



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1725 OF 2015

NASIB KAZUNGU BAYA CLAIMANT

VERSUS

MAISHA MABATI MILLS LIMITED RESPONDENT

JUDGEMENT

1. The Claimant was employed by the Respondent on 4th June, 2013 as a Quality Assurance Head at a monthly salary of Kshs.56, 500.00 on 9th April, 2015 the Claimant reported on duty where he found fellow employees gathered outside the factory premises and the general manager Mr Khare was addressing them in the presence of the Personnel Manager Mr Stephen Musyoka. The Claimant proceeded to the punching machine and clocked in to his office where he found his foreman and who informed him to join the others outside the gate as there was a strike and nobody was supposed to work.

2. The claim is that the Claimant was reluctant to join his colleagues outside the workplace but he noted that all employees including management were all not attending work. The meeting ended soon after the Claimant joined. The general manager proceeded to his office while the employees demanded to be addressed by the director of the Respondent company.

3. The Claimant proceeded to take lunch at 12 noon and upon return at p.m. he was informed that the personnel manager had issued a list of employees who had been terminated and the Claimant was part of the name on the list. That there was no notice, warning or reason for the termination. Due process was not followed. The Claimant was paid Kshs.102, 000.00 which was salary for May, 2015 and notice pay.

4. The Claimant is seeking compensation for unfair termination and severance pay for 2 years of service.

5. In evidence, the Claimant testified that he was employed by the Respondent in 2008 then left and later re-joined in 2013 but reported on duty from 2nd January, 2013. Such employment was however terminated after 1 year and 5 months on 16th May, 2015. On 9th May, 2015 the Claimant reported to work and found his colleagues on strike and his foreman forced him to join but he was later terminated from his employment for no justifiable cause, no notice or hearing. He was locked out the work place when he went for lunch and when he came back he had been terminated. He was later pay for the month together with notice pay. The termination has affected him and his family severely as the Respondent headhunted him for the job forcing him to leave his previous employer. His family was forced to move from Mombasa to Ruiru and with the loss of employment this was catastrophic. The termination was unfair as he was forced to attend the strike.

Defence

6. In defence, the Respondent case is that the Claimant applied for employment with them on 2nd January, 2014 while he was working at Prime Steel Mills Limited. He was employed as a Chemist from 6th January, 2014 at a gross wage of Kshs.45, 000.00 per month. The Claimant was terminated from his employment on 9th April, 2015 for breach of his employment contract. The reasons for termination were explained to the Claimant and were given an opportunity to defend himself. Terminal dues were computed and paid as follows;

Prorate leave Kshs.13, 038.00;

Notice pay Kshs.56, 500.00;

Severance pay Kshs.45, 635.00;

Days worked Kshs.71, 731.00

7. The termination was not unfair and the Respondent followed the law in effecting the same. The claims made are denied and not due.

8. In evidence, the respondent's witness was Stephen Musyoka the human resource manager of the respondent. That he has worked with the Respondent for the last 13 years and knew the Claimant well as he was employed by the Respondent then left and came back on a new contract from 2014. The Claimant called the witness with information that the Respondent chief executive officer had told him to give him a job but the witness advised him to make an application. It was later established that the Claimant had not been honest with such information as he lied about the chief officer directions.

9. Mr Musyoka also testified that he personally took charge of the Claimant and ensured that he was under a contract of employment and closely supervised his work. The Claimant was in a department that was very important to the Respondent in quality matters and was therefore required to be punctual at work. He worked in a team and was required to be a good example to the others. His reporting time was 7.30am to p.m. so as to be present before others reported and ensure that the work station was closed when all others left for the day. The Claimant was head of his department and thus supervising others.

10. The witness also testified that he took personal responsibility over the Claimant work performance. He observed that the Claimant was constantly absent at work and left early. The team under the Claimant did not appreciate his role. On 6th April, 2015 when the Claimant was required at work he did not report on duty. The witness had warned the Claimant verbally on different occasions. A warning letter had been issued. On 7th April, 2015 the witness met the Claimant at his office to try and resolve the matter but the Claimant could not give a proper explanation even when his supervisor Mr Lawrence Musyoka was called.

11. Noting the sensitivity in the department under which the Claimant was the head, a warning letter was issued. The Claimant was then terminated from his employment and paid terminal dues.

12. Both parties filed written submissions.

Determination

I have analysed the pleadings, the evidence from both parties and the filed written submissions. The issues that arise are

Whether there was unfair termination and

Whether the remedies sought are due

13. It is not in dispute that the Claimant was employed by the Respondent on a contract of service

commencing 6th January, 2014 which was terminated on 9th May, 2015. There is also no challenge that upon such termination the Claimant was paid the sum of Kshs.102, 000.00 being notice pay; salary for days worked; severance pay; and prorated leave days.

14. The Claimant does not challenge the evidence that he was late for work on various occasions and that he was issued with a termination letter. In the Affidavit of Musyoka Stephen dated 15th December, 2016, a schedule of clocking in and out of work is attached and being part of the records herein, taking it into account, the dates on the warning letters are in sync with the schedule noting the dates the Claimant was absent or reported late or left work early.

15. In the letter of employment issued to the Claimant and dated 2nd January, 2014, clause 8 on hours of work set out that;

Hours of work

You will be working for a minimum of 11 hours and no overtime shall be payable.

16. on several occasions/days the Claimant was not at work;

On 5th and 6th April, 2015 the Claimant was not at work;

On 28th March, 2015 the Claimant worked for less than 8 hours; and

This is repeated within this time and the worst being on 14th March, 2015 when he worked for 4 ½ hours.

17. Section 44 of the Employment Act allow an employer to terminate an employee by summary dismissal for absence from work or failure to attend work as directed. Such termination can be with less notice.

18. The Claimant does not explain himself as to why he attended work late or failed to attend work at all. The process of warnings issued to the Claimant for various late or no work attendance are quite lenient. His case warranted summary dismissal but the option of termination is quite humane.

19. I also find the Claimant was paid his terminal dues immediately upon termination. Section 45(5) of the Employment Act requires the court to take this into account;

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—

(a) The procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) The conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

(d) The previous practice of the employer in dealing with the type of circumstances which led to the termination; and

(e) The existence of any previous warning letters issued to the employee

20. In this case I find the Respondent complied with the mandatory provisions of the law and arrived at a justifiable finding on the termination of the claimant. The reasons for termination are fair and reasonable.

Remedies

21. On the Claimant for compensation, such is not available on the finding that the termination of employment was justified. Equally no damages are available as the termination was not wrongful.

No remedies are due. Case dismissed. No orders to costs.

Dated, delivered in open court at Nairobi this 23rd day of March, 2017.

M. MBARU

JUDGE

In the presence of:

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