



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 105 OF 2015

(Before D. K. N. Marete)

EDWARD ISEDIA MUKASIA.....CLAIMANT

VERSUS

ELDO SUPERMARKET LTD.....RESPONDENT

JUDGMENT

This matter was brought to court vide a Memorandum of Claim dated 10th March, 2015. It does not disclose the issue in dispute on its face.

The respondent in her Statement of Defence dated the 24th March, 2015 denies the claim and prays that same be dismissed with costs.

The claimants case is that on or about the 1st July, 2011 he was employed as a Shop Assistant (General Hand) by the respondent at a total gross consolidated salary of Kshs. 8,000. The claimant served with loyalty and diligence, dedication and commitment until the 2nd October, 2014 when he was unprocedurally, wrongfully and unlawfully dismissed with no payment of salary and terminal benefits.

The claimants further case is that his services were unprocedurally and unlawfully terminated when he was extremely ill and he had actually sought permission from the respondent which was granted with effect from 18th August, 2014 but when he resumed work on 2nd October, 2014 as agreed *inter parties*, his employment was terminated. This termination was without cause or procedure as entrenched in the Employment Act, 2007. The claimant avers that he has failed to secure further employment and that the respondent has failed to issue him with a certificate of service or any positive recommendation.

He prays for

Severance pay

15 days x years worked x basic / 30 days

15 days x 3 years x 12184 / 30 days

Kshs.18,276

Leave days

21 days x yrs worked x basic + house all / 26 days

21 days x 3yrs x 14011/26 days

Kshs.33,949

Overtime dues

45 hrs per week

13hrs x 6 days= 78- 45hrs= 33 hrs pwk

33hrs x4wks = 132hrs pm

132 x1.5x12184 /195=12371

12371 x 39 months *Kshs.482,469*

Pending salary of one month

Basic + House allowances

12184 + 1827 *Kshs. 14,011.00*

Under payment of wages

(iv) Legal notice no.197 of 1st May, 2013

14011-8000=6011 x 16 months *Kshs.96,176*

(v) Legal noticeno.71 of 1st May, 2012

10687+1603=12290-8000

4290 x12 months *Kshs.51,480*

(vi) Legal notice no.64 of 1st May, 2011

9450 + 1417 = 10867 less 8000

2867 x 10 months *Kshs.28,670*

One month pay in lieu of notice *Kshs. 14,011.00*

Compensation for unfair termination

Gross pay x 12 months

14011 x 12 months *Kshs. 168,132*

Kshs. 907,174

and this is summed up as follows;

- a. *Declaration that the claimant's services were unprocedurally, unlawfully and unfairly terminated;*
- b. *Kshs. 907,147*
- c. *Certificate of Service*
- d. *Cost of this suit and interest at court rates from the time of filing the suit until payment in full and*
- e. *Any other further and better relief the Honourable Court may deem just and fit to grant.*

The respondent from the onset denies that the claimant was its employee or that she owes the claimant the amounts claimed or even that she indeed terminated the services of the claimant and therefore prays that the claim be dismissed with costs.

The matter came for hearing on 5th May, 2015 when CW 1, Edward Isedia Mukasia, the claimant, testified and reiterated his claim. He said he is now unemployed but had previously worked for the respondent with effect from 29th July, 2011. He was employed as a supervisor on application. His salary was Kshs. 8,000.00 per month.

On 2nd October 2014, he was dismissed on grounds of sickness. He testified that he got unwell on 18th August, 2014 and informed his supervisor who disconnected his phone call. He was later told to go home until he had recovered. When he reported back upon recovery on 2nd October, 2014, he was told that there was no work. The claimant further testified that he is a paid up member of the union and union remittances were made by the respondent.

The claimant further testified that his salary was paid by Ajay Patel – the respondent's Director and that he never received any salary from Wimi Care Services and that he was not at all an employee of Wimi Care Services. He reiterates his prayers as per the memorandum of claim. His testimony was repeated on cross-examination and even re-examination.

The respondent, through DW1, Patrick Odhiambo Onyiko testified that he was an employee of the respondent and was familiar with the issues in this cause. He knew the claimant who had worked with him for the respondent. He was a general worker.

DW1 further testified that Wimi Care Services would bring workers to the respondent on the basis of a service contract *inter partes*. He further testified that Wimi Care Services is an employment bureau relating with the respondent. He paid the claimant and other workers. DW1 further testified that he had heard of the claimant's illness from the Manager. He confirmed and testified that the claimant was an employee of Wimi Care Services.

On cross-examination, DW1 testified that they (respondent) paid the workers on the authority of Wimi Care Limited.

