



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1263 OF 2013

KARIUKI NJOROGICLAIMANT

VERSUS

KENYACAM LIMITEDRESPONDENT

JUDGEMENT

Issue in dispute – unlawful and unfair dismissal.

1. The Claimant was in August, 2011 employed by the Respondent as a Driver at a monthly salary of Kshs.25, 000.00.
2. The claim by the Claimant is that while employed he was forced to carry out activities which were beyond his scope of employment which include manual work. He carried out installation, maintenance and repair of communication masts a job he was not qualified or skilled to do and which forced him to climb masts tall and long. He worked for 7 days a week; on public holidays and which work was without pay or due compensation.
3. The claim is also that the Respondent forced the Claimant to undertake trainings for activities which were beyond his employment contract and made a deduction of the costs from his salary. When the Claimant made a complaint about the unfair work conditions and noting other employees were not being subjected to the same, he was accused of being a trouble maker and was warned of dire consequences.
4. On 3rd January, 2013 the Claimant reported to work and was issued with letter of summary dismissal on alleged misconduct. Such dismissal was with malice and in breach of the employment contract. The Claimant was not issued with notice; reasons for dismissal; or any hearing before the dismissal.
5. The Claimant has suffered loss and damage due to the breach and malice of the respondent. The Claimant is seeking for a declaration that his dismissal is unlawful and null and void; an order for reinstatement; an order of re-engagement; terminal dues of compensation, notice pay, unpaid leave; costs and interests of the awards made.
6. In evidence, the Claimant testified in support of his claims. The Claimant was employed as a Driver but he was given other jobs of installations and when he complained about extra duties and being charged for undertaking trainings for the same, he was given a warning and later issued with letter of dismissal. He had no warning issued to him and the one produced by the Respondent never came to his attention. In December, 2012 the Claimant took leave and when he resumed in January, 2013 he was issued with a letter of dismissal.

Defence

7. In defence, the respondent's case is that this is a company which deal in telecom infrastructure and has no knowledge what *masks* the claim by the Claimant relates to. The Claimant has a contract of employment with terms and conditions set out therein. He was terminated in accordance with clause 10 of the contract. The Claimant was issued with a warning on 1st October, 2012. The dismissal arose out of the claimant's own doing. There was no malice or breach of contract. There is no reasonable case demonstrated by the Claimant as against the Respondent and the claim should be dismissed with costs.

8. In evidence, the respondent's witness was Francis Macharia. He testified that he was working with the respondent, a telecommunications company. The Claimant was employed on 1st August, 2012. He was on probation for 3 months in which period he was to be assessed in his duties and performance.

9. The Respondent employed the Claimant from a reference through friend but he was made to read and sign his contract of employment. While the work, the Claimant would report while drunk and his supervisor realised that he was not sober while at work. The witness called the Claimant to his office and from behaviour, he realised he was drunk. Being a driver, the Claimant could not undertake his duties well and was issued with a warning. When the Claimant reported to work in January, 2013, he was dismissed due to gross misconduct. Dismissal was on 3rd January, 2013. This was a time during probation period. There was no need to issue notice or hearing.

10. At the close of hearing, both parties filed written submissions.

Submissions

11. The claimant submits that he was serving for over a year at the time of his termination of employment and was thus not on probation as alleged by the respondent. The evidence produced is contradictory and cannot be relied upon the contract of employment and the letter of reference has different information with regard to duration of employment.

12. The termination was procedurally unfair in terms of section 45 of the Employment Act as the claimant was not given notice or a hearing. The termination was also substantively unfair as there was no evidence to support or any reasons to warrant the same. The respondent witness lied under oath that the claimant was employed as a driver/rigger which was not possible as each position/role has different duties. The claimant was therefore terminated for no apparent reason.

13. The procedural and substantive reasons thus lacking, the termination of the claimant was unfair. The remedies sought are due.

14. The claimant has relied on the cases – **David Gichana Omuya versus Mombasa Maize Millers Ltd [2013] eKLR**

15. The respondent also submits that following the termination of the claimant, trust and confidence in him is lost and thus in terms of section 49(4) the remedy to reinstatement should not issue. Such an order would not be appropriate to issue in this case as held in **Ezekiel N Okema versus Kenya Marine and Fisheries Research Institute, Cause No.186 of 2013.**

16. The respondent also submits that the claimant never subjected the claimant to unfair work conditions as he was under a contract of employment as driver/rigger and he professed competence to undertake such duties. The claimant has not proved that the termination was unlawful in terms of the Evidence Act. That the claimant was on probation and as such, the respondent as the employer had the right to terminate on short notice in terms of section 42 of the Employment Act and as such procedures under section 41 do not apply. Section 44 allow summary dismissal on good grounds where there is gross misconduct and as such the fact of the claimant failing in his work and being drunk while at work warranted summary dismissal.

