



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 375 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

CALEB NASENGO.....CLAIMANT

VERSUS

THELUJI DRY CLEANERS LIMITED.....RESPONDENT

JUDGMENT

The Claimant was an employee of the Respondent from January 2009 to 27th June 2012, earning a salary of Kshs.5,000/= per month. He was engaged as a press machine operator which position he held up to the date of termination of his employment.

In the Amended Memorandum of Claim dated 20th June 2016, the Claimant prays for:

- a. A declaration that the Claimant's services were unprocedurally, unlawfully and unfairly dismissed.
- b. Kshs. 327, 737.80
- c. Certificate of Service
- d. Costs of the suit and interest at court rates from the time of filing suit until payment in full and
- e. Any other further and better relief the Honourable Court may deem just and fit to grant.

The Claimant avers that he was terminated unfairly because:

- i. The Respondent did not give the Claimant termination notice as provided by section 35(1) c and 36 of the Employment Act.
- ii. The Respondent denied the claimant employment without following the procedure laid down in the Employment Act specifically the procedure laid out in section 15 and 41 of the Employment Act.
- iii. The Respondent terminated the Claimant's employment without proving that the reason for termination was valid as provided under section 43 and 45 of the Employment Act.
- iv. The Respondent failed to pay the Claimant his 12 months wages for loss of Employment as provided under section 15 of the Labour Institutions Act and section 49 of the Employment Act.
- v. The Respondent failed and/or neglected to give to the Claimant a Certificate of Service contrary to section 51 of the Employment Act.
- vi. The Respondent denied the Claimant his annual leave, leave dues, service benefits contrary to the provisions of the Employment Act.
- vii. The Respondent underpaid the Claimant

viii. The Respondent never accorded the Claimant a hearing nor an opportunity to call his witnesses in his defence as per section 41 and 44 of the Employment Act.

That upon termination the Claimant reported the matter to the Kenya Union of Commercial and Food and Allied workers Union who wrote a letter to the Respondent booking an appointment over the matter and the calculations of the Claimant's dues, which was not successful prompting filing of the suit.

The Claimant prays for payment in lieu of notice, leave dues, underpayments, service pay, salary for the month of June and compensation for unfair termination.

The Respondent in their memorandum of response admit the employment relationship save that his date of employment is 1st June 2011 at an all inclusive salary of Kshs. 7,000/=.

That during the period of employment the Claimant acted in breach of the employment contract and the Employment Act, 2007, by not being diligent in his work, absconding duty and by being late to report for duty. The Respondent aver that they issued the claimant with several warnings, which the Claimant did not heed.

The Respondent further aver that they followed due process in terminating the Claimant's services as he was given an opportunity to show cause why the contract should not be terminated but he failed to do so and that they paid him all his terminal dues.

It is the Respondent's contention that the underpayments claimed for the years 2009- 2012, one month's salary for the month of June in the amended memorandum of claim are more than 3 years old, and as such, the provisions of Section 90 of the Employment Act 2007 apply. Further, that the Claimant was summarily dismissed and therefore notice was not applicable. The Respondent also denies that the Claimant was a member of any trade union recognised by them. They pray for the claim to be dismissed with costs.

Evidence

The Claimant in evidence stated that he was employed by the Respondent in 2009 as a machine operator at a starting salary of Kshs.5,000/=. That he was not issued with a letter appointment at the point of employment but was issued with one in 2011.

He stated that his services were terminated in 2012 without being given any reason and payment of his terminal dues prompting him to report the matter to his union, Kenya Union of Commercial Food and Allied Workers who wrote to the Respondent asking for his dues but the Respondent replied stating that they did not owe the claimant anything.

Mr. Nasengo stated that he was issued with a warning letter for failing to report to work but at the time he had called the respondent to say he was unwell. Furthermore, the warning letter in question was given to the Claimant more than a year before the date of termination.

That on the material date Mr. Nasengo reported to work at 7 am and left between 6 pm and 7.30 pm. That he was not given any termination notice on the day he was terminated.

He stated that he did not take any annual leave while working for the Respondent and that he was not paid his salary for the month of June and service pay. He denied causing the Respondent to suffer loss as he was not privy the accounts of the Respondent. Mr Nasengo however admitted to being a member of NSSF.

In cross-examination, he stated that he was employed in 2009 and not 2011 but did not have any bank statements to prove that he was an employee prior to 2011. He also stated that he was not aware of the proceedings of the meeting of 26th June 2012, and on the said he was not given any opportunity to be heard. He prayed to be paid his terminal dues.

Respondent's Case

RW1, Margaret Kamau testified that she was the respondent's manager for the last 15 years. She confirmed that the Claimant had been an employee of the respondent for 4 years prior to termination. That during the existence of the employment the Claimant was not diligent in his duties as he would report to work late and she referred to various warning letters of apology by the Claimant attached as documents 2 and 3 in the Respondent's list of documents and documents 4 and 5 which were warning sent to the Claimant by the Respondent.

RW1 also stated that the Respondent was not aware that the Claimant was a member of any union as his subscriptions were paid privately.

That she was present at the board meeting where the claimant was accused of absenteeism. He had not been to work for 3 days prior to the said meeting. That she was sent to call the claimant to ask him where he was but he did not respond and as such, the board decided to dismiss him. She prayed for the case to be dismissed.

In cross examination she admitted that the letter to show cause purportedly sent to the Claimant was not part of the evidence on record. She also admitted that it had been more than 2 years since the Claimant had been warned on any misconduct. She also admitted that the attendance list to prove that the Claimant was absent as alleged was not in court. Further that the books of accounts to prove that the Respondent suffered loss as a result of Caleb's actions was not in Court.

Claimant's Submissions

It is submitted that the date of employment of the claimant is not in issue as during the examination in chief, the respondent's witness admitted that the claimant was employed in 2009. This is notwithstanding that in their amended reply to claimant's memorandum of claim, the respondents pleaded that the claimant was employed on 1st June 2011.

On the issue of absenteeism it is submitted that the respondent failed to produce all the records of the claimant as is required by the law more specifically the records for the date 26th June 2012, to prove that the claimant was not on duty, a notice to show cause and an invitation letter to the board meeting allegedly held on 26th June 2012.

That Section 10(7) of the Employment Act provides that:

“If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”

Further Section 74 of Employment Act, 2007 provides inter alia that the employer should keep written records of all employees and in line with Section 10 of the Act; the employer should in the circumstance produce all the records envisaged under Section 74 in any proceedings before the court.

That the respondent having violated the above provisions of the law, an adverse inference should therefore be drawn that the claimant's averments pursuant to paragraphs 3 and 4 of the memorandum of claim that he was employed in January 2009 and terminated on 27th June 2012 and also the allegations of absenteeism were not proved.

It is further submitted that the Claimant was unfairly terminated, as the provisions of section 45 of the Employment Act were not complied with. Counsel relies on the case of **Walter Ogal Anuro Vs Teachers Service Commission [2013] eKLR** where the honourable Court held that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.

That Section 41 of the Act sets out the conditions precedent to termination of employment on grounds of misconduct/poor performance or physical incapacity. In the case of **Alphonse Machanga Mwachanya Vs Operation 680 Limited [2013] eKLR**, the court summarized the legal fairness requirements set out in Section 41 of the Employment Act as follows:

- a. That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b. That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c. That the employer has heard and considered any explanations by the employee or their representative;
- d. Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

Also in the case of **Nicholus Muasya Kyula V Farmchem Limited [2012] eKLR** the court held that:-

“It is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes of undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at.”

It is further submitted that the warning letters relied on by the Claimant were more than a year old and as such should be expunged from the record. Counsel for the claimant cites **The Regulation on Wages (General) Order**, which provides that;

“Provided that where an employee completes two hundred and ninety two working days from the date of the second warning, without any further misconduct, any warning entered in his employment record shall be cancelled”.

