



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1563 OF 2014

ANTHONY OKOTH OSURE CLAIMANT

VERSUS

NAPRO INDUSTRIES LIMITED RESPONDENT

JUDGEMENT

1. Issues in dispute – unfair/wrongful termination of employment, failure to pay salary and other emoluments, failure to pay compensation for serious injury suffered while on duty; humiliation and degrading treatment and general violation of the Employment Act.
2. The claim – the Claimant was employed by the Respondent as a Mechanic but was terminated on 28th June 2016. His salary at the time was kshs.29, 500.00 per month. That the termination was done verbally in a very humiliating and degrading manner that lacked respect for human dignity as the Claimant was chased out from work without notice or reason. The Respondent also refused to pay terminal due and refuse dot hear the claimant.
3. The Claimant is seeking salaries due from February to June 2014 at Kshs.147, 000.00;
 - a. Annual leave for 6 years at kshs.216, 833.00;
 - b. Notice pay at kshs.29, 500.00;
 - c. Reasonable house allowance at kshs.130, 500.00;
 - d. 12 months compensation at kshs.354, 000.00;
 - e. Compensation for humiliation and degrading treatment at kshs.1, 500,000.00; and
 - f. WIBA compensation 25% injury at Kshs. 600,000.00.
4. In evidence, the Claimant testified that upon employment by the Respondent he served diligently without taking any annual leave until 18th May 2009. He was working at the garage and was working on a car brought by a client. He opened the cabin but his colleagues did not know and hence started the engine. The Claimant was injured and he lost 2 – right hand fingers which were chopped off. The Respondent did not compensate him.
5. The Claimant also testified that on 8th February 2014 he was at work and while in the go-down, while removing a vehicle, he was accused that there were stolen good in the car. He was arrested and taken to Industrial Area police Station. He was placed in custody for 3 days and released as the CCTV that were to confirm activities in the go-down were never presented. He was required to report a the police station for two weeks and every day he would report at work but the guard would stop him and the Claimant was told he had no permission to access the Respondent premises. On 28th June 2014, Bishal his supervisor told the Claimant not to report to work again as he had been dismissed. He came to the gate but did not

issue any written notice. The Claimant asked for his terminal dues but the Respondent refused to pay.

Defence

6. In defence, the Respondent admit they had employed the Claimant as a Mechanic for one (1) year contract. The Claimant took part in unlawful and illegal activities while in the employment of the Respondent which necessitated his summary dismissal. He was terminated on 10th February 2014 for theft and since he did not offer any service to the respondent. The Claimant took his annual leave for all the years he was in employment and the contract of employment having been terminated due to theft, the Claimant was not entitled to any notice pay.

7. The defence is also that the Claimant was paid his house allowances as noted in the pay slips and such is not due. The termination having arisen due to theft, the Respondent was justified and no compensation is due. The claim for compensation for humiliation does not arise as the Claimant is guilty of theft. The claims for injury occurred in 2009 and only maliciously introduced here.

8. In evidence, the Respondent called Atul Bhaguanji Shah a Director at the Respondent company. He testified that the Claimant was an employee of the Respondent and had a yearly contract since 2008. He earned Kshs.29, 500.00 per month. House allowance was paid monthly. Under the contract, it was a term that the Claimant could be summarily dismissed on misconduct without warning. On 8th February 2014 he found some oil in the vehicle which had been at the parking and the Claimant was handling oil from a jerry can. Present were a driver and turn boy. Since the oil was in the custody of the claimant, he knew that he was the one responsible for the theft. The matter was reported to the police who arrested the Claimant for siphoning the oil. There was evidence from the CCTV camera. The Respondent later decided to drop the matter and instead dismiss the claimant.

9. Mr Shah also testified that since 2008 the Claimant had had several warnings. His conduct was wanting over the years. He has also been taking annual leave. Had the Claimant not taken his annual leave, he would not have since the contracts issued annually. The Respondent closes in December every year and everyone has to go on leave due to Christmas holidays.

10. That after the matter was reported to the police, the Claimant never came back to work. The Respondent reported the matter with the Labour Officer who confirmed that since the Claimant had grossly misconducted himself, summary dismissal was justified under his contract.

The claim for injury took place in 2009 and the medical report assessed the same at 3%. The claim was forwarded to the Respondent insurance for the Claimant to follow. It was the duty of the Claimant to follow up the case.

Determination

11. Parties in an employment relationship are required to put the contract of employment into writing. Such is with regard to sections 8 and 10 of the Employment Act. Such an employment contract must adhere to lawful requirements, section 10 has set the legal momentum which the parties are guided and can go beyond such minimum requirements but not negate any provisions of the Employment Act. Where parties agree on the termination of the employment, such must put into account the legal requirements. In this case I find the parties had such annual contracts that are not contested by the claimant. Clause 7 of the contract make provision for summary dismissal. However such cannot have the backing of the law as before any summary dismissal and the application of section 44 of the Employment Act, such must put into account the provisions of section 41(2) of the Employment Act.