Determination

17. I have put into account the pleadings, evidence and written submissions.

18. At paragraph 3 of the Claim, the Claimant avers that was employed in August, 2011. Defence is that he was employed on 1st August, 2012. The Respondent submitted the list of documents with the employment contract of the claimant. Clause 1 is to the effect that employment commenced on 1st August, 2012 with the Claimant being put on probation for 3 months lapsing on 31st December, 2012.

19. Another annexure is a warning letter dated 1st October, 2012 allegedly issued to the Claimant by the Respondent on alleged misconduct for use of alcohol. This letter is not signed; the Claimant challenged it that it was never issued to him; and further, this letter is not signed or accepted by the Claimant in acknowledgment that it was issued to him.

20. Section 44(3) and (4) of the Employment Act allow an employer to dismiss an employee for breach of contract or for gross misconduct particularly where an employee is found drunk while at work. Such dismissal is allowed with less notice and based on the act of gross misconduct.

21. As noted above, the warning letter submitted by the Respondent on alleged misconduct and use of alcohol while at work is not signed. Such was a warning and not dismissal. It is not stated that on 3rd January, 2013 when the Claimant was dismissed he was being punished over the same alleged misconduct. In any case such was in October, 2012.

22. The letter of summary dismissal is not submitted. It is not clear on which reason, basis or justification the same was arrived at save for the evidence of the respondent's witness that the Claimant had misconducted himself and that he was on probation.

23. Section 42 of the Employment Act allows an employer to place an employee on probation. Within the probation period, an employee can be terminated as agreed or on short notice of 7 days or payment in lieu thereof.

24. In this case, the Claimant's contract was issued on 1st August, 2012. He was placed on 3 months' probation. Effectively, probation ended on 30th October, 2012.

25. Section 42 of the Employment Act also allow for an extension of a probation period. However, such extension must be with the knowledge and consent of the employee and the reasons for the same must be set out.

26. No evidence of extension of the contract has been submitted by the respondent. Without such, by operation of the law, as of 1st November, 2012 when the Claimant reported to work and continued to work until his dismissal, he was in full employment of the Respondent as the probation period had lapped. See, **Peris Nyambura Kimani versus Dalbit Petroleum Limited, Petition 63 of 2014**.

27. The respondent's witness testified that the Claimant was not issued with notice or hearing on the basis that he was still on probation and such was not required. Without any material evidence that probation period was extended beyond the 3 months of the contract, and that the Claimant was not given notice, a hearing or reasons for his dismissal, the same amounted to both being substantively and procedurally unfair. Such cannot find justification on any legal basis or on the facts set out. To dismiss the Claimant as the Respondent did is contrary to the law.

Remedies

28. The Claimant is seeking reinstatement. During the course of hearing the Claimant submitted that he is at work in Somalia. There was no great emphasis given to the claim for a reinstatement. Putting these matters into account and noting that reinstatement should only be ordered in the clearest of cases and section 49 of the Employment Act having other available remedies, this shall not be ordered.

29. On the finding that the dismissal of the Claimant lacked both in fair procedure and substantive reason, compensation is due. An award of 6 months gross wage is found appropriate. At a monthly salary of Kshs.25, 000.00 the Claimant is awarded Kshs.150, 000.00 in compensation.

30. On the admission that there was no notice before the dismissal, notice pay is awarded at Kshs.25, 000.00.

31. On the leave pay due, Section 28(b) provides that;

(b) where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period, to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.

32. Of the 5 months the Claimant was at work, he is entitled to $1 \frac{3}{4}$ of leave days for each month all being 8.75 and based on the monthly wage of Kshs.25,000.00 the leave pay due is [$1 \frac{3}{4} \times 5 = 8.75 \times 833 = 7,288.75$] Kshs.7,288.75.

33. The claimant allegations that he was made to undertake trainings at his own costs is left bare. There is no tabulation of such costs if indeed this was the case. Also the nature of trainings is not stated. The duration of training not stated. There is no claim for a refund of the monies deducted from the claimant's salary so as to meet the training costs.

Accordingly, judgement is hereby entered for the Claimant against the Respondent with a declaration that the Claimant was unfairly terminated from his employment; compensation is awarded at Kshs.150, 000.00; notice pay Kshs.25, 000.00; leave pay Kshs.7, 280.75; and costs of the suit.

Dated and read in open Court at Nairobi this 19th day of June, 2017.

M. MBARU

JUDGE

In the presence of:

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