



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 314 OF 2015

CLEMENT KIROSU KIBWEGA.....CLAIMANT

VS

HANTEX GARMENTS (EPZ) LTD.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal dues and compensation of unfair termination of the claimant's employment contract by the respondent on 3.10.2013. The respondent has denied liability and averred that the dismissal of the claimant was fair because he had misconducted himself by inciting other workers to go on strike.

2. The suit was heard on 26.5.2016 when the claimant testified as Cw1 but the respondent never attended court to defend the suit. After the hearing only the claimant filed submissions.

Analysis and Determination

3. Upon perusal of the pleadings and upon considering the evidence adduced plus the submissions filed, it is clear that the claimant was employed by the respondent from 3.1.2012 as a Helper. It is also not in dispute that the claimant was summarily dismissed from work for the alleged misconduct of inviting workers to go on strike. The issues for determination are:-

(a) Whether the termination of the claimant's services was unfair.

(b) Whether the reliefs sought ought to issue.

Unfair termination

4. Termination of employment of an employee's is unfair under section 45 of the Employment Act(EA) if the employer fails to prove that the reason for the termination was valid and fair and that the termination was done after following a fair procedure. In the present case the claimant testified that he never incited any employee to go on strike. The respondent never gave any evidence to prove that the claimant committed the offence and that such offence warranted dismissal because of her operational requirements.

5. As regards fair procedure, the claimant contended that he was never given any fair hearing before the dismissal. That all what the respondent did was to serve the claimant with the summary dismissal letter

dated 3.10.2013. That such procedure was not in all fours with the due process provided for under section 41 of the Employment Act.

6. The foregoing provision requires that before dismissing an employee for misconduct, the employer must first explain the offence to the employee in a language he understands and in the presence of a fellow employee or a shop floor representative of his choice and thereafter invite the two to air their defence for consideration before the dismissal is decided. Failure by the respondent to comply with the foregoing mandatory procedure, and to prove that she had a valid and fair reason for dismissing the claimant rendered the termination of the employment unfair and unjust under section 45 of the Employment Act.

Reliefs

7. In view of the foregoing finding I make declaration that the termination of the claimant's employment was unfair and unlawful. I also make a declaration based on clause 5 of the appointment letter dated 15.3.2012 that the claimant was entitled to annual leave after every 12 months of service.

Damages

8. I award kshs.36,198 to the claimant being six months salary as compensation for the unfair termination. In awarding the said compensation I have considered the fact that the claimant had served the respondent for a short period of about 2 years. In addition, I have considered the fact that there was no proof that the claimant had contributed to his dismissal through misconduct.

9. The claim for salary in lieu of notice is dismissed because the claimant admitted in evidence that the same was paid after the dismissal together with salary for September and October 2013. Likewise the claim for accumulated leave for 5 years is dismissed because he served the respondent for only one year 7 months. The total leave days earned during that period based on clause 5 of the letter of appointment is 33.04 days. The said claim was also settled after dismissal as admitted by the claimant in his testimony. Finally the claim for gratuity is dismissed for lack of evidence to support it.

Disposition

10. For the reason stated above I enter judgment for the claimant for the sum of **Kshs. 36,198** plus costs and interest.

Signed, dated and delivered this 7th day of October 2016.

ONESMUS MAKAU

JUDGE