



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 108 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

KARUME ENOCKCLAIMANT

-VERSUS-

DIESEL INJECT SERVICES LIMITEDRESPONDENT

J U D G E M E N T

Vide a Memorandum of Claim filed in court on 14th April 2015 the Claimant alleges that he was employed by the Respondent as Artisan Grade 1 on 1st August 2009 and served the Respondent until 25th April, 2014 when he was summarily dismissed. He alleges that instead of paying him salary for Artisan Grade 1 he was paid as an ungraded artisan and in spite of his relentless pleas he was consistently underpaid by the Respondent up to the date of dismissal. He avers that the summary dismissal was irregular, wrongful and in bad faith. He seeks the following orders:-

(a) Unpaid salaries due to underpayment from 1/8/2009 till 25/04/2015 as detailed follows;

(i) With effect from 1/8/2009

The Claimant was entitled to a gross salary of Kshs.19,937 per month but was only paid 13,000. Under payment Kshs.6,937 x 5 months =Kshs.34,685/=

(ii) From 1/01/2010

The Claimant was entitled to a gross monthly salary of Kshs.21,133 but he was only paid 13,910/=. Under payment of Kshs.7,223 x 12 =Kshs.86,676/=.

(iii) From 1/01/2011

He was entitled to a gross salary of Kshs.23,254 per month but was only paid Kshs.13,910. Under payment of Kshs.9,334 x 12 =Kshs.112,128/=

(iv) From 1/01/2012

He was entitled to a gross salary of Kshs.25,114.85 but was only paid Kshs.16,376. Under payment of Kshs.8,738 x 12 =Kshs.104,856/=

(v) From 1/01/2013

The Claimant was entitled to a gross salary of Kshs.27,375.75 but was only paid Kshs.17,850/=. Underpayment of

Kshs.9,525 x 12 =Kshs.114,309/=

(vi) From 1/01/2014

The Claimant was entitled to a gross salary of Kshs.29,565/- but was only paid Kshs.19,227/=. Under payment of

Kshs.10,338 x 4 =Kshs.41,352/-

- (b) Severance/Termination pay for the years worked.
- (c) 3 months' salary in lieu of notice.
- (d) General damages for wrongful termination.
- (e) Costs of this suit with interest thereon at court rates.
- (f) Any other relief the court deems fit to grant.

The Respondent filed a Memorandum of Reply denying the allegations in the Memorandum of Claim. According to the Respondents Memorandum of Defence, the Claimant was employed as an ungraded artisan in April 1994 and resigned from employment on 31st December, 2002. He was paid full benefits upon resignation. On 1st August 2009 the Claimant was re-employed as Ungraded Artisan-Lathe Machinist. He did not produce any Trade Test Certificate at the time of re-employment. The Claimant worked until 25th April, 2014 when he was summarily dismissed.

On 4th March 2011, the Claimant was erroneously issued a letter of appointment by the son of the Director of the Respondent on the presumption that he was a holder of Trade Test Grade 1. When the anomaly was discovered on 16th March, 2011 the Claimant was asked to produce the Trade Test Certificate for Grade 1 within 2 weeks failing which the letter stating he was appointed as a holder of Grade 1 Trade Test Certificate would be withdrawn and he would revert to Ungraded Artisan. The Claimant failed to produce the certificate and his appointment to Grade 1 artisan was reversed.

The Claimant raised the issue of underpayment through his union the Kenya Engineering Workers Union by letter dated 1st March, 2012 and the Respondent responded to the letter on 6th March, 2012, clarifying the position. The issue was again raised by the Claimant's Union by letter dated 6th March, 2014 and the Union reported a trade dispute on 17th March, 2014 to the Minister for Labour. The Respondent again clarified the issue by letter dated 27th March, 2014 demanding that the claimant produces the Trade Test Certificate. A reminder was sent to the Claimant to produce his original trade test certificate through the Respondent's letter dated 2nd April, 2014 but the Claimant failed to do so prompting the Respondent to suspend him by letter dated 14th April, 2014.

On 23rd April, 2016 the Claimant was invited to a disciplinary hearing at which he was represented by the shop steward, a Mr. Michael Juma. On 24th April 2014 after the disciplinary hearing the Claimant attempted to reply to the Respondent's letter of 14th April 2016 but still failed to address the issue of production of original trade test certificate for verification by the Respondent.

The Respondent considered the Claimant's behaviour to be gross misconduct under section 44(4)(e). The Respondent questioned, the authenticity of the Claimant's certificate, a copy of which is appended to his Memorandum of Claim, on the following grounds:-

- (1) That he did not produce the certificate which is dated 5th August 2002, during his employment by the Respondent which terminated vide the Claimant's resignation on 31st December, 2002.

(2) That the Claimant produced a certificate of service from Sotik Tea which shows that he was employed as Artisan Grade II between January 2003 and February, 2006 yet he claims that during the period he was in possession of Grade I certificate.

(3) The Claimant only produced a copy of the Grade I Certificate to the Respondent on 28th March, 2014 but failed to produce the original for purposes of authenticating the copy.

(4) The Claimant did not produce the certificate upon his re-employment in August, 2009 and did not make any demand for adjustment of his grade until after the erroneous letter from the Respondent's director's son dated 4th March, 2011 but failed to produce the certificate as demanded in the Respondent's letter dated 16th March, 2011.

(5) The Claimant failed to produce the certificate even after receiving the Respondent's show cause letter dated 27th March 2014.

