



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 853 OF 2013

JACKSON BIRYA KALU.....CLAIMANT

VERSUS

APEX STEEL LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's contract of service by the respondent on 24.7.2012. The respondent has denied the alleged unfair termination and averred that it is the claimant who deserted his employment without prior notice. The suit was heard on 30.10.2017 and 5.6.2018 when the claimant testified alone but the respondent called two witnesses. Thereafter both parties filed written submission.

Claimant's Case

2. The claimant stated that he was employed by the Respondent as cleaner in 2011 and worked until 29.7.2012 when he was told by the supervisor to go to the HR office. On reaching the office told him that he could not continue working there because he had sued the company for work related injury. He then went to the Labour officer to report.

3. The claimant contended that he was used to work from 7.00 a.m. to 7.00 p.m. He never went for any annual leave or paid in lieu thereof and he was never paid any House Allowance. He therefore prayed for the reliefs sought in his suit because he was not paid any dues after termination nor was he issued with a certificate of service.

4. On cross examination, he denied ever being issued with an appointment letter but he stated that he started with a daily wage of Kshs.368 which was later increased to 368 per day. He maintained that he worked daily but admitted that there were some days his name did not appear in the Attendance Register. He further contend that on 28.7.2012, his supervisor Mr. Amos Kungu sent him to HR officer Mr. Abraham. He admitted that he was not served with any termination letter but also denied that he deserted work. He further denied receipt of any letter from the respondent enquiring why he was not reporting to work.

Defence Case

5. Abraham Ombogo Ondara testified as Rw1. He told the court that the claimant was employed by the respondent as a casual in the General Section in January 2011 but in 2012 he was given a fixed term contract for January 2012 to November 2012. He further stated that the claimant was being paid a daily wage and was signing a manual Attendance Register but later, an electronic clock in system was introduced. He further contended that the claimant's daily pay was inclusive of House Allowance and like other employees he was paid cash for the annual leave at the end of the year. He contended that the claimant worked until 15.7.2012 and deserted work thereafter. He denied that the claimant attended work on 24.7.2012. he admitted receipt of demand letter dated 17.7.2012 from the claimant's lawyer for the work injury claim but stated that it came after the claimant had deserted work without prior notice. He contended that no disciplinary hearing could be accorded to the claimant after deserting work. He however admitted that the attendance record produced was not complete as it did not contain all the days from 2011 to July 2012. He concluded by stating that he served the claimant personally with a show cause letter.

6. Mr. Amos Mbugua Kungu testified as Rw2. He stated that the claimant never reported to work in 24.7.2012 the Rw1 later tried to contact him but in vain. He further contended that casual employees were being issued with one year contract. He admitted that he was the supervisor to the claimant and he used to prepare the Attendance Register and allocate duty.

Analysis and Determination

7. There is no dispute that the claimant was employed by the respondent from January 2011 to July 2012. The issues for determination herein are:

(a) Whether the claimant was unfairly terminated on 24.7.2012 or he deserted work after 15.7.2012

(b) Whether reliefs sought should issue.

Unfair termination vs Desertion

8. The claimant denies the alleged desertion and contend that on 24.7.2012 he attended work but he was dismissed for allegedly suing the company for work related injuries. That he immediately thereafter reported the dismissal to the Labour officer. He however did not produce any evidence to prove that he reported to work on 24.7.2012. He never called any eye witness to prove that he was on duty on the 24.7.2012 or even from 16.7.2012 to 23.7.2012. He also never called any witness to prove that the Rw1 was on duty on 24.7.2012 as he alleged. Consequently, I find and hold that the claimant has not prove unfair termination against the respondent as alleged in his suit.

9. However, I find merits in the respondent's defence and testimonies of her witnesses that the claimant deserted work from 16.7.2012 without prior notice. That the last day of work for the claimant was 15.7.2012 after which he never reported to work again. It is clear from the clock in print out for the period after 15.7.2012 that the claimant never attended work. Had he done so, he could have clocked in to the system. Consequently it is my view that it is the claimant who terminated his contract of employment through desertion without any prior notice to the respondent and the allegation that he was dismissed for suing the employer is therefore unfounded.

Reliefs

10. In view of the foregoing finding, I decline to declare that the claimant was unfairly or unlawfully dismissed. I also decline to award salary in lieu of notice and compensatory damages for wrongful termination.

11. The claim for annual leave for one year lacks particulars and it is also dismissed. The foregoing view is fortified by the payroll for leave for January – December 2011 which shows that the claimant was paid Kshs.1,172.50 cash in lieu of leave for that period. Finally, the claim for House Allowance is dismissed because the claimant was at all material times paid daily wage under the General Wage Order which definitely was inclusive of House Allowance.

Conclusion and Determination

12. I have found that it is the claimant who deserted his own employment from 16.7.2012 without prior notice to the employer. I have also found that he was paid cash for his leave and that his daily wage was inclusive of House Allowance. Consequently, I dismiss the suit with no order as to costs.

Dated, Signed and Delivered in Open Court at Nairobi this 26th day of October, 2018

ONESMUS N. MAKAU

JUDGE