



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1713 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 22nd July, 2015)

JOHN KIAMBATICLAIMANT

VERSUS

MOTORWAYS CONSTRUCTION.....RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed his Statement of Claim on 25/9/2012 through the firm of Kipsang & Mutai Advocates.

2. Issues in dispute

1. Unfair termination of the Claimant by the Respondent.
2. Failure to pay the Claimant notice
3. Failure to pay the Claimant prorata pay for the month of May 2012 and applicable leave pay.

3. The Claimant gave his oral evidence in court and stated that he was employed by the Respondent on 1/2/2007 as a general worker and remained in that position until 18/5/2012 when he was terminated. The salary payable to the Claimant rose from 11,203/= and graduated to 23,532/= at the time of termination.

4. It is the Claimant's position that on 18/5/2012 he was at his work station at Arboretum. He was on lunch break when one Amos came alleging that the Claimant had been seen towing another vehicle which was not true. The Claimant worked upto evening.

This day was a Friday. On Tuesday the following week, the Claimant avers that he was issued with a summary dismissal letter and dismissed on 22/5/2012. The Claimant denies he used the Respondents machines unlawfully and he also denies causing the company loss of 90,000/=. He wants the Respondent ordered to pay him his terminal dues.

5. In cross examination the Claimant agreed that he was earning 23,532/= which was not his permanent salary and it varied according to number of days worked and the basic rate was 491.87/= per day. He also admitted that he was a member of NSSF and his NSSF contributions were paid by his employer. He also stated that on his payslip, he was paid leave 2.25 days per month. He avers that he was never paid in May

2012. He denies he was given any hearing.

6. The Respondents filed their Statement of defence on 10/12/2012 through the firm of E. Muigai & Company Advocates. They also called 3 witnesses. It is the Respondent's case that the Claimant was their employee as a general worker but was later promoted to a Vibrating Roller Operator. The Respondent further deny that the Claimant was earning Kshs.23,532/= at the time of dismissal.

The Respondents content that the Claimant was terminated for justifiable cause having been in breach of the employment contract for misusing company property namely a grader by utilizing it to carry out work for a third party.

7. The Respondents further aver that the Claimant was given an opportunity to be heard contrary to the Claimant's averment. It is also the Respondents position that the action of the Claimant amounted to gross misconduct warranting summary dismissal having exposed the company to a loss of 90,000/=. The Respondent therefore prays this case be dismissed with costs to themselves.

8. The Respondent's witnesses RW1 stated that he is the one who saw their roller parked near Arboretum and it was towing a canter vehicle. He then called the supervisor and informed him of the same.

RW2 is one who was called by RW1 and informed him that their roller was being used for private work. He then called Claimant to ask about this but Claimant didn't respond.

RW3 stated that she called Claimant to a meeting on the alleged mistake. The Claimant denied any culpability. The company then decided to terminate his services with a co-worker he was with.

9. In cross examination RW3 stated that there were no minutes of the disciplinary meeting. She also denied issuing a written notice to Claimant to come for a disciplinary hearing. She also admitted that the Claimant was not paid that months' salary nor leave for that year.

10. Upon hearing both sides, plus submissions duly filed, the issues for determination by this court are as follows:

(1) Whether there were valid reasons to warrant dismissal of the Claimant.

(2) Whether due process was followed before Claimant was dismissed.

(3) What remedies if any the Claimant is entitled to.

11. On the 1st issue, the Respondents have averred that the Claimant was dismissed for misusing company property in that he was found towing a private vehicle when he was supposed to be doing Respondents work. The Claimant had never been issued with a letter of appointment and so in deciding if any part of the contract was breached, the fall-back position is the Employment Act 2007.

12. Section 43 (1) & (2) of Employment Act 2007 states that:

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

13. It is in line with this provision of the law that the Respondent is obliged to prove the reasons for this termination. The RW1 is the one who is said to have seen the Claimant in the action of towing another vehicle which Claimant has denied. Misuse of the Respondents property is a reason which would

necessitate some disciplinary action including a possible surcharge if proved.

14. The reason however does not warrant a summary dismissal as was meted out against the Claimant. The reasons that can call for summary dismissal are set out under Section 44(4) of Employment Act which are termed as gross misconduct but in this case, the act complained of whereas it amounts to a misconduct may not amount to a gross misconduct.

15. On the 2nd issue, there is no indication that due process envisaged under Section 41 of Employment Act 2007 was also followed. The Respondents admitted that there was no written notice issued to the Claimant of any disciplinary hearing and neither were there any minutes of the said hearing.

Infact RW3 admitted that she summoned Claimant on 15/5/2012 in her office and asked him what had happened and he denied involvement in the misconduct. This is not the hearing envisaged under Section 41 of Employment Act and this court finds that there was no due process before the Claimant was dismissed.

16. Having found as above, this court finds that the Claimant was unfairly terminated as provided under section 45 (1) & (2) of Employment Act 2007 which states as follows:

(1) No employer 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 employee's 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.

17. On remedies payable, it is not clear the salary the Claimant was earning per month. The pay slips adduced have salaries varying from one month to another. It was however agreed that in March 2012, the basic rate of pay was 491.81/= per day. Given that the Claimant had continuously worked for Respondent for over 3 months, it was unfair to continue treating him as a casual. I will therefore take his salary entitlement to be the daily rate x 30 days = 491.87 x 30 = 14,754/=.

18. I therefore award Claimant as follows:

(1) 1 months salary in lieu of notice = 14,757/= + house allowance of 2,262/= plus other allowances paid 1,475.61 = 18,495/=.

(2) Salary for 22 days worked in May 2012 = 22/30 x 18,495 = 13,563/=

(3) Leave not paid for 20/1/2012 = 18,495/=

(4) 6 months salary as compensation for unfair termination = 6 x 18,495/= = 110,970/=

TOTAL = 161,523/=

(5) Claimant be issued with a Certificate of Service.

(6) Respondent to pay costs of this suit.

Read in open Court this 22nd day of July, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wandeto for Respondent

Mrs. Omondi holding brief Mutua for Claimant