



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE 1833 OF 2014

MASTER BONIFACE MUTUA.....CLAIMANT

VERSUS

EAST AFRICA CANS AND CLOSURES LIMITED...RESPONDENT

JUDGEMENT

1. The claimant herein alleged that he was employed by the respondent as a machine operator earning a net salary of Kshs 9,515 per month which was later increased to Kshs 13,201/=. According to him, he diligently and with due honesty performed his duties and was willing and able to continue working but on 7th August, 2014 his services were summarily terminated without notice or justifiable cause.
2. The respondent on its part averred that the claimant worked on annual renewal contracts. Despite extension of the claimant's contract his performance deteriorated over time and he became negligent. This was particularly evidenced by an injury report on the claimant dated 11th June, 2014 indicating his right middle finger was cut while feeding discs/lids into a tin-moulding machine at the respondent's factory using his bare hands instead of safety equipment meant for such tasks.
3. The respondent further averred that the claimant frequently absented himself duly by obtaining numerous mysterious sick-offs throughout his employment. Through the assistance of the directorate of Occupational Safety and Health Services, the respondent established that the medical reports were obtained from one clinic called Happiness Clinic and Chemist and the information contained severally referred to illness repeatedly involving abdominal pain, diarrhea, headache and fever but were not backed by properly done medical tests.
4. The respondent therefore averred that it terminated the claimant's services on 7th August, 2014 after it lost faith in the claimant's ability to continue working due to negligence and misconduct. Before terminating the claimant's service the respondent averred that he was accorded a fair hearing before dismissal and the reasons why his services were terminated were explained in a hearing between the management and the claimant in the presence of a co-worker of his choice. The respondent further averred that the claimant was paid his terminal dues which he acknowledged.
5. In his oral evidence the claimant additionally stated that he worked for the respondent for five years and that his contracts were annual but renewable. According to him, he was dismissed when he got hurt and sued for compensation. He denied being subjected to any disciplinary hearing and further that he was not given any reason for dismissal.
6. In cross-examination, he stated that the machine he was operating had no safety guard and that he was never issued with any gloves. He further stated that he refused to withdraw his claim for compensation. The respondent called two witnesses. The first witness Mr Jimmy Kobiero stated he was the respondent's HRM. It was his evidence that in 2012 there were complaints against the claimant. According to him, the claimant used to represent fake off-duty letters. Investigations were conducted and it was found that the off-duty letters were not genuine. Mr Kobiero further stated that in 2014, the claimant started sleeping while on duty and got injured as a result.
7. In August, he was found asleep again and it was decided to terminate the claimant's service. The claimant was paid and he signed for his dues. In cross-examination, he stated that the labour office investigated and found the clinic did not exist. He further stated that the factory manager found the claimant asleep and called the shop steward to witness.
8. The respondent's second witness Mr Patrick Kilonzo stated that he was the claimant's supervisor and that the claimant was initially a good worker but he started sleeping while at work and further that his performance started dropping.
9. The court having reviewed the pleading and evidence is of the view that there seemed to exist valid reason for termination of the claimant's service. The respondent made reasonable attempt to authenticate the claimant's sick-offs. Their frequency and consistency on the ailments the claimant was suffering from reasonably raises eyebrows.

10. The court however, is not persuaded that the claimant was taken through a disciplinary process contemplated under the Employment Act before his services were terminated. There was no document filed on any allegation by the respondent's witness that the claimant was confronted with the accusations against him and his response sought.

11. The termination letter dated 7th August, 2014 simply communicated the decision of the respondent to terminate the claimant's service but did not assign any reason for doing so. The assignment of reason for dismissal or termination is not a requirement under the Employment Act and failure to do so would lead to a finding that the dismissal or termination was unfair under Section 45 of the Act.

12. The court therefore finds and hereby awards the claimant as follows:

- a. Six month's salary for unfair dismissal 79,206
- b. Kshs 19,708 as per termination of letter if not paid already
- c. Costs

13. Items (a) shall be subject to taxes and statutory deductions.

14. It is so ordered.

Dated at Nairobi this 20th day of July, 2018

Abuodha J. N.

Judge

Delivered at Nairobi this 20th day of July, 2018

Abuodha J. N.

Judge

In the presence of:-

.....for the Claimant

.....for the Respondent.