



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 382 OF 2016

JACKSON MAKAU KASWICLAIMANT

VERSUS

R.D. PATEL1ST RESPONDENT

STEEL MAKERS LIMITED2ND 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 contract of service by the respondents on 8/2/2016. The respondents have denied liability for the alleged unfair termination and averred that it is the claimant who voluntarily left his employment on 8/2/2016.

2. The claim against the first respondent was withdrawn on 17/11/2016 when the suit was mentioned for pretrial directions. Thereafter the parties agreed to dispose the suit by written submissions on the basis of the pleadings, documentary evidence and their witness statements.

3. The issues agreed for determination are:

(a) Whether the claimant was unfairly terminated by the respondent.

(b) Whether the claimant is entitled to the reliefs sought.

(c) Who bears the costs of the suit.

CLAIMANT'S CASE

4. The claimant states that he was employed by the respondent in January 2011 as a mechanic earning a daily wage of ksh.596. In April 2016 he was informed by his supervisor that his job had been terminated. No valid reason was given for the termination and no prior notice was served on him. He therefore prays for terminal and contractual benefits for long service. He produced NSSF statement which proves that his employer regularly remitted NSSF contribution on his behalf upto January 2016.

DEFENCE CASE

5. The respondent's supervisor in the vehicle mechanic Department Mr. Yunis Daud filed a witness statement on behalf of the defence on 28/7/2013. He stated the claimant was employed by the respondent as a causal helper in the motor vehicle mechanical department. He contended that the claimant's duties included helping the mechanic with such duties as were assigned to him in his department or any other.

6. He stated that on 8/2/2016, the claimant reported to work as usual at 8.00am but instead of going to his work station he went to wash his uniform. When he told the claimant to go back to his work station, and do his assigned job, he became unnecessarily rude and walked away in huff. Mr. Daud reported the matter to the management for the necessary action to be taken against the claimant. He however did not know whether the claimant was dismissed or not but he never saw him report back to work again. He also never heard from him until when the company was served with summons in this suit.

ANALYSIS AND DETERMINATION

7. There is no dispute from the pleadings that the claimant was employed by the respondent from January 2011 till 8/2/2016. The said position is corroborated by the NSSF statement produced by the claimant which show that the last remittance by the respondent on behalf of the claimant was in January 2016. I therefore proceed to answer the aforesaid issues agreed by the parties for determination.

Unfair termination

8. The claimant alleges that he was unfairly terminated on 8/2/2016 because there was no valid reason for termination and no prior notice was served. He therefore avers that the termination was in contravention of Section 41, 43,45 and 47 of the Employment Act. The respondent however denies the alleged termination and maintains that it is the claimant who walked away from his work after his supervisor told him to stop washing his uniform and proceed to do the duty assigned to him.

9. I have carefully considered the evidence before the court and the submissions by counsel and the law. Under Section 47(5) of the Act, the burden of proving unfair termination lies with the employee who alleges to have been so terminated. In this case the claimant has alleged that he was terminated by his supervisor. The supervisor has admitted that he had an altercation with the claimant on 8/2/2016 and the claimant walked away from work. On a balance of probability, I find that the claimant was terminated by the supervisor on 8/2/2016. He had reported to work on that day ready to work but he was terminated after disagreement with the supervisor. Under Section 47(5), the burden of proof shifts to the respondent to justify the termination.

10. 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 respondent never took effort to prove the reason for the termination or the fairness of the procedure followed before terminating the claimant's services. Instead defence witness spent all his effort explaining that the claimant deserted work after he rudely refused to take instructions. The failure by the respondent to prove a valid and fair reason for terminating the services of the claimant and the failure to prove that a fair procedure was followed, has rendered the termination unfair within the meaning of Section 45 of the Act.

Reliefs

11. Under Section 49 of the Act I award the claimant Ks.14794 being one month salary in lieu of notice plus Ksh.88764 being six months salary as compensation for unfair termination. The reason for awarding the said compensation is that the claimant had worked for the respondent for fairly long time and had the expectation to continue working and earning an income.

12. I also award him leave for 5 years at the rate of 21 days pay per year equaling to Ksh.59745. The claim for service pay is however dismissed because the claimant was beneficiary of NSSF and as a member of NSSF he is disqualified to claim service pay under Section 35(6) of the Act.

DISPOSITION

13. For the reason that the claimant was unfairly dismissed from work, I enter judgment for him in the sum of ksh.163,303 plus costs and interest.

Dated, signed and delivered this 28th July 2017

O.N. Makau

Judge