



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 775 OF 2015

VITALIS NDEGE OUYOCLAIMANT

VERSUS

MOMBASA APPAREL [EPZ] LTDRESPONDENT

JUDGMENT

INTRODUCTION

1. The claimant was employed by the respondent on 26/11/2014 as Assistant Security officer earning ksh.22500 per month. The employment was under a fixed term contract for one year which was extended for a further one year from 25/6/2015 to 24/12/2015. According to the claimant, the reason for the extension of his contract was his good performance and contribution to the company.

On 3/8/2015, the employment contract was allegedly terminated by the respondent without any prior notice or explanation or payment of any terminal dues.

2. He has now brought this suit seeking payment of his terminal benefits plus compensation for the unfair termination. The respondent has admitted the employment but denied the alleged unfair termination of the claimant's contract. It is the defence case that she has a valid reason for terminating the contract, and that she followed a fair procedure before terminating the claimant's contract.

3. The suit was disposed of by written submissions on the basis of the pleadings and the supporting documents filed.

ANAYSIS AND DETERMINATION

4. There is no dispute that the claimant was employed by the respondent as alleged in his claim. The issues for determination are:

(a) Whether the claimant's contract of service was unfairly terminated.

(b) Whether the reliefs sought should issue.

UNFAIR TERMINATION

5. Under Section 45(2) of the Employment Act, termination of employment contract by employer is unfair unless the employer proves that it was grounded on a valid and fair reason and that it was done

after following a fair procedure. A reason for terminating is valid and fair if it is true and it relates to the employees conduct, capacity or capability or operational requirements of the employer. On the other hand, procedure is fair if it complies with Section 41 of the Act which essentially requires that the employee be accorded a personal hearing in a language he understands and in the presence of another employee of his choice before termination is decided.

6. In this case the claimant has alleged that he was not served with a prior notice but he has not denied that he was accorded a hearing on 3/8/2015 before the dismissal. He also not denied that he met the people listed in the minutes of the meeting which was held on 3/4/2015 to discuss his conduct and performance. On a balance of probability, I find and hold that the claimant was accorded a fair hearing before the termination of his contract.

7. As regards the reasons for the termination, the termination letter stated as :

“RE: TERMINATION OF EMPLOYMENT CONTRACT

We refer to meeting convened on 3rd August 2015 in the conference room in MA3. From the discussions in the meeting it was noted that in your execution of the Assistance Security Officer function, you had failed to meet the expectations of the factory security despite several discussions with the factory manager and security in charge over the same”.

8. My interpretation of the foregoing excerpt is that the reason for the dismissal was poor performance. No evidence of agreed targets was adduced to prove the failure to meet expectations. As correctly submitted by the claimant, his contract was extended from 25/6/2015 to 24/12/2015 on grounds that he had made positive contribution to the company and performed well. From 25/6/2015 to 4/8/2015 was the span of time between the letter appreciating the good performance by the claimant and the letter terminating his contract on account of poor performance.

9. The question that arises is what was the yard stick used to measure the good performance on 25/6/2015 and poor performance on 4/8/2015? Without providing the answer to the said question means that the defence has failed to prove the reason for the termination on a balance of probability. Under Section 43 of the Act, the burden of proving the reason for terminating the claimant’s service in proceedings like this lies on the employer and in default of such proof, the termination is deemed unfair within the meaning of Section 45 of the Act. Consequently I hold that the termination of the claimant was unfair for lack of valid fair reason.

RELIEFS

10. Under Section 49 of the Act, an employee who is unfairly terminated is entitled to salary in lieu of notice plus compensation of upto 12 months gross salary. In this case the respondent has produced payslips showing that the claimant was paid one month salary in lieu of notice being ksh.30000 after dismissal. I therefore will not award to the claimant any salary in lieu of notice. I however award him Ksh.120,000 being 4 months salary as compensation for the unfair termination. In making this award, I have considered that the claimant was employed under a fixed term contract which was to expire after 5 months.

11. Under the said payslips, the claimant was also paid for the 13 leave days earned and he signed for the same as full and final settlement. He has not disputed that fact and as such I dismiss the claim for leave. In addition to the forgoing, the payslip indicated that the claimant has no public holidays worked and as such he cannot claim the same now.

DISPOSITION

12. For the reason that there was no valid and fair reason for dismissing the claimant, I enter judgment declaring that the termination of his contract of service is declared unfair and award him ksh.120000 plus costs and interest.

Dated, signed and delivered this 28th April 2017

O.N. Makau

Judge