



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1954 OF 2014

KITI SOSO CLAIMANT

VERSUS

INSIGHT MANAGEMENT CONSULTANTS LTD RESPONDENT

JUDGEMENT

1. The issue in dispute – whether the claimant’s dismissal was lawful and fair
2. On 3rd November 2014 the Memorandum of Claim was filed. On 22nd December 2014 the defence was filed. On 4th November 2015 parties were in court for hearing when respondent was granted adjournment to file defence as noted but directed to pay costs and Court Adjournment fees. Parties were in court for hearing on 3rd February 2016 where the claimant was represented by Gomba Advocate and the respondent was represented by Mogere Advocate holding brief for Kahonge Advocate. Counsel for respondent wanted hearing to proceed at 11.30am but gave no reasons as to this request. The court went over the cause list, and directed the case to proceed noting the respondent’s counsel had not paid costs directed on 4th November 2015, no reasons had been given so as to hold and wait for hearing at 11.30am and the respondent firm had no officer present in court; and Mogere Advocate exited. The claimant was then heard in his evidence in the absence of the respondent.
3. The claimant was employed by the respondent on 17th June 2013 as a machine Assistant and given a contract of one (1) year renewable. His salary was kshs.17, 325.00. The claimant worked diligently and his contract was renewed for a year on 17th June 2014. On 5th October 2014 the claimant went on a rest day as was the practice and reported back to work on 6th October 2014. On 8th October 2014 the claimant was summoned by the human resource manager to explain why he was not at work on 5th October 2014, he was given a warning letter and when he refused to sign for it, he was asked to resign, which the claimant refused to do. The respondent then summarily dismissed the claimant.
4. The claim is that the summary dismissal was with malice, in breach of contract and the statutory duty of care as there were no reasons given; no termination letter was issued; and there was no hearing before the dismissal. The claimant is seeking for his terminal dues being notice pay and compensation all at Kshs.225, 225.00. And costs of the suit.
5. The claimant testified in support of his claim and gave evidence that on 8th October 2014 while he was at work he was called by the human resource manager who wanted to know where he was on 5th October 2014. The claimant explained that this was his day off as it was on a Sunday but the officer

insisted that he was supposed to be at work. The human resource manager as his supervisor insisted that he was supposed to have been at work but the claimant had no such information. He was sent away. The next day the claimant was called and asked to resign from his position which he refused to do as there was no reason for it. The human resource manager then proceeded to dismiss the claimant.

6. The claimant also testified that his dismissal without notice affected him gravely as it caused him great hardship. He has a wife and children who depend on him for support. He was never given a hearing before termination or paid for the 8 days he had been at work in October 2014. That this was unfair termination of employment and he is seeking dues set out in the Memorandum of Claim.

Defence

7. In defence, the respondent admitted that they had employed the claimant on a renewable contract the last being dated 17th June 2014. The claimant was entitled to one day off every week pursuant to paragraph 4(c) of his contract but due to the nature of work at the claimant's work station, there was no specific day of the week when he was entitled to take the day off as such an off was to be communicated to him depending on work schedules. In this regard his contract at paragraph 4(a) provided that the respondent Sumaria Industries operate 7 days a week for 24 hours a day on different shifts. That the employee [claimant] was to be required to work on the shifts assigned by supervisors or managers.

8. The defence is that from the provisions of the claimant contract, he could not unilaterally designate a day as day off and proceed to absent himself from work on that basis as he did on 5th October 2014. This was not the first time the claimant was absenting himself. On 7th may 2014 he was absent from work without prior permission and he was issued with a warning. On 5th October 2014 the claimant was summoned to be given a hearing as to why he had absented himself from work but he failed to give sufficient reasons. The respondent officers did not force the claimant to resign as alleged.

9. The defence is also that the dismissal of the claimant was not actuated by malice. At the time of dismissal, reasons were given and issuance of a termination letter was not necessary in this case as it was a summary dismissal. The claimant was given an opportunity for hearing by his supervisor and the human resource manager.

That the claimant was in breach of his employment contract for being absent from work without permission. He was lawfully dismissed and no dues are owing. The claim should be dismissed with costs.

10. As noted above, no evidence was called to support the defence.

11. The claimant filed submissions on 11th February 2016.

12. The claimant submitted that his dismissal by the respondent was not fair. He was entitled to a rest day per week which he took and when he resumed work he was told to resign and since there was no reason to he declined. He was dismissed to asserting his right to a rest day. Pursuant to section 43 of the Employment Act, there was no reason given for the summary dismissal as held in **David Gichana Omuya versus Mombasa maize Millers Ltd [2014] eklr.**

13. The dismissal was not procedural as the claimant was not given a hearing and in defence, the respondent admit that this case did not warrant any notice or written reasons contrary to section 41 and 43 of the Employment Act.

14. That the claimant is entitled to notice pay, days worked before dismissal and compensation for unfair termination.

Determination

15. Despite the non-attendance of the respondent at the hearing, they have filed a comprehensive

defence as set out above. At paragraph 11 and 12 of the defence, the respondent admit that they dismissed the claimant as follows;

11. The dismissal of the claimant from the employ of the respondent was not actuated by malice on the part of the respondent but rather was due to a blatant breach of the terms of the claimant's contract of employment the particulars of which have been set out in paragraph 5 above.

