



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 306 OF 2014

(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)

CALEB NASENGO.....CLAIMANT

-VERSUS-

SHANIR DISTRIBUTORS LTD RESPONDENT

JUDGMENT

By his Memorandum of Claim dated 12th November 2014 and filed in court on the same date the Claimant avers that he was employed by the Respondent from 21st July 2013 to 23rd July 2014 as a general labourer at a monthly salary of Kshs. 7000 but without house allowance and working for 11 hours without payment of overtime. His employment was terminated on 23rd July 2014. He alleges that the termination was unilateral and without cause. The Claimant avers that the termination was unfair and in breach of labour laws. because the Respondent did not give him an opportunity to defend himself. The Claimant avers that he had joined Kenya Union of Commercial Food and Allied Workers, an action that did not please the Respondent. He avers that before termination he had been victimized with the intention to force him to revoke his membership to the union and was terminated after he refused to succumb to the Respondent's demand.

The Claimant seeks the following orders against the Respondent:-

1. One month's salary in lieu of notice
Basic(9024) + House allowance(1353) Kshs. 10,377
2. Service (15 days for 1 year worked) Kshs. 4,512
3. Leave dues at 21 days x gross pay/26 Kshs. 8,381
4. Overtime dues for 12 months Kshs. 69,960
5. 12 months' salary Compensation for unfair termination Kshs.124,524
6. Underpayment of wages (Legal Notice No. 197 of 1st May 2013)months)(10377-7000x12) Kshs. 40,524

The Claim was filed by the Claimant in person though his address for Service is care of Kenya Union of Commercial Food and Allied Workers Office at Sanice Guest House Building. The Claimant later appointed the firm of Mwakio Kirwa & Co Advocates who filed a notice of Appointment 30th April 2015.

The Respondent appointed the firm of Rotuk & Co, Advocates who filed a Notice of Appointment of Advocates on behalf of the Respondent on 7th July 2015 but did not file defence although they were on 7th July 2015 granted leave to file defence out of time. The Respondent further did not attend Court for hearing on 31st October 2016 although Counsel for Respondent was duly served with hearing notice.

At the hearing the Claimant testified that he was employed by the Respondent on 21st July 2013 as a shop assistant. His job was selling in the shop. His last salary was Kshs. 8000.00. He reported for work at 8am and left work at around 7.30pm. Sometimes he worked up to 9pm. He worked up to 23rd July 2014 when his mother died. He asked for permission and was given one week off. When he reported back to work he was told there was no work for him. He asked why and was told by Mr. Viral, the manager not to ask any questions.

The Claimant testified that he was not paid any terminal dues. That when he went back after 2 days he was chased away. He then reported to the office of Kenya Union of Commercial Food and Allied Workers. The union wrote a letter to the Respondent who responded. There was a meeting on 14th August 2014 when the Respondent said it did not have money to pay the Claimant. He thereafter filed this suit.

The Claimant prayed for judgment against the Respondent for the total sum of Kshs. 258278 as prayed in his Memorandum of Claim. He also prayed for costs and travelling expenses.

In the written submissions filed on behalf of the Claimant by Ms. Soita instructed by Mwakio Kirwa & Co. advocates for the Claimant, it is submitted that there existed an oral employment contract between the Claimant and the Respondent and that the contract was unfairly terminated by the Respondent who refused to pay terminal dues as tabulated Claimant by the union. It was submitted that the termination of employment was unfair both substantively for want of valid reason and procedurally for want of fair procedure.

The Claimant relied on section 41 and 45 of the Employment Act and on the following cases:

Walter Ogal Anuro V Teachers Service Commission [2013]eKLR in which the court held that for termination of employment to pass the fairness test there must be both substantive and procedural fairness.

Alphonse Machanga Mwachanya v Operation 680 Limited [2013]eKLR in which the court summarised the fairness requirements of set out in section 41 of the Employment Act as follow:

- a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;
- d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

The Claimant further relied on the case of **Nicholus Muasya Kyula v Farmchem Limited Industrial Court Cause no. 1992 of 2011** where the court held that

"It is not sufficient for the employer to make allegations against the employee. The employer is required to have internal systems and processes of undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at."

The Claimant also relied on the case of **Kabengi Mugo v Syngenta East Africa Limited Industrial Court Cause No. 1476 of 2011** where the Court held that

"The Kenyan employment law no longer accepts the 'at will doctrine' whereby an employer can fire employees at will, for any reason or no reason."

The Claimant also relied on the case of **Donald Odeke v Fidelity Security Limited Industrial Court Cause No. 1998 of 2011** where the Court held that

"It does not matter what offence the employee is accused of. If the employee is not heard, the termination is ipso facto unfair."

It is submitted the failure by the Respondent to attend court to defend its case and the late filing of a defence consisting of general denials are admissions of allegations by the Claimant.

Determination

I have considered the pleadings and evidence on record as well as the written submissions and authorities cited by the Claimant.

The issues arising for determination on the facts before the court are the following:

1. Whether the Claimant's employment was terminated unfairly by the Respondent; and,
2. If the Claimant is entitled to the remedies sought.

Was the Claimant's employment unfairly terminated

The Respondent although properly served did not file any defence to the Claim. The court therefore has only the Claimant's narrative of the facts. Having been served with the claim and having seen the allegations therein and not responded to the same, the court must assume that the Respondent does not deny the Claim by the Claimant. According to the Claimant he was given permission to attend his mother's funeral and when he came back he was terminated verbally by the Manager. However in the memorandum of claim the claimant alleges that he was dismissed because he refused to withdraw from membership of the union and thus was being persecuted for being a union member.

At paragraph 5 of the Memorandum of Claim it is pleaded as follows:

The claimant avers that the termination was illegal, unfair and in breach of Labour Laws. That the Claimant further avers that he joined Kenya Union of Commercial Food and Allied Workers as a member, the action that did not please the Respondent. This followed with all forms of victimization to force the Claimant to revoke his union membership.

Failure of which he was threatened with instant dismissal which was made real when the Claimant refused to succumb to the Respondent's demands.

In the Respondent's response to the demand letter from the union which is part of the Claimant's bundle of documents dated 8th August 2014 the Respondent stated as follows:

We wish to advise that the staff was not terminated but had himself not come to work for ten days, and he had sought prior permission for only two days and not ten days, nor had he attempted to communicate the same to us. The staff had previously been given three warnings of the same nature.

The question therefore is, was the claimant terminated because he attended his mother's funeral or because he refused to revoke his union membership as demanded by the Respondent, or was this a case of desertion of duty?

Section 47(5) of the Employment Act provides that *for any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.*

All the evidence on record is from the Claimant as the Respondent did not file response to the Claim. So which version of the Claimant is the correct position? This is a question that cannot be answered by the contradictory evidence of the Claimant on record. It is my opinion that the Claimant has not proved that he was unfairly terminated by the Respondent.

What remedies are the Claimant is entitled to

Having found that the Claimant has not proved that he was unfairly terminated, he is not entitled to pay in lieu of notice.

On the prayer for service pay, section 35(5) of the Employment Act provides for service for every year worked. The Claimant avers that he was in employment of the Respondent from 21st July 2013 to 23rd July 2014. The Respondent on the other hand stated in the letter dated 8th August 2014 referred to above that the Claimant was on probation from November 2013 to February 2014 and actually started working from February 2014. If his employment commenced on 21st July 2013 as alleged then he worked for one year and is entitled to service pay of 15 days salary.

The basic minimum wage for a shop assistant as at July 2014 was

Kshs. 13201.55. The Claimant is therefore entitled to service pay of **Kshs. 6601.00** which I award him.

On underpayments, the statutory minimum wage from July 2013 to April 2015 was Kshs. 13201.55. The Claimant was therefore underpaid as follows:

August 2013 to July 2014 $(13201.55 - 8000 = 5201.55 \times 13)$

Kshs. 67620.15 which I award him.

Having worked for one year the Claimant is entitled to annual leave of 21 days. I award him pay in lieu of leave in the sum of $(13201.55 / 30 \times 21)$ **Kshs. 9241**

The Claimant further prayed for overtime. It is my opinion that the demand of Kshs. 69960 for overtime has not been proved as the Claimant did not justify how the same was tabulated. He did not even prove how many days he worked and how much overtime he was entitled to. The Claim is therefore dismissed.

Having found that the Claimant did not prove that he was unfairly terminated, the claim for compensation for unfair termination must also fail.

Having partially succeeded in his claim, and in view of the the fact that the Respondent was served and ignored to file defence or attend court for hearing of the case, I award the claimant costs of the claim including Kshs. 6000 ordered on 7th July 2015 which the Respondent did not pay.

Orders accordingly.

Dated, Signed and Delivered this 4th day of May, 2017

MAUREEN ONYANGO

JUDGE