



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1259 OF 2014

EVANS ACHIMBA.....CLAIMANT

VERSUS

WANANCHI CLOTHING FACTORY (K) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Evans Achimba, the Claimant in this case, worked as a tailor for Wananchi Clothing Factory (K) Limited from January 2010 until 22nd October 2013, when his employment was terminated. He brought this claim seeking compensation for unfair termination of employment. The claim is contained in a Statement of Claim dated 30th July 2014 and filed in court on even date. The Respondent filed a Memorandum of Reply on 20th August 2014 to which the Claimant responded on 26th September 2014.

2. At the interlocutory stage, the Respondent raised a preliminary objection to the claim on the ground that the Claimant had, by a discharge voucher dated 2nd November 2013, waived his right to come to court. In a ruling delivered on 22nd January 2016, this Court overruled the objection and the matter therefore proceeded to full hearing. The Claimant testified on his own behalf and the Respondent called Stephen Kigunzu, Benson Oketch Ojwach and Shabbir M.A. Anjarwalla. Both parties filed written submissions.

The Claimant’s Case

3. The Claimant states that he entered into an oral contract of service with the Respondent in January 2010 by which he was employed as a tailor, on piece work basis. He was required to stitch different types of protective clothing for which he was paid a respective piece rate.

4. The Claimant’s wages were paid at the end of every week, in proportion to the number of pieces stitched. He pleads that his average daily wages fell below the statutory rate of Kshs. 799.05. He was paid a daily house allowance rate of Kshs. 83.30 which also fell below the statutory rate of 15%.

5. On 22nd October 2013, the Claimant was summarily dismissed on allegations of gross misconduct, which he denies. He states that he was not given an opportunity to be heard, prior to the dismissal. He contends that the dismissal was unlawful and unfair and claims the following:

- a) 1 month’s pay in lieu of notice.....-Kshs. 19,093.00
- b) Annual leave for 4 years.....-61,097.60

- c) Underpayment for 4 years.....-333,030.40
- d) Gratuity for 4 years.....-11,985.75
- e) 12 months' salary in compensation.....-229,116.00
- f) Certificate of service
- g) Costs

The Respondent's Case

6. In its Memorandum of Reply dated 19th August 2014 and filed in court on 20th August 2014, the Respondent admits having employed the Claimant as a machinist from May 2010 until 22nd October 2013. The Respondent states that its agreement with the Claimant was that he would be paid on an all inclusive weekly basis in proportion to the work done. The Respondent adds that the daily rate paid to the Claimant was above the applicable minimum wage.

7. The Respondent pleads that during his employment, the Claimant became rude, violent, abusive and uncooperative and that he continuously absented himself from duty, without valid reason. The Respondent accommodated the Claimant's behaviour for a long time until 19th October 2013, when he became extremely rude and abusive towards the Respondent's Director.

8. The Respondent further states that upon being asked to sign a warning letter and a voucher confirming his unauthorized absence from work, the Claimant tried to lead and influence the other workers to violence, thus necessitating intervention by the police. As a result of the Claimant's behaviour, he was summarily dismissed on 22nd October 2013. He was paid all his dues which he duly acknowledged.

9. The Respondent goes on to state that the Claimant lied to the police that he had been assaulted by the Respondent's Director leading to the Director's arrest. It is the Respondent's case that the Claimant used the police to threaten and intimidate its Director, thus forcing the Respondent to make a further payment to the Claimant on 2nd November 2011.

10. It is the Respondent's case that the Claimant's dismissal was lawful and fair and the claim is therefore without merit.

Findings and Determination

11. There are two (2) issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Dismissal

12. The Claimant was dismissed by letter dated 22nd October 2013, stating as follows:

"Re: Summary Dismissal

Following your very rude and irresponsible behavior on Saturday the 19th of October 2013 and your subsequent abuse to the director, the management has decided to dismiss you summarily.

We hereby give you final dues as under

1. 5 pieces of overalls light blue (half done) @ 78.40 = 392.00

2. Payment for Monday the 22nd October-450.00

3. House allowance one day-83.30

4. Balance of accrued leave seven days-3150.00

5. House allowance-583.10

TOTAL-4658.60

DIRECTOR

SHABBIR ANJARWALLA”

13. This letter accuses the Claimant of gross misconduct. In denying the accusation, the Claimant told the Court that he had been victimized for presenting the grievances of all the workers to the Respondent's management. He also averred that he had been assaulted by the security guards, on the instructions of the Respondent's Director, Shabbir Anjarwalla.

14. In the course of the proceedings, the Court watched an audio visual recording of the events of 19th October 2013, submitted by the Respondent. The Claimant did not object to the content of the recording in which he identified himself speaking loudly and banging a table. He also admitted calling the Respondent's Director, Shabbir Anjarwalla, 'stupid'. On the basis of this evidence, the Court reached the conclusion that the Respondent had a valid reason for dismissing the Claimant as required under Section 43 of the Employment Act, 2007.

15. The Court however noted that in effecting the dismissal, the Respondent failed to observe the procedural fairness requirements set out under Section 41 of the Act.

Remedies

16. In light of the foregoing, I award the Claimant one (1) month's salary in compensation. In making this award I have taken into account the Claimant's length of service as well as his conduct prior to the dismissal. I further award him one (1) month's salary in lieu of notice. In tabulating these claims, the Court adopts the figure of Kshs. 15,999 as the Claimant's monthly salary. This figure is derived from the daily wage of Kshs. 533 admitted by the Respondent in the dismissal letter dated 22nd October 2013.

17. With regard, to the claim for leave pay for the entire four (4) years of service, the Respondent produced a document titled '*Daily Production and Paying Slip*' showing days worked and leave days taken. From this document, which the Claimant did not contest, it is evident that the Claimant took some leave days and in the absence of details of the actual days claimed as unutilized leave, the Court finds that this claim was not proved and is dismissed. Similarly, no basis was laid for the claims for underpayment and gratuity which are also dismissed.

18. Finally, I enter judgment in favour of the Claimant in the sum of Kshs. 31,998 being 1 month's salary in compensation and 1 month' salary in lieu of notice.

This amount will attract interest at court rates from the date of judgment until payment in full.

19. Each party will bear their own costs.

20. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 29TH DAY OF
SEPTEMBER 2017**

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JUDGE

Appearance:

Evans Achimba (the Claimant in person)

Mr. Itonga for the Respondent