



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 117 OF 2016

(Before D. K. N. Marete)

BARAK GUYO SARANA.....CLAIMANT

VERSUS

LUQMAN PETROLEUM COMPANY.....RESPONDENT

JUDGEMENT

The matter was originated by a Statement of Claim dated 13th July 2016. The issues in dispute are therein cited as;

- a. Whether the claimant was unlawfully, unprocedurally and unfairly terminated from employment by the respondent;*
- b. Whether the claimant is entitled to compensation for unlawful, unprocedural and unfair termination from employment as prayed for in this memorandum of claim;*
- c. Whether the claimant is entitled to an award of certificate of service;*
- d. Who should pay costs and interest of the suit;*

The respondent in a Statement of Response dated 19th July, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that at all material times to this cause, he was employed by the respondent as a night watchman with effect from 7th March, 2013 on permanent terms. As at the time of the claimant employment up to the date of his unfair termination from employment he was earning a salary of Kshs.10,000.00, house allowance and other allowances excluded.

It is his further case that he served the respondent with loyalty, diligence and full dedication until the 16th December, 2014 when he was wrongfully, unprocedurally and unlawfully terminated with a refusal of payment of his terminal dues. This was on allegation that a petroleum lorry had been parked outside the gate as opposed to inside. He was therefore beaten up by the respondent's supervisor, Mohamed, and the manager. He contends that these allegations were untrue and these were also not subjected to fair and proper hearing.

It is his plea that his dismissal was illegal, unfair and unlawful and violates the provisions of S. 41 (1), 44

(4), 45 (2) and 43 of the Employment Act, 2007 as follows;

7. Section 41 (c) of the Employment Act 2007 provides that when an employee intends to dismiss or terminate the employment of an employee from among other reasons misconduct, it must explain to the employee in a language he/she understands the reasons for intended dismissal and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. The claimant submits that the respondent failed to explain to the claimant the reason for termination from employment contrary the aforesaid provision of the Employment Act.

8. Section 43 (1) of the Employment Act imposes a mandatory obligation on the employer to proof reason or reasons for termination failure to which the termination of employment is unfair within the meaning of Section 45 of the Employment Act.

Section 45 (2) of the Employment Act states that an unfair termination occurs when the employer failed to proof:-

- a. That the reason for termination is valid
- b. That the reason for the termination is unfair and
- c. That the employment was terminated in accordance with fair procedure

He prays as follows;

- a. *Declaration that the claimant's service were unprocedurally, unlawfully and unfairly terminated and in the circumstance the claimant is entitled to compensation of his terminal dues as outlined herein above;*
- b. *The sum of Kshs.434,476.16 as set out herein above;*
- c. *Certificate of service*
- d. *Cost of this suit and Interests at court rates from time of filing the suit until payment in full and*
- e. *Any other better relief the Honourable Court may deem just and fit to grant.*

The respondent's case is a denial of the claim in that the claimant was not an employee but instead undertaking a ten (10) months internship with the respondent effective on 16th February, 2014 to 16th December, 2014. Her further case is that on expiry of the internship, the claimant stole monies and she consequently opted not to extend the internship or retain him as employee. The relationship was ended.

The respondent further denies liability to the claimant as follows;

- a. *That the claimant was an intern and was being paid stipend and NOT salary.*
- b. *The intern was NOT an employee hence was NOT entitled to House allowance under section 31 of Employment Act;*
- c. *That the Claimant had been confirmed for employment for him to start earning leave days and had NOT worked for the Respondent other than as an intern;*
- d. *That the contract of Internship was for ten months and the Respondent had a right NOT to renew the upon its expiry hence the internship contract came to conclusion as required hence issues of compensation do not rise.*

e. THAT the termination of internship came to an end due to fluxion of time and that there was NO retrenchment and or redundancy hence issues of service and or severance pay do NOT come into play;

f. That the Claimant was on training ONLY during working hours during the week and was entitled to one day of per week for his day rest and therefore the claimant was NOT entitled to OVERTIME or DAY REST pay in lieu thereof.

The issues for determination are;

1. Whether the claimant was an employee of the respondent?
2. Was there a termination of the employment of the claimant and if so, whether this was wrongful, unfair and unlawful?
3. Is the claimant entitled to the relief sought?
4. Who bears the costs of this suit?

The claimant in his written submissions dated 27th February, 2017 set out and reiterates his case as pleaded. This however, does not come out to establish a case of employment and therefore a rebuttal of the respondent's case of no employment. This is not assisted by the claimant witness statement dated 1st January, 2017, or even his list of documents of the said date which does not include the actual list.

The respondent in her written submission dated 3rd March, 2017 faults the claimant's case for want of proof. It is her submission that the claimant does not file any witness statement and therefore has no intention of calling any witness in support of her case. In the absence of proof, the claim should be dismissed with costs. I agree.

This claim is not supported by evidence on the part of the claimant. His filing of a witness statement late in the day and absence of support documents enlist the claim as an afterthought and a badly litigated outfit. I therefore find a case of no employment of the claimant by the respondent and hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether there was a termination of the employment of the claimant and if so, whether this was wrongful, unfair and unlawful. This is in the negative. The claimant was not in any employment relationship with the respondent. There was therefore no termination in the circumstances.

The 3rd issue is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of employment, he is disentitled to the relief sought.

I am therefore inclined to dismiss the claim with costs to the respondent. And this answers all the issues for determination.

Delivered, dated and signed this 26th day of April 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa Instructed by Mwakio Kirwa & Company Advocates for the Claimant.
2. Mr. Chelangat Instructed by Nchogu, Omwanza & Nyasimi Advocates for the Respondent.