



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO.1638 OF 2013

HENRY THIONG'O THAIRU.....CLAIMANT

VERSUS

ITALIAN STYLES LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant, Henry Thiong'o Thairu commenced suit before the Chief Magistrate's Court on 11th June, 2007 as CMCC No.5019 of 2007. The Defence was filed on 18th July, 2007. The suit was transferred to this court by order issued of 30th September, 2013. The Claimant amended the Claim and filed on 24th August, 2016. Despite pre-trial directions of 28th June, 2016, the Respondent did not amend the defence. On 3rd November, 2016 the court proceeded with the hearing. The Claimant testified and the Respondent opted not to call any evidence. Both parties filed written submissions.

Claim

2. The Claimant was employed by the Respondent but in May to August, 2005 the Respondent failed to pay the due salaries. On 4th August, 2005 the Respondent without notice or any reason terminated the employment of the Claimant in disregard to the employment agreement. Upon termination, the Respondent failed to pay the termination dues of;

- i. One month notice pay at Kshs.19,500.00;
- ii. Leave for 2 years at Kshs.39,000.00;
- iii. Overtime pay of Kshs.19,000.00.

3. The Claimant did not breach the employment contract and despite notice to sue, the Respondent has refused to pay the owing dues. The Claimant is therefore seeking;

Terminal dues owing;

Notice pay;

Costs of the suit;

Interests on the owing dues; and

Any other relief the court may award.

4. In evidence, the Claimant testified that he is a Technician/Electrician and was employed by the Respondent on 1st march, 2003. He had an employment letter which he signed together with the managing director of the respondent. In July, 2005 he was given notice of compulsory leave of 2 weeks starting 18th July, 2005. There was no reason given. The managing director, Leonardo travelled abroad and on 4th August, 2005 when the Claimant resumed work he was told that his employment had been terminated. He was directed to leave. There was no notice or reason given and the termination was verbal. He was never paid terminal dues of notice, overtime and the salary due.

Defence

5. In defence, the Respondent admits that the Claimant was an employee and was paid his due salaries for the time worked by a credit to his bank account. The claimant's employment was terminated due to gross misconduct for misappropriation of the respondent's property. The Claimant was found stealing the respondent's property and he admitted to theft as a result of which there was summary dismissal in compliance with the Employment Act, Cap 226. The claim should thus be dismissed.

Submissions

6. The Claimant submits that there was no valid reason for his dismissal and he was not given a hearing in terms of section 41 of the Employment Act. On 18th July, 2005 the Respondent without any cause directed the Claimant to proceed on leave and when he resumed duty on 4th August, 2005 he was summarily dismissed. That there was no evidence to support a case of gross misconduct.

7. The Claimant also submit that the circumstances leading to the termination of the claimant's dismissal were unfair and against the provisions of section 45 of the Employment Act and thus due for the remedies sought in the amended claim.

8. The Respondent submits that upon the employment of the Claimant as an Electrician, he was lawfully terminated. That in court the Claimant failed to corroborate his evidence as he did not call for any witness or documents contrary to the Evidence Act. That the burden is upon a Claimant to prove his case under section 107 of the Evidence Act which the Claimant failed to do.

9. The Claimant testified that he earned Kshs.19, 500.00 per month and a take home of Kshs.8, 776.00 upon deductions but the pay slip submitted in court is not signed. The claim for notice pay is therefore not proved. On the question for leave pay sought for 2 years the Claimant did not apply or ask to go on leave. That it was the duty of the Claimant to apply and produce evidence for the same. That there is no explanation for the claim of overtime and this should be dismissed.

Determination

10. The evidence on record is that on Claimant was employed by the Respondent as an Electrician, on 18th July, 2005 he was sent on compulsory off and when he resumed duty, he was summarily dismissed. The respondent's case is that the Claimant was dismissed for gross misconduct. However the nature of misconduct is stated to be due to theft of the respondent's property but there was no evidence called to support such allegations of theft. Where indeed the Claimant committed such gross acts of misconduct such as theft, no case was filed against him with the relevant authorities to warrant the termination of his employment as required under the applicable law, the Employment Act, Cap 226 [now repealed].

11. The claimant's evidence was clear and not challenged in any material way by the respondent. That on 18th July, 2005 while the Claimant was at work he was sent on compulsory off. There was no reason given to the Claimant on why he was forced to go off work. The letter issued to the Claimant does not disclose any reason as to why he was sent on compulsory leave.

12. Under the Employment Act, Cap 226 [now repealed] an employer had an open right to dismiss an employee upon gross misconduct and by giving the employee notice or payment in lieu thereof. However,

where the termination of such employment was wrongful, the law allowed an employee to claim for damages and by setting out the wrongful acts of the employer.

13. In this case, noting the applicable law as at the time the cause of action arose, 4th august, 2005 when the Claimant was terminated being the Employment Act, Cap 226 [now repealed], the application of section 41 and 45 of the Employment Act, 2007 did not apply. The concept of unfair termination of employment was not yet born and the rights under section 41 of the Act in terms of procedural justice were not yet available.

14. There is no claim for damages or compensation made by the claimant.

15. Therefore based on the applicable law, the Employment Act, Cap 226 {now repealed}, I find on a balance of probabilities that the Claimant has proved his case to the required degree, upon termination he was entitled to terminal dues of notice or pay in lieu thereof; leave earned and overtime work. Such are entitlements that cannot be taken away from the Claimant as an employee as such were dully earned at the time of termination of employment. I find no evidence to challenge the claims as set out.

16. However there are no remedies available under the Employment Act, 2007 as this does not apply in the claimant's case.

17. However, under the Employment Act, Cap 226, the employment records of an employee were required to be kept by the employer at all material times. Upon termination and filing suit, the employer is required to produce such records to assist the court in arriving at a just decision. To seat back and require the employee to comply with the provisions of the Evidence Act and the provisions of section 107 without production of the requisite documents by the employer finds no justification. The duty rests upon the employer to keep and produce all work records of an employee before this court as was the practice before with the Industrial Court and under the provisions of the Employment Act as repealed.

18. The terminal dues available to the Claimant as in accordance with the Employment Act, Cap 226 and noting the gross pay due as at 4th august, 2005 was Kshs.19, 500.00 as admitted by the respondent, the remedies due shall be assessed in terms of this gross pay.

Judgement is entered herein for the Claimant against the Respondent in the following terms;

- (a) The Claimant is awarded notice pay at Kshs.15,500.00;**
- (b) The Claimant is awarded leave pay due all at Kshs.39,000.00;**
- (c) Overtime pay all awarded at Kshs.19,500.00;**
- (d) The above dues shall be paid with interests computed from date of termination – 4th august, 2005 until paid in full; and**
- (e) Costs of the suit.**

Judgement read in open court at Nairobi this 2nd February, 2017.

M. MBARU

JUDGE

In the presence of:

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