



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 881 OF 2016
NDUMBULAI LEMOMO OLEIKIPIA.....CLAIMANT
VERSUS
MARINE POWER HOUSE LIMITED.....RESPONDENT

J U D G M E N T

I N T R O D U C T I O N

1. The claimant brought this suit on 16/11/2016 claiming ksh.1,353,990 as terminal dues plus compensation for unfair termination of his contract of service by the respondent on 20/7/2016. The respondent has however denied the alleged unfair termination and averred that the termination was fairly done by giving the claimant one month notice due to his gross misconduct. She further averred that all his terminal dues were paid save for ksh.3738 still owing on account of leave and off days not utilized. The issues for determination herein relate to unfair termination of employment and remedies for any unfairness proved. The suit was heard on 9/6/2017 when each side called one witness and thereafter filed written submissions.

CLAIMANT'S CASE

2. The claimant testified as the CW1. He stated that he joined the respondent on 19/9/2001 as a Security Supervisor at Kijipwa then transferred to Funzi after 2 months. Initially the contract was oral but from 1/10/2012 he was given a written contract. His salary was ksh.20000 per month and he was allocated a house by the employer.

3. On 19/6/2016 he went on leave for one month and was to report back on 18/7/2016. On 20/7/2016 while on duty he received a phone call from the respondent's client Mr. Mwachia telling him not to report back to work. Upon enquiry of the reason for being terminated, Mr. Mwachia referred him to Ms Claudia one of the respondent's Directors, his calls to her were in vain. He also unsuccessfully tried to reach the other director. He therefore contended that termination was unfair because it was without any justifiable reason and he was not accorded prior hearing.

4. He prayed for the reliefs sought in the claim. He admitted that after the dismissal he was paid ksh.3600. He also admitted that he was given leave in 1 ½ years.

RESPONDENT'S CASE

5. Ms. Claudia Toriani testified for the respondent as RW1. She admitted that the claimant was employed

by the respondent for a salary of ksh.20794 but contended that he started working there from 1/10/2012. She also confirmed that the claimant went on one month leave from 19/6/2016 and he was to report back on 18/7/2016. However the claimant never reported back on 18/7/2016 as required and on 20/7/2016 she instructed Mr. Mwachia to call him but he never resumed work until August when he came back for his money. She however allowed him back to the Funzi Island because his fellow Maasai there were baying for his blood for sexually abusing their wives and also for extorting money from them. She contended that the claimant was paid all his dues by Mr. Mwachia save for ksh.3738 in respect of leave. She contended that the claimant had encashed much of his leave and off days and maintained that NSSF was remitted on behalf of the claimant.

ANALYSIS AND DETERMINATION

6. There is no dispute that the claimant was employed by the respondent as a Security guard vide letter of appointment dated 1/10/2012. There is also no dispute that the claimant went on leave for one month from 19/6/2016 and never reported back until 20/7/2016 when he received a phone call from the respondent's clerk Mr. Mwachia informing him not to report back to work. The issues for determination are:

(a) whether the claimant's services were unfairly terminated by the respondent.

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

Unfair termination

7. Under Section 45(2) of the Employment Act, termination of employment contract by the employer is unfair if the employer fails to prove that it was grounded on valid and fair reason and that it was done after following a fair procedure. In this case Rw1 stated that the claimant was terminated for absconding duty and on ground of his personal safety. She contended that the claimant failed to report back from leave on 18/7/2016. She further contended that his fellow Maasai men on the Funzi Island were baying for his blood for alleged extortion of money and sexual harassment of their wives. Consequently according to the Rw1, she instructed Mr. Mwachia to call the claimant and tell him not to sail to Funzi Island and instead wait for his dues at the mainland. The claimant has denied the alleged misconduct and contended that he was terminated unfairly without any valid reason and without being accorded a hearing.

8. After careful consideration of the evidence and submissions presented to the court, I am satisfied that the respondent has proved a valid and fair reason for terminating the services of the claimant under Section 44(4) (a) of the Act because he absented himself from work without leave or any other lawful cause from 18/7/2016 to 20/7/2016. The claimant admitted in evidence that he was not on duty on 20/7/2016 when he received a phone call from Mwachia telling him not to report back to work.

9. However, I find that the procedure followed to terminate his services was unfair and was not in accordance with Section 41 of the Act. The said section provides that before terminating the contract of service of an employee on ground of misconduct, under Section 44 of the Act, poor performance or physical incapacity, the employer must explain to the employee in a language he understands and in the presence of fellow employees or shop floor union representative, the reason for which termination is contemplated and thereafter accord the employee and his chosen companion of choice to air their representations for consideration before the termination is decided. In this case the respondent has not proved on a balance of probability that the foregoing procedure was followed before terminating the services of the claimant. Consequently, I find and hold that failure to follow a fair procedure rendered the termination of the claimant's contract of service unfair.

Reliefs

10. Under Section 49 of the Act, I award the claimant ksh.20000 being one month salary in lieu of notice, plus ksh.120000 compensation for unfair termination. In awarding the said compensation I have considered the fact the claimant contributed to his termination through misconduct.

11. The claim for house allowance is dismissed because the claimant admitted in evidence that he was given staff house by the employer. The claim for public holiday worked lack particulars and evidence to substantiate. However, I award him ksh. 3738 which was admitted by the RW1 in evidence. The claim for unremitted NSSF deduction for the period 2001-December 2011 is dismissed for being time barred by dint of Section 90 of the Act which limits the life of a claim founded on employment contract to 3 years. The period in question ended in December 2011 while the suit was commenced on 16/11/2016, more than 4 years after the cause of action arose. Finally the claim for accrued leave is also dismissed for want of particulars and evidence. CW1 admitted in evidence that he went for leave in 1 ½ years. He also not pleaded that crucial fact in his claim. He has left that to the court to guess how much leave has accrued. I will not do that. Instead I hold that the claimant went for some leave and encashed other days which he has deliberately failed to plead and substantiate.

DISPOSITION

12. For the reasons that the services of the claimant were terminated unfairly, I enter judgment for him in the sum of ksh.143,738 plus costs and interest.

Dated, signed and delivered this 17th November 2017

O. N. Makau

Judge