



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

INDUSTRIAL CAUSE NO. 315 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

DAVID OTIENO.....CLAIMANT

VRS

KISUMU WATER & SEWERAGE CO. LTD.....RESPONDENT

J U D G E M E N T

The Claimant David Otieno Oduka alleges in his Memorandum of Claim filed on 12th November, 2012 that he was employed as a meter reader by the Respondent, Kisumu Water and Sewerage Company Limited as a meter reader by contract dated 26th February, 2013. His gross salary was Kshs.31,151 per month. His employment was terminated on 31st August, 2013. He alleges the termination was wrongful and unlawful and prays for the following remedies (sic):-

1. Statutory deduction arrears and Termination 12 months salary Allowance/Retirement Benefits,
2. Reinstatement,
3. General Damages
4. Costs of this suit
5. Interest on (a) , (c) and (d) above at court rates
6. Any other relief which this Honourable court may deem fit and just to grant.

The Respondent filed a Memorandum of Defence in which it admits employing the Claimant but denies that the termination of his employment unlawful or unfair. It alleges that the Claimant who was on probation was terminated in accordance with Section 42 (1) (2) and (4) of the Employment Act as the Claimant did not satisfactorily complete probation. The Respondent submitted that the Claimant is not entitled to gratuity as he was a contributor to NSSF and in any case had not completed a year in service. It was further submitted that the Claimant was paid in lieu of 7 days notice.

The case was heard on 17th March, 2015. The Claimant testified that he was employed as a casual by the Respondent in July, 2009 and left on 1st October 2013 when he received a letter of termination dated 1st October, 2013. He was issued with the letter of appointment on 26th February 2013. The letter of termination did not give reasons for the termination. He was not given notice or paid in lieu.

He testified that he received a certificate of excellence on 21st December, 2012 signed by the

Respondent's Managing Director. He prayed for payment as pleaded in the Memorandum of claim.

The Respondent called Evelyn Opiyo, the Head of Human Resource and Administration who testified that she was employed by the Respondent in 2013. She testified that the Claimant's performance was not up to date. That there was a customer who complained that the Claimant over-read his meter. She further testified that the Claimant was not a form 4 graduate, a fact she realised when taking the Claimant's file to the Managing Director for confirmation. She was not sure if Claimant's certificate of excellence was authentic. She however confirmed that the Respondent issues certificates of excellence to staff and there is a committee which recommends the names to the Managing Director. She was also not sure if the Claimant had been paid salary for August, 2013. Ms Opiyo was also unable to confirm when the Claimant was served with the letter of termination of employment.

The issues for determination are whether the Claimant was in employment before the date of issue of his contract of employment, whether the termination of his employment was unfair and whether he is entitled to the remedies sought.

From the evidence on record, it is obvious that the Claimant was in employment before the date he was issued with his contract of employment. This is confirmed by his evidence as corroborated by the certificate of excellence issued on 21st December, 2012. This evidence was not controverted by the Respondent.

This being the case, placing the Claimant on probation from date of the letter of contract was against the law as he was already in employment and had proved his ability to perform as evidenced by the certificate of excellence dated 21st December, 2012.

The Claimant's letter of termination gave the reason for termination as unsatisfactory completion of probation period. Since the Claimant should not have been on probation having already been in employment before the date of issue of the letter, he was entitled to the process provided for under Section 41 of the Employment Act which was not complied with. The termination of his employment was to that extent unlawful.

The Respondent was unable to prove when and how the Claimant received his letter of termination. This leaves the Claimant's contention that he was served with the letter on 1st October, 2013 uncontested. This being the case, the Claimant was no longer on probation on 1st October, 2013, when he was served with the letter of termination.

From the foregoing I make the following determination:-

1. The termination of employment of the Claimant was unfair.
2. The Claimant is entitled to one months salary in lieu of Notice which I award at Kshs.31,151. He is also entitled to salary for August, and September 2013 which I award him at Kshs.62,302
3. I award the Claimant 3 months salary as compensation for unfair termination in the sum of Kshs.93,453/=
4. The Respondent will pay the Claimant's costs for this suit.

The decretal sum shall attract interest at court rates until payment in full.

Orders accordingly.

Dated delivered and signed in open court in Kisumu this 24th day of July, 2015.

HON. LADY JUSTICE MAUEEN ONYANGO

JUDGE.

Appearances:-

Otieno C. O. Ayayo for the Claimant

Opolo Akinyi for the Respondent

Cc Hassan