



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 492 OF 2012

OYANGI ZACHARY.....CLAIMANT

VERSUS

NAIROBI WEST HOSPITAL LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant who avers that he used to work for the Respondent as Security Guard claims he was unlawfully and unfairly terminated from employment. He therefore seek the judgment of the Court directed to the Respondent to pay him his terminal benefits as well as order 12 month's wages as compensation for unfair dismissal.
2. The Respondent on its part averred that the Claimant's services were terminated on account of gross misconduct and in that regard the Respondent attached as appendix D1 the letter terminating the Claimant's services.
3. The Respondent further averred that it never failed to clear the Claimant's dues upon termination of his employment and stated that the Claimant refused to collect his dues. Regarding annual leave, the Respondent averred that the claimant utilized all his leave days as at the time of termination of his services.
4. On 30th October 2014, the matter proceeded for hearing ex-parte after I disallowed an application for adjournment on the part of the Respondent after realizing the Respondent had made several similar applications before.
5. The Claimant was the only witness that testified on his part. It was his evidence that he was employed in 2009 November at a salary of Kshs.10,515 per month. His working hours were from 5.30 p.m. to 7.00 a.m. and that he used to work for six days. Regarding leave he stated that he went on leave in 2012 but the previous years he never went.
6. Concerning his dismissal he stated that in October, 2012 while at Clinix some electrical items were returned to the Respondent at Nairobi West and he was asked why that happened and later suspended.
7. According to him, he never went through any disciplinary process and was never given any termination letter. It was his evidence that he used to work during public holidays and was never paid during the time he was suspended.

8. Mr. Nyabena in his final submissions before the Court argued that on or about the 13th of September, 2011 the Claimant was suspended from duty on account of some investigations that were to be done yet no reason whatsoever were advanced to him.

9. This according to counsel was unfair loss of employment and the Respondent despite having the burden of proof failed to justify the dismissal of the Claimant. According to Counsel no evidence was placed on record to show the Claimant was involved in any theft at the Respondent's premises. To this extent Counsel submitted the dismissal was unfair and urged the Court to so find and order that the Claimant either be reinstated or compensated for unfair dismissal.

10. Counsel for the Respondent, though not present at the hearing filed submissions.

11. Counsel submitted that although the Respondent did not call evidence at the trial to controvert the Claimant's evidence, it should be noted that the Respondent disputed the Claimant's averments in its memorandum of response.

12. Whereas this Court is not strictly bound by rules of evidence, averments in pleadings cannot be taken as the truth at all times. The best form of evidence is oral evidence by the parties to the suit as it is then that such witness can be cross-examined on oath and his demeanour observed by the Court.

13. Although in limited circumstances the Court may decide a matter based on pleadings and documents filed but this is usually by consent of the parties.

14. This matter proceeded ex-parte and after the Court refused further adjournments on the part of the Respondent considering several adjournments had been sought before and granted.

15. Had the Respondent attended the hearing. It could have tendered evidence and cross-examined the claimant. Having failed to do so and there being no consent to have the matter determined on the basis of the pleadings filed and the supporting documents, the averments by the Respondent in its memorandum of response remained as such. Just averments.

16. The Claimant's case therefore remains uncontroverted and the Court is at liberty to award his payers only subject to limitation set by law. For that reason the Court awards the claimant as follows:-

Kshs.

(a) Salary for September – December 2011.....38,216.20

(b) Salary for January to February 2012.....28,662.15

(c) One months' salary in lieu of notice.....9,554.05

(d) Service pay for 2 years

(e) Public holidays for 2 years.....36,478.00

(f) 5 months' pay as compensation

for unfair dismissal.....47,770.00

160,680.40

17. The Respondent shall further issue the Claimant with a certificate of service.

18. It is so ordered.

Dated at Nairobi this 13th day of February 2015

Abuodha J. N.

Judge

Delivered this 13th day of February 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge