



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 64 OF 2014

SAMUEL OJWANG JUMA.....CLAIMANT

VERSUS

SAPHIRE COLLECTIONS LIMITED.....RESPONDENT

JUDGMENT

1. The claim for the court is for the following orders:

- (a) A declaration that the termination of the Claimant by the Respondent on 6/12/2013 was unfair, and unlawful
- (b) An order compelling the Respondent to pay the Claimant his terminal benefits amounting to Kshs.416,745/=.
- (c) Letter of service.
- (d) Costs and interest of this claim.

2. The claimant contends that he was unfairly terminated without any lawful cause and without following a fair procedure as laid down by the law.

3. The respondent denies the alleged unfair termination and avers that the claimant constructively resigned from employment by forcefully proceeding on one week's leave after it was denied by the respondent. She therefore prayed for the suit to be dismissed with costs.

4. The main issue for determination herein is whether he voluntarily resigned or he was unfairly dismissed by the respondent. The claimant testified as Cw1 while respondents Director Mr. Dilip Gudka testified as Rw1. Thereafter both parties filed written submission.

Claimant's Case

5. Cw1 testified that he was employed by the respondent from 1.1.1999 as a Tailor based at Sarit Centre. His salary was Kshs.6,000 per month which he contended that it was an underpayment. He worked well without any disciplinary issues until 6.12.2013 when his Manager M/s Abana Gudka gave him the work of making a men's jacket at 6 p.m. He started the work despite being late after the normal working hours and continued till 7.45 p.m when he became extremely tired and proposed to the Manager that he could complete the jacket the following morning. However, the Manager insisted that he must complete the jacket before going home but when the claimant said he was totally exhausted, the Manager snatched the jacket from him and shouted at him to leave and not come back to work the following day.

6. On the following, day, Cw1 went to see Rw1 at his office at the Nairobi City Centre and explained that he was dismissed by her daughter Abana Gudka on 6.12.2013 and sought for his directions or payment of his terminal dues. Rw1 confirmed the dismissal and directed him to go to the labour office for calculation of his dues. He however reported to his trade union who served a demand letter on 10.12.2013 but the respondent ignored the same but Rw1 wrote a note to the claimant offering to pay him Kshs.13,200 for leave plus Kshs.2,000 travelling allowance and promised to check on the claim for overtime.

7. Cw1 declined the said offer by Rw1 and instructed his lawyer to serve a demand letter but again the respondent ignored it. He prayed for the reliefs sought in the suit.

8. On cross examination, Cw1 stated that as at December 2013 his salary was Kshs.16,500 and admitted that the employer remitted NSSF contributions for his benefit. He further stated that Rw1 never called him back to work and he is still unemployed.

Defence Case

9. Rw1 confirmed that Cw1 was her employee engaged as a tailor. He further confirmed that her daughter M/s Abana Gudka was the Managing Director for the respondent. He admitted that Cw1 went to see him on 7.12.2013 and reported that he was dismissed by the MD on 6.12.2013 and that he did not wish to continue working there. He then contended that he pleaded with Cw1 to continue working and serve one month termination notice but he declined. He then referred him to the labour office but again he refused and deserted only to serve a demand letter through his lawyer, which he responded to on 17.1.2014 denying liability because he is the one who deserted work without notice. He however admitted that the claimant served him for many years with a clean record.

10. On cross examination, Rw1 admitted that he employed Cw1 on 1.1.1999. He contended that on 7.12.2013, Cw1 reported to him that he was told to go so that the shop can be closed if he could not finish the jacket. He admitted that he was served with demand letter by the union but he never responded to it because he discussed the matter with Cw1 and offered to pay Kshs.15,200 and also because the union visited him. He further admitted that after the claimant insisted on leaving work on 7.12.2013, he never served him with any warning or notified the labour office. He further admitted that he never issued the claimant with a certificate of service. He contended that the claimant's salary inclusive of overtime was Kshs.19,091 per month.

Analysis and Determination

11. There is no dispute that the claimant was employed by the respondent from 1.1.1999 till 6.12.2013. The issues for determination are:

(a) Whether he was unfairly dismissed or he deserted employment.

(b) Whether he is entitled to the reliefs sought.

Desertion or unfair termination

12. The claimant contended that he was dismissed by M/s Abana Gudka, the respondent's MD on 6.12.2013 after he failed to complete a jacket, which was assigned to him after normal working time. Rw1 admitted that Cw1 reported to him that the said dismissal by the MD. The MD never gave any evidence in this case to rebut the claimant's allegation that he was dismissed by her on 6.12.2013. Rw1 was not present when the alleged dismissal occurred. His evidence is therefore hearsay and not capable of rebutting the claimant's evidence. Consequently, I find and hold that the respondent has not proved on a balance of probability that the claimant deserted work on 7.12.2013 without notice. In fact, the evidence by Rw1 went contrary to the pleading in the respondent's defence which alleged that Cw1 constructively resigned from his employment by forcefully proceeding on a week's leave after it was denied by the respondent. On the other hand, I find and hold that claimant has proved on a balance of probability that he was dismissed by the respondent's MD on 6.12.2013.

13. Under section 45(2) of the Employment Act, termination of an employee's contract of service 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 reason for terminating the claimant's service was not cited but according to the claimant, the reason was his failure to complete a jacket which was assigned to him at 6 p.m and which he worked on until 7.45 p.m and he felt completely exhausted. That was not a valid reason considering the circumstance of the case. The MD did not act fairly by demanding labour from an already exhausted employee who had overshot his normal working hours from 5 p.m. to 7.45 p.m.

14. On the other hand, I find that the procedure followed to dismiss the claimant was not fair because it did not consonate with section 41 of the Act. The said provision required in mandatory terms that before dismissing an employee for misconduct, poor performance or physical incapacity, the employer must explain the reason to the employee in a language he understands and in the presence of another employee or shop floor union representative of his choice and thereafter invite the employee and his companion to air their defence for consideration before the termination is decided. In this case, the foregoing procedure was never followed and I return that the dismissal of the claimant on 6.12.2013 was unfair within the meaning of section 45 of the Act.

Reliefs

15. Under section 49 of the Act, I award the claimant Kshs.19,091 being one month salary in lieu of notice plus Kshs.229,092 being 12 months' salary compensation or unfair dismissal. In awarding the maximum compensation, I have considered the long service of 13 years and the fact that the claimant never contributed to the dismissal through misconduct.

16. The claim for leave is granted at $Kshs.19,091 \times 24/26 = Kshs. 17,622.45$. The claim for leave travelling allowance is also granted at Kshs.2,000 as admitted by the respondent.

17. The claim for underpayment is however dismissed for lack of particulars and evidence to prove how the sums claimed were arrived at. Likewise, the claim for service pay is dismissed because Cw1 admitted that the employer remitted NSSF contributions in his favour and by dint of section 35(b) of the Act, he is disqualified from claiming service pay. Finally, the claim for overtime is dismissed for want of evidence.

Conclusion and Disposition

18. For the reasons that the claimant was unfairly dismissed from employment by the respondent, I enter judgment for him the sum of Kshs.267,805.45 plus costs and interest less statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 28th day of September 2018

ONESMUS N. MAKAU

JUDGE