12. In response to the claimant's alleged particulars of malice/breach of contract/statutory duty of care outlined at paragraph 10 of the Statement of Claim, the respondent states as follows:

a. the claimant at the time of dismissal was informed of the reason for his dismissal

b. a termination letter was not necessary in the instance as the employee was summarily dismissed.

c. as indicated in paragraph 7 above, and admitted by the claimant in paragraph 6 of the Statement of Claim, the claimant was given an opportunity to be heard by his supervisor and the human resource manager. [emphasis added].

16. With these facts set out by the respondent, I take it that this was a case of summary dismissal of the claimant. the reason for the summary dismissal as discerned from the pleadings and the evidence of the claimant is the fact that he went on a rest day/day off without the permission of the respondent as per his contract of employment that required the claimant to work in a shift system and could therefore not unilaterally decide which rest day to take. Indeed I find Clause 4 of the claimant's employment contract quite explicit in this regard. His work hours were to be at Sumaria Industries that operate 7 days a week for 24 hours a days on different shifts. The claimant was to work for 48 hours a week and any hours beyond would earn him overtime pay. It was also a term of the employment contract at clause 4(b) and (c) that;

... The company will regulate the working hours in a day and this will vary depending.

c. the employee will be required to work (6) six days a week with one day break.

17. As such, the rest or off day is not fixed. Such a day was to be taken upon consideration of the contractual terms that the respondent business was running 7 days a week, 24 hours a day and in shifts and within which the claimant was to work for 48 hours and any overtime worked, he earned an extra pay. Such, I find a reasonable term within the employment contract issued to the claimant. Such terms and conditions as to when to take rest day or an off day or be out of the work place was a matter well set out in the employment contract.

18. The claimant testified that on 5th October 2014 he took his rest day because it was a Sunday. Despite there being no defence to challenge this testimony, the claimant has attached his employment contract that had a term and condition that such rest day was not fixed on Sundays. This was to be regulated by the respondent as the employer and was to be varied within the shifts. The claimant cannot therefore allocate and or vary such a term to his contract unilaterally. Such was a term agreed in advance and the employer, noting the nature of business, the work schedules and shifts, had to allocate such time. Where the claimant required time off and such time was not allocated, clause 6 of the contract regulated such time off. He could apply for time off.

19. That said, where the claimant took his rest day on this particular Sunday the 5th October 2014, upon filing of the claim, the duty to prove that this was not his allocated time off was on the respondent. Section 43 of the Employment Act requires that where there is an allegation of misconduct, the employer must prove the existence of such misconduct so as to rely on it to dismiss an employee. It is not sufficient to state that the employer had the control of the rest days, when such a right exists and indeed recognised by the parties in the employment contract, the employer has the duty to set out as to how such a rest day was allocated and where not so allocated how it was compensated for. To therefore cause a summary dismissal of the employee on the basis that such an employee took the rest day unilaterally is not enough.

It is equally unprocedural to fail to issue the reasons for dismissal as this is contrary to the law as set out under section 43 of the Employment Act. It is requirement to give and prove the reasons for terminating the employment of the employee. Section 45 of the Employment Act further requires that the employer must demonstrate that such reasons for termination are valid and fair in the circumstances of each case. Once such validity and fairness is established, the court must also look at the mandatory procedural requirements that should be followed before a termination can be said to be procedurally fair – that the employee was given a hearing before another employee of his choice and allowed to give his defence.

20. It is no longer tenable to dismiss an employee at will. An employer cannot simply dismiss an employee on the simple reason that they have the power to. The employer must justify the grounds and prove the reason for such termination. Such reasons must be valid and fair. The court must be satisfied that in arriving at such a decision, the employer acted reasonably and within the law. Such is the import of section 45 of the Employment Act.

21. I therefore find that despite the claimant taking his rest day on 5th October 2014, the respondent has not offered any evidence to show that this was not justified and that it was not due as taken by the claimant. The failure to give the claimant notice, reasons for termination and the termination letter under the guise of this being a case of summary dismissal is an unfair labour practice that cannot justify such a dismissal. It is also not a fair or just reason to cause a termination. To dismiss the claimant in the circumstances of taking his rest day is a sanction too harsh. The dismissal therefore is substantively and procedurally unfair.

Remedies

22. The claim is for compensation and notice pay. Upon the finding that the dismissal of the claimant was unprocedural, notice pay is due. Clause 8 of the contract of employment made provision of one (1) month notice. The claimant is awarded kshs.17, 325.00.

23. On the finding that the claimant was unfairly dismissed, compensation is due under the provisions of section 49 of the Employment Act. Such compensation must put into account the provisions of section 45(5)(b) and (f) of the Employment Act in that the conduct of the employee up to the date of termination and the existence of previous warning letters issued to the employee. On record is the warning letter issued to the claimant for being absent from work without permission on 7th may 2014. The claimant did not challenge this warning letter at all. Its existence is a fact that must be brought to account. Such and in view of compensation due and claimed at 12 months will serve to reduce the same. The claimant is awarded 3 months gross pay in compensation all amounting to Kshs.51, 975.00.

24. It is fair and reasonable to award costs herein.

Judgement is entered for the claimant against the respondent for unfair termination and awards compensation at kshs.51, 975.00; notice pay at Kshs.17, 325.00; and costs.

Orders accordingly.

Delivered in open court at Nairobi this 25th day of February 2016.

M. Mbaru

JUDGE

In the presence of

Court Assistant: Lilian Njenga

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