



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2227 OF 2012
FELIX SIMIYU NYONGESACLAIMANT
VERSUS
BLOWPLAST LIMITEDRESPONDENT

Mr. Wathome for claimant

M/S Oyaro for respondent

JUDGMENT

1. By a memorandum of claim dated 5th November 2012, the claimant seeks compensation for unlawful termination of employment and payment of terminal benefits including one month's salary in lieu of notice and Kshs24,474/= in lieu of unpaid leave days for three years' service period to the respondent.
2. The claimant states he earned a gross monthly salary of Kshs8,156/-. That he worked as a machine operator from 2nd February 2009 to 18th June 2012 when his employment was terminated by the respondent.
3. That on or about 5th may 2012, the claimant suffered work injury and upon treatment he was on sick off for about 17 days.
4. That upon his return on 18th June 2012, the respondent had already prepared a payment slip for the month of June which he was given and his services were terminated.
5. That the personnel manager told him that the respondent had spent a lot of money on his treatment and that he was incapable of performing his duties as required.
6. The claimant prays that he be awarded as he prayed in the statement of claim. The claimant testified in support of the particulars of claim.

Response

7. Respondent filed a reply to the memorandum of claim on 4th April 2013 in which it admits that the claimant was employed as a machine operator from 2nd February 2009 up to 18th June 2012. That his salary was Kshs.8,158/- per month.

8. The respondent denies that the claimant was on 5th May 2012 injured in the course of his duty and was unable to work for 17 days.

9. The respondent denies that it terminated the employment of the claimant. RW1 Bernard Mukawa a supervisor of the claimant while he worked told the court that on 5th May 2012, the claimant got injured in the course of his work at around 9 p.m. in the night. RW1 told the court that he called his bosses who took the claimant to hospital. The claimant was later given a sick off for 13 days and paid Kshs.4,211/=. He was recommended to do light duties upon return to work.

10. When he came back he worked for 3 days and absconded. The respondent tried to get him to return to work in vain. RW1 added that the claimant's employment was not terminated but he absconded duty.

11. RW1 denied under cross examination that he had gone to look for the claimant after one year since the termination stating that the claimant said he did not wish to work and had absconded duty.

Determination

12. The claim by the claimant set out in the memorandum of claim was well supported by the sworn testimony by the claimant. On the other hand the testimony by RW1 in many respect contradicted the reply to the memorandum of claim rendering the testimony incredible and therefore unreliable.

13. In the memorandum of reply in particular the respondent denied in total that the claimant got injured at work and was given work-off. These averments were completely contradicted by RW1 under oath.

14. To this extent, no credible rebuttal is available against the claim by the claimant that he was sent home after he reported back to work following a sick-off given after he had incurred injury at the work place.

15. The court finds that the claimant has dispersed the onus placed on him under Section 47 (5) of the Employment Act, 2007 to show on a balance of probability that his employment was wrongly terminated.

16. The claimant also demonstrated in the absence of any evidence to the contrary that he was paid in lieu of one month notice and that he did not go on leave for the 3 years worked and was not paid in lieu thereof.

17. The court upon consideration of the evidence before court and Section 49 (1) (c) of the Act, awards the claimant five (5) months' salary compensation for unlawful and unfair termination of employment in that the claimant wished to continue working, did not contribute to the termination; was not paid terminal benefits upon termination and was not given certificate of service upon termination.

18. The court enter judgment in favour of the claimant as follows;

(i.) Kshs.40,790/= compensation five (5) months' salary.

(ii.) Kshs.8,158/= in lieu of one month's notice.

(iii.) Kshs.24,474/= in lieu of years' leave.

Total Kshs.73,422/=

(iv.) Interest at court rates from date of judgment till payment in full.

(v.) Costs of the suit.

Dated and delivered at Nairobi this 7th day of April 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE