



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2103 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 18th May, 2018)

SAMUEL NZUKI MUTISYA.....CLAIMANT

VERSUS

SUNRISE TEXTILE MILLS LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant herein filed his Memorandum of Claim on 30/11/2015 in person stating that the issue in dispute was wrongful and unfair termination of his services and failure by the Respondent to pay him his terminal benefits.
2. It is the Claimant's evidence that he was employed by the Respondent as a Machine Operator in January 2003 at a salary of 16,800/= . He was however never issued with an appointment letter. He contends that he served the Respondent with diligence and loyalty until 25/5/2015 when the Respondent wrongfully and unlawfully terminated his services.
3. In his oral evidence in Court, the Claimant stated that he was on duty on 25/5/2015 when the Respondent accused him of sleeping on duty and chased him away from work. He told Court that he used to be paid weekly earning 750 per day.
4. The Claimant called 2 witnesses who gave evidence and told Court that they used to work with the Claimant for the Respondent.
5. The Respondent called one witness who admitted that the Claimant was their employee since 2010 and that she was paying him 9,000/= per month inclusive of house allowance. That the Claimant was also a member of NSSF and she used to deduct and remit his NSSF dues.
6. She avers that he worked upto July 2011 and then he requested to be a casual employee and wrote a letter to that effect (Page 3 of bundle). In the letter under reference, the Claimant wrote indicating that he wanted his salary paid weekly and not monthly.
7. She avers that she paid him 700/= per day. That in 2015, he absconded duty and never came back. That later the Claimant wrote the Respondent a demand letter through Kituo Cha Sheria and the Respondents responded indicating that they had never sacked the Claimant but that he absconded work and could come back to work if he so wished.
8. The parties filed their respective submissions. I have considered the evidence and submissions filed. The Applicant has indicated he was an employee of the Respondent until he was dismissed. The Respondent's contention is that the Claimant was a permanent employee until he opted to be a casual one.
9. The Respondents rely on a letter written by the Claimant, which is attached at page 3 of the Respondent's bundle of documents. My reading of the letter show that the Claimant wrote to the Respondent asking the Respondent to pay his salary weekly instead of monthly. There is no indication that he asked to be put on casual terms. A casual employee is one defined under Section 2 of Employment Act 2007 as follows:-

“Casual employment” means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time“.

10. The Claimant does not fit in this description and as such the Respondent's contention that he opted to be a casual employee just because he asked to be paid weekly instead of monthly is not viable.

11. That notwithstanding, there is proof that the Claimant served the Respondent over a period of time. The Respondent was obliged to issue him with an appointment letter spelling out the terms of the engagement. This was never done. They however issued the Claimant with a letter stating his duties (Appendix 2 – Respondents documents) but which never spelt out the detailed terms expected in an employment contract including leave, separation, discipline etc. In this case, when there is a dispute as to any terms of the contract Section 10(7) of Employment Act comes in play. Section 10(7) of Employment Act 2007 states as follows:-

(7) “If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer”.

12. The Respondent avers that the Claimant absconded duty. The Claimant on the other hand avers that he was dismissed for no reason.

13. The Claimant told Court that he was verbally dismissed on 25/5/2015. In September he wrote a demand notice to the Respondents through Kituo Cha Sheria but they never responded to the same. Appendix 5 Respondent’s document is also a letter written by the Respondents on 1/7/2015 to the Ministry of Labour referring to previous letter written in relations to the Claimant and the Respondents indicate that the claimant was misbehaving and not taking instructions and they could consider reinstating him if he was repentant of his misdeeds.

14. My reading of this indicates that the Respondent accepted having terminated the Claimant but were willing to reinstate him if he was repentant of his misdeeds. The contention therefore that the Claimant absconded duty is also not true.

15. I therefore find that the Claimant was indeed terminated by the Respondent for whatever reasons they had. The Claimant was never subjected to a disciplinary process as envisaged under Section 41 of Employment Act which states as follows:-

(1). “Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

16. The reasons if any for which the Claimant was dismissed are also unknown and this contravenes the provision of Section 43 of Employment Act which provide as follows:-

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.

17. Section 45(2) of Employment Act also states as follows:-

2) “A termination of employment by an employer is unfair if the employer fails to prove:-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

18. It is my finding that the Claimant was dismissed without any valid reasons and without due process. I therefore find the dismissal unfair and unjustified.

19. In terms of remedies, I award the Claimant as follows:-

1. 1 months salary in lieu of notice = 16,800/= (6 days x 4 in a month x 700).

2. House allowance for 3 years = 3 x 12 x 0.15 x 16,800= 90,720/=.

3. *Unremitted NSSF deductions for 19 months = $400 \times 19 = 7,600/=$.*

4. *Accrued leave for 1 year.*

5. *6 months salary as damages for unfair termination = $6 \times 16,800 = 100,800/=$*

TOTAL = 232,720/=

6. *The Claimant should also be issued with a Certificate of Service.*

7. *The Respondent will pay costs of this suit and interest at Court rates with effect from the date of this judgement.*

Dated and delivered in open Court this 18th day of May, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Claimant in person - Present

Mbaya holding brief for Mbugua for Respondent