



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 918 OF 2013

EVANS OMWENO ANUNDA.....CLAIMANT

VERSUS

RAMBOO COLOURCANE LIMITED.....RESPONDENT

JUDGMENT

1. In this claim, the Claimant was employed as a general worker on 10th April 2004 but the Respondent promoted him over the years to a machine operator earning Kshs. 20,499/- a month. He asserts that he was a diligent employee and was never served with a warning letter but on 10th April 2013 he was summarily dismissed. He was alleged to have been absent from work without permission on 3 occasions. He averred that the only day he was absent was when the President was being sworn in on a day declared a public holiday and during the Easter Holiday. He stated that it was custom for the Respondent to seek attendance on public holidays if need be and the letter would spell the overtime pay. He averred that no letter was sent to him hence his non-attendance on that day. He sought 3 month's salary in lieu of notice – Kshs. 60,591/-, house allowance underpaid, medical allowance unpaid, transport allowance for 7 years @ rate of Kshs. 150 a day – Kshs. 252,000/-, and compensation under Section 49(c) of Employment Act at 12 months.

2. The Respondent filed a defence and averred that the Claimant had been absent from work on several occasions together with the rest of the employees on the night shift and that he would inform the supervisor in the machine shop that he would be absent and then they would switch off their phones so as not to be reached. It was averred that his summarily dismissal was justified on account of his absence from work without permission or good cause, deliberately ignoring his work or performing it improperly and disobeying lawful orders from persons with authority. The Respondent stated that the Claimant was paid his terminal dues amounting to Kshs. 4,951/- being dues for days worked including the pending leave days he was entitled to. The Respondent averred that the Labour Officer was involved and the Claimant therefore cannot say he did not now the reasons for the dismissal. It thus urged the dismissal of the claim with costs.

3. The Claimant testified that he was commended for his service and given the employee of the month award in September 2012 for his performance. He stated that he was given the summary dismissal letter on 10th April 2013 and was not allowed to give an explanation. He said for them to work on a public holiday they would get a memo. He did not go to work on the day that was declared a public holiday when the President was being sworn in. He sought payment for transport as he did not get transport to work though he worked at night. The day shift had a bus hence his claim for transport allowance. He did not go on leave in 2012. He stated that 4 of the night shift staff were dismissed. The Respondent called Maureen Juma the HR manager for the Respondent. She stated that she joined the Respondent on 27th November 2017 and was familiar with the matter from the record held by the Respondent. She testified that the Claimant who was a night duty employee was absent on 8th April 2013. She stated that he was absent on two days in April hence the dismissal. She stated that the claimant was paid his leave dues of Kshs. 7,599/- in the April payslip.

4. The Claimant filed submissions in which it was asserted that the dismissal was unfair and cited the provisions of Sections 41(1) and 45(2) of the Employment Act. He cited the case of **Alphonse Machanga Mwachanya v Operation 680 Limited [2013] eKLR** which summarized the legal requirements for termination of employment on grounds of misconduct, poor performance or physical incapacity as set out in Section 41. He also relied the cases of **Teresa Carlo Omondi v Transparency International [2017] eKLR** and **Dr. Ezekiel Nyangoya Okemwa v Kenya Marine & Fisheries Research Institute [2016] eKLR**.

5. The Claimant was absent from work during the night shift on 9th April 2013. The day had been gazetted as a public holiday for the swearing in of the President elect. His letter of dismissal was to the following effect *in parri materia*:

It has been noted that on several occasions and together with the rest of the night shift team you have not been attending work as scheduled and when you do the output of your work is unsatisfactory. On 3 occasions within the past 2 months yourself and the other

night shift staff did not turn up for work.

6. There was no indication that the Claimant was heard prior to his dismissal. Section 41 clearly sets out what is to be done when dismissal is contemplated for misconduct as was alleged in this case. He was paid a paltry sum on dismissal having worked for almost a decade. The Respondent did not adhere to the procedural requirements under Section 41 of the Employment Act. The Claimant did not prove the claims on overtime and medical allowance. The is however entitled to recover for transport allowance but only for 3 years since he let the claims for the previous years go stale. The sum is Kshs. 150 for days worked in a month which is 25 days making a total of Kshs. 135,000/- in total. He earned Kshs. 20,499/- a month and he had performed well to the point of commendation as employee of the month in September 2012. He was thus not dismissed for good cause thus entitling him to the maximum compensation. In the final analysis I will enter judgment for the Claimant as follows:-

- a. Transport allowance for 3 years – Kshs. 135,000/-
- b. One month notice – Kshs. 20,499/-
- c. Compensation for the unlawful and unfair dismissal Kshs. 245,988/-
- d. Costs of the suit.

It is so ordered.

Dated at Nyeri this 3rd day of December 2018

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 4th day of December 2018

Radido Stephen

JUDGE