



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1696 OF 2013

ROBERT NDURUNGI CHEGE CLAIMANT

VERSUS

SAMSUTECH CORPORTATION LIMITED RESPONDENT

JUDGEMENT

1. The issue in dispute is the unlawful dismissal of the claimant and non-payment of his terminal dues
2. The claim was filed on 23rd October 2013. The respondent entered appearance on 8th November 2013 but no defence was filed. On 9th June 2015 the matter came up for hearing, the respondent was represented by counsel and submitted that the he was sick but did not submit any evidence. Court directed parties to proceed with the claimant's case at 10.30a.m. However, by 10.45a.m. The respondent was absent and court directed the claimant to proceed with his case as earlier directed.
3. The claim is that in October 2005 the claimant was employed by the respondent. He served diligently until 23rd august 2012 when he was dismissed and despite efforts to seek reasons for the dismissal or a resolution of the same, the respondent was adamant and refused to take the claimant back to work or pay his terminal dues. The matter was reported to the Labour Office but the respondent refused to attend. The claimant is seeking for a declaration that his termination was unlawful and should be paid 3 months' notice, severance pay, salary arrears, 21 leave days due and his costs herein.
4. In evidence the claimant testified that he was employed as a Service person by the respondent. He loaded vehicles, and made deliveries. He was issued with a job card for this purpose and was stationed at Rantassi Trust Building. His monthly salary was Kshs.17, 693.00 paid directly to his bank account opened by the respondent at African Bank Corporation (ABC) Koingage Road Branch. The claimant was paid his salaries until July 2012. From the bank statement, there are different salary deposits that are not explained.
5. The claimant also testified that in august 2012 he went on his annual leave from 17th but on 23rd August he was called by the respondent and informed that he had been terminated. In the previous years, the claimant never went on leave; this was paid for by the respondent but in 2012 he opted to take his leave. The respondent said there was no money to pay for the leave and thus asked the claimant to proceed on his leave. Since there was no written communication, on 5th September 2012 the claimant decided to report back to work but was not allowed into the premises. No reasons were given for the termination. The claimant reported the matter to the Labour Officer who wrote to the respondent but they

ignored the same. No reasons had been given for the dismissal; there was no notice or salary payment for the period he was on leave.

6. The claim is for compensation; 3 months' notice pay; arrears of salaries not remitted; 21 leave days not taken and costs of the suit. In 2006 the claimant was registered with the NSSF and the respondent submitted his dues.

Determination

7. Section 3 of the Industrial Court Act is clear with regard to the objectives of the court. The court must at all times work for the interests of justice, in an expeditious manner and ensure that all parties that seek to be heard are given a fair chance to do so. Parties come to court to assert their rights and whether such an action has basis or is well-founded is based on the evidence presented before the court to assess. When one party fails to attend court or is absent on the date scheduled for hearing or as directed by the court, then such a party has to be taken as not being keen to be heard to present its case. In this regard, the respondent who is represented was well served with a hearing notice; his advocate was in court and indicated that the respondent was unwell but lacked the evidence to support the same. Even where the respondent was unwell, I note this is a corporate body and any officer of the respondent could have been called to be in court where the respondent was unwell. In any event, the claimant was ready with his case and where indeed the respondent was unwell, the court was ready to hear the claimant's case and allocate a new date for the respondent to submit their case. Being represented, the respondent had the chance to hear the claimant and subject him to cross-examination. Therefore the absence of the respondent or the advocate at the time of hearing has no justification.

8. The claimant's evidence is that while he was on leave, he received a call stating that he had been dismissed from his employment; he had proceeded on leave on 17th August 2012 upon the respondent stating that they had no money to pay for his leave and was called 3 days later with the notice of dismissal. This was not communicating in writing and so he was at the office on 5th of September when he was prevented from accessing the premises.

9. It is clear from the pleadings and evidence that the claimant was not given notice before termination as required under section 35 of the Employment Act. An employee such as the claimant who had worked from 2005 to 2012 continuously, in law required a written notice of dismissal of termination before the same could be effected. Where such notification is lacking, the action of the respondent as the employer is an unfair labour practice that has no rationale. To terminate an employee while on annual leave or away from work is a bad labour practice contrary to constitutional standards set out under Article 41 of the Constitution. I therefore find, in the absence of any defence to challenge the evidence of the claimant that the action of dismissing the claimant lacked basis, the same has no justification and amounts to unfair labour practice.

10. The claimant is seeking notice pay at 3 months. Where such notice was not issued before dismissal, section 35 of the Employment Act makes provision for one month's pay in lieu of notice. The claimant is awarded Kshs.17, 747.00 being his last salary paid and deposited to his bank account by the respondent.

11. The claimant is also seeking severance pay for the 7 years he worked with the respondent. Severance pay is due in a case of redundancy as outlined under section 40 of the Employment Act. The claimant was dismissed while on leave, he went on leave because the respondent had no money to pay him for his leave as in the previous years. This did not stand out as a case of redundancy as the registered issue in dispute is that of unfair dismissal. The claimant cannot thus seek severance pay in the circumstances of his case. This is declined.

11. A claim for salary arrears for August 2012 is made. The claimant gave evidence that he proceeded on leave on 17th August 2012 and reported back on 5th September 2012 when he was stopped at the gate. Where the salary for August 2012 was thus not paid, the same is due and owing and is awarded at Kshs.17, 747.00.

12. The claimant is seeking payment for 21 leave days due. In evidence the claimant was clear that his leave was paid for and that on 17th August 2012 he proceeded on his leave until 5th September. The claimant however failed to outline how the 21 days of leave sought arose where he had taken such leave from 17th august 2012 to 5th September 2012. Where there was a balance of such leave days for the year at hand, the duty was on the claimant to outline such. Even where there was no evidence by the respondent, the claim in this regard lacks merit. This is declined.

13. On the finding that the claimant was unfairly dismissed and that the respondent engaged in unfair labour practices, the court awards the maximum compensation of 12 months in compensation. This is computed at Kshs.212, 964.00.

Judgement is entered for the claimant against the respondent in the following terms;

- a. **The claimant was unfairly dismissed form his employment with the respondent;**
- b. **Compensation awarded at Kshs.212, 964.00;**
- c. **Notice pay at Kshs.17, 747.00;**
- d. **Unpaid salary for August 2012 at kshs.17, 747.00; and**
- e. **Costs of the suit.**

Delivered in open Court dated and signed at Nairobi on this 30th day of June 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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