



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 74 OF 2015

PAUL OKEMWA MOSETI.....CLAIMANT

VERSUS

KURMALLY PERFECT PIZZA LTD.....RESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for compensation for unfair and unlawful termination of the claimant's employment by the respondent by which the claimant seeks to recover kshs.407,140 and Certificate of service. The gist of the claimant's case is that he was employed by the respondent on from 1.3.2001 as a Night Watchman and worked without any disciplinary case until 30.6.2014 when he was served with a letter terminating his services. The reason cited for the "termination was the harsh economic conditions that was facing the industry". He avers that the termination was unfair because it was done breach of the redundancy procedure provided under section 40 of the Employment Act (EA). At the time of his discharge the claimant's monthly salary was kshs.10732.

2. The respondent admits that she employed and discharged the claimant as pleaded in the suit but avers that the commencement date of employment was 1.1.2009. She further avers that the claimant was arrogant and he habitually absconded his duties, some times for 84 days consecutively and gave no apology.

3. The case was heard on 10.6.2015 when the claimant testified as CW1 while the respondent called Mr. Mahamood Kurmally as RW1. Thereafter both parties filed written submissions.

Analysis and Determination

4. After carefully considering the pleadings, evidence and the submissions, it is clear that CW1 was employed by the Respondent as a Night Guard upto 30.6.2014 when he was terminated by the respondent. The main issues for determination herein are:

- a. Whether the termination of the employment was unfair and unlawful.
- b. Whether the reliefs sought should be granted.

Unfair and unlawful termination

5. Cw1 testified that on 10.5.2014, he applied for his annual leave from Rw1 but he was told to wait until July during the Ramadhan. That on 8.6.2014, Cw1 was served with letter terminating his employment from 30.6.2014 due to harsh economic conditions. That Cw1 was never paid any terminal dues because Rw1 cited low business. RW1 has admitted that he terminated Cw1's services due to low business. That he served Cw1 with the termination notice dated 1.6.2014 before termination. That he failed to pay the claimant his terminal dues because he was demanding too much money.

6. After careful consideration of all the material placed before it, this court finds that the claimant was terminated through redundancy. That the procedure followed to lay off the claimant was, however, not in accordance with section 40 of the EA which requires that before terminating the services of an employee on redundancy, he shall first serve one month notice in writing to the Labour Officer and the employee or his union. Thereafter the employer must pay to the employee all his accrued employment dues plus severance pay. In this case the respondent never served 30 days notice to the claimant and the Labour Officer. He only served the claimant a notice from 8,6.2014 which was shorter notice than the 30 days prescribed by the law. The said breach rendered the termination unfair and wrongful and the court so finds.

Reliefs

7. In view of the foregoing the court makes declaration that the claimant was unlawfully and unfairly terminated. In addition the court awards the claimant terminal dues plus compensation for the unlawful termination. He will get one month's salary in lieu of notice, accrued leave, plus 8 months gross salary as compensation for the unlawful termination. There is no dispute that Cw1 was away from work for 84 days between March and June 2014 which Rw1 graciously converted into annual leave for 2012 and 2013. The court will therefore award him leave of 16 days as admitted by the Rw1.

8. The said dues will be based on the claimant's salary of kshs.10732 shown in payslip for June 2014 produced as defence exh.3B. Consequently, the claimant is awarded kshs.10732 in lieu of notice, kshs.5,723.75 for 16 leave days plus kshs.85856 as compensation for unlawful termination. In this court's view, the 8 months compensation is reasonable considering that the claimant had served for 13 years. In addition the claimant had become sickly while in service forcing him out of work for many days and as such he has no good chances of securing any alternative employment.

9. The claim for underpayment is dismissed for lack of substantiation. Similarly, the claim for severance pay is dismissed because it would amount to double benefit considering that damages for unlawful termination have already been awarded herein above. He will however be issued with Certificate of Service as required under section 51 of the EA.

Disposition

10. For the reasons stated above, judgment is entered for the claimant declaring his termination unlawful and awarding him the sum of kshs. 102,311.75 plus costs and interest. He will also have Certificate of Service.

Signed, dated and delivered at Mombasa this 26th day of February 2016.

O.N. MAKAU

JUDGE