



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA**

**CAUSE NO. 443 OF 2014**

**JUSTINE ABURI OKEMWA .....CLAIMANT**

**VERSUS**

**SHEIKH ZAYED CHILDREN WELFARE CENTRE.....RESPONDENT**

**J U D G M E N T**

**Introduction**

1. The claimant brought this suit on 12.9.2014 claiming Ksh 472,500 as his terminal dues plus compensation for the wrongful termination of his employment by the respondent on 31.7.2014. According to claimant he was summarily dismissed without being accorded any fair hearing and without any reason.

2. The respondent filed defence on 27.10.2014 denying liability for wrongful termination. She avers that the claimants' dismissal was lawful and justified because he performed his duties recklessly as a result of which he damaged a Lawn mower belonging to the respondent. It is further defence case that the claimant was paid all his terminal dues.

3. The suit was heard ex parte on 28.7.2015 and judgment rendered on 23.10. 2015. However by consent of the parties, the exparte judgment was set aside on 26.2.2016 and the suit heard afresh on 9.1.2017 and 18.1.2017 when the claimant testified as Cw1 and the respondent called her Director Mr. Mir Khan as RW1. Thereafter both parties filed written submissions.

**The Claimant's case**

4. The claimant was employed by the respondent as a general worker as casual employee from 2.1.2013 to April 2013 but signed a fixed term contracts from April to July 2013 and from 1.8.2013 to 31.12.2014, for a salary of kshs. 15000 per month. His duties included cleaning, gardening, mowing and any other duty assigned. His normal working hours was 7.00 am to 4.30 pm Mondays to Fridays, and 7.30 am to 1.00pm on Saturdays. However he used to report at 6A.M to collect pupils by bus before starting his normal duties at 8A.M. During the lunch hour he was dropping the pupils back home by bus up to 2pm when he resumed his normal duties. From 4.30P.M he dropped the pupils home by bus up to 7 P.M when he returned the bus and signed off.

5. On 30.7.2014, he was instructed by the Director Mr. Mir khan to cut grass using a new Lawn mower. The grass was big and the machine broke down. Cw1 reported the matter to the Director who inspected it and said he would return the machine to the dealer for repairs. However in a surprise turn of events, the Director served him with a dismissal letter the following day at 4 pm. The reason for the dismissal was lack of diligence in operating the Lawn mower.

6. CW1 has denied the truth in the said reason for his termination and maintained that he never operated the said machine carelessly, negligently or recklessly. He contended that he was dismissed without being accorded any hearing in the company of a fellow employee. He was also not served with any notice before the dismissal and he had not received any previous warning or show cause letter. He therefore prayed for compensation plus terminal benefits.

7. CW1 further stated that he was never paid for the overtime worked and he never went for any leave during his entire period of service. He therefore prayed for payment in respect of the accrued leave and overtime worked.

8. On cross examination, CW1 admitted that the machine was new when it broke down but he maintained that he used it carefully for two weeks as instructed by the RW1. He also admitted that he was being paid kshs 2000 per month for picking and dropping pupils but protested that the amount was too little for the four hours worked every day. He admitted that the termination was premature by five months and he was paid only 50% of his pension contribution as oppose to 100% plus 50% of the employer's contribution.

### **The defence case**

9. Rw1 confirmed that the claimant started working for the respondent from January 2013 as a gardener on casual basis but from 1.5.2013 he was given a contract for three months. The contract was renewed for 17 months upto 31.12.2014.

10. RW1 explained that, he bought a new Lawn mower on 16.7.2014 from Car & General and a team from the dealer explained the use of the machine to the claimant among other Gardeners. Specifically they were told to avoid bringing hard objects close to the blades. On 30.7.2014 he assigned the claimant the duty of cutting grass using the said machine but he used it recklessly and severely damaged it. When RW1 took the machine to the dealer, the warranty was dishonoured because the damage was caused by the claimant's negligence. RW1 therefore begun a journey of buying spare parts and repairing the machine which took three months to complete, at a cost of kshs 15481

11. In the meanwhile RW1 stated that he called the claimant to his office on 31.7.2014 and explained to him the offence he had committed and in his defence he stated that the machine hit a coconut. RW1 was however not satisfied with the defence and he dismissed the claimant by the letter dated the same date. Thereafter he calculated his dues including kshs 13000 as salary in lieu of notice plus kshs 5984 being 14 days leave less kshs 1000 advance plus kshs 15000 being cost of repairing the damaged machine. He therefore paid kshs1806 to the claimant through his bank.

12. RW1 denied the claimant's claim save for the leave which he admitted that it was 35 days outstanding but he paid for only 14 days. He offered to pay the balance of kshs 8961. He further admitted that the claimant was working 4 hours overtime but was paid kshs 2000 per month for two hours overtime daily. He offered to pay the balance of kshs 3285 equaling to kshs 12246. Finally he contended that the claimant refused to receive his Certificate of service.

13. On cross examination, Rw1 admitted that there were 4 other gardeners in her establishment all of whom used the new Lawn mower. He however denied that the damage was accidental and contended that the claimant ought to have surveyed the ground before starting the work. RW1 was however unable to produce any evidence to prove that the dealer had rejected the warranty. He also did not produce the receipts to prove the amount it costed him to repair the machine.

14. RW1 admitted that he called the claimant alone to his office on 30.7.2014 and explained the offence to him. He contended that the other employees had no business accompanying the claimant to the meeting. Finally he admitted that he made error while calculating the claimant's terminal dues.

### **Analysis and Determination.**

15. There is no dispute that Cw1 was employee of the respondent from 2.1.2013 to 31.7.2014 when he was dismissed. The issue, for determination are whether the termination of the claimant's employment was wrongful and unfair, and whether the reliefs sought should be granted.

### **Wrongful / unfair Termination.**

16. Under section 45 (2) of the Employment Act ( EA), termination of employment is unfair if the employer fails to prove that it was founded on a valid and fair reason and that it was done after following fair procedure. A fair hearing under section 41 entails explaining the reason for the intended dismissal to the employee in the company of a fellow employee or shop floor union representative of his choice and thereafter allowing them to air their representations in defence for consideration before the termination is decided. Such proceedings must be conducted in a language of the employees understanding.

17. In this case there is no evidence adduced by the defence to prove that Cw1 used the machine in a reckless manner. The RW1 was not present when the machine broke down and no eye witness testified against the claimant. In addition RW1 admitted in evidence that Cw1 was never invited to any hearing to defend himself in the company of a fellow employee of his choice as required under Section 41 of the Act. Consequently the court finds on a balance of probability that the claimant was unfairly and wrongfully terminated within the meaning of section 45 of the Act

### **Reliefs**

18. In view of the foregoing finding that the termination of the contract was unfair and wrongful I award the claimant kshs 15000 being one month plus kshs 60000 being 4 months' salary compensation for the wrongful and unfair termination of his contract of service. In awarding the said compensation I have considered the fact that the claimant expected to serve the remainder of the term of his fixed term contract. In this case the claimant had 5 months remaining before his contract expired.

19. The claimant will also get pay in respect of leave days for the period served from January 2013 to July 2014. The contract of employment provided for 21 annual leave days. RW1 admitted that the total leave days were 35 calculated using the basic pay he will therefore get  $ksh\ 10000 \times 35/26 = Ksh\ 13461.55$ .

20. The claim for over time has also been admitted by the RW1 at the rate of kshs 3285 and a total sum of kshs 12246. It is however not clear how he arrived at that figure. In my view the hourly wage was  $kshs\ 13000 / 26 = kshs\ 500/8 = 62.50$ . The daily overtime pay was therefore  $kshs\ 62.50 \times 4 = kshs\ 250$  equaling to kshs6500 per month. The claimant was paid kshs 2000 leaving kshs 4500 per month. The claim is for 17 months but RW1 stated that the said overtime was never done during the school holiday. It is common knowledge that schools in Kenya go for holidays in April, August and December. In calculating the overtime I will therefore omit August 2013, December 2013 and April 2014. Thus  $kshs\ 4500 \times 14$  equals to kshs 63000.

21. The claim for pension contribution is allowed to the extent that the employer is directed to have the claimant's pension paid to him as per the contract of employment and the pension scheme rules and without any loss.

### **Disposition.**

22. For the reason stated above judgment is entered for the claimant for the sum of Ksh 151461.55 less paid kshs 1806 equaling to kshs 149655.55 plus costs and interest. He will also be issued with a certificate of service.

**Signed, Dated and Delivered at Mombasa this 16 day of June 2017.**

**ONESMUS MAKAU**

**JUDGE**