



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NO. 973 OF 2013

(Before Hon. Justice Maureen Onyango on 13.3.2015)

SAMUEL OMUNGALA OLULUNGU CLAIMANT

-VERSUS-

DESIGNWEAR LIMITED RESPONDENT

JUDGMENT

By a Memorandum of Claim dated 25th June 2013 and filed on 26th June 2013 through the firm of Mulanya & Maondo Advocates the claimant alleges unlawful/unfair dismissal and non-payment of terminal benefits by the respondent. The claimant seeks the following remedies:-

(a) One months pay in lieu of notice Kshs 11,954/=

(b) 12 months salary pay as compensatory damages for unfair and/or unlawful termination Kshs 168,55/=

(c) An order for the respondent to pay cost of this suit plus interest thereon.

The respondent filed its Memorandum of Response dated 23rd July 2013 and filed in Court on 16th July 2013 (sic) through the firm of M'Limbiine & Mungai Advocates. The respondent denied unlawfully dismissing the claimant and averred that the claimant was dismissed for absconding duty after being accorded a fair chance to defend himself. The respondent prays that the claim be struck out or dismissed for not disclosing any reasonable cause of action.

The case was heard on 6th October 2014. The parties thereafter filed written submissions. The claimant was represented by Mr. Ombasa while the respondent was represented by Mr. Ndolo.

The claimant testified that he started working for the respondent in May 2009 as an assembler. He was assembling office furniture. On 4th August 2012 which was a Saturday he reported to work but was not feeling well. He asked for permission from the General Manager who asked him to fill a leave form. The General Manager then gave him a driver to take him home from where he was taken to hospital by his wife. He was diagnosed with malaria and typhoid, treated and given 2 days off. On 6th August 2012 the General Manager called him and he explained that he was unwell and had been given two days off and that he had filled a leave form. On 7th August the claimant reported back to work and gave a copy of the letter from the doctor to the General Manager who then went to the Sales and Marketing Office which was upstairs. He came back after about six minutes and asked the claimant to accompany him to the Sales & Marketing Office. At the office they met Mrs. Farida (RW2) the accountant and the two started talking in a language that the claimant did not understand. They then went to the Human Resources

Office where they continued talking in the same language. After that the General Manager asked him when he started working and then pulled out his file from the filing cabinet. He was then asked to go and wait downstairs where job seekers wait for work. Ms. Farida then went downstairs where the claimant was with money in her hand. She also had a letter. She asked the claimant to sign the letter and take the money but he declined. After that the General Manager and the Human Resources Manager started talking in their language which the claimant did not understand. Two G4S security guards were instructed to eject him from the workplace. He refused saying he was an employee, had his dust coat and work identity and had not been told why he was being removed. He was forced to leave by the guards.

The claimant testified that he was not given a hearing, had no previous warnings or disciplinary proceedings and was not given notice.

RW1 Farida Tajbhai testified that she works for the respondent in accounts and administration. On 4th August 2012 she received the claimant's leave form. The claimant reported to work on 7th August 2012. He did not report to work on 6th August 2012. The General Manager asked her to handle the claimant's case. When the claimant went to her office she asked him for the doctor's letter but he did not produce it. She told the claimant that the day would be deducted from his leave and the claimant became wild and started throwing papers on her desk. She held a meeting with the claimant and prepared a report. She spoke in English at the meeting which was attended by the warehouse manager and RW1. It was decided that the claimant should leave because he was acting in a rude manner. The claimant refused to leave the premises and security personnel were asked to get him out. She testified that the claimant refused to collect his money which was available.

On leave days RW1 testified that employees were given one day per month for 11 months and 10 days during December holidays making a total of 21 days.

Under cross - examination RW1 stated that there was a meeting but the claimant was not present. She stated further that the claimant did not inquire the reasons for termination.

RW2 Norshad Ayub testified that he was the claimant's supervisor from 1st February 2011 when he joined the respondent. He testified that the employees were given 10 days leave during the year and 11 days in December. That when an employee is sick the policy is that he submits a doctor's report. If he fails to submit the doctor's report he signs a leave form. He testified that he was not at work on 4th August 2012 and he did not notice that the claimant was not at work on 6th August 2012. On 7th August 2012 he heard that there was a commotion involving the claimant and RW1. The claimant was told to remove his dust coat and get out of the compound. He stated under cross - examination that the claimant did not have any previous disciplinary cases or warning letters.

I have considered the pleadings and evidence on record. I have also considered the written submissions filed by the parties. Both parties agree that the two issues for determination are whether the claimant's termination was lawful and fair and whether he is entitled to the relief's sought.

For termination of employment to be valid, there must be both procedural fairness as provided in Section 41 of the Employment Act and validity of reason as provided in Section 43. Failure to comply with either section renders any termination or dismissal unfair.

In this case there is no dispute that the claimant was granted permission and filled a leave form on 4th August 2012. He had explained that he was given two days off by the doctor, copies of which he has submitted in his claim and which RW1 confirmed were produced at the Labour Office. If the claimant did not have a letter from the doctor when he reported back to work on 7th August 2012, what RW1 needed to do was give him time to submit it instead of threatening to recover the days from his leave. In any event the claimant stated that he had the letter and had shown it to the General Manager who looked at it and gave it back to him.

Assuming that the claimant actually became rowdy as stated by the RW1 after being informed that the days he was away would be recovered from his leave, he still should have been given a hearing as

provided in Section 41 of the Act. Failure to give him a hearing as admitted by RW1 renders the termination unfair. The minutes attached to the respondent's Memorandum of Response are obviously a fabrication as the contents are materially different from the testimony of RW1 who is the author thereof and that of the claimant.

For the foregoing reasons, I declare the termination of the claimant's employment by the respondent unfair.

I now consider the reliefs sought by the claimant. The first prayer is for payment of one month's salary in lieu of notice. I award the claimant Kshs 13,040 based on his payslip at page 9 of the Memorandum of Claim.

The claimant further prayed for maximum compensation of 12 months salary. Taking into account the claimant's length of service and the manner in which he was dismissed I award him 6 months salary as compensation in the sum of Kshs 78,240/=.

The decretal sum shall attract interest at court rates from date of judgment. The respondents shall pay the claimant's costs.

Orders accordingly.

Dated and delivered in Nairobi this 13th day of March, 2015

MAUREEN ONYANGO

JUDGE

In the presence of:

..... for claimant(s)

..... for respondent(s)