Counsel for the Claimant submits that in view of the foregoing the Court should find the procedure adopted by the Respondent by summarily terminating the Claimant irregular. That the termination of the Claimant's employment was unfair for want of both substantive justification and procedural fairness.

Counsel prays for payment of one month's salary in lieu of notice, leave days for years worked, pro rata leave for year 2012 and underpayments broken down as follows:-

- a) Legal Notice No. 70 of 1/5/2009 Kshs.8781.40 – 5000 Kshs.45,376.80/-
 - b) Legal notice No. 98 of 1/5/2011
- 8400 + 1260

9660 – 7000 x 12 months Kshs.31,920/-

c) Legal Notice No. 64 of 1/5/2011

9450 + 1417.50

108867.5 – 7000 x 12 months Kshs.46,410/-

The Claimant also prays for service pay tabulated as;

15 days × 3 years × 8001 ÷ 30 days Kshs.12,001/-

He also prays for compensation for unfair termination tabulated as:

9201 × 12 months Kshs.110,412/-

In addition to the above the claimant prays for the Respondent to issue him with a certificate of service and costs of the suit.

Respondent's Submissions

The respondent's counsel submits that in the disengagement with the claimant herein, the Respondent observed the requirements of procedural fairness expected of an employer in the circumstances of the case.

That Section 45(2)(b) and (c) of the Employment Act, 2007 provides that the termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is a fair reason related to the employee's conduct, capacity or compatibility or based on the operational requirements of the employer. It is the contention of the respondent that the claimant's employment was terminated in accordance with fair procedure and that the respondent acted in accordance with justice and equity.

That based on section 44 of the Employment Act, 2007 the respondent was justified to terminate the employment as the claimant without leave or other lawful cause absented himself from the place appointed for the performance of his work. The respondent cites the case of **James Kiprop Tarus v Riley Falcon Security Services Ltd**, in which Justice Njagi Marete observed,

“A scrutiny of the case for the respective parties brings out a case in favour of the respondent. This is because her case and evidence demonstrate a clear case of absconding duty by the respondent. This amounted to gross misconduct on his part, resulting in dismissal from service. The claimant does not come out of his way to rebut this overwhelming case of misconduct as enunciated by the respondent. Instead, he elaborately cites a case of violation of the Employment Act and unlawful termination, which he fails to establish and illustrate in evidence. I therefore find a case of lawful termination of employment and hold as such.

The second issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment, the claimant would not be entitled to relief, or at all.

I am therefore inclined to dismiss the claim with costs to the respondent. And this answers all the issues for determination.”

That the claimant absented himself from his place of work without prior permission, neglected performance of his duties by working carelessly and without diligence thereby occasioning the respondent's business great losses and therefore the summary dismissal was justified.

It is submitted that the Claimant's case is untenable for the reason that the respondent had sent several warning letters in response to which the claimant wrote several letters of apology throughout his period of service. That the claimant's many letters of apology were a clear demonstration of his indifference, stubbornness and defiance in the face of the warnings from the respondent.

Counsel cites the case of **Nelson Ken Kipkemei -V- Diamond Trust Bank Lenya Limited, (2015) eKLR**, where the court after considering the pleadings documents and evidence by both sides found that the respondent followed fair procedure in dismissing the claimant from employment and dismissed the claimant's claim with costs. In so holding, the court stated;

“Dismissal from employment is in no way akin to conviction for a criminal offence. The reason for which an employer would dismiss does not have to meet the standard of proof in criminal cases, which is beyond reasonable doubt. All an employer needs to satisfy himself or herself is whether there is more probability than not that the employee is responsible for the act or omission, which goes contrary to staff rules and regulations or is in breach of his contract of employment or employment Act. It must further be noted that the employment relationship largely thrives on trust and confidence on the part of the employee which once eroded the relationship cannot practically exist.”

As for the claims for underpayment of wages, annual leave and service benefits it is submitted that they are contained in the amended memorandum of claim dated 11th July 2016, are time barred by virtue of section 90 of the Employment Act, 2007 and the same should be disallowed.

