



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 385 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 16th February 2016)

JAPHETH MUSEE KITHEKA.....CLAIMANT

VERSUS

RHINO BOX MANUFACTURERS LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed his Memorandum of Claim on 22.3.2013 through the firm of Namada & Company Advocates. His claim is that he was unfairly terminated by the Respondents who also failed to pay him his terminal dues.
2. The Claimant's case is that on 15/3/2011, he was employed by the Respondent as a Machine Operator at a salary of Kshs.14,000/= per month.
3. He avers that on 31.8.2012, after the cashier paid him his salary, he informed him that his services were no longer required and summarily dismissed him. He contends that the reasons why he was probably terminated is because, he had asked to be paid house allowance in July.
4. He contends that he was not paid any other dues. He also avers that he never went for leave all the time he worked for Respondent and he was not a member of NSSF or NHIF. He also states that he was not given any dismissal letter and it is his case that the dismissal was unfair and unjustified.
5. The Claimant denies that he was a casual employee and he denied that the contract of employment dated 1/4/2012 produced by the Respondents does not bear his signature. He avers that he was dismissed on 31.8.2012. He also denied that the petty cash vouchers produced were in respect of his payments and he denies signing them.
6. The Respondent on the other hand filed their Statement of Response on 2.5.2013 through the firm of Kembi Gitura & Company Advocates. It is their defence, they state that the Claimant was employed by the Respondent as a casual employee working as a Stitching Machine Operator with effect from mid June 2011 earning a daily pay of 500/=. They deny he was employed from 15th March 2011 and earning a salary of 14,000/=.
7. The Respondents further deny terminating the Claimant's services. They aver that on 1.4.2012,

- the Claimant was put on a 3 months contract ending 31st June 2012 and earning a salary of 14,000/= per month. They produced RBM1 as the copy of the said contract.
8. It is also their position that during the terms of the contract, the Claimant engaged in acts of indiscipline i.e. smoking within the factory premises. He was warned severally to cease such acts but failed to heed the Respondent's warnings. That as a result of the indiscipline the Respondent did not renew the contract upon expiry on 30th June 2012 but elected to retain the Claimant as a casual earning 500/= per day and working 6 days per week.
9. The Respondents contend that they paid the Claimant all his entitlements and that his claim is misconceived and ill-founded and should therefore be dismissed.
10. I have examined all evidence adduced in court plus submissions filed herein. The issues for determination are as follows:

1. Whether the Claimant was employed and the terms of the engagement and separation.

2. What prayers if any the Claimant is entitled to.

11. On the 1st issue, the Claimant stated that he was employed by the Respondents on 15.3.2011. The Respondents on the other hand stated that he was employed in June 2011 as a casual and later placed on a 3 months contract on 1.4.2012. The Claimant denied the supposedly signed contract claiming that it did not bear his signature and he had never seen it before. In any case the said contract falls below the standard of any contract as it does not bear the signature of any of the Respondent.
12. I will therefore disregard it as being non-existent. That as it may, it is also not clear who signed the vouchers purportedly used to pay the Claimant and others as the Claimant also denied ever signing them.
13. The Claimant having been employed in 2011 whether March or June, it was incompetent upon the Respondent to issue him with a letter of employment detailing the terms and conditions of employment under Section 37(1) of Employment Act:

“(1) Notwithstanding any provisions of this Act, where a casual employee:-

- a. ***Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or***
- b. ***Performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.”***

14. The Claimant having worked for over 3 months continuously, he would be on casual engagement converted to permanent and therefore in terminating him, the provisions of Section 41 of Employment Act would apply.
15. Also under Section 10(7) of Employment Act:

“If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer”.

16. The onus of proving or disproving any term of the contract lies with the Respondent. There is no indication how the contract was terminated as the Respondents aver he was placed on casual basis whereas Claimant stated that he was just told that his services were no longer required. In any case, due process was not followed.
17. It is therefore this Court's finding that the dismissal of Claimant was unfair and unjustified in

terms of Section 45(1) and (2) of Employment Act which states that:-

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.***

18.I find for Claimant and award him as follows:

1. 1 months salary in lieu of notice = 14,000/=

2. 1 year leave – 14,000/=.

3. Gratuity for the duration of service at 15 days for each year = 7,000/=.

4. 8 months salary as damages for unlawful termination

= 14,000 x 8 = 112,000/=

TOTAL = 147,000/=

5. The Claimant should also be issued with a Certificate of Service.

6. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this Judgment.

Read in open Court this 16th day of February, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wanjiku holding brief for Njoki Gachehe for Respondent – Present

No appearance for Claimant – Absent