



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 437 OF 2016

JULIUS OMONDI OMEDO.....CLAIMANT

VS

S.S MEHTA & SONS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for Kshs.1,032,500 being terminal and contractual benefits plus compensation for unfair termination of the claimant's employment contract by the respondent on 16.5.2016. The respondent never filed defence despite being served with summons. Therefore the suit proceeded exparte on 5.9.2016 when the respondent dispersed with tendering testimony and instead adopted his written statement and the documentary evidence filed together with the claim and filed written submissions.

Analysis and Determination

2. After considering the pleadings, evidence and submissions, it is clear that the claimant was employed by the respondent as a Junior Foreman. There is further no dispute that in July and August the claimant was diagnosed with Tuberculosis (TB) but after medical review he was found fit to continue working. Finally there is no dispute that the claimant's service was terminated on 16.5.2016 before his one year fixed term contract had lapsed. The issues for determination are:

(a) Whether the termination of the employment contract was unfair

(b) Whether the reliefs sought should issue.

Unfair Termination

3. Under section 45(2) of the Employment Act, termination of employment is unfair if the employer fails to prove that it was grounded on a valid and fair reasons and that it was done after following a fair procedure. The reasons for termination is valid and fair if it is true and it relates to the employee's conduct and the operational requirement of the employer. Under section 41 of the Act, the procedure followed is fair if the employer explains the reason for the termination to the employee in a language he understands and in the presence of another employee of his choice, and then invites the two to air their defence for consideration before the termination is decided.

4. In this case the claimant stated his written statement that he was dismissed from work by the

respondent's Accountant, Mr. Latif on grounds that the respondent did not wish to continue employing a TB patient. That piece of evidence has not been contested by the defence and therefore the court finds that the claimant has proved that he was unfairly dismissed from employment.

5. The reason for the foregoing finding is that the termination was not grounded on a valid and fair reason because the claimant had been found fit to continue working by a medical expert. Secondly the procedure followed was unfair because it breached section 41 of the Employment Act which requires that before dismissal an employee on ground of misconduct, poor performance and physical incapacity, the claimant must be explained in a language he understands and in the presence of another employee of his choice and thereafter given a chance to defend himself before the dismissal is decided.

Reliefs

6. Under section 49(1) of the Employment Act the claimant is entitled to one month salary in lieu of notice plus compensation for unfair termination of upto 12 months gross salary. However considering the fact that the claimant was serving a fixed term contract of one year, I will award him a total compensation equivalent to the salary he expected to receive under the contract had it not been unfairly terminated by the respondent. The claimant's contract started in February 2016 for a monthly salary of 36,082 and was terminated in May, with 8¹/₂ months to go. He will therefore get the salary for 8¹/₂ month being Kshs.306,697.

7. The claimant also prayed for, and he is awarded a Certificate of Service as provided for under section 51 of the Act.

Disposition

8. For the reasons stated above, I enter judgment for the claimant in the sum of **Kshs.306,697** plus costs and interest. He will also have Certificate of Service.

Signed, dated and delivered at Mombasa this 20th day of January, 2017.

O.N. MAKAU

JUDGE