



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 461 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 27th September, 2018)

GUYO HUKA.....CLAIMANT

VERSUS

MAWARA HOLDING LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant herein filed his Memorandum of Claim on 21.3.2014 through the firm of Gakoi Maina and Company Advocates contending unlawful and unfair termination of his employment and failure to pay his terminal dues by the Respondent.
2. The Claimant's case is that he was employed by the Respondent on 24.6.2007 as a Security Guard. On 7.11.2011, he avers that he was informed by the Respondent's Manager that he had been dismissed as he was under investigation for alleged theft of a transformer. The salary of the Claimant then was 5,700/= and he had worked for Respondent for 4 years 6 months.
3. He avers that he used to work from 6 pm to 6 am and only got one day off with no leave and also worked during public holidays. He seeks payment of Kshs.128,440/= as per paragraph 10 of his Claim.
4. The Claimant contends that he was unfairly dismissed and that he was not involved in any theft of the transformer.
5. The Claimant annexed his NHIF Member Data Summary (Appendix F) which shows that he was employed by the Respondent.
6. In his oral evidence, he told Court that on 7/11/2011, the management sacked him after an attempted theft at the premises where he was working. He raised an alarm and the thugs ran away. The management thereafter told the Claimant that he had colluded with the police. He was taken to the police and the police interrogated him and found nothing against him.
7. The Respondent, he avers never gave him an opportunity to defend himself. He reported the matter to the labour office and the Memorandum of Claim bears the evidence of the same. The labour officer tried to resolve the issue but did not succeed.
8. The Respondents were served with the Memorandum of Claim and summons to enter appearance on 11.12.2014 as per the affidavit of service filed in Court on 28/5/2013.
9. Despite service, the Respondent failed to enter appearance/file a Response. The Respondent was also served with a hearing notice for hearing of this case on 28/5/2018 but they also failed to attend and so this claim proceeded exparte.
10. I have considered the evidence of the Claimant and submissions filed in Court. There is evidence of an employment relationship between the Claimant and the Respondent evidenced by the NHIF Member Data Statement (Appendix F). Appendix G also shows that the Claimant was amongst employees of the Respondent.
11. The evidence of the Claimant indicate that the Claimant served the Respondent for over 4 years. In the circumstances, the Respondent should have issued him with an appointment letter, which they did not issue.
12. That notwithstanding, the Respondents proceeded to dismiss the Claimant without any disciplinary hearing or without giving him a chance to defend himself. This was in contravention of Section 41 of Employment Act 2007 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”.

13. There is no evidence from the Respondent to controvert the Claimant’s case. I therefore find the dismissal of Claimant unfair and unjustified as provided for under Section 45(2) of Employment Act 2007 where 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.

14. I find for Claimant and I award her as follows:-

1. 1 month salary in lieu of notice = 5,700/=.

2. Service pay for 4 years = $\frac{1}{2} \times 5700 \times 4 = 11,400/=$.

3. Leave for 4 years = $4 \times 5700 = 22,800/=$.

4. 8 months’ salary as damages for unlawful dismissal = $8 \times 5700 = 45,600/=$.

TOTAL = 85,500/=

5. 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 27th day of September, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Oyugi holding brief for Gakoi Maina for the Claimant – Present

Respondent – Absent