



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.188 OF 2015

(Before D. K. N. Marete)

JEPHTHER ETYANGATA ODERA.....CLAIMANT

VERSUS

KHETIA GARMENT LIMITED.....RESPONDENT

JUDGMENT

This matter came to court vide a Memorandum of Claim dated 11th July, 2015. The issues in dispute are therein cited as;

- a. Whether the claimant was unlawfully, unprocedurally and unfairly summarily dismissed from employment by the respondent;*
- b. Whether the claimant is entitled to compensation for unlawful, unprocedural and unfair termination from employment as prayed for in this memorandum of claim;*
- c. Whether the claimant is entitled to an award of certificate of service;*
- d. Whether the claimant is entitled to an award of compensation for breach of contract and*
- e. Who should pay costs of the suit;*

The respondent in a Respondent's Statement of Defence dated 10th August, 2015 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that at all material times prior to this suit, he was employed by the respondent as a turn boy with effect from February, 2013 and earned Kshs. 8,000.00 as the time of unfair termination. He served diligently and with loyalty until 15th March, 2014 when he was wrongfully and unlawfully orally dismissed without payment of terminal dues. The claimant's further case is that he was targeted for termination when the respondent was served with medical documents calling for light duties for him on ground of injuries sustained on his hands while on duty. It is also his case that he requested for assistance on medical care as a consequence of the accident but the respondent was reluctant in so doing and hence this claim.

He prays for;

i. *One month pay in lieu of notice*

Basic salary Kshs. 9372/=

ii. *Leave due*

1 year leave due

Basic salary Kshs. 9372/=

iii. *Unpaid public holiday*

11 days per yr x yrs worked x basic /30 days

11 days x 1 yr x 9372/30 days Kshs. 3436.4/=

iv. *Unpaid rest days*

4 days x months worked x basic + hse allow/30days Kshs.17244.48/=

v. *Service pay*

15 days x yrs worked x basic/30 days Kshs. 4686/=

vi. *Overtime dues*

45hr pwk

13hrs x6 days= 78hrs -45hrs-330 OT

33hrs x 4wks = 132hrs p.m

132x1.5x9372/195=9516p.m

9516 x 12 months Kshs. 123708/=

vii. *Compensating for unfair termination*

Gross pay x12 months

107777 x 12 months Kshs. 129324/=

TOTAL **Kshs.297,142.88/=**

This is summarized in his penultimate prayers as follows;

a. *Declaration that the dismissal was unlawful, unfair and unprocedural.*

b. *The sum of Kshs.297,142.88/= as set out at paragraph 11 above.*

c. *Certificate of service as per section 51 of the Employment Act.*

d. *Cost of this suit and interests on (b) and (d) above at court rates from time of filing the suit until payment in full and*

e. *Any other further and better relief the Honourable Court may deem just and fit to grant.*

The respondent denies the claim on employment and even pay and further states as follows;

i. There existed no contractual relationship whether written, express, oral and or otherwise between the claimant and the respondent to warrant this cause.

ii. The claimant was never an employee of the respondent and thus invites the claimant for better facts and particulars of this case.

iii. The respondent never in his capacity did it dismiss from and/or refused to pay the claimant his terminal dues.

She denies having been the employer of the claimant or the existence of a contractual relationship *inter partes*. Her further case is that the claimant has no cause of action against herself and that she has been wrongly sued and shall seek the enjoinder of a third party to these proceedings. This is at paragraph 14 of the defence as follows;

“The respondent further avers that it shall at the hearing hereof raise a preliminary objection to have this suit struck out since it has been wrongly sued and that this suit is thereof incompetent and bad in law and should be dismissed on these grounds.”

She in the penultimate prays that the suit be dismissed with costs.

The matter variously came to court until the 23rd November, 2015 when the parties recorded a consent on determination by way of written submissions and hence this judgment.

The issues for determination in the circumstances came out as follows;

1. Was the claimant an employee of the respondent?
2. Was the claimants dismissal from employment by the respondent wrongfully, unfair and unlawful?
3. Is the claimant entitled to the relief sought?
4. Is the claimant entitled to a certificate of service from the respondent?
5. Who bears the costs of the claim?

The claimant in his written submissions reiterates his case. In answer to the 1st issue for determination, the claimant submits that it is the employers duty to proffer evidence of employment or employment contract under Section 10 of the Employment Act, 2007. In the circumstance of this case, the employer did not cause the drawing of a written contract and therefore in the circumstances of contradiction on the terms of the contract, the employees statement takes sway. There was no challenge or contradiction of the evidence of the claimant by the respondent and therefore the claimants version takes the day.

Again, on the 1st issue for determination: whether the claimant was or was not an employee of the respondent, the parties take antagonistic positions. The claimant in support of his employment by the respondent annexes his membership card for KUCFAW which indicates that he was employed by the respondent as a turn boy. He also produces and annexes a copy of his identity card that tallies his name to the particulars of the document in support of this position. In further evidence, the claimant annexes a demand letter to the respondent detailing his claim, all at pages 6-9 of the claim.

All these are not denied, dented or controverted by the respondent. The claimant in the claimant's supplementary list of documents produces a recommendation letter from Uasin Gishu District Hospital and a medical report dated 17th March, 2014 in further support of his case.

The respondent in opposition to the claim filed an application by way of Notice of Motion dated 10th August, 2015 seeking the following orders of court;

I. This Honourable Court be pleased to grant leave to the defendants/applicants to issue a third party notice to Pemage Security Services Ltd., the former employee of the claimant herein in order to enable the court to justly determine who is liable to the claimants herein.