12. As held by this Court in the case of **Kenya Union of Commercial Food and Allied Workers versus Meru North Farmers Sacco Limited [2014] eKLR**; even in cases of gross misconduct which render an employee liable to summary dismissal, the procedural fairness requirements set out under section 41 of the Employment Act must be followed as they are mandatory. The requirement is to call the employee to attend hearing in the presence of a fellow employee of his choice where his defence is submitted for

consideration by the employer. Also the Court in **Henry Ondari versus Top Security Systems Limited, Cause No.572 of 2011** held;

... Without such defence [before summary dismissal] being heard and discussed, the employee is left exposed to the whims of the employer to terminate at will. The right to terminate an employee is no longer unrestricted as section 41 of the Employment Act has created a safeguard to ensure natural justice is achieved at the shop floor where the facts are best established.

13. The Respondent does not plead to have given the Claimant a hearing as upon his arrest by the police, he never reported back to work. There is also no record of a notice of summary dismissal. I therefore believe the Claimant that he dismissed verbally on 8th February 2014. He did not attend to work after his arrest by the police as he would be required to report at the police station.

14. The provisions of section 41 of the Employment Act, are mandatory. Where an employer fail to adhered to the same, any resulting termination or dismissal amount to unfair procedure under section 45 of the Act.

Remedies

15. As noted above, the Claimant last day at work was 8th February 2014 when he was arrested. He did not offer any labour to the Respondent since. He cannot claim for salaries due for a period he was not in employment. Claims for salaries due from February to June 2014 are declined save for salary for 8 days worked in February 2014 all at kshs.7, 870.00.

16. The one year contract issued to the Claimant covered the period of 1st May 2013 to 4th April 2014. Termination of employment occurred within this contract. The employment was subject to 28 days of leave. Within this existing contract, the Respondent has not submitted any record of the Claimant taking his annual leave. Mr Shah testified that the Claimant would sign for his annual leave under the previous contract. Where the annual leave was taken therefore under the last such contract, no evidence is submitted. Such can only be applied to the advantage of the claimant. The Claimant is awarded 28 days of leave due under his contract with an award of one (1) month pay all at kshs.29, 500.00.

17. Notice pay is due to an employee is dismissed unprocedurally. Notice pay is awarded at kshs.29, 500, 00.

18. Compensation due on the finding that termination was unfair is under section 49 of the Employment Act. However the court is directed to take into account the previous conduct of the Claimant under his current contract of employment as each contract set up a new relationship and upon the lapse of each, such record lapsed with each contract. The last such warning issued to the Claimant was on 10th May 2013. Section 45(5) of the Employment Act require the Court to put into consideration such warning letter with regard to the conduct and record of the Claimant. The compensation due is also discretionary for the court to determine based on the facts of each case. In this regard, no compensation shall be awarded.

19. House allowance is claimed on the basis that the Claimant should have been given reasonable house allowance. At paragraph 4 of the memorandum of claim, the Claimant avers that his monthly salary was inclusive of house allowance. The pay slip submitted also conform that the house allowance was paid. I therefore find no justification for the claim. Such is declined.

20. Compensation for humiliation – such is a serious claim as with it the dignity of the person is in issue. Such is forbidden under the constitution. Treatment that is degrading and inhuman is also outlawed under the Bill of Rights. However, save for the pleadings, the Claimant did not address these claims in his evidence. Such were left bare. What I was left to surmise is that, when the Claimant was found in possession of siphoned oil, the police from industrial Area police station were called and he was arrested. The circumstances leading to the claimant's arrest and the claim that he was humiliated and treated in a

degrading and inhuman manner was theretofore necessary for him to set out for the Court to analyse and order as appropriate. Without the Claimant therefore delving into this subject, the claim herein is declined.

21. The work injury benefit claim relate to matters that took place in 2009. There are specific records in this regard. Such is a matter that the Claimant ought to have filed before the subordinate Court or alternative where filed with this Court for directions, such is regulated under section 90 of the Employment Act and should have been filed within 3 years from 18th May 2009. As such the claim is time barred for this Court to address.

In conclusion, judgement is entered for the Claimant in the following terms;

- a. **Notice pay at kshs.29, 500.00;**
- b. **Leave due awarded at kshs.29, 500.00;**
- c. **Salary due for 8 days in February 2014 at Kshs. 7,870.00;**
- d. **The Claimant is awarded 50% of his costs.**

Orders accordingly.

DELIVERED IN OPEN COURT AND SIGNED THIS 31ST DAY OF MARCH 2016.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Lilian Njenga

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