



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2283 OF 2012

ALEX KAGOCLAIMANT

VERSUS

HEBATTULA BROTHERS LTDRESPONDENT

JUDGEMENT

1. In March 2004, the Claimant was employed by the Respondent as a Storekeeper at automobile glass division at a salary of Kshs.500 per day which was increased to Kshs.635.00 per day and later a monthly wage of Kshs.16, 510.00 exclusive of a house allowance. The contract of employment was oral contrary to section 9 of the Employment Act.

2. On 23rd August 2012, the Claimant was terminated from his employment without notice, reason or justifiable cause. This was contrary to section 41 of the Employment Act as there was no hearing or an opportunity given to the Claimant to defend his employment. The Claimant was paid kshs.15, 000.00 on 28th August 2012 which amount was too low and cannot constitute full terminal dues after working for 9 years.

3. The claimant's case is that he never went on his annual leave contrary to section 28 of the Employment Act. He was never given reasons for the termination contrary to section 43 of the Employment act and the same was unfair.

4. The Claimant is seeking;

a) Notice pay

b) Service pay

c) Leave accrued;

d) Salary arrears from 1st May 2012 to 23rd May 2012;

e) 98 days x 135

f) Pay for 4 days worked and not paid for;

g) 12 months' pay in compensation

h) Certificate of Service.

5. In evidence, the Claimant testified that upon employment by the Respondent he worked diligently until 23rd August 2012 when he was terminated. On this date, his boss, Mr Shoeb called him and without any notice, reason or a chance to know what had happened terminated his employment. The boss just wrote on a piece of paper that he should leave. He had remained in the employment of the Respondent for 9 years without a breach, without taking leave and without change of duties. He would report at work at 8am and leave at 5pm from Monday to Saturday which last day he worked half day and Sunday was his off day.

6. The Claimant also testified that upon termination he was paid kshs.15, 000.00 through a voucher and without any justification. He signed for this money as he was forced to leave immediately.

7. That the defence by the Respondent that he was a casual employee is not correct as he had remained at the Respondent employment for 9 years continuously and without a break. The allegations that the claimant stole some items is not correct as there is no evidence of such misconduct. He was never told what was stolen or given a hearing to defend himself.

8. That in his claims he is seeking notice pay; service due; lave due for the years served; salary arrears; the 98 days claim he does not know how this arose; 4 days worked and not paid for; and compensation due in a case of unfair termination.

Defence

9. In defence, the respondent's case is that they never employed the Claimant in 2004, he was a casual labourer earning a weekly wage and was on and off as a casual labourer. The Claimant was involved in theft of the respondent's property and was paid Kshs.15, 000.00 in full and final settlement of amounts due and payable which was acknowledged. The Claimant is not owed the dues claimed and amounting to Kshs.414, 585.00 and since he was only a casual labourer such an amount does not arise. That the claim should be dismissed with costs.

10. In evidence the Respondent opted not to call any witness.

Submissions

11. Both parties agreed to file their written submissions.

12. The Claimant submit that there was no valid reason for the termination of the Claimant as required by section 43 of the Employment Act. That the Claimant was never given a fair hearing before his termination and the payment of Kshs.15, 000.00 was an amount too low for his terminal dues. The remedies sought are due and should be paid with costs.

13. The Respondent submit that the Claimant did not adduce any evidence to support the allegation in the statement of claim as required under section 107 of the Evidence Act. The law places the burden of proof on the person alleging breach of the terms of contract. The Claimant failed to comply and the claims set out should be dismissed with costs.

Determination

14. The Respondent in their submissions relied on the provisions of section 107 of the Evidence Act. Such provisions are addressed under section 20 of the Employment and Labour Relations Court Act, which gives the Court general powers to conduct proceedings on matters of employment and labour relations without undue regard to technicalities and also provides that;

20. (1) in any proceedings to which this Act applies, the Court shall act without undue regard to technicalities and shall not be strictly bound by rules of evidence except in criminal matters.

15. When a matter is therefore filed with the Court by an employee, the duty is vested upon the employer

in all cases, where as a Claimant or as a Respondent to submit all work records with the court. Section 10(6) and (7) of the Employment Act gives better clarity in this regard thus;

(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.[emphasis added].

16. In this regard therefore, when the Claimant filed his Memorandum of Claim and the Respondent filed the defence in response, such defence should have been filed together with the work records. Failure to abide with the mandatory provisions of the law, the benefit is to the employee claiming unfair labour practices by the employer.

17. Section 37 of the Employment Act provides that;

37. (1) notwithstanding any provisions of this Act, where a casual employee—

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(B) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more,

The contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.

18. In this case, the Claimant testified that he remained in the employment of the Respondent from 2004 to 2012. He was never issued with an employment contract and the defence is that he was on casual terms and or was a casual labourer. However, an employee who remains in the continuous service of one employer for periods of over one months and continues to perform duties that are reasonably not expected to end within 3 months or more, such an employee converts to full time employee by operation of the law. All the rights due under the Employment Act arise.

19. I therefore find that the claimant, having been in the service of the Respondent from March 2004 to 23rd August 2012, he effectively became a full time employee of the respondent. Without any records submitted by the Respondent as the employer to controvert the evidence of continuous service, the Claimant is entitled to claim all dues and owing by the nature of his full time employment.

20. An employee on full time employment is entitled to notice before termination; reasons before termination; a hearing before termination pursuant to the provisions of section 35, 43 and 41 of the Employment Act respectively. Even in cases where the misconduct complained of warrant summary dismissal, a hearing and notice and the reasons for the dismissal is required by the provisions of section 44 and 41(2) of the Employment Act. Where circumstances are of the nature that the employer is not able to hear or give the employee a notice before termination, the duty is upon the employer to demonstrate these exceptional circumstances that led to summary action.

21. The Respondent alleges that the Claimant stole their property, such material evidence was made as a general averment in defence but no evidence was called to this effect. Intimately, the termination of the Claimant lacks basis, is not justified and has no reason that is valid of found to have foundation. Such is an unfair labour practice in terms of section 45 of the Employment Act and compensation is due.

Remedies

22. Notice pay is due in a case where there was no notice issued before termination of employment in a

case such as the one the Claimant faced at the hands of the respondent. Notice pay is awarded at Kshs.16, 510.00.

23. There is no record of statutory deductions, remittance to the relevant bodies and or evidence that the Respondent is in compliance with the provisions of section 35(5) and (6) of the Employment Act. Such provisions are mandatory and where not complied with, service pay is due. The Claimant served the Respondent from March 2004 to August 2012, a period of 8 full years. The Claimant is entitled to 15 days' pay for each year and on a daily wage of Kshs.635.00 is awarded Kshs.76, 200.00 as service pay.

24. Leave is due to every employee for every year and month served full time and in accordance with section 28 of the Employment Act. Without any employment records that the leave due was taken or paid for, the Claimant is entitled to 21 days of leave for every year all being Kshs.120, 015.00.

25. There is a claim for salary arrears from 1st May 2012 to 23rd August 2012 of Kshs.3, 510.00 I find no material evidence by the Respondent challenging this claim. The Claimant is awarded salary arrears at Kshs.3, 510.00.

26. The claim for 98 days' pay is not supported by any evidence or law. The Claimant could not recall why this claim is made part of his memorandum. As such this will not be granted.

27. Claim for 4 days worked is made on the basis that he worked for 4 days in August 2012 and was not paid. However, the Claimant has made salary arrears claim which include salaries due from 1st May 2012 to 23rd August 2012 when he was terminated. The 4 days claimed under this heard lack clarity as to their source and difference in terms of the salary arrears claimed. Such is declined.

28. On the finding that the Claimant was unfairly terminated, compensation is awarded at 12 months' salary all being Kshs.198, 120.00.

In conclusion therefore, judgement is hereby entered for the Claimant against the Respondent for:

- (a) Compensation for unfair termination at Kshs.198,120.00;**
- (b) Notice pay at Kshs.16,510.00;**
- (c) Leave due at Kshs.120,015.00;**
- (d) Service pay at Kshs.72,200.00;**
- (e) Salary arrears at Kshs.3,510.00;**
- (f)The Respondent shall issue the Claimant with a Certificate of Service forthwith.**
- (g) Costs of the suit.**

Orders accordingly.

Delivered in open Court at Nairobi this 14th day of November 2016.

M. MBARU

JUDGE

In the presence of:

Court Assistant: