



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 2523 OF 2012

DENNIS OМУKA MAKUTWA.....CLAIMANT

VERSUS

SPINNERS AND SPINNERS LTD.....RESPONDENT

JUDGMENT

1. The claimant avers that he was employed by the respondent as a machine operator on a monthly salary of Kshs.11,802/=. He was however not issued with an appointment letter. According to him he served the respondent with loyalty and diligence until 30th September, 2012 when his services were wrongfully and unlawfully terminated by the respondent.
2. The claimant therefore sought judgment against the respondents for some Kshs.413,070/= which comprised of overtime, service, holiday and leave allowance all for 5 years. He further sought to be awarded one month's pay in lieu of notice of termination of his services.
3. The respondent on the other hand refuted the claimant's claim and denied it was liable to the claimant in any way whatsoever.
4. In his testimony before the Court the claimant stated that his services were terminated because he sued the respondent for compensation for injuries he sustained in the course of his employment with the respondent. It was his testimony that he used to work from 7.00 a.m. to 6.00 p.m. and that he never went on leave for the period he worked. He stated that his salary was between kshs.10,000/= and Kshs.11,802/= depending on work.
5. During his employment with the respondent, he stated that he never received any adverse warning letter. Upon his termination he was paid Kshs.13,856/=. It was his evidence that they used to sign contracts and would be rehired again upon expiry of the contract.
6. In cross-examination he stated that he was paid Kshs.13,856 for work done between 21st August, 2012 and 18th October, 2012. He further stated that they used to be issued with annual contracts and would be paid at the end of such contracts.
7. The respondent called two witnesses. The first witness Mr. Hassan Ali testified that the respondent was hired in 2007 to 2008 as a general worker. In 2009 he was employed on contract for 10 months. In 2010 he got injured and was out of work for 7 months. In August 2012 the claimant got a renewal for 6 months. Mr. Ali further testified that he received a memo from the claimant's department that he was

always leaving his work place to attend to private matters. According to Mr. Ali, the claimant was a good worker until August 2012 when he started receiving complaints about the claimant's frequent absence from work. He denied the claimant was dismissed after he demanded for compensation for his injuries. Upon termination the claimant was paid all his dues including overtime as per the payslip which was exhibited in the respondent bundle of documents.

8. The respondent's second witness, Mr. Zadock Odhiambo testified that the claimant was a good worker and after his injuries he was reassigned other duties in August to October, 2012. According to Mr. Odhiambo, from August, 2012 the claimant's movement out of work became frequent and that the claimant never told him the private matter he used to attend to.

9. In her closing submissions, Counsel for the claimant submitted that the respondent terminated the claimant's services due to an accident in which he was involved. This according to counsel amounted to discrimination and disregard for the claimant's dignity. According to Counsel, the claimant met the accident when he was working for the respondent and it was therefore unfair to terminate the claimant's services simply because he was slow on his job. Counsel further submitted that the claimant was not given audience to air out his views or explain himself regarding the slow pace of his work.

10. Counsel for the respondent on the other hand submitted that the reason for the claimant's sacking were clearly set out in his letter as having poor performance of his duty despite being cautioned several times. According to Counsel evidence was placed before the Court by the respondent's two witnesses which confirmed that the claimant had lost interest in his job and had numerous incidences of unauthorized absenteeism. Counsel further submitted that upon termination, the claimant was paid Kshs.13,856 comprising the payment in respect of salary for days worked, overtime, pay in lieu of leave and notice. These payments according to counsel were done on 8th October, 2012 and the claimant executed a discharge voucher in full and final settlement. Regarding overtime, Counsel submitted that the claimant admitted in evidence that he was paid overtime for hours he worked for entire period he worked for the respondent.

11. This Court has stated severally before that termination of employment is two pronged process. It starts with the employer having justifiable and valid reasons for terminating an employee's contract. Once this requirement is met, the employer must ensure that in executing the process of termination a fair procedure is followed.

12. The Court has reviewed the pleadings and documents in support of either party's positions in this dispute. The Court also had the advantage of listening to witness testimonies and consider final submissions by Counsel. Whereas it may have been true that the claimant absented himself from work frequently and without authority no evidence was tabled either by way of minutes or memorandum that the claimant was confronted with this accusation and asked to make any representation before he was dismissed. Absence from work without authorization is a valid ground for summary dismissal but its validity alone does not negate or waiver the duty of an employer to follow a fair process in dismissing an employee guilty of such unauthorized absence. To this extent the Court reaches a finding that the claimant's services were unfairly terminated for want of fair procedure. The Court therefore awards him 6 month's salary as compensation in that regard.

13. Concerning the payment of Kshs.13,856 and execution of discharge voucher, the Court observes that execution of a discharge voucher cannot oust the jurisdiction of the Court to interrogate the fairness of the process of termination and make an award as mandated by Employment Act and the Industrial Court Act.

14. In conclusion the Court awards the claimant Kshs.54,618/= being 6 months basic pay as at September, 2012 when he was dismissed.

15. The claimant having been paid in lieu of notice and for days worked in October, the Court will not make an award in respect thereof again.

16. The claimant shall have costs of the suit and interest thereon.

17. It is ordered.

Dated at Nairobi this 10th day of July 2015

Abuodha J. N.

Judge

Delivered this 10th day of July 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge