



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 87 OF 2015

BETWEEN

SIMPSON NGUGI NGEKECLAIMANT

VESRUS

RAIPLYWOOD [K] LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Clarks & Company Advocates for the Claimant

Nyairo & Company Advocates for the Respondent

JUDGMENT

1. This Claim was initially filed at the Senior Principal Magistrate's Court at Mombasa as Cause 667 of 2013. It was transferred to the Industrial Court at Mombasa, by an order of the High Court Mombasa, dated 8th July 2014. It was registered at the renamed Employment and Labour Relations Court as Cause Number 87 of 2015.

2. The Claimant filed his Amended Statement of Claim after transfer of the Claim, on 1st September 2015. He states he was employed by the Respondent Timber Company as a Loader. He was stationed at Mombasa. He states that on 18th May 2011, the Respondent purported to transfer him to its Outlet in Eldoret, with effect from 1st June 2011. He requested for funds from the Respondent to enable him transfer. He was not facilitated. He was summarily dismissed by the Respondent on the allegation that he had refused to transfer. He earned a monthly salary of Kshs. 10,214, as of the date of termination. He prays for Judgment against the Respondent as follows:-

- a) Certificate of Service to issue.
- b) Terminal benefits at 15 days' salary for every year completed in service at Kshs. 76,605.
- c) 2 months' salary in lieu of notice at Kshs. 20,428.
- d) Salary for June 2011 at Kshs. 10,214.

e) Salary for 10 days worked in July 2011 at Kshs. 3,000.

f) 12 months' salary for unlawful termination at Kshs. 122,568

Total... Kshs. 223,815

g) Costs, Interest and any other suitable relief.

3. The record indicates the Respondent filed its Statement of Defence to the original Claim on 6th May 2013. It is conceded the Claimant was employed by the Respondent. He was summarily dismissed for gross misconduct. He failed to report for duty at his new station on 1st June 2011, when required to do so. He absconded from duty from 2nd June 2011 to 10th July 2011, when he was discharged of his duties. Termination was fair and lawful. The Respondent prays for dismissal of the Claim.

4. The Claimant testified, and closed his case, on 16th November 2016. He was on annual leave when he was called by the Respondent and told he had been transferred to Eldoret. He did not have any money to relocate. Manager Munir refused to assist the Claimant with money to transfer. The Claimant waited, and on 10th July 2011, he received the letter of summary dismissal. He earned a monthly salary of Kshs. 12,200 as of the date of termination. Cross-examined, the Claimant told the Court he did not seek facilitation to transfer in writing; he made an oral request. He was issued letter to show cause, why disciplinary action should not be taken against him. He did not give a reason as to why he could not travel, in his reply to this letter. Redirected, he emphasized he was on annual leave when transferred. Leave Application Form was retained by the Respondent.

5. Munir told the Court the Claimant was advised by the Respondent, to report to his new Station at Eldoret. He did not make any request for facilitation. He worked for 10 years. He was not paid terminal benefits. Termination was fair and lawful.

The Court Finds:-

6. The Claimant was employed by the Respondent as a Loader. He testified he was employed in May 2000, and left employment in July 2011, after working for 11 years.

7. It is not disputed that the Claimant was transferred to Respondent's Eldoret Saw Mills, in a letter dated 18th May 2011. He was to report on 1st June 2011.

8. It is similarly not disputed that he did not report as instructed. He explained he did not have money to enable him relocate to Eldoret, and a request made by him to Munir for facilitation, yielded no money.

9. The Respondent did not show he was unable to travel to Eldoret for want of money, or that he made any request for facilitation. There was adequate opportunity to do so, between the time instructions to transfer issued, and the date of termination. He did nothing to show compliance with the command of his Employer which was issued reasonably and legally. He did not write any letter, explaining his inability to travel, or requesting for funds.

10. He should have, even in the absence of sufficient funds to enable him relocate, at the very least, have travelled to Eldoret and reported to the Manager there on the given date, before returning to Mombasa to organize with the Mombasa Office for his relocation. The record casts him in the light of an Employee who was unwilling to transfer. It is the duty of Employers to assign duties and determine from which workstation, Employees discharge those duties. Unless transfer is made illegally, unreasonably or with ulterior motive, the Employee has no justification to resist or decline transfer.

11. The Respondent had valid reason in terminating the Claimant's contract under Section 43 and 45 of the Employment Act 2007.

12. The Respondent did not fulfill the requirements of fair procedure under Section 41 and 45 of the Act. The Claimant was asked to show cause, why he should not face disciplinary action. He replied to this letter alluding to some differences with Munir, as having caused his transfer. There were no charges presented against the Claimant after the show cause process. He was alleged to have absconded from work effective 2nd June 2011. He was not called to a disciplinary hearing for the offence of absconding, or that of insubordination by his refusal to transfer. There was no hearing at all. The letter to show cause, dated 21st June 2011 has a comment written by hand by Respondent's Management: '*to be dismissed.*' The Respondent saw no need to hear out the Claimant. Even as he was being asked to show cause, a determination had been made: *to be dismissed.* Termination was unfair on procedure.

13. The Claimant prays for what he calls terminal benefits, based on 15 days' salary for every year completed in service. He did not explain to the Court on what law, wage instrument or contract, these terminal benefits are payable. If, as the mode of computing terminal benefits he adopts suggests, the Claimant means he deserves service pay, he was an active Member of the N.S.S.F as shown in his pay slip. He is not eligible for service pay under Section 35 [6] of the Employment Act. The item is rejected.

14. He did not explain why he wishes to be paid 2 months' salary in lieu of notice, rather than the minimum 1 month salary given under the law. He declined transfer in any event, which amounted to insubordination under Section 44 [4] of the Employment Act, and would not be entitled to notice pay in any form. Insubordination is an act of gross misconduct, warranting summary dismissal. The prayer is rejected.

15. He was dismissed on 10th July 2011. He ought to have been paid his salary for June 2011, and for 10 days in July 2011 when he was still an Employee of the Respondent. ***He is granted salary for June 2010 at Kshs. 10,214 and salary for 10 days in July 2011 at Kshs. 3,928-amounting to Kshs. 14,142.***

16. Termination as discussed above was unfair on procedure. ***The Claimant is granted the equivalent of 6 months' salary in compensation for unfair termination at Kshs. 61,284.***

17. ***Certificate of Service to issue.***

18. No order on the costs.

19. ***Interest granted at 14% per annum from the date of Judgment till payment is made in full.***

IN SUM, IT IS ORDERED:-

a) Termination was based on valid ground, but flawed on procedure and therefore unfair.

b) The Respondent shall pay to the Claimant: arrears of salary for June/July 2011 at Kshs. 14,142; and the equivalent of 6 months' salary in compensation for unfair termination at Kshs 61,284- total Kshs. 75,426.

c) Certificate of Service to issue,

d) No order on the costs.

e) Interest granted at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 27th day of June 2017.

James Rika

Judge