



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 413 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 21st January 2016)

PETER WAKABU WACHIECLAIMANT

VERSUS

PREMIER BAG & CARDAGE LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed his case on 26th March 2013 through the firm of Gakoi Maina & Company Advocates. His case is that on 8/3/1991, he was employed by the Respondent as a Spinner but was not issued with a job card until 1995 (Appendix A).
2. He avers that he served the Respondents faithfully until 4/7/2012 when he reported to work as usual at 3 pm. He was told to report to personnel. He went to Personnel Department and was informed that there were some investigations going on and therefore he should stop working and would be informed on the progress at a later time. He returned home and kept inquiring of the progress and on inquiring after 1 week, he was informed that the boss Ibrahim had decided that he should be terminated.
3. He contends that in June, they had been given a work uniform and they thought it was free. When they received their pay slip at the end of the month, they found the uniform had been charged 742/=. They inquired as to why they were charged. On 4/7/2012 he was then sacked.
4. He reported to Thika Labour Office and therefore his Advocate wrote a demand notice to the Respondents. Kshs.10,248/= was paid into his account. His salary was usually 6,000/= and so the 10,248/= was his salary and arrears after an increment. He was a member of NSSF having joined in 1998.
5. The Claimant denies fighting a fellow employee called John Busisa.
6. The Respondents filed their Memorandum of Response on 20/5/2013 through the firm of Otieno Omuga and Ouma Advocates. It is their position that the Claimant worked on and off for the Respondent as a casual employee and when the circumstances dictated, he was engaged on contract on 20/8/1998 as a Spinner.
7. The Respondent called one witness John Busisa who stated that he was Claimant's workmate in Sisal Section. That on 3/6/2012 there was some disturbance at work for one hour. Their salaries had been delayed. HR explained the delay and they returned to work. On 4/6/2012, he states that

he was reported for being involved in the disturbance of 3/6/2012. They were then suspended pending investigations for 7 days. They were not found culpable and were told to return to work but Claimant refused to work. DW1 still work for the Respondent.

8. In cross examination DW1 stated that the disturbance of 3/6/2012 was not due to uniform. He avers that only 2 of them were bungled out. He says he does not know if the Claimant was told not to come back to work.

9. Having considered evidence of both parties, the issues for determination are whether:

1. ***There were valid reasons to warrant dismissal of the Claimant.***

2. ***Due process was followed before the termination***

3. ***What remedies if any the Claimant is entitled to .***

10. On the 1st issue, the Respondent Appendix 7 is the letter of appointment of the Claimant on contract. However, despite the averment by the Respondent that the Claimant refused to work and was dismissed under gross misconduct, there is no termination or dismissal letter. Given that the contract of the Claimant was wrong, it would have been prudent and fair to have the dismissal in writing. The allegation by the Respondent that he refused to work, should have been put in writing in form of a dismissal letter.

11. This was not done. This then leaves it open to believe the Claimant's position that he was orally terminated or dismissed. No reasons were given to her. This is against Section 43(1) & (2) of Employment Act 2007 which states that:

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

12. Section 41 of Employment Act 2007 also mandates the employer to accord an employee a fair hearing before termination. The was never accorded to the Claimant.

13. It is therefore this Court's finding that the termination of the Claimant was unfair and unjustified under Section 45 (1) & (2) of Employment Act 2007 which states as follows:

1. ***No employer shall terminate the employment of an employee unfairly.***

2. ***A 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; and***

c. ***that the employment was terminated in accordance with fair procedure.***

14. Having found as above, I find for Claimant and award him as follows:

1. ***1 months salary in lieu of notice = 9,231/=***

2. ***12 months salary as damages for unlawful termination = 9,231 x 12 = 110,772/=***

3. ***Salary for July 4 days = 4/30 x 9,231 = 1,230.80.***

4. *Leave for 2012 = 9,231/=.*

TOTAL = 130,645/=

5. *Claimant should be issued with a Certificate of Service.*

6. *The Claimant being a member of NSSF is not entitled to service pay.*

7. *The Respondent will pay costs of this suit.*

The amount awarded attracts interest at Court rates with effect from the date of this Judgment.

Read in open Court this 21st day of January, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Odera holding brief for Mr. Omuga for Respondent – Present

No appearance for Claimant