



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1054 OF 2013

DANIEL ONYANGO ODHIAMBO.....CLAIMANT

VS

WATERWELL INTERNATIONAL (K) LTD.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 11th July 2013 and filed in court on 12th July 2013, the Claimant has sued the Respondent for unlawful termination of employment. The Respondent filed a Reply on 20th December 2013.
2. At the hearing, the Claimant testified on his own behalf and the Respondent called its Director, Nilesh Sandi Shah.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent in the position of Welder from 28th March 2011 until 20th May 2013, when his employment was terminated. He adds that the termination was unlawful and unfair in that no charges were preferred against him and he was not given an opportunity to defend himself. Further, he was not given any prior notice and was not paid his terminal dues.
4. The Claimant's claim against the Respondent is as follows:

- a) 3 months' salary.....Kshs. 52,000
- b) Unpaid leave for 3 years.....52,000
- c) Severance pay for 3 years.....52,000
- d) General damages for wrongful dismissal
- e) Costs plus interest

The Respondent's Case

5. In its Reply dated 19th December 2013 and filed in court on 20th December 2013, the Respondent states that the Claimant was never a full time employee but worked and was paid on piece work basis.
6. The Respondent further states that if the Claimant's employment was terminated, it was done properly upon the Claimant being found to have breached his conditions of service.

Findings and Determination

7. There are two (2) issues for determination in this case:
 - a) Whether the Claimant has made out a case for unlawful termination;

b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

8. In his witness statement dated 11th July 2013, the Claimant state that on 20th May 2013, he was paid an advance of Kshs. 4,000 and asked to proceed on compulsory leave. Upon resuming duty, the Claimant was paid the balance of his salary for May 2013, amounting to Kshs. 8,950. He was then issued with a recommendation letter dated 5th June 2013. The Claimant deemed this to be dismissal from employment.

9. The Respondent's Director, Nilesh Sandi Shah told the Court that the Claimant who was a permanent employee of the Respondent, used to absent himself from work without notice. He was warned verbally and was finally given a thirty (30) days' termination notice. After this the claimant worked for fifteen (15) days and then disappeared.

10. The Respondent admitted issuing the Claimant with a recommendation letter dated 5th June 2013 stating as follows:

"TO WHOM IT MAY CONCERN

This is to confirm that Mr. DANIEL ONYANGO was an employee of Waterwell International (K) Ltd for the last 2 years from 28th March 2011 to May 2013 as a WELDER.

He worked with us as a welder in the field section. We found him hardworking and trustworthy person, his performance was to the best level.

We wish him luck for (sic) his future endeavors.

For and on behalf of Waterwell International (K) Ltd

Maureen Aholi

(Signed)

Administrator"

11. The Court was unable to reconcile this positive recommendation with the Respondent's assertion that the Claimant was a habitual absentee, who had been issued with verbal warnings. Further, there was no documentary evidence to prove that the Claimant had indeed been issued with a termination notice, as alleged by the Respondent's Director, Nilesh Sandi Shah.

12. Additionally, if it is true that the Claimant deserted duty in the middle of his notice period, the Respondent ought to have made effort to reach him. This did not happen and the defence that the Claimant deserted duty is therefore not available to the Respondent (see **Godfrey Anjere v Unique Suppliers Limited [2015] eKLR**).

13. In the end, the Court finds that the Respondent terminated the Claimant's employment without justifiable cause as required under Section 43 of the Employment Act, 2007. Moreover, in effecting the termination, the Respondent failed to observe the mandatory procedural fairness requirements of Section 41 of the Act.

Remedies

14. Arising from the foregoing findings, I award the Claimant four (4) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service as well as the Respondent's conduct in the termination transaction.

15. I further award the Claimant one (1) month's salary in lieu of notice. The Respondent did not produce any leave records to counter the claim for leave pay which therefore succeeds and is allowed.

16. No basis was laid for the claim for severance pay which consequently fails and is dismissed.

17. Finally, I enter judgment in favour of the Claimant in the following terms:

- a) 4 Months' salary in compensation.....Kshs. 52,800
- b) 1 month's salary in lieu of notice.....13,200
- c) Leave pay for 2 years (13,200/30x21x2).....18,480

Total.....84,480

18. This amount will attract interest at court rates from the date of delivery of judgment until payment in full.

19. The Claimant will have the costs of the case.

20. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 16TH DAY OF JULY 2018

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Nyambane for the Claimant

Mr. Kandere for the Respondent