(6) The Claimant earned the salary of ungraded Artisan without any complaint during his earlier employment and also during the 2nd employment until after the letter of March, 2011.

(7) Both the Claimant and his Union were aware about the contents of the collective bargaining agreement which set out the rights of employees including the wages payable to employees who held an Artisan Grade 1 certificate but did not raise any issues.

It is the Respondent's submission that the Claimant's Grade 1 trade test certificate is not genuine, that the original copy of the certificate has to date not been produced and that the summary dismissal of the claimant was fair as the Respondent has a valid reason and complied with fair procedure. The Respondent prays that the claim be dismissed.

The case was argued by way of written submissions by consent of the parties.

Claimants submissions

In the written submissions filed on behalf of the Claimant by his Advocate Otieno Yogo Ojuro & Co. Advocates, it is submitted that the Claimant produced his certificate when first engaged and the Respondent persistently continued to harass him, and he again produced a copy via his letter dated 27th March, 2014. It is submitted that as at that date the original certificate was with the Claimant's union for purposes of preparing submissions for the conciliation of the trade dispute and that the Area Secretary of the Claimant's Union again produced the same certificate on 10th April, 2014 on the Claimant's behalf.

It was submitted for the Claimant that he was unfairly dismissed. The Claimant relied on the case of **William Menta Nyamoko v Jurgen Fuks t/a Shakatak Night Club [2014]eKLR**. In the Claimant's submissions reference is also made to **Industrial Court Cause No.52 of 2013 Sarah Wanyanga Muchiri v Rt. Rev. Bishop Henry Kathii & Another, Walter Ogal Anuro v Teachers Service Commission{2015]eKLR** and **Kituu v Nzambi (1984)KLR** copies of which were not availed to court and which the court must therefore ignore.

It is submitted that the Respondent continued to underpay the Claimant as an ungraded Artisan leading to a total underpayment of Shs.494,006. The Claimant prayed for Judgement as prayed.

Respondent's Submissions

For the Respondent the written submissions reiterate the issues raised in the Memorandum of Defence (Reply). It is submitted that the Claimant did not challenge the letter dated 16th March, 2011 which pointed out that the letter dated 4th March, 2011 was issued in error, and that the Claimant failed to produce the certificate within 2 weeks as directed in the letter.

Determination

The main issue in this case is whether or not the Claimant has a valid Trade Test Certificate Grade I. The answer to this issue would address both the issue of underpayments and the issue of unfair termination which are both based on the authenticity of the claimant's trade test certificate. The best way to deal with such an issue was to produce the original certificate which has not been done.

In the written submissions the Claimant has attempted to raise issues of evidence including matters that are not borne by his pleadings. Written submissions cannot replace evidence. Written submissions can only highlight or expound on evidence already on record.

The evidence on record is that the Claimant was required to produce the original copy of his trade test certificate for purposes of authentication severally, and was even subjected to a disciplinary hearing for failure to produce the original certificate but still persisted in his failure to produce the same. The ground for his summary dismissal was that he had failed to obey a lawful order by failing to produce the original copy of his trade test certificate. Instead of producing the certificate the Claimant resorted to using his trade union to demand underpayments from the Respondent including filing a trade dispute in respect of the underpayments. No mention has been made by either the Claimant or the Respondent of the outcome of the conciliation of the dispute.

Section 47(5) of the Employment Act provides that in a complaint of unfair termination or wrongful dismissal the burden of proving that unfair termination occurred shall rest on the employee, while the burden of justifying the ground for the termination of employment or wrongful dismissal shall rest on the employer. In this case the employee has failed to prove wrongful termination.

When this case came up for hearing it was the Claimant's counsel Mr. Odhiambo who requested that the matter proceeds by way of written submissions. The Claimant thus squandered the opportunity to prove that he is in possession of the Grade 1 Trade Test Certificate by simply producing the same.

For the foregoing reasons, I find that there was valid reason to dismiss the Claimant. I however do not find the process to have been fair. The Claimant was not informed in advance about the disciplinary hearing. He reported to work after suspension only to be ambushed with a disciplinary hearing. Although the Claimant was asked to call in and was represented by a shop steward, he did not have adequate opportunity to consult and/or prepare for the hearing. To this extent the termination was procedurally wrong.

Having found that the procedure adopted by the Respondent was not fair is the Claimant entitled to compensation and damages as prayed? My response would be in the negative. I think that compensation or damages are only payable where the dismissal or termination is substantively unfair, where the reason for termination is not proved or the termination is for an invalid reason. Where only the procedure has not been complied with to the letter as in this case, but the conduct of the Claimant is found to have justified his dismissal, I think the only remedy the Claimant should be awarded is what is provided in section 49(1)(a) and (b) and not compensation. For this reason, I reduce the summary dismissal of the Claimant to normal termination with the result that he is entitled to payment of salary in lieu of notice. According to the Collective Bargaining Agreement appended at page 22 of the Memorandum of Claim, an employee with less than 5 years service is entitled to 1 month's notice and not 3 months as prayed. I award the Claimant one month's salary in lieu of notice.

The Claimant did not produce his original Trade Test Certificate and therefore did not prove underpayments. The prayer is dismissed. The prayer for severance pay is also dismissed as the Claimant was not declared redundant.

In summary, therefore, all the prayers in the claim fail with the exception of the prayer for pay in lieu of notice which I award in the sum of Shs.19,227. Each party shall bear its costs.

Dated, signed and delivered this 15th day of September, 2016

MAUREEN ONYANGO

JUDGE