Counsel cites the Court of Appeal decision in **Hema Hospital v Wilson Makongo Marwa [2015] eKLR** where it was held:

“Even if we were to assume that the doctor intended to claim service pay, which is what the Judge ultimately awarded, under section 35 of the Act, no evidence was led on the issue of service pay, particularly having regard to section 35(6) of the Act, which provides that service pay is not payable where an employee is a member of;

- a. a registered pension or provident fund scheme under the Retirement Benefits Act;
- b. a gratuity or service pay scheme established under a collective agreement;
- c. any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
- d. The National Social Security Fund.

Although the pay slips presented before the trial court do not show any deductions made from the doctor’s salary towards any of the schemes referred to under section 35(6) of the Act, we cannot assume no evidence would have been led on the matter had the issue of payment of (service pay’ been raised before the court. There is, as we have said, a difference between a claim for severance pay and a claim for service pay. Based on the material before the lower court, we are not satisfied that an award for either heads of claim was justified.

For those reasons the award for service pay of Kshs.1,085,000.00 cannot be sustained and is hereby set aside.”

It is submitted that the Claimant’s case be dismissed with costs.

Determination

I have considered the pleadings, the evidence on record and submissions of the parties. The issues for determination are whether the claimant’s employment was terminated unfairly and if he is entitled to the remedies sought.

The summary of the termination of the claimant’s employment is contained in the evidence of RW1 where she states –

“There was a board meeting. Claimant was not at work for 2 days. While at the meeting, I was sent to call him on phone to ask where he was but he did not respond. The board decided to dismiss him. The minutes are signed by Chairman and Secretary.”

It is evident from this evidence that the claimant was not notified of the intention to terminate his employment or asked to show cause why his employment should not be terminated. The decision to terminate his employment was reached in his absence without giving him a hearing. The termination was as a result contrary to the provisions of Section 41 of the Employment Act which require the employer to inform the employee of the intention to terminate his employment and give him an opportunity to defend himself and Section 43 which requires the employer to prove the grounds of termination. Absence per se is not a grand for dismissal unless it is “*without leave or other lawful cause.*” The respondent must therefore not make a presumption of absence without giving an employee an opportunity to explain if there may have been some lawful cause for the absence.

I therefore find the termination of the claimant’s employment unfair in terms of Section 45 (2) of the Act and declare accordingly.

Remedies

The claimant having been unfairly terminated is entitled to pay in lieu of notice which I award him in the sum of Kshs.10,384.80 being the minimum wage of Laundry Operator in June 2012 together with Kshs.1,558.00 being 15% house allowance. I have done this in view of Sections 3(b) and 26 of the Employment Act and Section 48(1) of the Labour Institutions Act, which prohibits this court from applying terms that are less favourable than the prescribed minimum. I therefore award the claimant pay in lieu of notice in the sum of Kshs.11,942.50.

The claimant is further entitled to annual leave for the entire period he was in service being from January 2009 to June 2012 at the rate of 21 days per year worked or 1.75 days per month worked being 73.15 days at Kshs.33,760.50.

The respondent did not deny the underpayments as claimed which I have confirmed to be correct. I thus award the claimant the underpayments in the total sums of Kshs.150,118.80.

The respondent further did not deny that the claimant was not paid salary for June 2012, which I award him at Kshs.11,942.50.

The claimant having admitted to being a member of NSSF is not entitled to service pay.

Taking into account the circumstances under which the claimant was terminated and also the fact that he was underpaid throughout the period he was in employment and denied the minimum wages set by law, I award him 8 months’ salary as compensation in the sum of Kshs.95,540.00.

The respondent shall issue certificate of service to the claimant. The respondent shall also pay claimant’s costs for this suit. Interest shall accrue at court rates from date of judgment.

DATED AND SIGNED AT NAIROBI ON THIS 8TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 25th DAY OF OCTOBER 2018

MATHEWS NDERI NDUMA

JUDGE