



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT MOMBASA
CAUSE NUMBER 206 OF 2015
BETWEEN
KENNEDY OWUOTH ODHIAMBOCLAIMANT
VERSUS
TEA WAREHOUSE LIMITED RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Ms. Chala Advocate instructed by Chala & Company Advocates for the Claimant

Muturi Gakuo & Kibara Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed his Statement of Claim on the 16th April 2015. He states he was employed as a Sampling Clerk by the Respondent Company, on the 1st November 2008. He earned a monthly salary of Kshs. 20,659. His contract was unfairly and unlawfully terminated by the Respondent on 20th September 2012. He states termination was without notice; there was no valid reason justifying termination; and he was not heard. He was denied the protections granted to him by the Employment Act, Rules of Natural Justice, and the Constitution. He seeks the following orders against the Respondent:-

- a. 1 month salary in lieu of notice at Kshs. 20, 659.
- b. 3 days of pending annual leave for the year 2011 and annual leave pay for the whole of 2012, at Kshs. 22,724.
- c. Unpaid salary for September 2012 at Kshs. 20,659.
- d. 12 months' salary in compensation for unfair termination at Kshs. 222,828.
- e. Overtime allowances not paid of 168 hours at Kshs. 11,088

TotalKshs. 297,958

f) General damages for loss of employment and loss of expected earnings.

g) Certificate of service.

h) Costs; Interest; and any other suitable relief.

2. The Respondent filed its Statement of Response, on the 1st September 2013. It is accepted the Claimant was employed by the Respondent. He failed to report to work from 17th September 2012 to 20th September 2012. He did not have lawful cause or leave. He turned off his cell-phone and could not be reached by his Employer. He did not avail medical records to the Respondent to show he was sick. The Respondent computed his terminal dues at Kshs. 34,187.75, which was applied in offsetting a debt he owed to the Respondent. Termination was fair and followed Section 41 and 45 of the Employment Act, Rules of Natural Justice and the Constitution. The Respondent prays the Court to dismiss the Claim with costs to the Respondent.

3. The Claimant testified, and closed his case, on the 11th February 2016. The hearing date was taken in open Court by the Parties' Advocates. The Respondent did not participate in the hearing. The Claimant, his Advocate and the Court waited for the Respondent and its Advocates, from 9.00 a.m. to 12.00 o'clock on the hearing date. Eventually the Claimant testified in the absence of the Respondent.

4. He told the Court he was employed as a Sampling Clerk, earning Kshs. 20,659 in monthly salary. He was placed under various periodic and renewable contracts. He was issued pay slips. His contract was terminated on the 20th September 2012. He was at the time a Sorting Supervisor.

5. He was unwell on 16th September 2012. He left for home and called the Senior Warehouse Supervisor on the 17th September 2012 informing him he was unwell. He forwarded his medical treatment records to the Respondent. He was issued the summary dismissal letter on the 20th September 2012. The Respondent was aware all the time that the Claimant was absent on medical grounds. Mr. Bwire, a Warehouse Clerk was sent by the Respondent to the Claimant's house on 17th September 2012, and was entrusted the medical records by the Claimant, to forward to the Respondent.

6. The Claimant was not paid his September 2012 salary. He was owed annual leave days. He worked overtime without compensation. The Claimant relies on his contracts; pay slips; letter of termination; medical records; and demand letter before institution of the Claim, in urging the Court to grant the Claim.

The Court Finds:-

7. The Respondent did not attend Court during the hearing to challenge the evidence given by the Claimant. From the Pleadings and the uncontested evidence of the Claimant, it is conclusive the Claimant was employed by the Respondent as a Sampling Clerk. His salary was Kshs. 20,659 per month. He was summarily dismissed by the Respondent on the 20th September 2012. Dismissal was on the ground that the Claimant absented himself from work, and could not be reached, beginning 17th September 2012.

8. It is the duty of the Employer under Section 41, 43, 45 and 47 of the Employment Act to demonstrate termination is based on valid reason or reasons, and is carried out fairly. Section 47 requires the Employer to justify termination, while the onus of showing unfair termination has taken place, is on the Employee.

9. The Respondent sought to justify termination in its Statement of Response, by alleging the Claimant had absented himself, and could not be reached. This justification was not supported by any evidence from the Respondent. The Claimant testified he informed the Senior Warehouse Supervisor he was unwell. He forwarded medical records through Mr. Bwire. Mr. Bwire was sent to the Claimant's house by the Respondent. It is not true that the Respondent could not reach the Claimant, or did not know why he was absent.

10. In the case of ***Dr. Stephen Ongere Nyaramba v. Ivey Iqua [EPZ] Limited [Cause Number 191 of 2011 at Industrial Court sitting in Nairobi]***, it was held for the Employer to justify termination based on the absence of an Employee from work, the Employer must demonstrate the absence is without leave, or without lawful cause. The Claimant's assertion that he called the Senior Warehouse Supervisor about his illness on 17th September 2012, suggests the Claimant left on 16th September 2012, without leave of the Respondent. There were medical records entrusted to Mr. Bwire, on 17th September 2012 which suggest the Claimant had lawful cause to be absent. He may in the view of the Court, have left without the leave of his Employer, but had lawful cause in being absent. The Claimant's illness was the lawful cause, and was brought to the attention of the Respondent, through Bwire, and through the Senior Warehouse Supervisor.

11. There was no hearing granted to the Claimant before termination. The Respondent did not draw any charges against the Claimant. The Claimant was not asked to show cause why disciplinary action should not be taken against him. There was no hearing of any sort. The Claimant was able to show he was unfairly dismissed.

12. ***He is allowed 8 months' gross salary as compensation for unfair termination at Kshs 165,272.***

13. ***He is granted 1 month salary in lieu of notice at Kshs. 20,659.***

14. He did not work the whole month of September 2012, to justify the claim for the full September salary. He worked up to 17th September 2012. His letter of dismissal is dated 20th September 2012. He is to be considered to have been an Employee of the Respondent up to 20th September 2012. He merits salary for 20 days worked in September 2012. ***He is granted salary for 20 days worked in September 2012, at Kshs. 15,891.***

15. The Respondent did not avail to the Court Claimant's annual leave records. There was no attempt made by the Respondent in its Pleadings to show the Claimant's annual leave record. ***The claim for annual leave pay is allowed at Kshs. 22,724 as prayed.***

16. There was no sufficient evidence given by the Claimant to establish the prayer for overtime pay. He merely pleaded 168 hours. It was not explained to the Court when in his employment, these excess hours were served. The computation giving the figure of Kshs. 11, 088 was not explained to the Court. The item is rejected.

17. The grant of compensation has redressed the Claimant's economic injury. There is no reason why he should be granted general damages for lost employment and future earnings. The prayer for general damages is rejected.

18. ***Certificate of service is granted under Section 51 of the Employment Act.***

19. The Claimant is granted costs, and interest at 14% per annum, from the date this Award is delivered.

IN SUM, IT IS ORDERED:-

a. ***Termination was unfair.***

b. ***The Respondent shall pay to the Claimant 8 months' gross salary in compensation at Kshs. 165,272; 1 month salary in lieu of notice at Kshs. 20,659; 20 days' salary at Kshs. 15,891- total Kshs. 201, 822.***

c. ***The full amount shall be paid within 30 days of the delivery of this Award.***

d. ***Certificate of service to issue.***

- e. *Costs and interest at 14% per annum granted to the Claimant calculated from the date this Award is delivered.*

Dated and delivered at Mombasa this 24th day of June 2016

James Rika

Judge