in their capacity as officials of KURUWITU CONSERVATION &

WELFARE ASSOCIATION.....RESPONDENT

JUDGMENT

Introduction

1. The Claimants brought this suit on 28.6.2016 alleging that they were terminated on ground of redundancy in August and September 2015 and their demand for terminal dues was ignored. By this suit they seek to recover Kshs.100,000 and Kshs.70,000 made up of salary in lieu of notice, accrued leave, gratuity and compensation for unlawful and unfair termination of their employment .

2. The Respondents have admitted having employed the Claimants but denied the alleged unlawful and unfair termination of the Claimants services. They averred that it is the Claimants who terminated their employment through desertion. They averred that the first Claimant deserted from 22.9.2014 while the second Claimant deserted from 15.1.2015 after being suspended for gross misconduct namely, attending work under the influence of alcohol, absenteeism, and disobeying lawful command from his supervisors. They therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 12.7.2017 and 6.11.2017 when the second Claimant testified as CW1 and the first Claimant testified as CW2. The Respondents never participated in the hearing. After the hearing the Claimant filed written submissions which I have considered herein.

Claimant's Case

4. CW1 testified that he was employed by the Respondent as a Watchman in 2006 earning Kshs.4,000 per month. The contract was verbal and he worked with CW2 whom he found working there. He testified that he worked for 6 years upto May 2016 when he reported to work as usual at 6 pm but he was stopped from continuing with work by his supervisor on ground that he had absented himself from work the previous 3 days. He further explained that the supervisor also deducted his salary advance from Kshs.2,000 to Kshs.800 to reduce the pay for the days not worked.

5. However, CW1 contended that the absence was due to an illness and that he had secured permission from the same supervisor. He further contended that on that day he was told that he will be called back but that was never to be. He served a demand letter but again it was ignored. He therefore concluded that he was unfairly terminated and prayed for the reliefs sought by the suit.

6. CW1 contended that for the 6 years he worked for the Respondents, he was deducted Kshs.260 towards NSSF contribution but the same was never remitted to the fund. He further contended he also went for leave for one month only in 2016 and not any other time before. He ended by stating that he was 44 years old and feared that he may not secure any other job in future.

7. CW2 adopted his written statement dated 11.4.2016 which was filed with the suit on 28.6.2016. He stated that he and CW1 were employed in September and June 2012 respectively and the salary was Kshs.3,500 and later increased to Kshs.4,000 per month. He further stated in or about August and September 2015 the Respondent terminated his employment citing the reason that work had reduced and promised to call him back but that never happened. He therefore contended that he was terminated without prior notice and payment of any terminal dues.

Analysis and Determination

8. There is no dispute that the Claimants were employees of the Respondents. The issues for determination are:

- a) Whether the Claimants deserted their employment or they were unlawfully and unfairly terminated;
- b) Whether the reliefs sought should be granted.

Desertion of unfair termination

9. The Respondent has not prosecuted his defence and therefore, the allegation that the Claimants deserted employment is dismissed. The Respondent have also not adduced any evidence to rebut the Claimants evidence that they were terminated by them without prior notice and without payment of terminal dues. Under section 45(2) of the Act, termination of employment by the employer is unfair if he fails to prove that it was founded on a valid and fair reason and that it was done after following a fair procedure. As observed above, the Respondent has not participated in the hearing and as such the foregoing burden of proof has not been discharged and consequently I hold that the termination of the Claimants services was unfair.

Reliefs

10. Under section 49 of the Act I award each Claimant one month's salary in lieu of notice being Kshs.4,000 plus 3 months compensation for the unfair termination being Kshs.12,000. In awarding the said compensation, I have considered the fact that the Claimants could secure another job within a short time.

11. The claim for leave is dismissed for lack of particulars and evidence.

12. The claim for gratuity is also dismissed because they did not prove the total number they served.

Disposition

13. For the reason of unfair termination of their employment, I award each Claimant Kshs.16,000 plus costs and interest.

Dated and signed at Nairobi this 12th day of March, 2018

ONESMUS MAKAU

JUDGE

Delivered at Mombasa this 12th day of April, 2018

LINNET NDOLO

JUDGE