



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 311 OF 2013

HUMPHREY RIUNGU MUKIRA.....CLAIMANT

VERSUS

SPEED STEAM WORLD LTD.....RESPONDENT

J U D G M E N T

BACKGROUND

1. The claimant brings suit against the respondent, his former employer alleging wrongful and unfair termination of employment. He prays for ksh.145,950/ being the accrued employment dues plus damages for unfair termination. He avers that he was dismissed without notice for demanding his salary arrears through his lawyer.
2. The Respondent admits that she employed the Claimant as a security guard but on casual basis and paid all his wages daily. He denied that he had employed the Claimant on monthly salary basis and further denied that he unfairly dismissed him.
3. The suit was heard on 2.2.2015 when the Claimant testified as Cw1 and called Mr.Charo Wilson Jambo as Cw2. The Respondent however called no witness. After the close of the hearing counsel for both parties filed written submissions.

CLAIMANTS' CASE

4. The Cw1 was employed by the Respondent on 15/11/2010 as a security guard. His salary was ksh.7000 per month which was paid in cash after signing a voucher. The employer deducted NSSF and NHIF from his salary but he never remitted a fact to the Agencies he proved by blank NSSF statements (Exhibit 3). He contended that from January 2013 to 10/4/2013 the respondent never paid salary to the Claimant. When Claimant raised the issue with the respondent he was paid ksh.6000 as part of the salary for January 2013. The Claimant then sought legal assistance from a lawyer who served demand notice on the respondent on 15/4/2013.
5. In response to the letter the respondent's manager summoned the claimant to his office and told him that he could not continue working there unless he withdraws the case from the lawyer. When the claimant refused to withdraw the case, the manager dismissed him. He therefore brought this case by which he prays for salary arrears for January to April 2013, public holidays worked and leave days outstanding for 3 years, salary in lieu of notice to terminate and compensation for unfair termination all totalling to ksh.145,590/=.

6. On cross examination by the defence counsel, Cw1 maintained that after serving his lawyer's letter demanding for salary arrears, Mr. Biti, then Respondent's Manager told him to withdraw the case from the lawyer or else he would not continue working for the Respondent. That when Cw1 refused to withdraw the case from his lawyers he was dismissed by Mr. Biti on 15/4/2013. Cw1 further maintained that he was not paid salary arrears of kshs.1000 for January kshs.7000 for the February, kshs.7000 for March and kshs.3500 for April 2013. He contended that he was deducted kshs.460 being kshs. 200 for NSSF and 260 for NHIF monthly but the same were never remitted to the relevant Funds. He denied that he deserted work and insisted that he was dismissed for demanding his salary.

7. Cw2 was Cw1's fellow guard at the respondent since 2012. He confirmed that Cw1, just like him was receiving Ksh.7000 monthly salary and was not casual employee. He further confirmed that they were all deducted NSSF and NHIF contributions by the employer totaling to kshs.460 per month but the same was never remitted to the respective agencies. The said pay was acknowledged by signing vouchers which were all retained by the employer.

ANALYSIS AND DETERMINATION

8. There is no dispute that Cw1 was employed by the respondent from 2010 to 2013 as a security guard. The issues for determination that arise from the pleadings and evidence above are:

- 1. Whether the dismissal of the claimant amounted to unfair and wrongful termination.**
- 2. Whether the reliefs sought should be granted.**

UNFAIR TERMINATION

9. The respondent did not adduce any evidence to rebut the Claimant's evidence. The court therefore relies on the Claimant's evidence to find that the dismissal of the Claimant was for no just cause and it amounted to unfair and wrongful termination. It was unfair because although the claimant was invited to the office and was explained the reason for the intended dismissal by the manger, the reason for dismissal was unfair, invalid and unjustified under section 43,45 and 46 of the employment Act. Section 46 of the Act provides that it is not fair for an employer to dismiss an employee for the reason that an employee has initiated or proposes to initiate a complaint or other legal proceedings against the employer except where it is shown that the said proceedings are irresponsible and without legal basis. In the present case the claimant served a demand notice through his lawyers demanding salary arrears, leave, off days, public holidays and refund of unremitted statutory deductions. The above matters cannot be said to be lacking any legal basis. It was therefore unfair for the respondent to dismiss the claimant for proposing to initiate legal proceedings by a lawyer's demand letter.

10. In addition the termination was also wrongful and unjustified because failure to serve notice prior to termination as provided under section 36 of the Employment Act, the employer breached the employment contract.

RELIEFS

11. The second issue for determination is also answered in the affirmative. The Claimant has proved that he is entitled to one month notice because he was on a monthly salary. He is also entitled to the salary arrears as prayed in the claim for the period between January-April 2013 kshs.18500. He will also get cash in lieu of leave for 2 ½ years served. This is assessed at 53 leave days for which he is award kshs.12,133.33. He will also get his service pay of kshs.7000 for the 2 complete years served being worked at the rate of 15 days per year. The prayer for holidays worked was not properly particularized and proved. It is therefore declined. The claim for compensation is awarded but only for 3 months because the claimant confirmed on oath that he got another similar job shortly after the dismissal by the Respondent. The claimant is also entitled to a certificate of service.

DISPOSITION

12. For all the above reasons the court enters judgment in favour of the claimant and against the respondent declaring his dismissal unfair and awarding him.

1. one month salary in lieu of notice7,000.00
2. salary arrears for January 15th – April 2013.....18,500.00
3. service pay for 2 years 7,000.00
4. 53 days leave 12,133.33
5. 3 months gross salary for unfair termination....21,000.00

65,633.33

The Claimant will also have Certificate of Service, costs and interest.

Dated, signed and delivered this 19th day of June, 2015.

O. N. Makau

Judge