



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NUMBER 1081 OF 2012

JAMES OMBOGA ONDAWA.....CLAIMANT

VERSUS

STEEL STRUCTURES LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant averred he was employed by the respondent on 25th March 1982 at the respondent's fabrication department. The appointment was in writing. Under the terms of contract either party was to issue one month's notice of termination or salary in lieu.
2. On 3rd October 2011 the respondent summarily dismissed him which dismissal the client claimed was in complete disregard to the rules of natural justice. At the time of dismissal the claimant averred he was earning Kshs.13,198/= per month.
3. The respondent on its part denied that it unlawfully and in complete disregard to rules of natural justice dismissed the claimant. On the contrary the respondent averred that the dismissal as procedural and lawful and in conforming with the CBA in force.
4. The respondent further averred that the claimant often failed to perform to basic standards and was always subject to disciplinary procedure due to his carelessness and improper performance of his duties.
5. In his oral testimony, the claimant stated that he worked for the respondent from 1996 to October 1995 and left when he unsuccessfully sought salary increment. It was his evidence that he resumed work again in 2010 October. It was the respondent who called him back. His new salary was Kshs.11,000/= and Kshs.2,000/= as housing allowance. He worked for one year and was dismissed.
6. According to him, he had an eye problem. A particle got into his eyes in the course of work. He was taken to hospital but there was no eye doctor for two days so he left the hospital on his own and sought treatment elsewhere. When he resumed work, he was asked how he got the injury and that he later decided to sue for compensation for his injuries. When he resumed work, his relationship with the respondent became bad.
7. The client further stated that he was allocated a truss to fit. In his view, the truss was oversize and he tried to make it fit. When he was done, he was issued with a dismissal letter. He was asked to explain why he was saying the truss was oversize and he did so.

8. Upon termination he was paid his salary for the days worked and leave days.
9. In cross-examination, he admitted he had two previous warnings letters. He further stated he was registered with NSSF.
10. The respondent's witness, Mr. Samuel Mungai stated that he was the respondent's Human Resource and Administration Assistant. It was his evidence that on 23rd October 2011, he reached a disciplinary requisition form from the claimant's supervisor. According to him, the claimant had been assigned work with drawings to fabricate but at the conclusion, the work was not according to drawings and had to be repeated at a cost. A show cause letter was issued to the claimant but he never gave a satisfactory explanation.
11. According to Mr. Mungai the claimant had two previous warning letters. The claimant was therefore summarily dismissed. It was his evidence that before the dismissal there was a discussion with his supervisor.
12. Section 47 (5) of the Employment Act places the onus of proving that an unfair termination of employment or wrongful dismissal has occurred on the employee. The burden of justifying the grounds for termination of employment or wrongful dismissal is on the employer.
13. It is not in dispute that the claimant was assigned some work to do. According to him, he was assigned a truss that was oversize hence he tried to adjust the same to make it fit. The respondent on the other hand averred that the claimant was assigned drawing of a truss to fabricate but on completion, the work was not as per specification and had to be done again at an extra cost.
14. In his pleading filed in court, the claimant averred he was dismissed for no reason at all yet in his evidence and that of the respondent it now emerges he was assigned work to do and there arose a dispute over whether the work was properly done or not.
15. A party is bound by his or her pleadings. It was therefore not open for the claimant to plead he was dismissed for no reason yet there was a reason for such dismissal even if he did not agree with it.
16. The claimant herein was dismissed on account of negligence. Section 44 (4) of the Act permits an employer to dismiss an employee on account of negligence. Under Section 44 (4) (c) a dismissal is lawful if an employee willfully neglects to perform any work which it was his duty to perform or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract to have performed carefully and properly.
17. The claimant initially pleaded he did not know the reason for his dismissal. However, in his evidence in court, he stated that he was allocated a truss which was oversize and he tried to make it fit. The respondent on the other hand stated that the claimant was allocated drawings of a truss to fabricate but at the conclusion thereof, the work was not satisfactory and had to be done afresh.
18. The claimant admitted he had two previous warning letters about his work performance.
19. In the circumstances, the court finds the claimant to be not a witness of truth and he has consequently failed to show that his summary dismissal and the reason therefor was unlawful or unfair. On the other hand, the respondent has ably demonstrated that there was justifiable cause to dismiss the claimant.
20. The claim is therefore found without merit and is hereby dismissed with costs.
21. It is so ordered.

Dated at Nairobi this 1st day of December 2017

Abuodha J. N.

Judge

Delivered this 1st day of December 2017

Abuodha J. N.

Judge