II. The Honourable Court be pleased to issue directions on the filing and serving of the said Third Party Notice as the end of justice may demand.

and grounded on;

a. That the claimant herein instituted this cause of action seeking damages for unfair termination of employment.

b. That the said claimant was employed by Pemage Security Services Ltd.

c. That the said employee was therefore to claim in case of any grievances from Pemage Security Services Ltd.

d. That the said Pemage Security Services Ltd and Khetia Garments Ltd are two different distinct companies capable of being sued and also to sue.

e. That from the foregoing it is apparent that the issue related to or concerned with the subject matter of this claim can only be properly determined as between the claimant, the Respondent and the Third party or between any and either of them.

f. It is in the interest of justice that the orders herein are sought.

g. That the prayers sought shall not prejudice the claimant's case.

h. That in the circumstances it is fair and just that this application be allowed in its entirety.

The respondent further filed third party notice to Pemage Security Services highlighting that the actual employer of the claimant was the third party but in all, this process was not pursued to conclusion, or at all. It would therefore not assist her case.

The claimant in his written submissions again engages Section 8 and 9 of the Employment Act, 2007 in that the law covers oral and written contracts and that where the employment is for more than three (3) months the employer is obliged to make a written contract of service. This is as follows;

“Section 8 The provisions of this Act shall apply to oral and written contracts.”

“Section 9 (2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with sub-section (3).”

The claimant also sought to rely on the authority of **Edward Isedio Mukasia Vs Eldo Supermarket Ltd [2015]** eKLR where this court reiterated the position in law at Section 10 (7), of the Employment Act, 2007 as follows;

“Section 10 (7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disapproving an alleged term of employment stipulated in the contract shall be on the employer.”

This mandates the employer to abide by the requirements of Section 10(1) or alternatively undertake the

burden of proving or disapproving an alleged term of employment. The respondent does not fulfill this but instead brings out a case of mere denial both in his statement of defence and written submissions. I therefore find that the claimant's evidence overwhelmingly supports a case of employment by the respondent and hold as such. This disposes of the 1st issue for determination.

The 2nd issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. This is the claimant's case. The claimant sought to rely on the provisions of Section 45(2) and (4) of the Employment Act, 2007 as follows;

45 (2) *“No employer shall terminate the employment of an employee unfairly.*

Termination of employment by an employer is unfair if the employer fails to prove-

- a) *That the reason for the termination is valid;*
- b) *That the reason for the termination is a fair reason-*
 - i) *Related to the employee's conduct, capacity or compatibility; or*
 - ii) *Based on the operational requirements of the employer;*
- c) *That the employment was terminated in accordance with fair procedure.”*

45 (4) (b) *“.....that termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating an employee.”*

This is provided for in Section 45 (2) and 45 (4) (b) above cited the latter of which emphasizes the need for procedural fairness in cases of termination of employment.

The claimant also sought to rely on the authority of **Kennedy Nyaguncha Omanga -vs- Bob Morgan Services Limited, Nairobi Cause No.1983 of 2011**, where it was held that;

“While employers are entitled to terminate employment on the ground that an employee is too ill to work, they must exercise due care and sensitivity. First, the employer must show support to the employee to recover and resume duty. Second, once the employer begins to consider termination, they must subject the employee to a specific medical examination aimed at establishing the employee's ability to resume work in the foreseeable future. Treatment notes and sick off sheets do not qualify as medical reports for purposes of termination of employment on medical grounds. Third, the employer must give the employee specific notice of the impending termination. Failure to follow this procedure even where there is overwhelming evidence of an employee's inability to work amounts to unfair termination for want of procedural fairness.”

Lastly, the claimant also submitted on the respondent's failure to observe the provisions of Section 41 that dictates procedural fairness in the determination of employment as follows;

Section 41. (1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, an employee shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representative which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

All these fallacies lead to a case of wrongful, unfair and unlawful termination of the claimant's employment and I find as such.

The 3rd issue for determination is whether the claimant is entitled to relief sought. He is. Having countered issue numbers I and II above, the claimant is entitled to relief sought.

The 4th issue for determination is whether the claimant is entitled to a certificate of service. To me, this is a non issue. The law provides for a mandatory issue of a certificate of service by the employer on cessation of employment. Section 51 of the Employment Act, 2007 refers. This applies in the instance of this case.

As to costs, these follow the event. And this closes the issues for determination.

I therefore, allow the claim, declare and order relief as follows;

i. A declaration that the termination of the employment of the claimant was wrongful, unfair and unlawful.

ii. The respondent be and is hereby ordered to issue the claimant with a certificate of service.

iii. That the Commissioner for labour be and is hereby ordered to, with the involvement of the parties, compute overtime dues payable to the claimant on or before ninety (90) days of this judgment of court.

iv. One month's pay in lieu of notice Kshs.8000.00.

v. Leave due for one (1) year Kshs.8000.00

vi. 8 months compensation for unfair termination of employment;

=8,000 x 8 months = Kshs.64,000.00

TOTAL = Kshs. 80,000.00

vii. Mention on 4th May, 2016 to confirm computation of overtime dues and other directions of court.

viii. The costs of this claim shall be borne by the respondent.

Delivered, dated and signed this 28th day of January 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa instructed by Mwakio Kirwa & Company Advocates for the Claimant.

2. Mr. Wanyoni instructed by Kimaru Kiplangat & Company Advocates for the Respondent.