



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1378 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 20th December, 2018)

DAVID MULWA MULINGE.....CLAIMANT

-VERSUS-

LAMINATES FURNITURE LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed suit on 28th August, 2013, through the firm of Ashiruma & Company seeking damages for unfair termination.
2. He avers that he was employed by the Respondent vide a letter dated 19th January, 2011 as Carpenter on a 2-year renewable contract earning a salary of Kshs. 15,600/= per month. That he served the Respondent for a period of one year and was remaining with one year to complete the contract when he was unfairly dismissed without any warning or notice. He prays for damages for unfair termination and for payment of his terminal dues.
3. The Respondent filed a response on 27th March 2015 wherein they admit the employment relationship and state that they paid the Claimant all his dues for the year ending in December, 2011 before he proceeded on Christmas vacation. That the Claimant was to report back to work on 3rd January, 2012, but he reported on 4th January, 2012 and declined to do the work he was assigned and went away.
4. They aver that the Claimant came back on the same day with a letter of complaint lodged with the Labour officer alleging that his work had been terminated without pay. That meetings were arranged between the Claimant, the Respondent and the Labour officer at which meeting the issue of termination was reviewed and the labour officer concluded that the Claimant had been paid his dues and that the Company had not terminated the Claimant recommending that he report back to work if he so wished.
5. They claim that the prayers sought are not merited as it is the Claimant who deserted duty and he had not completed a full year of service at the material time.

Evidence

6. At the hearing, the Claimant reiterated the contents of his pleadings and stated that in December, 2011, when he went to pick his payslip he found that it had various deductions and his status had been converted to a casual. NHIF, PAYE and NHIF had been deducted from his payslip.
7. That in January he came back to pick his pay slip but was advised by the Respondent to continue working but he decided to report the matter to the labour officer. The parties were summoned to the labour office at 2pm but upon the Claimant arriving, he found that a decision had already been made in his absence at 11 am but in the presence of the Respondent. That the Respondent sacked him when he breached the contract of service. He stated that he used his own tools on the job and that he worked full time without any rest days.
8. In cross-examination, he stated that the payment he received in December, 2011 was irregular as this was a two year contract and it did not reflect all his due and thus it was less than he expected.
9. The Respondent's witness stated that they paid the Claimant his dues for the month of December less a salary advance and thereafter they expected him to resume his duties on 3rd January but the Claimant failed to do so. That he was not given any notice as he was not coming to work.

Submissions

10. It was submitted on behalf of the Claimant that the law on termination as contained in Sections 41, 43, 44 and 45 of the Employment Act was not complied with and as such the claim should be allowed as contained in the Memorandum of Claim.
11. The Respondent on the other hand submits that the claim must fail for the reason that the Claimant was not terminated but rather he abandoned duty. That the remedies sought are not merited and should be dismissed.
12. The Claimant had not produced a contractual agreement wherein the claim for gratuity is anchored and in any event it is on the higher side as it exceeds the 15 days' pay for every year worked provided under Section 35(6) of the Employment Act.
13. That notice pay is not payable for reason that it is the Claimant who abandoned duty and thus the claim does not arise. That the amount pleaded for tools allowance has not been proved moreover in the demand letter from the Claimant's advocates attached as document 7 in the list of documents gives a sum of Shs. 200 for the claim.
14. As to off duty worked, it is submitted that the same is not payable as the Claimant was paid for off days if any for all the months he worked. That payslips for previous months indicate the salary the Claimant was receiving plus allowances and overtime if any. They urge the Court to dismiss the Claim.
15. I have examined all the evidence and submissions of the parties herein. The Respondent avers that they never terminated the Claimant's services but that the Claimant absconded duty.
16. The Claimant contends that he was employed on a two year contract (Appendix 1). He avers that Respondent dismissed him without any warning or notice on 24th December 2011.
17. From the contract document (Appendix 1) the Claimant was to serve from 19th January 2011 for 2 years. His salary was 13,565/= gross and house allowance was 2,035 making total 15,000/=. He was also to earn this salary less statutory deductions of NSSF, NHIF and PAYEE.
18. In evidence, the Claimant stated that when he picked his salary in December 2011, he did not find his payslip. He finally checked and found there were various deductions and he was now being considered a casual.
19. The Claimant did not explain to Court why he was now being considered a casual in December 2011. The Claimant's payslip for September 2011 shows he was being paid 15,600/= gross. This was the same for October 2011 and November 2011.
20. The Claimant's contention is that in December 2011, he was not issued with any payslip. The Respondent exhibited a payslip for claimant which shows that his salary had reduced from 15,600 to 8,869/=. There is no explanation as to why this was the case. It is apparent that the Respondent had made some changes in Claimant's terms and conditions of employment without explanation.
21. According to the Claimant, this amounted to a termination and that is why he reported to the Labour office.
22. Section 10(5) of Employment Act 2007 provide as follows:-

“(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing”.
23. The key word here is consultation. There is no indication that when the Respondent altered the contract terms, they had consulted with the Claimant.
24. Altering or changing the contract terms in my view was rightly viewed as a termination of the contract. In CA No.55/2015 (Kisumu) the JJA Musinga, Gatembu and Murgor in determining a similar matter had this to say:-

“The court cited with approval several authorities, among them, Western Excavating (ECC) LTD v Sharp [1978] 1 CR 222 where Lord Denning held:-

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice.”

In the circumstances that gave rise to the case before the trial Court, we find and hold that the appellants' action of unilaterally assigning the respondent new duties amounted to significant breach that went to the root of the employment contract. The Respondent was right in treating herself as discharged from any further performance of her duties as a cateress.....”
25. The Claimant in the instant case had his salary unilaterally altered as per the December 2011 payslip exhibited by the Respondents and it is therefore my finding that he was right in considering himself terminated without notice.

26. In terms of remedies, I therefore find for Claimant and award him as follows:-

1. *1 months' salary in lieu of notice = 15,600/=*

2. *12 months' salary as compensation for unfair termination = 12 x 15,600 = 187,200/=*

Total = 202,800/=

3. *The Respondent will also 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 20th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ashiruma for Claimant – Present

Watua holding brief Sheila Mugo for – Respondent