



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 375 OF 2016

NASORO OMAR MOHAMMED.....CLAIMANT

VERSUS

KWALE INTERNATIONAL SUGAR CO. LTD.....RESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's services by the respondent on 8/11/2015. The respondent has denied liability for unfair termination and averred that the claimant was a casual employee and as such he was not entitled to prior notice or fair hearing before terminating his services. In addition the respondent avers that the claimant grossly misconducted himself by siphoning and stealing fuel from the respondent's tractor which offence warranted automatic summary dismissal. Finally the respondent has denied the reliefs sought by the claimant on the aforesaid reason that the claimant was a casual employee who lacked the right to such benefits under the law.

2. The issues for determination are:

- (a) Whether the claimant was a casual employee at the time of his termination.
- (b) Whether the termination was unfair.
- (c) Whether he is entitled to the reliefs sought.

3. The suit was disposed of by written submissions on the basis of the pleadings, documentary evidence and witness statements filed.

CLAIMANT'S CASE

4. The claimant stated that he was employed by the respondent on 9/9/2008 as a driver earning ksh.350 per day. He worked continuously until the night of 7/11/2015 when he was confronted by two guards at 2.00 hours. while going to fetch water and they accused him of stealing fuel. He produced NSSF and NHIF statement to prove continuous employment.

5. On 8/11/2015, Mr. Befkadu told him to see the HR Manager. When he went to see the HR manager he was told that he was caught stealing fuel and therefore he should go home until further notice. That way he lost his job and went away without payment of his terminal benefits.

6. The claimant contended that the termination of his services was unfair because he was not given prior notice or any hearing as required by the law. He further contended that the termination was unfair because he was denied certificate of service.

DEFENCE CASE

7. The respondent called two witnesses who filed witness statements. The first was Mr. Kennedy Sila, security officer and the second one was Martin Muchiri, legal officer. Mr. Sila stated that his security department got information that some of the respondent's employees were siphoning fuel at a neighbouring Guram farm. The respondent's security office decided to lay ambush on the night of 7/11/2015. The team was led by Mr. Abdulswaleh Galgalo. At around 1.30 hours a tractor was spotted leaving the respondent's farm and heading to Guram farm and entered the manager's residence. The security team approached and found the driver siphoning fuel from the tractor but they were denied entry by Guram Farm security until they used another route to enter.

8. By the time they reached the scene a motorcycle had come to the main gate and fled with 20 litre jerrycan and the guard for Guram farm. They however found the claimant and the tractor at the scene. They also saw fuel spillage and noticed that the claimant had a master key to ignite the tractor. The team escorted the claimant to his supervisor Mr. Sino who confirmed that the claimant had no permission to drive out of the respondent's farm.

9. Mr. Muchiri stated that the claimant was a casual employee whose wages were paid on weekly basis. He further stated that the claimant was caught stealing by siphoning fuel from the respondent's tractor in a residential area at night. He further stated that after interrogation, he failed to explain his mission at the residential area and with a master key for igniting the tractor. On further investigation, his supervisor confirmed that the claimant had no permission to drive out of the respondent's farm. According to Mr. Muchiri, the claimant committed misconduct contrary to terms of his engagement, company policies and procedures and thereby his termination was not unfair.

ANALYSIS AND DETERMINATION

10. There is no dispute that the claimant was employed by the respondent earning ksh.350 per day but paid on weekly basis. There is also no dispute that the claimant was summarily dismissed by the respondent on 8/11/2015 for the alleged theft of fuel on the night of 7/11/2015. I will therefore proceed to determine the issues outlined herein above.

Casual employee or otherwise

11. The claimant contends that although he was employed on casual basis, his contract had by dint of Section 37 of the Employment Act converted to regular terms contract. The respondent however avers that the claimant was a casual employee who was hired as and when the need arose. After considering the NHIF and NSSF statements produced as exhibits by the claimant and which were not contested by the respondent, it is clear that the claimant served continuously and his NHIF and NSSF deductions were remitted continuously on regular monthly basis. Consequently, I find and hold that the claimant has proved on a balance of probability that he worked for the respondent as a casual employee continuously from October 2008 till November 2015 when he was dismissed and by dint of Section 37(1) and (3) of the Act his contract converted to a term contract.

12. Section 37(1) of the Act provides that if a casual employee works for an aggregate working days equal to one month, his contract converts to a term contract that is terminable by 28 days in writing or salary in lieu of notice. Subsection (3) then provides that if after the conversion the employee continuously works for a number of days equal to two months from the date he started working on casual basis, the terms and conditions of service converts to those of term contract under the Act as if he never started as a casual employee.

Unfair termination

13. Under Section 45(2) of the Act, termination of employment of an employee is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case, the reason for termination was theft of fuel from the respondent's tractor. He had done so by driving out of the respondent's farm without permission. The claimant denied that he siphoned fuel from the tractor and contended that he had gone to fetch fresh water.

14. The evidence by the two defence witnesses that the claimant committed the theft of fuel is inadmissible because it was hearsay. The said witness stated that they heard it from a security team which laid an ambush and caught the claimant in the act. The two witnesses were not in the team that laid the ambush. I therefore find that the reason for termination was not proved as required by Section 43 and 45(2) (a) and (b) of the Act.

15. In addition to the foregoing the respondent has also failed to prove that she followed a fair procedure before dismissing the claimant for the alleged misconduct of theft. Under Section 41 of the Act, before the employer terminates the services of his employee on ground of misconduct, he is required to first explain the reason to the employee in a language he understands and in the presence of a fellow employee or shop floor union representative of his choice and thereafter invite the employee and his chosen companion to air their representations for consideration before the termination is decided.

16. In this case the respondent has admitted in her defence that the claimant was a casual employee and was not entitled to any prior notice or fair hearing before terminating his services. The respondent having failed to prove both the substantive and procedural fairness, it is my opinion that the dismissal of the claimant from service was unfair within the meaning of Section 45 of the Act.

Reliefs

17. Under Section 49 of the Act, I award to the claimant ksh.9100 being one month salary in lieu of notice as prayed. I also award him ksh.91000 being ten month salary and compensation for unfair termination. In awarding the compensation, I have considered his long service of 7 years to the respondent.

18. I further award him ksh.51450 being leave earned for the 7 years of service at the rate of 21 days per year as provided under Section 28 of the Act. In making the claim for leave, I have dismissed the defence contention that the claimant was a casual employee without any right to annual leave. I have also dismissed the contention that the only entitled to a maximum of 3 years.

19. I however dismiss the claim for service pay because the claimant was a beneficiary of the NSSF as per NSSF statement produced as exhibits. Under Section 35(6) of the Act, an employee who is a beneficiary of pension, gratuity or other social security scheme is disqualified from claiming service pay.

DISPOSITION

20. For the reason that claimant was unfairly dismissed, I enter judgement for him in the sum of ksh.151,500 plus costs and interest.

Dated, signed and delivered this 28th July 2017

O. N. Makau

Judge