



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 770 OF 2014

NATHAN NYONGESA LICHUNGU.....CLAIMANT

VERSUS

HIGH GROVE HOLDING LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal dues plus compensation for wrongful and unfair dismissal of the claimant from his employment by the respondent. It is the claimant's case that he was dismissed for no good cause and without following the procedure provided under section 41 of the Employment Act. The respondent has denied the alleged unfair termination of the claimant's employment and averred that the claimant who was a casual employee and who was terminable without prior notice, was indeed favoured with adequate notice before termination. She therefore denied the reliefs sought by the suit and prayed for the suit to be dismissed.

2. The suit was heard 20.9.2017 when the claimant testified and closed his case but the respondent never tendered any evidence to support her defence. After the hearing, the parties file written submissions.

Claimant's Case

3. The claimant testified that he was employed by the respondent on 16.3.2011 as a plumber and stationed at Lower Kabete. That his started with a daily wage of Kshs.550 which was paid weekly in arrears equaling Kshs.3,300. The pay was however increased to Kshs.634 per day from 1.5.2011. He was not housed by the employer and he used to work from 6.00 a.m. to 5.00 p.m. He was never issued with any letter of appointment and as such the contract was verbal.

4. He further testified that on 18.2.2013 he reported to work as usual and at 9.00 a.m. his supervisor Mr. Dheranesh called him and his colleagues and told them that their work had come to an end. The claimant contended that there was still work remaining at the site. He further contended he was not served with any prior notice yet he had worked there for one year nine months without going for any annual leave. He therefore stated the termination was abrupt and without payment of any terminal dues and it affected him adversely because he was forced to relocate to his rural home. He prayed for reliefs sought in his claim and contended that the employer never remitted any NSSF contributions in his favour during the period of his employment.

5. On cross examination, the claimant admitted that he was employed at a construction site. He contended that he was not a casual employee and maintained that he was employed permanently, contended that he asked for appointment letter but he was not given. He admitted that he was paid on weekly interval, that work was not over when he was terminated, and contended that the reason for his termination was not explained to him. He further contended that he was employed to work at different sites and that he was never registered with the NSSF. He concluded by stating that he worked through out until the day he was terminated but admitted that he signed the payment voucher filed herein by the respondent

Analysis and Determination

6. There is no dispute that the claimant was employed by the respondent at a construction site at Lower Kabete Nairobi between 16.3.2011 and 18.2.2013 when he was terminated with other employees by the respondents Manager/Supervisor Mr. Dharenesh. The issues for determination are:

- (a) Whether the termination was wrongful and unfair

(b) Whether the reliefs sought by the claimant should be granted.

Unfair termination

7. The claimant testified that he worked for the respondent continuously from 16.3.2011 to 18.2.2013 when he was terminated. The said evidence was not rebutted by the respondent who did not tender any evidence to support her defence that the claimant was only hired on casual basis as and when the need arose. I have however considered the claimant's testimony under oath vis-à-vis his pleadings in the statement of claim and his written statement. It is not difficult to notice sharp contradictions, which renders the claimant's case hard to believe.

8. First the pleadings and the written statement state that the claimant was employed on 16.3.2012 while in his testimony under oath he stated that he was terminated on 18.2.2013. Secondly, in the claim he pleaded his salary as Kshs.19,815.52, indicated in his written statement a dash salary while in his testimony under oath he stated that his salary was Kshs.634 per day.

9. The salary and the duration of service were contradicted further by the admission by the claimant under oath that he signed the payment vouchers for September 2013 to December 2013 filed by the respondent. The said vouchers show that the claimant was still in employment months after he alleges that he was dismissed and expelled from the respondent's employment. The vouchers also show that the claimant was paid different sums in different weeks meaning that he was not working continuously.

10. Considering the said sharp contradictions between the claimant's pleadings and his evidence, I find and hold that the claimant has not proved on a balance of probability that he worked for the respondent continuously from 16.3.2011 to 18.3.2013 as alleged in his evidence or 16.3.2012 to 18.12.2013 as he has pleaded in his claim. The failure to prove continuous service is fatal to the claim for unfair termination because it disqualified the claimant from notice before termination or protection under section 45 of Employment Act.

11. The reason for the foregoing finding that continuous service has not been proved is that the pleadings are not supported by the evidence with respect to the day the cause of action arose and the manner in which it arose. Consequently, I return that the claimant has not discharged his burden of proving that he was unfairly and wrongfully dismissed by the respondent on 18.12.2013 as pleaded in paragraph 6 and 7 of his statement of claim. To say the least, he is not sure when he was employed and when he was discharged. He did not also know what was his salary on 9.5.2014 when he filed his written witness statement.

Reliefs

12. In view of the foregoing finding that the claimant has not proved that he was unfairly and wrongfully terminated and the exact period of service and his salary, I decline to grant any relief to him.

Conclusion and Determination

13. I have found that the claimant's pleadings have not been supported by the evidence tendered because the two have sharply contradicted on the date when the termination occurred. Finally, I have found that the salary and the duration of employment upon which the reliefs sought are based has not been proved because the claimant's pleading and his testimony also sharply contradicted. Consequently, I dismiss the suit with no costs.

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

ONESMUS N. MAKAU

JUDGE