



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
CAUSE NO. 522 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 29th September, 2016)

EZEKIEL MOSOMI NYAKUNDICLAIMANT

VERSUS

ADIX PLASTICS LIMITED RESPONDENT

JUDGMENT

Pleadings

1. The Claimant filed his claim on 1.4.2015 through the firm of Onguti and Company Advocates seeking damages for unfair termination of employment and his terminal benefits.
2. He states that at all material times of the suit he was employed by the Respondent and worked continuously with due diligence and to the satisfaction of the Respondent.
3. That on 21st February, 2015, he reported on duty as usual and as he was about to log in to work he was instructed by the Human Resource Manager Mr. Ephraim Maduya to leave the queue so as to sign a warning letter stating that he left work early the previous day. He states that he refused to sign the letter leading to the termination of his services.
4. The Claimant avers that he told the Human Resource Manager that he left work at 6.30 p.m with everyone else and that is why he refused to sign the letter. He alleges that his dismissal was unjustifiable and due process was not followed before his dismissal.
5. He prays for his salary for the month of February, one month's salary in lieu of notice, salary in lieu of untaken and unpaid leave for 2.3 years, service pay and damages for unfair dismissal.
6. He also prays for a declaration that the Respondent's refusal and/or inordinate delay in recalling the Claimant back to work amounts to constructive dismissal of the Claimant's employment, a declaration that the Claimant is entitled to payment of terminal dues and damages as prayed, an Order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totaling to Kshs. 198,655.42 plus interest thereon and costs of the suit.

7. The Respondent filed a reply to the Memorandum of Claim wherein he states that the Claimant's employment was regulated by a contract of employment and the Employment Act. They deny that the Claimant conducted himself within the precincts of his contract and the dictates of statute but rather his employment was characterized by insubordination and a gross reckless disregard of his duties.

8. The Respondent state that the Claimant absconded from duty without just cause thus violating the express provisions of his contract of employment and the Employment Act and in particular Section 44 of the Act thereof. In the circumstances they state that the Claimant was never dismissed within the meaning of Section 35 of the Act or at all as alleged.

9. The Respondent required the Claimant to show cause why he absconded from duty and failed to carry out his duties which the Claimant failed to honour.

10. They deny owing the Claimant any money and state that they paid him all his dues in full. They also deny that service pay as claimed is applicable as the Claimant was a registered member of a pension scheme from time of employment.

Evidence

11. The Claimant in evidence reiterated the contents of his claim and stated that on 21.2.2015, he was on duty when the Human Resources Officer came and removed him from the queue to sign a warning letter which he refused to do. He stated that the previous day he had left early because he had a sick child at home but he had informed his supervisor about this and left others continuing with the work.

12. He states that when he refused to sign the warning letter, the Human Resource Officer reported to the Manager who told him to chase him away without being given a chance to explain anything. He was given Shs. 2,000/= as he was sent away.

13. In cross examination the Claimant stated that he started work in 2012 but only had his last contract in Court. He admitted that the previous day he had not been given permission to go attend to his sick child because the supervisor refused to attend to him. He was subsequently sent away and denied access into the Respondent's premises.

14. The Respondent put up one witness one Mr. Peter Kali Mwanza, the Stores Supervisor. He stated that he knew the Claimant as he had worked with him for over two years since he joined the Company. He states that on 20.2.2015, at about 4.30pm he was given an order to take goods out.

15. It was late and the Claimant together with 4 others were adamant in carrying out the orders. He reported the matter to the Director who went to the stores and told them that if they did not wish to work they leave. The following day, the Director told the HR to issue a warning letter to those who left early the previous day which the Claimant refused to sign thus sent to him by post. The Claimant never reported back to work after this day.

Submissions

16. The Claimant in submissions states that on 20.2.2015 he carried out his tasks until around 6.30 pm when he received a disturbing call from home that his child was unwell. Shortly after, his Supervisor Mr. Peter Kali walked in with an Order that required to be acted upon. He states that he explained his predicament to his Supervisor but the Supervisor showed no interest causing the Claimant to log off work and rush home to his child.

17. It is his submission that on 21.2.2015 as he was logging in to work he was removed from the queue and ordered to sign a warning letter that intimated that he declined to work during overtime hours. That he declined to sign the warning letter as he had given a logical explanation for leaving work early.

18. He contends that it is at this point that he was escorted out of the Company premises and collected his

final dues. He had never been issued with a warning letter regarding refusing to work during overtime hours. He submits that he had been a diligent worker and there was no reason to terminate him.

19. The Claimant states that procedural requirements of Section 45 of the Employment Act were not followed in his dismissal. He cites the case of **Esther Wambui Karongo vs. Palbina Tours and Travel Limited (2014)** where it was held that procedural requirements must be followed when carrying out a dismissal.

20. He prays to be awarded as prayed in the Claim.

21. The Respondent in their submissions state that they never terminated the Claimant but rather he absconded from duty. On 21.2.2015, the Respondent wrote a warning letter to the Claimant which he refused to sign before leaving its premises. When the Claimant failed to return is when they processed his dues. Therefore, in their view provisions of Sections 41, 45 and 46(5) do not apply.

22. It is the Respondent's further submission that the Claimant did not resign and thus there was no constructive dismissal in the circumstances.

23. On service pay, they submit that the Claimant was a member of a provident fund, NSSF, and thus this claim should not be allowed. They also state that the Claimant was paid for all his leave and is therefore not entitled to the claim of unpaid leave. They pray for the claim to be dismissed with costs.

24. Having considered evidence from both parties, the issues for determination are as follows:

1. Whether there were valid reasons to warrant termination of the Claimant.

2. Whether due process was followed before termination of Claimant.

3. What remedies to grant in the process.

25. On the 1st issue, the Claimant stated that he had been asked to do some overtime work on 20.2.2015 but he couldn't do the work as he had received a call from her that his child was unwell. He had to log off to go and attend to his child.

26. The following day on coming to work he was asked to sign a warning letter for leaving earlier the previous day and he declined to do so as he had a valid reason to leave early. It is then that he was forced out of Respondent's premises.

27. The reason for refusing to do overtime work is alluded to by the Respondents.

28. The Respondents however attempted to serve Claimant with a warning letter which was the best in the circumstances and he refused to sign it.

29. The Claimant's refusal to sign a warning letter in my view was now tantamount to refusing to take proper instructions and to be subjected to disciplinary process which then was a good reason to dismiss the Claimant.

30. I find that the Respondents had valid reason to terminate the Claimant and therefore the Claimant's case lacks merit. I therefore dismiss this case accordingly with no orders to costs.

Read in open Court this 29th day of September, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Jackie Kwamboka holding brief Miss Mbiro for Respondent

No Appearance for Claimant