



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 581 OF 2015

EMMANEL THOYA KATANACLAIMANT

VERSUS

KASSAM HAULIERS LTDRESPONDENT

J U D G M E N T

INTRODUCTION

1. This is claim for terminal benefits plus compensation for unfair termination of the claimant's contract of employment by the respondent on 27/5/2015. The respondents admits that she employed the claimant between 20/10/2012 and 27/5/2015 as a Administration Clerk earning ksh20000 per month but she denies the allegation that she unfairly terminated the employment contract. It is the defence case that she summarily dismissed the claimant for his perpetual poor and unprofessional performance of his duties.

2. The suit was heard on 12/10/2016 when the claimant testified as CW1 but the respondent did not attend court for the hearing. After the hearing only the claimant filed written submissions.

CLAIMANT'S CASE

3. CW1 testified that on 27/5/2015, he attended work as usual. While on his duty at this station, the respondent's director Mr. Hussein Kassam approached him calling him a dog and ordered him to leave the respondent's premises. CW1 then went to see the respondent's HR Manager who paid him sh21000 and directed him to vacate the office because his services had been terminated.

4. CW1 contended that he had worked very well without any issues with the employer. He described his summary dismissal as unfair and unlawful because there was no valid reason to justify it, and that he was not given any hearing before the same. He therefore prayed for compensation, his terminal dues and certificate of service.

ANALYSIS AND DETERMINATION

5. There is no dispute that the claimant was employed by the respondent as Administration Clerk from 20/10/2012 till 27/5/2015 when he was summarily dismissed. The issues for determination are:

- (a) Whether the summary dismissal was unfair.
- (b) Whether the reliefs sought to issues.

Unfair termination

6. Under Section 45(2) of the Employment Act, termination of employment contract by the employer is unfair if the employer fails to prove that the termination was grounded on a valid and fair reason and that it was done after following a fair procedure. According to the defence filed, the reason for the summary dismissal the claimant's perpetual unprofessional and poor performance of his duties. The burden of proving and justifying the reason for terminating the contract lies with the employer. The employer never prosecuted his defence during the trial. Under Section 43 of the Act, if the employer fails to prove the reason for the dismissal in a suit like this, the termination becomes unfair within the meaning of Section 45 of the Act.

7. Needless to add, the respondent did not prove she followed a fair procedure. Under Section 41 of the Act, before the employer terminates the services of his employee on ground of misconduct, poor performance or physical incapacity, he must first explain to the employee in a language he understands and in the presence of a fellow employee or shop floor union representative of his choice, the reason for which termination is contemplated and thereafter invite the employee and his chosen companion to air their defence for consideration before the termination is decided in this case.

8. Having found that the respondent has failed to prove that the summary dismissal was done on ground of a valid and fair reason, and that she followed a fair procedure before dismissing the claimant, it is my holding that the dismissal was unfair within the meaning of Section 45 of the Act.

Reliefs

9. Under Section 49 of the Act, I award the claimant ksh.20000 being one month salary in lieu of notice plus ksh.120000 being six months salary as compensation for unfair termination. In making the award for compensation, I have considered the fact that the claimant had worked for the respondent for a fairly long period of about 3 years and that no misconduct was proved against him that contributed to his dismissal.

10. The claim for outstanding house allowance of ksh.70000 is dismissed for lack of evidence and particulars. In his evidence, the claimant testified that his salary was reviewed upwards after some unspecified time. He cannot therefore claim a uniform amount. He is however awarded service pay for every completed year of service at the conventional rate of 15 days pay per year. He served for only 2 complete years and he will therefore get ksh.20000.

11. Finally the claimant is awarded the prayer for certificate of service because that is his right under Section 51 of the Act.

DISPOSITION

12. For the reason that the summary dismissal of the claimant was unfair, I enter judgment for him in the sum of ksh.160000 plus costs and interest. Certificate of service will also be issued to him.

Dated signed and delivered this 9th June 2017

O. N. Makau

Judge