



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 2321 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 26th February, 2015)

SAMSON KIMANI GACHARA.....CLAIMANT

VERSUS

AUTO SPRINGS MANUFACTURERS LIMITED.....RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed his Memorandum of Claim on 16/11/2012 through the firm of Rakoro & Co. Advocates. The issues in dispute are unlawful and unfair termination of employment plus failure to pay salary and terminal benefits at the correct rates.

The Claimant's case

2. It is the Claimant's case that he was employed by the Respondent in May 2009 as a Personnel Manager. The employment contract was based on an oral agreement that he would be paid Kshs.40,000/= as basic salary plus house allowance of Kshs.6,500/= and Kshs.510/= as medical allowance all totaling Kshs.47,010/=.

The Claimant contends that after serving for 30 days and upon receiving of his June pay and salary slip, he realized that the salary agreement had been breached and instead of being paid Kshs.47,010/= as agreed, he was given a gross pay of Kshs.20,000/=. Copy of salary slip for June 2009 is marked Appendix 1.

3. The Claimant aver that he sought for an explanation from the General Manager, Mr. Mitan Desai about his written agreement but the said General Manager declined to give an explanation and/or the said contract.

On 2/7/2009, he wrote to the company about his salary review and a reminder on 31/7/2009 and 5/8/2009 – Appendix 2. There was no reply to his inquiries. The Claimant continued working but made several demands on various occasions which the Respondent still did not respond to.

4. On 8/2/2012, he had a meeting with Respondent about his salary review and he did a letter on what he should have been earning from the time of his employment an amount totaling Kshs.50,343/= vide a letter dated 9/3/2012 (appendix 4). The management felt that the Claimant was demanding too much and he says they verbally threatened to get rid of him wanting to only adjust the Claimant's salary by only 5% as per Appendix 4.

5. On 13/6/2012 while coming on duty the Claimant aver that he was stopped at the gate by a security guard following instruction of the General Manager that he should not be allowed into the company premises.

On 12/6/2012, the Claimant wrote him a termination letter which he received on 20/6/2012 (Appendix 5).

In this letter, it was alleged that the Claimant had left his workplace on 12/6/2012 purposely without informing anyone. He argues that on 12/6/2012 he was on duty and had even been sent by the Respondent to make a report at Athi River Police Station about some employee at work which he did under OB No.19/12/2012 at 12.30 pm and later on he went back to work. In the evening the Claimant made another report at same police station about his life being in danger due to a riot that had taken place at the company that day under OB No. 40/12/206/2012 marked Appendix 6.

6. On 22/6/2012 he went back and collected his dues under duress and on the same day found that his office files and essential personal documents like certificates lost. This prompted him to report to the police under OB No. 7/23/6/2012 (appendix 7).

He avers that he was discriminatorily treated and underpaid and he seeks for prayers as per his Paragraph 18 of the claim totaling 2,094,364/=.

He also seeks a declaration that his termination was unlawful and unfair.

Respondents case

7. The Respondents filed their reply to the claim on 27/5/2013 through the firm of Pramod Patel Advocate. It is their position that the Claimant was employed by the Respondent as a Personnel Manager in Personnel department at as agreed gross pay of Kshs.20,000/= inclusive of house and medical allowance which the Claimant accepted and commenced work. The Respondents further avers that the Claimant unnecessarily sought and requested for salary increment from time to time from the time of his engagement and was verbally advised that the salary payment was as communicated to him at recruitment and paid to him as evidenced by his pay slips but that review could be made in accordance with company policy upon consideration of his job performance, duration of service, his duties and obligations, departmental budget allocation, skills, competencies, innovation and dedication to duty.

8. The Respondent denies they ever alluded to any agreement of higher payment. The Respondent aver that travelling allowance was only payable as a refund upon forwarding of receipts in support of the claim and would not exceed 500/=. They further aver that the Claimant never claimed for the leave and travelling allowance and that the claim is an afterthought.

The Respondent avers that the claim is not justified as the Claimant absconded work upon rejection of his early retirement request which was unprocedual, unlawful, illegal and uncontractual. The Claimant was thereafter summarily terminated on grounds of absconding duty and his dues were calculated and availed to him for payment on the basis of his gross pay and under consideration of the fact that his employment was subject to NSSF which was duly acknowledged by the Ministry of Labour letter dated 4th February 2011.

