



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NUMBER 2038 OF 2013
SAMUEL MAINA.....CLAIMANT

VERSUS

POWER GROUP TECHNOLOGIES.....RESPONDENT

JUDGMENT

1. By a memorandum of claim dated 18th November 2013, the claimant sought compensation from the respondent for wrongful dismissal and unfair termination of services. He seeks payment of January, 2013 salary, one month salary in lieu of notice, accrued leave for 15 days, imprest and one Sunday overtime. These heads of claim total to Kshs.75,915/=. The claimant further seeks an order for 12 months salary as compensation for unfair termination of services.
2. The respondent on its part denied the claimant's claims and stated that it was justified in terminating the claimants' services. The respondent further raised a counterclaim in which it alleges that out of the claimants negligence it incurred an expense of Kshs.95,358/= which it offset from the terminal dues payable to the claimant leaving a deficit of Kshs.26,089 which it counter claimed.
3. Facts of the dispute as recounted by the claimant in his evidence before Court was that he was employed by the respondent on 1st December, 2011 but issued with an appointment letter on 9th April, 2012. His salary was Kshs.21,000/= per month which was later increased to Kshs.27,000/=.
4. According to the claimant the respondent was sub-contractor to KPLC or REA and used to pick materials from their stores using issue notes to carry out various sub-contracted works. It was his evidence that they had just finished a project in Mbita when he was called to undertake another in Yatta. He requisitioned the materials and proceeded to Yatta. According to him there was an advance team in Yatta which started the works before he arrived. It was his evidence that on 17th November, 2012 he was called from the respondents office by one James Abuga who asked him to hand over the Yatta project to Mr. Lagho and return to Mbita to commission the project. He was thereafter assigned another project in Rangwe. On 28th January, 2013 he was asked to report to the Head Office by Mr. Abuga and when he arrived he was told that the Yatta project had some defects. He was questioned over the project by a Mr. Kihoro and was thereafter told his services would be terminated. He denied being given any hearing before termination.
5. In cross-examination he denied that it was his responsibility to dig stay holes. He however stated that he prepared the pay schedules and they showed the work done and payment made. According to him the Yatta project was 50% done when he handed over.

6. The respondents witness Mr. Lago, on the other hand stated that when the claimant handed over the Yatta project he noticed some defects and verbally reported the issue to the management. According to him by the time he was sent to Yatta, the works were 93% complete and his was merely to tension the line which was about 7%. When the KPLC team visited the line for commissioning they rejected it for being below standard. According to him, KPLC stated that most of the holes were 4 feet deep instead of 6 feet and some poles were lean.

7. In cross-examination he stated that he did not have a report on the defects from KPLC and that he did not have receipts or imprest on the rectification works. According to him the claimant was supposed to supervise the works.

8. The respondent's second witness, Mr. Abuga informed the Court after the defects were found, he called the claimant to come to the office and give an explanation but he failed to give a satisfactory explanation. The management therefore decided to terminate his services, it was further his evidence that the claimant's dues were computed and offset from the cost of repairing the defects. According to him the defects were commissioned by KPLC verbally as normally KPLC did give any written report on defects. He stated that the claimant was not issued with termination notice.

9. In his closing submissions on behalf of the claimant, Mr. Nzioki for the claimant submitted that there was no valid reason for the termination of the claimant's services. This was because the respondent alleged that there were defects with the project which were caused by the claimant yet no proof of the alleged defects was produced in Court nor a copy of the report from KPLC and REA availed. Further the respondent failed to avail proof of any imprests, receipts, delivery notes or invoices that would have clearly itemized the materials used in the rectification. The claimant's counsel further submitted that the bundle of documents exhibited by the respondent's clearly showed that the respondents were paid for the Kauthulini Yatta Project and if there were defects they could have lost a lot more money than claimed from the claimant.

10. From the foregoing, counsel submitted that since there was no evidence to support the alleged defects, and since the claimant was neither given a chance to be heard nor represented during the explanation the termination was unjustified and contrary to section 41 of the Employment Act.

11. The respondent's counsel Mr. Maina on the other hand submitted that there were no reports from KPLC on defects the days when the claimant was working for the respondent. Everything was verbal. According to counsel, Mr. Abugha, the respondent's Managing Director informed the claimant of the defects that were detected and asked for an explanation yet the claimant offered none. The meeting ended with Mr. Abugha requesting that the claimant give his response by close of business on 30th January, 2013 but no response was received leading to his termination. According to counsel, it was clearly adduced at the hearing that it was the claimant's job to dig stay holes which fact the claimant admitted. Counsel further submitted that inspection was carried out by KPLC and REA representatives who found serious defects with the stay holes which had been dug by the claimant. Regarding absence of documented report on the defects, counsel submitted that this absence is not a failure on that of the respondent but due to the fact that no report were generated then.

12. On whether the claimant was entitled to the orders sought counsel submitted that whatever could have been due to the claimant was offset from the amount owing to the respondent as a result of the cost of rectification made on the project. Regarding compensation by 12 months salary for unfair termination counsel submitted that since termination was unfair, the claimant was not entitled to this prayer. The respondent was in any event entitled to judgment on the counter claim for the cost of rectifying the defects occasioned by the claimant.

13. In a claim for termination of employment or wrongful dismissal the onus is on the employee to show that termination was unfair and or dismissal wrongful. The duty cast on the employer is to justify the reasons for termination or dismissal and further demonstrate that in carrying out the dismissal or termination a fair procedure was followed. Section 43(1) further places the burden on an employer to prove the reason for termination and where the employer fails to do so the termination shall be deemed to

have been unfair.

14. The claimant averred and testified in Court that when he handed over the Yatta project to his colleague Mr. Lagho no issue was raised about the defects and that no report was submitted by either the respondent or KPLC and or REA on the alleged defects. The claimant further averred that if indeed there were such defects the respondent should not have been paid only to make such a small claim against him for rectification of the defects.

15. As pointed out above, in a claim for unfair termination the duty is cast on the employer to prove reasons for termination. Proof here is on a balance of probability that the reason or reasons, were reasons for which any reasonable employer would dismiss. The respondent oddly claims that whereas KPLC and REA detected and complained about defects which had to be rectified before the Yatta line could be commissioned, no written report was issued since it was practice then not to issue written reports. Odd as this might be, it would have been more plausible if the respondent called a witness from either KPLC or REA to vouch for this. None was however called. To this extent the Court is not satisfied that the respondent has proved that it had a reason to terminate the claimant's services with the consequence that his termination is found to have been unfair.

16. Concerning dismissal, apart from the testimony in Court by Mr. Abuga that the claimant was given upto close of business on 30th January to explain the defects, no evidence of such notice was produced nor minutes of any meeting where such was discussed was produced. Besides if the claimant's services as stated in the letter of termination were terminated with effect from 29th January, of what use was the explanation by end of business on 30th January meant to serve? The Court therefore finds that the claimant's services were terminated contrary to his contract of employment and or procedure laid down in the Employment Act.

17. In conclusion the Court awards the claimant as follows:-

Kshs.

- a. One month's salary in lieu of notice.....24,057.00
- b. January salary.....24,057.00
- c. Accrued leave for 15 days.....13,500.00
- d. One Sunday Overtime.....1,800.00
- e. Imprest.....6,615.00
- f. 7 months salary for unfair termination of services.144,342.00

274,371.00

e. Costs of the suit.

18. The respondent counterclaim was not proved hence hereby dismissed.

19. It is so ordered.

Dated at Nairobi this 26th day of February 2016

Abuodha J. N.

Judge

Delivered this 26th day of February 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge