



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 166 OF 2015

MWENGA MUTIICLAIMANT

VERSUS

JOSHUA KARUNGE (t/a Mwambao café)RESPONDENT

J U D G M E N T

INTRODUCTION

1. The claimant was employed by the respondent as a cook in July 2009 and worked until 20/10/2014 when he was unfairly dismissed by the respondent's wife Njeri. The respondent never filed any defence despite being served with summons and the suit proceeded *ex parte* by written submissions on the strength of the pleadings filed.

CLAIMANT'S CASE

2. The claimant filed a written statement as his testimony. He stated that he was employed in July 2009 as a cook and worked until 20/10/2014 when he was summarily dismissed by the respondent's wife, Njeri. According to the claimant the reason for termination was cited as his refusal to go after he was sent by Njeri. He denied that he refused to comply with Njeri's instruction. After the dismissal by Njeri, he went to talk to the respondent as his employer, but the respondent affirmed the dismissal.

3. The claimant was aggrieved and reported the matter to the labour office and after demand letters, a meeting was convened where the respondent was represented by one Jane. After the deliberations, it was agreed that the respondent will pay to the claimant Ksh.82,148 but the respondent defaulted. As a result the claimant instructed his lawyer who served demand letter on the respondent. The respondent replied saying that the claimant was a casual employee who was not entitled to any terminal dues. The claimant maintained that from 2009 he was earning ksh.250 per day but later he started receiving ksh.10500 per month for which he used to sign vouchers. The vouchers were retained by the employer who also never remitted the NHIF and NSSF deductions from his salary. He prayed for the dues and compensation as prayed in the claim.

ANALYSIS AND DETERMINATION

4. There is no dispute that the claimant was employed by the respondent between July 2009 and 20/10/2014 when he was terminated. The issues for determination herein are:

- a. Whether the termination of the claimant's contract of service was unfair.

b. Whether reliefs sought ought to issue.

UNFAIR TERMINATION

5. Under Section 45(2) of the Employment Act, termination of employment contract by the 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. In this case the claimant's evidence that he was dismissed for false reason and without being given a chance to defend himself has not been contested by the respondent. Consequently, I find that the respondent has not discharged her burden of proving under Section 43 and 45 of the Act. The said default has rendered the dismissal of the claimant unfair and I so hold.

RELIEFS

6. Under Section 49 of the Act, an employee who is unfairly dismissed is entitled to salary in lieu of notice plus compensation of upto 12 months gross salary. The claimant has alleged that the salary of ksh.10500 he was earning was an underpayment and that the correct pay under the wage order was ksh.12148. The said minimum salary was confirmed by the labour officer in his recommendation to parties vide his letter dated 23/12/2014. I will award that salary which was the gazette minimum pay due to the claimant as at the time of his dismissal. He is therefore awarded Ksh.12148 as one month salary in lieu of notice plus Ksh.72888 being six months salary compensation for unfair dismissal. In making the said compensation, I have considered the period of service being 7 years and the fact that no misconduct was proved against the claimant.

7. In addition, I award the claimant service pay for the 4 years served at the conventional rate of 15 days per year of service – he will get ksh.21137 as service pay. His claim for leave for 18 months was not opposed and I grant it being ksh.12755.40 just as recommended by the labour officer. The claimant will further get ksh.8098.75 being salary for the 20 days worked in October 2014. Finally, the claimant is awarded the claim for salary underpayment for 17 months at the rate of ksh.1,648.10(ksh.12148-10500). He will therefore get ksh.2,127.20 as prayed although the correct amount was much higher.

DISPOSITION

8. For the reasons that the dismissal of the claimant was unfair, I enter judgment for him in the sum of ksh.148144.35 plus cost and interest.

Dated, signed and delivered this 5th May 2017

O. N. Makau

Judge