Issues for determination

9. Upon hearing the evidence of both sides the issues for determination are as follows:

- i. Whether Claimant absconded duty or was terminated.
- ii. If terminated, whether the termination was justified and lawful.
- iii. What remedies if any the Claimant is entitled to.

10. On the 1st issue it is the Claimant's case that he was dismissed unfairly. He denies absconding duty. It is however evident that the Claimant worked for the Respondents and had been employed in May 2009 but not issued with any letter of appointment. This definitely contravenes the provision of Section 9(1) of Employment Act 2007 which states that:

“A contract of service:-

a. for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more;

or

b. which provides for the performance of any specified work which could not 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, shall be in writing.”

11. In the absence of any written contract Section 19(7) of Employment Act 2007 comes in handy which states that:

“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.”

The burden then of proving or disapproving the contents of the oral agreement rests on the Respondents herein.

12. From the Appendix 1 – Claimant's pay slip though, the Claimant was paid Kshs.20,000/= gross pay which he accepted from the onset in June 2009, he complained about the money paid to him in July 2009 as per Appendix 2, 3 and 4 but the Respondent didn't seem to reply to it. He still continued working through upto 12th June 2012 when his services were terminated.

The Respondents claim that he absconded duty is not therefore true as Appendix 5 is clear that the Respondents terminated his services.

13. As to how much pay he was to be paid, having accepted to work and continuing to work from May 2009 to June 2012 with the less pay, he was in principle agreeing to the less amount he was offered. In the case of **Miguna Miguna – vs- A.G Industrial Court at Nairobi Case No. 433/2011** I alluded to this where Claimant had sued apparently for breach of an oral term in the contract to pay him a higher salary than he finally was given and the court found that:-

“Not only did the Claimant acknowledge it but he continued to work in the capacity appointed and received salary and was allocated an office which he occupied. It is at this point that he should have declined to take up the appointment given that he felt that the terms and conditions befitting the office were not met. However the Claimant took up his appointment despite the fact the remuneration package was below his expectation. He continued serving and receiving salary and allowances as per the captioned appointment letter for over two years only to take up this case to court when the contract period he was serving was a few months to terminate”.

The assertion therefore by Claimant that he was offered 40,000/= salary and paid only 20,000/= will not suffice as he accepted the Kshs.20,000/= given to him at the onset and cannot be heard to complain about the same this late in the day.

14. Having found that the Claimant was terminated, the question is whether the termination was fair and justified. In the termination letter, the Claimant was told his services had been terminated immediately for absconding work. This was on 12th June 2012. Claimant has in his evidence stated that he did not

abscond work and has produced evidence to the effect that he had been sent by the Respondent. Even assuming he had left work without permission this alone did not warrant his summary dismissal as envisaged under the law under Section 41 of Employment Act:-

“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

15. In the case of the Claimant's he was not given a hearing and this contravened provision of Section 41 of employment Act and also the Constitution Article 50(1).

It is therefore the finding of this court that termination of claimant was unfair and unjustified.

Remedies

16. Having found that the Claimant was unfairly terminated, I award him as follows:

1. 1 month's salary in lieu of notice = 20,000/=

2. June salary for 12 days worked

$$12/30 \times 20,000 = 8,000/=$$

3. Leave days 19.5 days

$$19.5/21 \times 20,000 = 18,571/=$$

4. Gratuity for the period worked

3 years = 1 month salary for each

$$\text{year worked} = 3 \times 20,000 = 60,000/=$$

5. 12 months salary as compensation for

$$\text{Unlawful termination} = 12 \times 20,000 = 240,000/=$$

$$\text{TOTAL} = 346,571 = \text{less statutory deductions}$$

6. Claimant should also be issued with a Certificate of Service.

7. The Respondent shall pay cost of this suit.

It is so ordered.

Read in open Court this 26th day of February, 2015

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Chelagat holding brief Rakoro for Claimant

Kiora holding brief for Patel for Respondent