



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1294 OF 2014

ANTHONY VAI MUSILA CLAIMANT

VERSUS

FINLAY BRUSHWARE LIMITED RESPONDENT

JUDGEMENT

1. Issue in dispute, he unlawful and unfair termination of employment and non-payment of terminal dues.
2. On 6th August, 2014 the Claimant filed his Memorandum of Claim, served the Respondent who filed defence on 23rd October, 2014. The matter came for hearing on three (3) occasions – 28th July, 2015; 17th November, 2015; and 14th December 2016 – but the Respondent though served were absent. The court being satisfied with serve and Affidavit of Service on record, heard the Claimant on his evidence.
3. The Claimant was employed by the Respondent in April, 2010 as a causal employee and was paid wages monthly. The Claimant rose through the ranks and became a Machine Operator. It was a term of the employment that either party could terminate the same by issuance of one month notice or payment in lieu thereof.
4. On 12th August, 2013, the Respondent through the manager, Mr. Atul and the supervisor Mr. Mwangi, without any justifiable cause verbally terminated the Claimant from his employment. The Claimant was terminated from his employment without reason or notice. The salary due for August 2013 was not paid. At the time he was earning a monthly salary of Kshs.11, 300.00 and 1,500.00 as house allowance.
5. The claim is that the Respondent did not follow the law in the termination of the claimant; there was no reason, notice of any justifiable cause for the same. The termination was unfair. The Claimant is seeking the payment of his salary for August, 2013; notice pay; service pay; compensation; gratuity; and costs of the suit.
6. In his evidence and submissions, the Claimant testified that upon employment by the respondent, he worked diligently as a Machine Operator. On 12th August, 2013 he was called by his manager Mr. Atul and the supervisor Mr. Mwangi following a case he had filed at mavoko Law Court following an injury while at work and was asked to withdraw the case or be dismissed form work. As there was no justifiable cause for such a demand, the Claimant who had suffered injuries at work saw no need to follow such directives. The Respondent had been served with summons in the civil case on 10th August, 2013 and hence the move to threaten the claimant. The Respondent officers therefore asked the Claimant to remove his work clothes and leave the premises.
7. The Claimant also testified that the events leading to the dismissal were unfair, not justified, there was

no notice or reasons to justify the unfair termination. That the was never given a chance to defend himself despite performing his duties diligently.

8. When the Claimant went back to the Respondent to demand for his terminal dues, he was only given Kshs.4, 500.00 which was not acceptable as this was too little noting the unfair termination of employment. He therefore declined to accept the same. No certificate of service was issued.

Defence

9. In defence, the respondent's case is that they employed the Claimant and issued him with a contract of employment but he disappeared from work without notice or reasonable cause after losing a case he had filed on work injury on 12th August, 20`3 at Mavoko Law Court. The Claimant was therefore the one to give notice or payment in lieu of notice. That this claim is an afterthought after the Claimant was unsuccessful in his work injury claim.

10. That the dues claimed are not available to the Claimant as he opted to absconded duty without notice. This is not a case of unfair termination. The claim should be dismissed with costs.

11. That the Respondent had no chance of tracing the Claimant and only got served with summons to attend these proceedings. The Claimant was a member of the NSSF and dues remitted and thus not entitled to service pay.

Determination

12. Every employee is entitled to be given reasons and hearing before any termination can be lawful. Section 43 and 41 of the Employment Act read together set out the parameters within which an employee must be given procedural safeguards before a termination of employment.

13. Section 43(1) provides that;

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

14. Therefore, where the Claimant was an employee of the Respondent and absconded duty for any reason(s), the duty was upon the employer to issue the Claimant with notice of misconduct.

15. The respondent's case is that they employed the Claimant and issued him with a n employment contract which is attached to the Statement of Defence. In such a contract, it must comply with the provisions of section 10 of the Employment Act. There is the address of the claimant, the telephone numbers and all the required details where the Respondent ought to have reached the Claimant through when absent from duty. Section 10 (2) of the Employment Act requires an employer to set out the following details;

(2) A written contract of service shall state—

(a) The name, age, permanent address and sex of the employee;

(b) The name of the employer;

(c) the job description of the employment;

(d) the date of commencement of the employment;

(e) the form and duration of the contract;

(f) the place of work;

(g) the hours of work;

(h) the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;

(i) the intervals at which remuneration is paid; and

(j) the date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; and

(k) any other prescribed matter.

16. Therefore, when an employee abscond duty, the employer has a duty to demonstrate efforts made to reach the employee. Where no evidence is presented, the averments of the employer that he was chased away after being directed to withdraw his work injury suit filed at mavoko Law Court is taken as the truth. The Respondent also failed to attend court for hearing so as to argue their case. I take it that the evidence of the Claimant setting out the circumstances of his unfair termination is true.

17. Where an employee is absent from work, the employer should not just seat back easy. Such absence where not justified is a matter addressed under section 44(4) of the Employment Act as gross misconduct and where the employer fails to take action against the subject employee, the absence is deemed to have been with the knowledge and approval of the employer. The inaction by the Respondent in this case is not sufficient defence. The Claimant was under an employment contract and was expected to be at work. Where the Claimant refused to avail self for work allocation, and the employer failed to issue any notice or sanction and took it for granted that the Claimant simply did not want to attend work, then this claim is justified.

18. Where the Claimant was therefore terminated without notice, hearing or any reasonable cause, section 45 of the Employment Act refers. Such termination was unlawful and unfair. The termination has not been justified.

Remedies

19. On the finding that the Claimant was unfairly terminated, a compensation of 6 months is found sufficient. The Claimant was earning Kshs.13, 000.00 a month and is awarded Kshs.78, 000.00.

20. Notice pay is due in a case where there was no hearing, notification or any reasons given before termination of employment. The terms of employment were that either party should give a notice of one month before termination. The Claimant is awarded a notice pay of kshs.13, 000.00.

21. The due salary for August, 2013 is due for days worked. The Claimant testified that he was directed to remove his uniforms and leave the Respondent premises on the 12th of August, 2013. As such, for days worked in August, 2013, the Claimant is entitled to a pay of Kshs.5, 200.00.

22. On the claim for gratuity, the Claimant has not justified why this is due. In his evidence, the Claimant remained silent on this aspect of his claim. Such is declined.

23. The Claimant submitted his pay slips which have evidence that he made contributions to the NSSF and NHIF. Section 35(5) and (6) requires that service pay is not due to an employee whose statutory deduction to these bodies is made unless there is an agreement setting out such benefit. The Claimant for service pay is declined.

Judgement is hereby entered for the Claimant in the following terms;

- a) The termination of employment was unfair;**
- b) Compensation awarded at kshs.78, 000.00;**
- c) Notice pay at Kshs.13, 000.00;**
- d) Due salary for august, 2013 Kshs.5, 200.00;**
- e) Certificate of service be issued; and**
- f) Costs of the suit.**

Delivered in open court at Nairobi this 19th day of January, 2017.

M. MBARU

JUDGE

In the presence of:
