



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 845 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 9th July, 2015)

DANIEL WEKESA NYONGESA.....CLAIMANT

VERSUS

SUNFLOWER DRY CLEANERS LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed their Memorandum of Claim on 21/5/2014 through the firm of Betty Rashid & Company Advocates. The Claimant claims that he was unlawfully and wrongfully terminated by the Respondents who also failed to pay him his terminal benefits.
2. The Claimant's case is that in the year 1997, he was employed by the Respondent as a machine operator at a salary of 16,000/= per month though he was not given any appointment letter. He avers that he performed his duties with loyalty and diligently until 30/6/2012 when the Respondent unlawfully and without any reasonable cause terminated his employment without giving him any notice nor paying him his full terminal benefits.
3. He now seeks payment of terminal dues including 3 months salary in lieu of notice, service pay for 15 years, leave allowance for 15 years, general damages for unlawful termination and other dues deducted as NSSF and NHIF but not remitted all valued at 720,000/= plus issuance of a Certificate of Service plus costs and interest.
4. The Respondents filed their Statement of Defence on 2/7/2014 though the firm of Messrs Mbugwa, Atudo & Macharia Advocates. In reply, they admitted that the Claimant was employed by the Respondent as a Security guard from 1998 and not as a machine operator.
5. It is the defendant's case that the claimant was after this trained by the Respondents in making machines for hanging clothes and was later promoted to staff supervisor in charge of managing quality and compliance with regard to garments on 27/11/2008. They also aver that the Claimant was indeed issued with a formal contract where he was entitled to Ksh.63/= per hour plus Kshs.3,000/= as allowances. That he was also entitled to leave which he chose to take intermittently.
6. The Respondents further aver that on or about June 2012, the Claimant was informed that the workload had significantly reduced and it was best time to go for the accumulated leave. He proceeded for 21 days leave from 2/7/2012 and was expected back on 26th July 2012. The Claimant however failed to report

back as expected. The Respondent even wrote to the Claimant informing him that he had absconded work for 17 days. The Respondent assumed he didn't intend to report back and filled up his position.

7. It is then that the Claimant contracted his union who visited the company stating that he claimant had been unlawfully terminated.

8. It is the Respondents averment that they were willing to resolve the matter and even offered the Claimant his job back but he refused insisting on his demand for the unjustified exaggerated claim for compensation.

9. The Respondents aver that they didn't unlawfully dismiss the Claimant from employment but that the Claimant absconded his duties and was the author of his misfortune and the same could not therefore be vested on the Respondents.

10. The Respondents have further averred that they have made all statutory payments and deductions during the claimant's employment and that he claimant is not entitled to a claim over the same and they ask court to dismiss this claim accordingly.

11. I have considered the evidence of both parties and issues for determination are as follows:

(1) Whether the Respondents terminated Claimant's services or the Claimant absconded.

(2) If so whether the Respondent had valid reasons to so terminate.

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

12. On the 1st issue, the Respondents have in their defence stated that the Claimant was asked to proceed on leave on 2nd July 2012 and report back on 26th July 2012 but he didn't report back. However in the same defence, the Respondents had asked him to take this leave as they had entered into a contract with White Rose Dry Cleaners to carry out dry-cleaning on their behalf. This in self was like telling the claimant that he had been declared redundant as White Rose Dry Cleaners were now poised to do the work he was previously doing.

13. Though the Respondents aver that he absconded duty, this contradicts the Respondents own defence.

As early as 22/8/2012, the Claimant wrote to the Respondents but they didn't talk about his absconding duty. The issue of Claimant absconding duty comes late after an averment that the other company had been contracted to do the work the Claimant normally did. It is therefore the finding of court that the services of claimant were terminated on account of redundancy.

14. The next issue is on validity of reasons. It is apparent that the Respondents got into a contract with another company which now took over the duties previously performed by the Claimant and therefore, this is a case of redundancy. The applicable procedure to terminate claimant would therefore have been as provided for under Section 40 of Employment Act 2007 which states as follows:

(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:

(a) Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

(b) Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(c) The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d) Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) The employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

15. The Respondents did not adhere to these provisions of law and therefore the termination of Claimant was unlawful and wrongful. I therefore award Claimant as follows:

(1) 1 month pay in lieu of notice = 16,000/=

(2) 15 days salary for each year worked as severance pay = 16,000 x 15/30 x 15 =120,000/=

(3) 6 months salary for unlawful termination

= 16,000 x 6 = 96,000/=

TOTAL DUE = 232,000/=

(4) The Claimant be issued with a Certificate of Service.

Other parts of this claim have not been proved and are therefore not awarded.

The Respondents will pay costs of this suit.

Read in open Court this 9th day of July, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Claimant

No appearance for Respondent