



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 503 OF 2013
(Before Hon. Justice Hellen S. Wasilwa on 16th July, 2015)
ROBERT CHAKA NDUPHA.....CLAIMANT
VERSUS
M/S VEGPRO (K) LIMITED.....RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein Robert Chaka Ndupha filed his Memorandum of Claim on 11/4/2013 through the firm of Nyabena Nyakundi and Company Advocates claiming that he was unlawfully terminated from employment by the Respondents.
2. It is the Claimant's case that on 6/3/2007, he was employed by the Respondent as a Motor Mechanic at a monthly salary of Kshs.12,834/= per month plus house allowance of Kshs.1,925/- per month total being 14,759/=. This salary was later increased to 19,320/= per month. The Claimant produced his contract of employment letter as exhibit which was later amended on 9/11/2009 stating the increased pay to 20,992 per month gross.
3. It is the Claimant's claim that he worked from 8 am to 6 pm 6 days a week.
4. The Claimant avers that he was summarily terminated on 28/9/2010 after he failed to repair a customer's vehicle in time, the reason being he had no spare parts and had requested for them.
5. The Claimant avers that he was dismissed on the spot and paid 7,567/= as his dues. He avers that he was not given any hearing nor was he given any notice before the termination. He also denies embezzling any company property and also denies abusing a manager of the Respondent.
6. He seeks payment of his September 2010 salary, leave allowance for year 2010, notice pay, gratuity and 3354 hours of overtime work all totaling 614,913/=. He also prays for costs of this case.
7. The Respondents filed their Statement of Defence on 22/5/2013 through the firm of Muturi S.K. & Company Advocates. It is the Respondents position that the Claimant was summarily dismissed on suspicion of embezzling Respondents company property and grossly misconducting himself by insulting the manager investigating the matter.
8. It is also the Respondents position that the Claimant was paid all his dues amounting to Kshs.7,557/= vide a cheque number 007336 in full and final settlement of the terminal dues for the contract. They

therefore ask the court to dismiss the Claimant's case accordingly. Other than the defence filed, the Respondents opted not to call any evidence.

9. Having considered the evidence of both parties, the issues for consideration are as follows:

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

2. Whether due process was followed before dismissal.

3. Whether the Claimant is entitled to remedies sought.

10. The reasons given for Claimant's dismissal are embezzlement of Respondents funds and insulting a manager which the Claimant has denied.

Section 43 of Employment Act 2007 states:

(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.

11. It is therefore important that as per the law that the Respondent should not only state reasons but must prove them. No evidence has been adduced by the Respondent on the alleged embezzlement. The allegation remains a mere statement.

Other than this the issue of abuse of a manager, has also not been proved as the manager allegedly abused was not called as a witness to explain the circumstances of the alleged abuse. It is therefore this court's finding that there were no valid reasons to warrant Claimant's dismissal.

12. On issue of due process too, the Claimant was not give any notice before termination as envisaged under Section 35 of Employment Act 2007.

Section 41 of Employment Act states that:

“(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.”

This process was also not followed.

13. It is therefore this court's finding that the Claimant's dismissal was unfair 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.

14. Having found as above, I find for Claimant in the following terms:

1. 1 month salary in lieu of notice = 20,992/=

2. Service gratuity for 3 years = 37,912/=

3. 12 months salary as compensation for unfair termination = 20,992 x 12 = 251,904/=

TOTAL = 310,808/=

4. Other parts of the claim not proved

5. The Claimant will also be issued with a Certificate of Service.

6. The Respondent will meet costs of this suit.

It is so ordered.

Read in open Court this 16th day of July, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Muoki holding brief Muturi for Respondent – Present

Nyabena for Claimant – Present