



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 87 OF 2014

GEORGE OKOTH.....CLAIMANT

VS

FUTURE DEVELOPMENT CORPOARTION LTD.....RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the respondent as a Machine operator driver from 23.7.2012 earning kshs 10500/= per month. He worked continuously until 20.10.2013 when he was dismissed for alleged theft. He avers that the dismissal was unfair because he was not given any hearing before dismissal. He now brings this suit claiming terminal dues plus compensation for unfair dismissal.
2. The respondent has denied liability for the unfair dismissal of the claimant and avers that the claimant was a casual.
3. The suit was heard on 11.11.2015 when the claimant testified as Cw1 but the respondent called no witness. Thereafter the parties agreed to file written submissions but only the claimant filed on time.

Analysis and Determination

4. There is no dispute from the pleadings, evidence and submissions that the claimant was employed by the respondent earning kshs. 10500/= per month. There is also no dispute that the claimant worked continuously for more than one year before his dismissal. The issues for determination are:-
 - a. Whether the claimant's employment was Casual or permanent employment.
 - b. Whether his dismissal was unfair and unjust
 - c. Whether the reliefs sought should be granted.

Casual vs permanent employment

5. Claimant stated that he worked continuously for the respondent from 13 July 2012 till 20 10.2013 and was receiving a monthly salary. He therefore considered himself as permanent employee entitled to protection of the law from unfair dismissal. He clarified that the only wages he was paid in cash in respect of any overtime or public holidays he worked.

6. After careful consideration of the evidence adduced, the court is of the view, on a balance of probability, that Cw1 worked for the respondent continuously for more than one year. Consequently his contract of service ought to have been in writing as required by Section 9 of the Employment Act. Without such written contract, the employer has burden of disproving the terms of contract verbally alleged by the employee in this court proceedings as provided by section 10 (7) of the Employment Act (EA). In this case she did not discharge that burden of proof because she adduced no evidence and as such the court finds that the employment relationship between the parties herein was not casual but permanent. The reason for the foregoing finding is that the service was continuous and payment was made monthly as opposed to daily wage. Even if the claimant started as casual employee, in the circumstances of the this case he had converted into a permanent employee under section 37 of the EA.

Unfair termination

7. Under section 45 of the Employment Act termination of employment is unfair if the employer fails to prove that it was founded on a valid and fair reason and that the termination was done after following a fair procedure. In this case the person who dismissed the claimant was the Personnel Manager Mr. Ming. He however, never testified in this case to prove that there existed a valid and fair reason to warrant the dismissal of the claimant's employment. The alleged theft, as the reason for the dismissal of the claimant was only communicated to his lawyer by the respondent through a response to the claimant's demand letter. That the alleged theft was never proved in evidence in this case.

8. He also never testified to prove that he followed a fair procedure before dismissing the claimant. Under section 41 of the Employment Act, before an employer dismisses an employee for misconduct under section 44 (3) and (4) of the Act, he must explain to the employee the reason for the intended dismissal in a language the employee understands. That during such explanation, the employee has the right of being accompanied by a fellow employee or shop floor union representative of his choice. That the employee and his companion must be given a chance to tender their views for consideration before the decision is reached. In this case, that statutory procedure was not followed.

9. In view of the foregoing uncontested evidence by the Cw1, the court finds on a balance of probability that the termination of the claimant's contract of employment by the respondent on 20.10.2016 was unfair within the meaning of section 41 and 45 EA. The said termination did not meet the threshold of substantive and procedural fairness required by both statute and the natural law.

Reliefs

10. In view of the findings above that the nature of the claimant's employment was permanent, the court makes declaration that he was entitled to annual leave after every 12 months. The court however declines to declare that the claimant's salary was underpaid because no evidence was adduced or submissions made to form the basis for such a relief. In addition to the declaration made above, the court awards the claimant damages for the unfair and unjustified termination.

11. He will get kshs. 10,500/= being one month's salary in lieu of notice as prayed; kshs. 9,187.50 for the 26.5 leave days earned in the period 1 year and 3 months served and kshs.5,250 being service pay for the one complete year served at the rate of 15 days salary per year of service. The claim for arrears of house allowance is dismissed for the reason that the court has already declined to make a declaration that there was salary underpayment.

12. The claimant will however get 3 months gross salary for unfair and unjustified dismissal being kshs. 31500/=. The reason for awarding the 3 months is that although did not contribute to the termination through misconduct, the claimant had worked for the respondent for only one year. In addition the court has considered the fact that Cw1 could, with due diligence, secure alternative employment within 3 months.

Disposition

13. For the reasons stated above judgment is entered for the claimant declaring that his employment was permanent and awarding him **kshs./= 56,437.5** plus costs and interest.

Dated, signed and delivered this 26th day of February, 2016

ONESMUS MAKAU

JUDGE