



REPUBLIC OF KENYA
 IN THE INDUSTRIAL COURT AT MOMBASA
 CAUSE NUMBER 558 OF 2014

BETWEEN

OMARI MWACHIKOKO CLAIMANT

VERSUS

ASHBURTON GROVE LIMITED RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Ms. Wayodi Advocate instructed by Mwachungu Mtana & Company Advocates for the Claimant

Mr. Aminga Advocate instructed by Aminga & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed his Statement of Claim on the 10th November 2014. He states he was employed by the Respondent in February 2003 as a Site Operative. He earned a salary of Kshs. 13,200 per month. His contract was terminated without reason or notice by the Respondent, on the 9th March 2014. He seeks from the Court, which he confusedly refers to as an Arbitral Tribunal, the following orders against the Respondent:

- a. 1 month salary in lieu of notice at Kshs. 13,200
- b. 12 months' salary in compensation for unfair termination at Kshs. 158,400
- c. Interest and Costs

2. The Respondent filed its Statement of Response on 17th December 2014. It concedes the Claimant was its Employee, on the terms of employment stated in the Claim. It concedes terminating the Claimant's contract, but states the decision was fair and lawful. The Claim is not merited. The Respondent urges the Court to dismiss the Claim.

3. The Claimant gave evidence and closed his case on 2nd June 2015. The Respondent testified through its Director Mr. Michael John Bell on the 3rd September 2015 when the hearing closed.
4. The Claimant testified he currently works as a Shamba Boy. He was previously employed by the Respondent as a Site Operative. He was assigned duties at the Respondent's construction sites. He was paid Kshs. 13,200 per month. Some contractors engaged by the Respondent took away some bitumen from one of the sites. The Respondent charged that the Claimant had taken the bitumen. His contract was thus terminated, without any good reason, notice or hearing.
5. Questioned, the Claimant testified he is also known as Abdallah Mwanjewa. He was employed by the Respondent. There was no letter of employment issued to him. He was a Site Operative. He presently works for a certain Whiteman named John, as a Gardner. He did not know if John has any relationship with the Respondent. Mike and his Wife are Directors of the Respondent. There was a split in the Company's directorship. The Claimant had an outstanding loan of Kshs. 10,000 with the Employer at the time he left employment. He did not absent himself for duty for 2 days. He was told he had stolen bitumen. He recalled he was ill on certain occasions and did not report for duty. He did not recall being admonished by the Employer for absenteeism. He did not know the details of computation of terminal benefits and compensation claimed; computation was done for him by his Advocate. He prays the Claim be allowed.
6. Bell testified his Business involved joinery. The Claimant was employed as a General Labourer by Bell and his Partner. Bell did not terminate the Claimant's contract. The two Gentlemen had a serious argument. The Claimant requested Bell to loan him Kshs. 15,000. He gave the Claimant Kshs. 10,000 on a Sunday. The following Monday the Claimant called on Bell. He demanded the balance of Kshs. 5,000. Bell did not oblige. At the end of that month, the Claimant deserted. He then instructed his Advocates to demand compensation and terminal benefits from Bell, alleging unfair termination. The Witness testified he certainly told the Claimant to go away, because of the Claimant's persistent demands for money. The Claimant demanded through his Advocates for settlement at Kshs. 1.2 million. Bell responded. There was no communication from the Claimant. The Claimant later wrote once more demanding the same amount. Bell proposed the dispute is settled before the Labour Office. This did not materialize. The Witness testified he does not oppose the claim for notice pay. The Claimant took Kshs. 10,000 from Bell, did not work for it, or repay. There was no discussion with the Claimant before termination. The Claimant kept away from the workplace. Termination was based on the persistent demands for money, and absence from work.
7. Bell testified on cross-examination that the Claimant worked for the Respondent from 2003 to 2014- a period of approximately 11 years. He worked for both Partners. His salary was Kshs. 13,200. The wage slip referred to him as Site Operative. He was absent on many occasions. There was no letter warning him on this. Bell did not have documents showing the Claimant was loaned Kshs. 10,000. The Claimant is entitled to notice pay. The grounds upon which termination was made were persistent demands for money, and absenteeism. The Witness did not have proof of these grounds, he stated. The Respondent urges the Court to dismiss the Claim.
8. Was the Claimant unfairly and unlawfully dismissed? Is he entitled to the prayers sought?

The Court Finds:-

9. It is agreed the Claimant was employed by the Respondent Company in 2003, and left in 2014, after a period of 11 years. His pay slip indicates his salary was Kshs. 13,200 per month. His job designation was 'Site Operative.' Although Mr. Bell initially suggested he did not terminate the Claimant's contract of employment, he later in his evidence conceded he terminated the contract on the grounds that the Claimant made persistent demands for money, and was absent from work without leave or lawful cause.
10. Section 41, 43 and 45 of the Employment Act 2007 require the Employer to demonstrate fair and valid grounds in every termination decision. The decision must be shown to have been arrived at following a fair procedure, which includes the presentation of the details of the employment offence to

the Employee; and the granting of the Employee the opportunity to be heard.

11. The Claimant asked Bell for a loan of Kshs. 15,000, and was availed Kshs. 10,000. He is alleged to have persistently demanded for the balance of Kshs. 5,000. Bell told the Claimant to go away. The Claimant cannot therefore have deserted; he was specifically asked by Bell to go away, presumably because he was making a nuisance of himself, through his persistent demand for money. The second ground for absenteeism appears to have been supported in the evidence of the Claimant. He stated he was occasionally ill, and failed to report for duty. He did not explain to the Court why he absented himself without informing his Employer, or seeking sick-off days. While the first ground on persistent demands for money seems quite weak in justifying termination, absence of the Claimant from work without leave, was a strong enough ground to justify termination under Section 44 [4] of the Employment Act 2007. Employees who fall ill must always seek leave and where not able to do so before leaving their workstations, at the very least communicate at the earliest with their Employers, to enable their Employers organize for relievers.

12. The Respondent did not however, hear the Claimant on either ground. The Respondent should have heard the Claimant in the manner prescribed under Section 41 of the Act, before asking the Claimant to go away. In the end the Claimant was denied substantive justice as well as procedural justice. IT IS ORDERED:-

- a. ***Termination was unfair.***
- b. ***The Respondent shall within 21 days of the delivery of this Award pay to the Claimant 1 month salary in lieu of notice at Kshs. 13,200 and 6 months' salary in compensation for unfair termination at Kshs. 79,200- total Kshs. 94,400.***
- c. ***No order on the costs and interest.***

Dated and delivered at Mombasa this 30th day of October, 2015

James Rika

Judge