



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 454 OF 2015

VICTOR OUMA OTIENO.....CLAIMANT

VERSUS

COOL XTREME LIMITED .....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 employment contract by the respondent on 30/4/2014. The respondent has however denied the alleged unfair termination and averred that it is the claimant who terminated his employment without any prior notice after a report of theft was lodged against him at Changamwe police station.

2. The suit was heard on 29/3/2017 when the claimant testified as CW1 but the respondent never attended court to prosecute the defence. After the hearing the claimant filed written submissions.

CLAIMANT'S CASE

3. CW1 stated that he was employed by the respondent on 1/6/2013 and the payslip for June 2013 as exhibit to support his case.

4. On 30/4/2014, he reported back to work after release by the police where he had been detained for investigations in relation to a report of theft of copper wire made against him by the respondent. He maintained that the alleged theft was not true and the copper wire in question did not even belong to the respondent.

5. CW1 further explained that on reporting back to work on the said day, he was informed that his services had been terminated for his attempt to steal copper wire. He produced the termination letter dated 30/4/2014 as exhibit. He contended that the termination of services was unfair because it was done without giving a fair hearing as required under section 41 of the Employment Act. He therefore prayed for compensation for the unfair termination and other reliefs prayed for in the suit.

ANALYSIS AND DETERMINATION

6. There is no dispute that claimant was employed by the respondent from 1/6/2013 until 30/4/2014. The issues for determination are:

(a) Whether the claimant was unfairly terminated or he deserted work.

(b) Whether the reliefs sought should grant.

### **Unfair termination or desertion**

7. Under Section 45(2) of the Act, termination of employment by the employer is unfair if he fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. Under Section 47 of the Act, the said burden of proof only accrues if the claimant alleges and proves on a balance of probability that the said essential elements of unfair termination existed in his termination.

8. In this case, the claimant alleged that he was terminated without first being accorded a fair hearing to defend himself against the charges of attempted theft of copper wire which was cited as the reason for his termination. He also denied the validity of the alleged offence and contended that he was released by the police without any criminal charges after investigations revealed that the alleged theft was not substantiated.

9. Without any evidence to the contrary, I am satisfied that the procedure followed before terminating the claimant's services was not in consonance with the procedure provided under Section 41 of the Act. The said section requires in mandatory terms that before terminating the services of an employee on ground of misconduct, physical incapacity or poor performance, the employer must first explain to employee in a language he understands and in the presence of a fellow employee or shop floor union representative of his choice the reason upon which termination of his services is contemplated and thereafter invite the employee and his chosen companion to air their defence for consideration before the termination is decided. There is no doubt that in this case the defence has not adduced any evidence to prove that the foregoing mandatory procedure was followed.

10. As regards the reason for termination, there is no doubt that it was stated in the termination letter as attempted theft of copper wire. There is no dispute that the claimant admitted the offence by signing on the termination letter acknowledging that he indeed attempted to steal the copper wire. The letter was produced by the claimant as his exhibit. He however did not plead or testify that he signed the letter through any mistake, misrepresentation, coercion or undue influence from the employer. The court therefore makes an inference that the letter was signed voluntarily by the claimant and the denial of the offence in this suit is therefore an afterthought. It is also my finding from the said termination letter dated 30/4/2014 that allegation by the defence that it is the claimant who terminated his own employment by absconding work to be untrue.

11. Flowing from the finding above that the respondent has failed to prove that she followed a fair procedure before terminating the claimant for his misconduct, as required by Section 45(2) of the said Act, I now hold that the termination was unfair.

### **Reliefs**

12. Under Section 49 and 50 of the Act, I award the claimant ksh.15000 being one month salary in lieu of notice plus ksh.45000 being 3 months salary as compensation for unfair termination. In awarding the said compensation, I have considered the fact that the claimant had served for a fairly short period of ten months.

13. However the claims for overtime and public holidays worked are dismissed for want of particulars and evidence. Likewise the claim for unpaid leave is dismissed for lack of particulars, evidence and legal basis. I wonder what is an employee's legal right to the alleged unpaid leave.

14. Finally the claim for certificate of service is allowed because it is a right under Section 51 of the Act.

### **DISPOSITION**

15. For the reason that the claimant's employment contract was unfairly terminated, I enter judgment for him in the sum of ksh.60000 plus costs and interest. The claimant will also have a certificate of service as prayed.

**Dated, signed and delivered this 21<sup>st</sup> July 2017**

O.N. Makau

Judge