



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO.1535 OF 2014

(Before D. K. N. Marete)

JOSEPHAT OTIENO OKWEDO.....CLAIMANT

VERSUS

VILLA CARE MANAGEMENT LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by a Memorandum of Claim dated 2nd September, 2014. The issues in dispute are therein cited as;

- a) Unlawful and unfair dismissal from employment.*
- b) Non-payment of terminal dues and compensatory damages.*

The respondent in a Memorandum of Response dated 15th October, 2014 denies the claim and prays that this be dismissed with costs.

The claimant's case is that at all material times to this case and particularly on 15th November, 2011, he was employed by the respondent. He started as a casual labourer but was later confirmed to permanent employment.

The claimant's further case is that he worked diligently and to the satisfaction of the respondent. This was variously as a caretaker, day guard and store keeper. His gross salary was kshs.15,000.00 per month.

The claimant's other case is that in the cause of time, another worker was employed and took up the duties of caretaker. He was then designated a guard. Further, on 26th April, 2014, the respondent hired a contractor to plaster/cement some houses in her premises. The contractor brought in her workforce and this work force was her (contractors) responsibility.

The claimant's further case is that on 28th April, 2014 he took his wife to hospital with notice to his supervisor, one, Elphas, which notice he made on phone. In the meantime, a commotion involving the contractor's workers arose over their delayed payments resulting in violence and breakages in the respondent's premises.

The claimant's avers that he reported back to work on 29th April, 2011 and on the following day he was issued with a letter requiring him to explain his absence on 28th instant, which he did. On 9th May, 2014, he was called to the office of Mr. Okong'o and issued with a letter of dismissal and informed that he would be called back to pick his terminal dues.

The claimant avers that the summary dismissal was wrong, unlawful and inhuman considering that he had a valid reason for his absence and further that this was communicated to his supervisor. This was unlawful and unconstitutional in that;

- a) The Claimant had done nothing wrong to warrant disciplinary acting being taken against him.*
- b) No hearing ever took place before the alleged decision to dismiss the Claimant was reached.*
- c) Due process was thrown out for the window in the haste to summarily dismiss the Claimant.*
- d) The decision to dismiss the Claimant was extremely harsh considering he had served the Respondents diligently and without blemish for over 2 years.*

He claims thus;

i) Salary for the total compensatory damages for 10 days worked to 9/5/14.....Kshs.5,000/=

ii) One month's salary in lieu of notice.....Kshs.15,000/=

iii) Payment in Lieu of unpaid/untaken leave for the entire duration of service being Kshs.15,000/= x 2 years....Kshs.30,000/=

iv) Payment in lieu of prorated leave for the 6 months worked

(December, 2013 – May, 2014)

Being calculated at Kshs.15,000/= ÷ 2.....Kshs.7,500/=

v) Service/gratuity at the rate of 15 days salary for the completed year of service being $15/30 \times Kshs.15,000/= \times 2$ years.....Kshs.15,000/=

He prays thus;

a) A declaration that the Claimant's dismissal from employment was unlawful and unfair.

b) A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.

c) An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totaling to kshs.252,500/=

d) Interest on (c) above from the date of filing suit till payment in full.

e) Cost of this suit plus interest thereon.

The respondent proffers a case of lack of diligence on the part of the claimant in that on various occasions he would abscond office, without permission or authority of his immediate supervisor thus occasioning the respondent losses due to negligence as was in the instant case. This caused loss as a consequence of the theft of materials stolen at his designated area of work.

Again, the claimant was awarded an opportunity to explain himself which he did before he was dismissed. He was paid his terminal dues on departure. The respondent therefore posits a case of lawful termination in the circumstances.

The matter came to court variously until 18th October, 2018 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
2. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant in his written submissions dated 2nd November, 2018 reiterates his case and submits a case of unlawful termination of employment. It is his submission that the reason for termination must only be just and factual but also fair in terms of section 45 of the Employment Act, 2007 as read with Article 51 (41?) of the Constitution of Kenya, 2010.

The claimant submits that the reason for his termination from employment was the violent reaction by the foreign workers belonging to the contractor. This was occasioned by their non-payment by the employer, the contractor. How was he involved in this? In any event, even if the claimant was present during the riots by the workers, how would he have single handedly been able to restrain an angry and hungry mob of unpaid labourers.

The claimant in further support of his case sought to rely on the authority of **KUDHEIHA WORKERS VS MOMBASA SPORTS CLUB, CAUSE NO.440/2013** where the court in a demonstration of a case of unlawful termination of employment employed the provisions of section 45 (1), (2) (a) and (b) and 4 (b) of the Employment Act as follows;

45.(1) No employee shall terminate the employment of an employee unfairly.

(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 employees conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

(4) A termination of employment shall be unfair for the purposes of this Part where-

(b) it is found in the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

The respondent did not file any written submissions in support of her case. She however annexes the following documents to her defence;

1. Letter of introduction to Equity Bank of Kenya dated 17th September, 2014.
2. A letter to the respondent on stealing of materials from Bellcrest site dated 17th September, 2014.
3. A letter of response to No.2 above denying theft of materials as alleged. *This letter is not signed or at all.*
4. A letter to the claimant dated 2nd May, 2014 on negligence and desertion of duty on 28th April, 2014.
5. A letter of response by the claimant dated 3rd May, 2014 explaining the circumstances of his absence from duty and an apology on the same. On this letter there is a rider that the caretaker of the claimant was never consulted on the claimant's absence and whereabouts.
6. A letter of termination of employment to the claimant dated 9th May, 2014.
7. A letter of receipt of final dues dully signed by the claimant in the presence of Francis Okongo, a witness and Human Resource Manager.

These are all self telling.

A close scrutiny of the respective cases of the parties brings out a case of lawful termination of the employment of the claimant by the respondent. This is because, as is ably demonstrated by the respondent, the claimant was never a reliable employee and occasionally deserted duty and involved in misconduct.

On the material date of the skirmishes by the workers of the contractor, the claimant was away from duty without authority. His attempt to explain these are farfetched and not supported by any evidence. The claim therefore collapses and I hold a case of lawful termination of employment in the circumstances. And this answers the 1st issue for determination.

The 2nd 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, he becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their costs of the claim.

Dated and signed this day of 2018.

D.K. Njagi Marete

JUDGE

Delivered and signed this 20th day of December, 2018.

Maureen Onyango

PRINCIPAL JUDGE

Appearances

1. Mr. Namada instructed by Namada & Company Advocates for the claimant.
2. Mr. Ndolo instructed by Onyango Ndolo & Company Advocates for the respondent.