The issues for determination therefore are;

1. *Whether the Claimant was an employee of the Respondent?*
2. *Whether the termination of the employment of the Claimant, if at all, was wrongful, unfair and unlawful?*
3. *Whether the Claimant is entitled to the relief sought?*
4. *Who bears the costs of this suit?*

The 1st issue for determination is whether the claimant was an employee of the respondent. The parties are diametrically opposed on this. The claimant in support of his position annexes Appendix II – a letter of application for employment to the respondent which he testifies resulted in his employment by the respondent. He further produces Appendix I, a membership card of Kenya Union of Commercial, Food

and Allied Workers Union (KUCFAW) which indicates that he was an employee of the respondent in the capacity of a supervisor. The membership is dated 2nd September, 2013. This is not denied or controverted by the respondent.

The respondent, in support of an opposing position on this produces unmarked attendance forms for January, February, March, April, May, June and July 2014 some of which are signed by the claimant and intimating that the claimant was an employee of Wimi Care Services. The claimant *in toto* and at all levels of his testimony denies knowledge of Wimi Care Services. He further on cross-examination denies that the signature and identity card numbers on this document are his. Further, he testified that the documents had the name of Wimi Care Services but he had been impressed that this was the respondent's muster roll and that he did not know that the Wimi Care Services was an employment bureau. Indeed, he was not brought to this employment through Wimi Care Services.

A denial of the claimant/cespondents evidence on the position of Wimi Care Services, including signing the document and propriety of the identity card number provided on the document casts a shadow on the authenticity of the evidence adduced by the respondent. It would have required a further testimony of the respondent to rebut the claimant's position and silence on the matter renders the respondent's evidence hollow. The respondent, bearing in mind the testimony and annexures adduced by the claimant should have demonstrated a clear case of having warned and informed the claimant of the status of his employment. It was the respondent's duty and legal responsibility to clearly inform the claimant of his employment relationship with Wimi Care Services and not herself as it appeared on the ground. This was not done and the claimant all this time was of the impression that he was indeed an employee of the respondent. It would not be convincing that a last minute denial of this circumstance would derail the position.

Section 10 (7) of the Employment Act, 2007 binds the employer to proof of terms of employment in the event of non production of a written contract of employment in all legal proceedings in the subject as follows;

Section 10 (7)

“If 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.”

I therefore find that the claimant was in the circumstances an employee of the respondent. This disposes off the 1st issue for determination.

The 2nd issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. It is the claimant case that this was so.

Section 45 of the Employment Act, 2007 provides for cases of unfair termination of employment as follows;

Section 45;

45.(1) No employee shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove-

a. that the reason for the termination is valid;

b. that the reason for the termination is a fair reason-

i. related to the employees conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

(4) A termination of employment shall be unfair for the purposes of this Part where-

a. the termination is for one of the reasons specified in section 46; or

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Industrial Court shall consider-

a. the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

d. the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

e. the existence of any previous warning letters issued to the employee.

Further Sections 41 and 43 of the said Employment Act provides other criteria for wording a termination;

Section 41 (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.

Section 43(1)

In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the

termination shall be deemed to have been unfair within the meaning of section 45.

Again, Section 44 also brings out this clearly as follows;

Section 44 (4)

Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer of an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

(b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;

(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

(d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer.

(e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.

(f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or

(e) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

The circumstances of the termination of the employment of claimant were in total disregard of the law as above cited and therefore wrongful, unfair and unlawful and I find as such. The claimant was not afforded an opportunity to ventilate his cause, or at all. The termination of the employment of the claimant was wrongful, unfair and unlawful.

The 3rd issue for determination is whether the claimant is entitled to the relief sought. Having passed the test on issues No's 1 and 2 above. The claimant becomes entitled to relief.

The last issue is on costs. These follow the event. The cost of this cause should necessarily be borne by the respondent.

I therefore allow the claim, declare and order relief as follows;

- i. *A declaration that the termination of the employment of the claimant was wrongful, unfair and*

unlawful.

ii. *The respondent be and is hereby ordered to issue the claimant. with a certificate of service.*

iii. *That the Commissioner for Labour be and is hereby ordered to, with the involvement of the parties, compute overtime dues payable to the claimant on or before ninety (90) days of this judgment of court.*

iv. *One (1) months pending salary* Kshs. 14,011.00

v. *Underpayment of wages* Kshs. 173,459.00

vi. *One months pay in lieu of notice* Kshs. 14,011.00

vii. *6 months compensation for unfair termination of employment* Kshs.14,011

x 6 months Kshs. 84,066.00

viii. *Leave dues* Kshs. 33,949.00

Total Kshs. 319,496.00

ix. *Mention on 2nd December, 2015 to confirm computation of overtime dues and other directions of court.*

x. *The costs of this claim shall be borne by the respondent.*

Delivered, dated and signed this 30th day of June 2015.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa instructed by Mwakio, Kirwa and Company Advocates for the claimant.

2. Mr. Kitiwa instructed by Kitiwa and Company Advocates for the respondent.