



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 156 OF 2015

JACKSON KIVILUCLAIMANT

VERSUS

ALBA PETROLEUM LTD RESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for compensation for unfair and unlawful termination of the claimant's employment by the respondent by which the claimant seeks to recover kshs.1, 618,152 and Certificate of service. The gist of the claimant's case is that he was employed by the respondent on from September 1996 as Operations Assistant. He worked without any problems with the employer until 8.5.2013 when he was served with a letter warning him of his alleged low productivity. When he sought audience with the Managing Director (MD) he was told to wait for explanation of the letter at a later date. However on 1.10.2013, he was served with a termination letter.
2. The termination took effect immediately but he was offered salary in lieu of notice, salary arrears and leave outstanding. The reason for the termination cited in the termination letter was gross misconduct namely, unsatisfactory performance of obligations. The claimant has denied the alleged misconduct and contended that he was never accorded any hearing before the termination. Consequently he prays for compensation for the unfair and unlawful termination. At the time of his discharge the claimant's monthly salary was kshs.134,846.50.
3. The respondent admits that she employed the claimant as from 1996 to 1.10.2013 when he was terminated for gross misconduct. It is the respondent's case that the claimant failed to oversee his juniors in his department and follow the operations procedures as a result of which the respondent suffered loss through theft by the said junior officers. It is further respondent's case that she paid the claimant all his terminal dues and he acknowledged the same as full and final settlement.
4. The case was heard on 10.6.2015 when the claimant testified as CW1 while the respondent called Beatrice Achieng Ooko as RW1. Thereafter both parties filed written submissions.

Analysis and Determination

5. After carefully considering the pleadings, evidence and the submissions, it is clear that CW1 was employed by the Respondent as the Operations Assistant until he was terminated without notice on 1.10.2013. The issues for determination are:
 - a. Whether the termination of the employment was unfair and unlawful.

- b. Whether the reliefs sought should be granted.

Unfair and unlawful termination

6. According to RW1, the claimant failed to perform his duties satisfactorily with regard to supervising his juniors, following the respondent's operations procedures and documentation as a result of which his juniors stole from the respondent. She further contended that the claimant was given a hearing before dismissal. She however admitted that no performance appraisal was done on the claimant before his dismissal. She also did not produce any evidence to prove that the claimant was given a fair hearing before dismissal.
7. The claimant has however denied that he was a poor performer and maintained that there were no agreed targets between him and the employer upon which he could be judged as a poor performer. He further maintained that he was never given any opportunity to defend himself against the alleged misconduct and he was never given any Certificate of Service after the termination.
8. After evaluating the above evidence, the court is persuaded to believe the claimant's evidence and has therefore dismissed the respondent's evidence. Under Section 45 of the Employment Act, termination of employment is unfair if the same is founded on an invalid and unfair reason and if done without following a fair procedure. The burden of proving the reason and the fair procedure for termination rests with the employer according to Section 45 read with section 41, 43 and 47 (5) of the Employment Act.
9. The said section 41 requires that before an employer dismisses an employee for misconduct and poor performance, like in this case, he must explain the reason for the dismissal to the employee and afford him a chance to defend himself in an oral hearing before the termination. Such a hearing must be done in the presence of another employee of the accused employee's choice and must be done in a language they understand.
10. In this case, the foregoing elaborate procedure was never followed before dismissing the claimant and the alleged gross misconduct or poor performance by the claimant or his juniors was not proved before this court. The termination of the Claimant's services was therefore unfair and unjustified within the meaning of Section 45 of the Employment Act. The contention by the respondent that she was entitled to summarily dismiss the claimant under section 44 (4) (c) and (e) without any hearing is misconceived and is dismissed. Even where an employee has committed an offence under section 44 of the EA, the right of the employer to dismiss him is subject to the provisions of section 41 of the Act which guarantees the employee to fair oral hearing.

Reliefs

11. In view of the finding above, the court makes declaration that the termination of the claimant's employment by the respondent was unfair and unlawful. Under section 49 (4) of EA the court is required to take into account several matters, including the wishes of the employee, in deciding which relief to award. In this case, the claimant wishes to be awarded damages and not to be reinstated.
12. Consequently he is awarded damages under section 49 (1) of EA being 12 months' gross salary compensation for unfair and unlawful termination totaling to Kshs.1,618,152 as prayed. In so awarding, the courts has considered the fact that, even with due diligence, the claimant may not have secure alternative employment of equal pay within 12 months in view of his advanced age of 60 years. the court has also considered the fact that the claimant had also served the respondent for 27 which on average is long period of time with no pension or gratuity entitlement.
13. The respondent never opposed the order for Certificate of Service and it granted as prayed.

Disposition

14. For the reasons stated above, judgment is entered for the Claimant against Respondent declaring the termination of the Claimant's employment unfair and unlawful, and awarding him Kshs.1, 618,152 plus costs and interest. The claimant is awarded certificate of service.

It is so ordered.

Signed, dated and delivered at Mombasa this 14th day of September 2015

O.N. MAKAU

JUDGE