



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1481 OF 2015

SILA PAUL.....CLAIMANT

VERSUS

KENYA BUILDERS & CONCRETE COMPANY LTD.....RESPONDENT

JUDGMENT

Introduction

1. Sila Paul was an employee of Kenya Builders & Concrete Ltd, from 16th January 2013 until 9th October 2014. He brought this claim following the termination of his employment. The claim is contained in a Statement of Claim dated 20th August 2015 and filed in court on even date. The Respondent filed a Memorandum of Defence on 28th October 2016.

2. At the hearing, the Claimant testified on his own behalf and the Respondent called Justus Katuta. Both parties also filed written submissions

The Claimant's Case

3. The Claimant states that he was employed by the Respondent on 16th January 2013, as a casual labourer, at a daily rate of Kshs. 510. He was confirmed in his position at a monthly salary of Kshs. 13,530, effective May 2014. The Claimant avers that he worked from 7.30 am to 4.30 pm, Monday to Saturday, without leave and overtime compensation.

4. The Claimant avers that on 8th October 2014, he sought clarification on overtime payment from the Respondent's Paving Production Supervisor, aMr. Garnsham. Instead of answering the Claimant, Garnsham slapped the Claimant and ordered him back to work. The Claimant started experiencing headaches and therefore decided to go home and rest.

5. Upon reporting to work on 9th October 2014, the Claimant was told by Garnsham, together with the Human Resource Manager, Jeremiah Nzioka to hand over his overall to one Paul Muli. He was notified that he had been summarily dismissed.

6. It is the Claimant's case that his dismissal was actuated by malice and was in breach of the Respondent's statutory duty. His claim is as follows:

- a) A declaration that his dismissal was unlawful and unfair

- b) Salary for the month of October 2014.....Kshs. 13,530.00
- c) 1 month's salary in lieu of notice.....13,530.00
- d) Unpaid annual leave (2013).....9,471.00
- e) Unpaid annual leave (2014).....9,471.00
- f) Overtime compensation.....14,048.40
- g) Costs plus interest

The Respondent's Case

7. In its Memorandum of Defence dated 26th October 2016 and filed in court on 28th October 2016, the Respondent admits having employed the Respondent as a general worker, at a monthly basic salary of Kshs. 9,830 plus a house allowance of Kshs. 3,700, effective 1st July 2014.

8. The Respondent states that the Claimant was dismissed for gross misconduct on 10th October 2014. The Claimant had been issued with previous warnings.

9. While denying the Claimant's claim for overtime compensation, the Respondent states that its working hours ran from 7.30 am to 4.30 pm, from Monday to Saturday. The Claimant therefore never worked overtime.

10. The Respondent further states that the Claimant, either took his annual leave or was paid in lieu thereof. Upon dismissal, the Claimant's accrued leave was factored into his final dues.

11. On the events leading to the Claimant's dismissal, the Respondent states that on 8th October 2014 at 3.30pm, an hour ahead of close of business, the Claimant removed his overall and approached his supervisor to sign off his attendance card as he wanted to leave. The supervisor asked the Claimant to finish his assigned duties but the Claimant insisted that he had to leave. A heated argument ensued between the Claimant and the supervisor, with the Claimant leaving in a huff.

12. The Respondent states that the Claimant was invited to a disciplinary hearing on 9th October 2014, to show cause why disciplinary action should not be taken against him, for gross misconduct committed the previous day. The Respondent adds that during the disciplinary meeting, the Claimant was rude and aggressive. The Respondent was therefore left with no choice but to summarily dismiss the Claimant.

13. Upon dismissal, the Claimant's final dues were tabulated and issued alongside a certificate of service.

Findings and Determination

14. 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

15. The Respondent produced a dismissal letter addressed to the Claimant, dated 10th October 2014, stating as follows:

"Dear Sir,

RE: GROSS MISCONDUCT

With reference to the incident that happened on 8th October 2014, whereby you came to your supervisor Mr. Garnsham at 3.30pm without your overall wanting him to sign your attendance card. After refusing and telling you to go back to work, you disobeyed him and went home.

From our gate records and the meeting held with you after the incident, it has been established that you have formed a habit of leaving work between 3.30 & 4.00pm for almost a month without permission. You have also been leaving the premises at 10.30am claiming that you are going to clean the staff quarters and returning back at 3.00pm to get your card signed by your supervisor.

In the circumstances thereof, you are hereby dismissed for disobedience and absenting yourself from duty without any permission from your supervisor from the date of this letter.

Your dues will be as follows; 1) Days worked plus any OT worked 2) One year leave pay

Yours Faithfully,

Kenya Builders & Concrete Ltd

(Signed)

JEREMIAH K. NZIOKA

HR& ADMINISTRATION MANAGER

16. The Claimant denied receiving this letter but admitted in evidence that he left work early on 8th October 2014, claiming that he suffered a headache, after being slapped by Garnsham. The question in the mind of the Court is why the Claimant did not escalate his dispute with Garnsham but instead chose to walk away from his place of work, before official closing time.

17. Section 43 of the Employment Act, 2007 requires an employer to establish a valid reason for terminating the employment of an employee. The question then is, what constitutes a valid reason? In **British Leyland UK Ltd v Swift [1981] IRLR 91**, Lord Denning stated as follows:

“The correct test is: was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employer may not have dismissed him.”

18. In **Paul Waigiri Muriuki v Nairobi Water and Sewerage Company Ltd [2015] eKLR** this Court rendered itself as follows:

“When the Court sits it does not ask itself what it would have done had it been in the position of the employer. What it asks is whether given the facts and circumstances of the particular case, the employer acted lawfully and in a reasonable manner.”

19. By his own admission, the Claimant left his place of work without authority and the Court found no justifiable reason for him to have done so. On this account, I find that the Respondent had a valid reason for dismissing the Claimant.

20. The downside is that in effecting the dismissal, the Respondent failed to adhere to the procedural

fairness requirements set out under Section 41 of the Employment Act. In making this finding, the Court rejected minutes of a disciplinary committee meeting held on 9th October 2014, as they were not signed by the Claimant. At any rate, it was evident from the record that the Claimant was not given adequate opportunity to defend himself against the accusations made against him.

Remedies

21. For the foregoing reason I award the Claimant three (3) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service as well as the parties' conduct prior to the dismissal. I further award the Claimant one (1) month's salary in lieu of notice.

22. In response to the claim for leave pay, the Respondent produced a leave application status form showing 25 leave days to the Claimant's credit as at 20th September 2014. These days were paid to the Claimant in cash as evidenced by a discharge voucher signed by him on 27th October 2014. The Claimant was also paid salary for eight (8) days worked in October 2014. These claims are therefore without basis and are dismissed. The claim for overtime compensation was not proved and is dismissed.

23. Overall, I enter judgment in favour of the Claimant as follows:

a) 3 months' salary in compensation.....Kshs. 40,590

b) 1 month's salary in lieu of notice.....13,530

Total.....54,120

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

25. Each party will bear their own costs.

26. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 3RD DAY OF NOVEMBER 2017

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JUDGE

Appearance:

Mr. Gomba for the Claimant

Miss Kamau for the Respondent