



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1712 OF 2012

ONESMUS MUTUKU NDUNDA.....CLAIMANT

VERSUS

MOTORWAYS CONSTRUCTION LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant brought this suit on 25.9.2012 and amended it on 4.3.2014. The suit seeks the following reliefs:

- (a) Declaration that the termination of the Claimant was unlawful;
- (b) Payment of Kshs.52,515/- being 3 months pay in lieu of notice;
- (c) Payment of Kshs.10,503/- being the applicable pay for the month of May, 2012;
- (d) Payment of Kshs.12,000/- being the applicable pay in lieu of earned leave;
- (e) Payment of Kshs.210,060 being 12 months compensation for wrongful termination under section 49(1)(c) of the Employment Act, 2007;
- (f) Severance pay at the rate of 15 days for each year worked of Kshs.43,762.50/-
- (g) Cost of suit;
- (h) Interest on (b), (c), (d), (e), (f) and (g) at court rates;
- (i) Any other or further relief that this honourable court may deem fit to grant.

2. The Respondent filed defence and counterclaim admitting that she employed the claimant as general worker until she fairly summarily dismissed him for absenteeism and misuse of her Vibrating Roller Machine. She therefore counterclaimed for Kshs.33,346 for said misuse of her machines.

3. The suit was heard on 14.2.2018 when the claimant testified as Cw1 but the respondent failed to attend Court. After the hearing, the claimant's counsel filed written submissions which I have carefully considered herein.

Claimant's Case

4. Cw1 testified that he was employed by the respondent in June 2007 as a General Labourer earning Kshs.9,000 per month. He worked well until May 2012 when he was called to the office and without any prior notice or service of show cause letter, he was told that he had been dismissed summarily because he was seen towing a third party's tractor that was stuck in the mud.

5. Cw1 further contended that he was not accorded any disciplinary hearing prior to the dismissal and after the dismissal he was denied the salary for that month of May 2012 plus Certificate of Service. He explained that as at the time of the dismissal, he had risen in the ranks to become Plant Operation and Excavator Driver earning Kshs.19,000. He however produced payslip for March, 2012 showing a gross salary of

Kshs.17,800. He concluded by praying for the reliefs sought in the Amended Memorandum of claim.

Analysis and Determination

6. There is no dispute that the claimant was employed by the respondent as a General Labourer and later as Plant Operator and Excavator Driver until he was summarily dismissed in May 2012. The issues for determination are;

- (a) whether the dismissal of the claim was unfair;
- (b) Whether the reliefs sought by the claim and the counterclaim should be granted.

Unfair termination

7. Under section 45(2) of the Employment Act termination of employment is unfair if the employer fails to prove that it was grounded on a valid and fair reason, and that it was done after following a fair procedure. In this case, the alleged reason for the dismissal was absence from work and misuse of the employer machines/equipment to serve a third party without permission. The respondent has however not offered any evidence to support his defence. She has therefore not discharged her burden of proving the reasons for the termination as required by section 43 & 45 of the Act and consequently I find and hold that the summary dismissal of the claimant was unfair within the meaning of section 45 of the Act.

8. In addition, the respondent has failed to prove on a balance of probability that she followed fair procedure before dismissing the claimant. Section 41 of the Act requires that before an employer terminates the employment contract of an employee, on ground of misconduct, poor performance or physical incapacity he shall first explain to the employee, in a language he understands and in the presence of a fellow employee or shop floor union Representative, the reason for which the termination is contemplated, and thereafter invite the employee and his chosen companion to air their defence for consideration before the determination is decided.

9. In this case, the claimant's evidence that he was not accorded any hearing as contemplated by section 41 above has not been contested. Indeed my reading of the dismissal letter dated 18.5.2012 leaves no doubt that the claimant was dismissed without prior hearing because the letter does not even refer to any hearing. Consequently, I find and hold that the summary dismissal was not only substantively unfair but also procedurally unfair.

Relief

10. Under section 49 of the Act I award the claimant Kshs.17,505 being one month's salary in lieu of notice plus Kshs.175,050 being ten months' salary as compensation for the unfair termination. In awarding the foregoing compensation I have considered that the claimant had served for a fairly long period of 5 years without being served with any warning letters.

11. I also award him Kshs.10,503 being salary for the 18 days worked in May 2012. The claim for leave is however dismissed for want of particulars and evidence. Likewise, the claim for severance pay is dismissed because the termination was not through redundancy under section 40 of the Act.

12. Finally, the counterclaim by the respondent is dismissed for want of prosecution since no evidence was tendered to prosecute it.

Disposition

13. I enter judgment for the claimant in the sum of Kshs.203,058 plus costs and interest at Court rate from the date hereof till payment in full. The award will be paid subject to any relevant statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 18th day of May, 2018

ONESMUS N. MAKAU

JUDGE