



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 863 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 9th July, 2018)

STEPHEN ODINDO.....CLAIMANT

VERSUS

J & K INVESTMENT (K) LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed suit on 14th April 2014 through the firm of Rakoro & Co. Advocates seeking damages for unfair termination and non-payment of terminal dues.
2. He avers that he was orally employed by the Respondent on 11/10/2011 as a Welder then earning a salary of Kshs.16,000 per month, but which rose to Ksh.24,000 per month. He states that he was summarily dismissed from employment on 4th March 2014 when he was told that his services were no longer required and asked not report to work on 5th March 2014. No reasons were given for the dismissal but he was asked to hand over his uniform and to go home while someone else was told to continue with his work.
3. He further avers that on 19th March 2014, he wrote a demand letter and a notice of intention to sue the Respondent on the issue regarding his dismissal but the Respondent did not reply to the said letter. He claims that he used to report to work at 8.00 am and leave at 5.30 pm an overtime of 6 hours per week or 24 hours per month.
4. He also states that he was terminated without any notice, without any reason or at all and without being heard, contrary to the provisions of natural justice and Employment Act, 2007. He avers that his rightful terminal benefits were never paid.
5. He avers that he worked for the Respondent for 4 years without any disciplinary record, loyally, dutifully and honestly but was dismissed without due regard to the law pertaining to employment. He has been unable to secure commensurate employment for lack of a certificate of service.
6. The Respondent filed their response where they admitted that the Claimant was their employee but deny each and every allegation made in the claim and put the Claimant to strict proof of the contents. They also deny that the Claimant is entitled to compensation.

Submissions

7. The Claimant filed his submissions where he submits that he was terminated without regard to rule of natural justice and without any payment of his rightful terminal benefits. He also states that he was not given a letter of service hence the said termination was manifestly unfair.
8. During cross-examination, the Respondent suggested that the Claimant was told to go to Kangundo and take measurements but he failed to go warranting him being given 3 warning letters which were not contained in their response to claim dated 19/6/2016.
9. He states that he was not aware of the said warning letters and that his not going to Kangundo had anything to do with his termination. He relied on the case of **Wairimu Mureithi Vs Sphinx Pharmaceuticals Limited [2016] Eklr.**
10. He further submits that having been on a term contract by virtue of operation of the law and since he was unfairly terminated, he is entitled to payment of 1 months' salary in lieu of notice as provided in Section 49 (1)(a) of the Act and so should be awarded Kshs. 24,000 as provided in Section 35(1)(c).

11. He avers that the Respondent was deducting NSSF but not remitting the deductions, which they did not deny in Court hence owing him Kshs. 1,400. He relied on the case of Sylvester Oduor Oyile Vs Prime Fuels (Kenya) Limited 2013 Eklr.

12. The Respondent filed their submissions where they submit that their actions were justified since the Claimant even admitted during cross-examination that he was sent to Kangundo road to take measurements of a structure but refused as he was busy and told his supervisor to send someone else. His unbecoming conduct is sufficient reason to warrant summary termination of his employment hence there was no unfair termination. They relied on the case of Akasa Shikoli vs Lilian Otundo [2014] eKLR.

13. They further submit that the Claimant is not entitled to any benefits having been summarily dismissed on the basis of insubordination as it does not have any statutory obligations to render any statutory entitlements and terminal benefits as expressed in Claimant's Memorandum of Claim as this would lead to extortion since his employment was terminated fairly and regularly as required under the law.

14. They aver that the issue of overtime payment is untenable as they paid for any extra time and that the Claimant did not demonstrate that there was any pending overtime to be paid both in the statement of claim and during hearing. They therefore humbly submit that the Claimant's suit be dismissed with costs to them.

15. I have examined all averments and submissions from the parties. I note that the Claimants called their evidence but the Respondent failed to call any witness on the day for hearing and the Court ordered closure of Claimant's case.

16. It therefore follows that the Claimant's case remained unchallenged by virtue of the ruling in the Civil of Appeal No. 140/2008 at Nairobi JJA Visram, Mwilu (as she then was) and Otieno Odek rendered themselves as follows:-

"in Der Raj Sharma vs Reginam 1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification and that the few exhibits should be confirmed to articles which have been fairly probed and admitted in evidence. In the Nigerian case of Michael Hausa vs the State (1994) 7-8 SCANJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial Judge and the Judge cannot use the document as evidence".

17. From the Claimant's case, he worked for the Respondents for over 2 years and 5 months when he was dismissed. The pay slip produced by the Claimant is proof of this employment relationship showing he earned a gross salary of 24,000/=.

18. Without any evidence to the contrary there is no proof of how this relationship ended save for what the Claimant told Court. The Claimant was not subjected to any disciplinary hearing. The Claimant was also never informed of the reasons of the termination.

19. It is my finding that the Claimant was unfairly dismissed. I therefore find for him and award him as follows:-

1. 1 month salary in lieu of notice = 24,000/=.

2. 4 days salary for February 2014 = 3,200/=.

3. Unremitted NSSF deductions = 1,400/=

4. 10 months salary as damages for unfair and unlawful termination = $10 \times 24,000 = 240,000/=$.

TOTAL = 268,600/=

5. The Claimant be issued with a Certificate of Service.

6. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 9th day of July, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kioko holding brief for Rakoro for Claimant – Present

Lemayan for Respondent – Present