



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 142 OF 2015

JOANES OSUGA GUTI.....CLAIMANT

VS

KILIFI PLANTATION LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant has brought this suit claiming terminal dues and compensation for unfair termination of his employment by the respondent in May 2013. The reason for the termination was that he was not able to take care of his family and that he had brought shame to the respondent company. The respondent has denied liability for unfair termination and avers that the claimant was lawfully dismissed on 23.7.2013 for absconding duty. That before the dismissal, the respondent had written to the claimant on 5.7.2013 telling him to resume duty. That she wrote another letter on 10.7.2013 pointing out his continued absence from work and giving him 3 days to report back to work but he never did so.

2. The suit was heard on 21.7.2015 when the claimant testified as Cw1 but the respondent never called any witness despite several adjournments being given to her to avail her witnesses. After the hearing however, both parties filed written submissions.

Claimant's case

3. Cw1 was employed by the respondent on 28.5.1992 as a Feed Mixer. He produced his appointment letter as exhibit 1. He also produced his payslip for May 2013 to prove that his salary was kshs.7,416.00 per month. He explained that in May 2013, his daughter was raped while he was on night shift and when he went to the police station the following morning (Sunday) with his wife, he was arrested. He was however released without recording any statement because he was not a witness. That on the following Monday, he went to work and was called before the committee and gave his testimony about her daughters ordeal.

4. Later he received letter dated 8.6.2013 accusing him of not responding to the show cause letter dated 5.6.2013. He responded the letter by his letter dated 10.6.2013 but he was dismissed orally on ground that he refused to change the report he made to the police about his daughter who was raped within respondents' staff quarters. That he was also orally ordered to vacate the company house by the Personnel officer. Thereafter he instructed his counsel to serve a demand letter. He now prays for his dues including salary in lieu of notice, leave for 21 years, plus compensation for dismissal without just cause.

5. On cross examination, he admitted that he never reported the rape of his daughter to the employer; that another of his daughters was raped in 2010 in the same quarters; that the rape took place while he was on duty and he did not know what was happening in the house; that the house was a distance away but he could see it from his work station; and that he never sought permission from the employer to go and assist his daughter in the police case. He denied that he was not aware whether his wife was summoned by the respondents committee in June 2013 to discuss the rape of his daughters. That he never received any notice from the Shop Steward of any kind and he was never called to collect his dues. He further denied that he absconded duty to go and assist his raped daughter but contended that he went to report the rape to the police on Sunday, which was his official off day. He also denied ever receiving any letter for his reinstatement. Finally he denied ever giving any postal address to the respondent and maintained that he never received any dismissal letter.

Analysis and Determination

6. After careful consideration of the pleadings, evidence and submission the following issues arose for determination:-

- a. **Whether the claimant was unfairly and unjustifiably dismissed.**
- b. **Whether the reliefs sought out to issue.**

Unfair and unjustified dismissal

7. The claimant's evidence that he was dismissed verbally after delivering his letter dated 10.6.2013 was never contested. The reason for the said dismissal was because he was not taking good care of his family and that is why his two daughters had been raped. That is not a valid and fair reason under Section 44 and 45 of the Employment Act. The dismissal was therefore not justified. Secondly, the dismissal was unfair because the claimant was not accorded a fair hearing. According to the respondent's letter dated 8.6.2013, the claimant was suspended pending hearing of his case on a date to be proposed by the Shop Steward. No evidence was adduced by the defence to prove that the Shop Steward proposed any hearing date and that the claimant was eventually given a hearing in the presence of another employee or shop floor union representative of his choice as required under section 41 of the Employment Act. Instead, when the claimant responded to the said letter he was verbally dismissed and ordered to vacate the staff quarters.

Reliefs

8. In view of the foregoing reasons, the court makes declaration that the termination of the claimant's employment was unfair. In that respect he is awarded 12 months salary in consideration of his long period of service being 21 years. Hence $12 \times 7419 = 88,992.00$. The court however declines to make declaration that the claimant was entitled to one month leave after every year worked. The reason for the foregoing is that no evidence or law was cited to support such relief. The appointment letter produced by the claimant provided that leave shall be as per the Collective Agreement (CBA between the respondent and the union. The CBA produced by the respondent provided under clause 6 that a person who serves for over 6 years and above, like the claimant shall be given 28 days.

9. The said clause 6 (iii) of the CBA barred any employee from accumulating his annual leave. Consequently he is only awarded 28 days leave for the year ending in June 2013 being kshs. $4716 \times 28/30 = \text{kshs.}6921.60$. He will also get one month salary in lieu of notice being kshs.7416 as per the payslip produce. The claim for service gratuity is also granted. Clause 22 of the CBA provides for payment of gratuity to every employee whose service is terminated after completing 2 years for reasons other than gross misconduct or resignation. As already held herein above, the reason cited for the termination of the claimant was not gross misconduct under section 44 of the Employment Act. Consequently, the claimant qualifies for the gratuity at the rate of 18 days per year of service being 21 years from May 1992 to June 2013. Thus $21 \text{ years} \times 18/30 \times 7416 = \text{kshs.}93,441.60$. However the court awards only kshs.78,340.50 as pleaded in the suit.

Disposition

10. For the reasons stated above, judgment is entered for the claimant declaring his dismissal unfair and awarding him **kshs.181,670.10** plus costs and interest.

Dated, signed and delivered this 6th day of May 2016

ONESMUS MAKAU

JUDGE