



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NUMBER 1655 OF 2013

TAILORS AND TEXTILES WORKERS UNION.....CLAIMANT
VERSUS
CHIC FASHIONS LIMITED.....RESPONDENT

JUDGMENT

1. According to the memorandum of claim the grievant herein was employed by the respondent as a general worker on 23rd January, 2006 working in several departments as a packer, cleaner and at the store. According to him his services were verbally and unlawfully terminated on 22nd March, 2013 after serving the company for over seven years and 2 months. According to him by the time his services were terminated he was earning Kshs.10,218/= per month which translated to a daily rate of Kshs.393/= instead of Kshs.412.80 as provided for in the obtaining Regulation of Wages (General) Amendment Order, 2012 hence underpayment of 19.80 per day for the 7 years and 2 months which he served the respondents.
2. The grievant further averred that he was never paid house allowance during the time he worked for the respondent.
3. The respondent through his memorandum of response filed on 7th February, 2014 refuted the claim averring that the grievant was at all material times employed as a casual labourer earning a daily pay and that he absconded hence the issue of unlawful termination does not arise. The respondent further averred that as a daily wage worker the respondent was earning Kshs.393.50 plus a Kshs.28 per day as pro rata leave and the payment was well within the requisite statutory wage guidelines applicable to the grievant. The respondent therefore contended that it was justifiable to dismiss the grievant for absconding work without lawful excuse of permission.
4. The respondent further averred that it duly attended conciliation hearings as requested by the Labour office and the finding was given to the effect that the respondent had fully paid all dues payable to the grievant. The respondent therefore averred that referral of the dispute to this Court amounted to abuse of the Court process and amounted to forum shopping.
5. In his evidence in Court, the claimant testified that he asked for permission to travel upcountry which was granted but upon his return on 22/2/2012 he was not allowed to resume duties. He was instead asked to come the following week. Thereafter this became continuous. On 23rd July, 2012 he returned again to his place of work and was told to return the following week. It was his evidence that he was not

given termination letter upon dismissal. Further that prior to dismissal he was never taken through any disciplinary hearing.

6. In cross-examination he denied that he was employed by the respondent in 2011 and that his services were terminated on 15th March, 2012. He denied being declared redundant.

7. Concerning conciliation by the Ministry of Labour, he admitted seeing the Labour officer by the name Ms. Kimani. He was in the company of a Mr. Munyao. He admitted that he understood the contents of the letter by Ms. Kamau attached as appendix A in the respondent's bundle of documents but denied knowledge of Mr. Kinyotu though he could recall the letter marked Appendix 2 of his bundle of documents.

8. The respondent called one witness a Mr. Francis Njau Mwaura who said he worked for the respondent as a Human Resource manager. According to his evidence the claimant joined the respondent in 2011 as a general worker on daily wages paid through petty cash vouchers. To vouch for this he made reference to annexure B of the respondent's bundle of documents which were payment sheets indicating payments received by employees. According to his evidence the claimant was earning Kshs.393.50 per day. It was his evidence that in working daily wages, the respondent relied on General Wages Order and that payment offered by the respondent was higher than minimum wage. He denied that the claimant was employed in 2006. According to him he never turned up for work after being granted leave to travel up country and that they only received summons from the Labour Officer concerning him.

9. There was no dispute that the claimant herein was employed by the respondent as a general worker. What was disputed was when the claimant was employed. Whereas the claimant maintained that he was employed in 2006, the respondent denied this and maintained that the claimant was employed in 2011. The respondent produced payment sheet for the month of December, 2011 to show this.

10. The claimant acknowledged these paysheets and that he signed them against payment. The claimant on the other hand did not produce any document or call any witness to support his allegation that he was hired in 2006 by the respondent. The claimant's union who brought this claim on behalf of the claimant though attached the claimant's membership card which indicated he had been a member since 2006 and his employer indicated as the respondent, did not produce any further document such as a copy of recognition agreements or Collective Bargaining Agreement with the respondent showing the claimant as one of its listed members in the respondents employment.

11. Besides there is a claim for underpayment since 2006 which if indeed it be true, it would be hard to understand why the union did not pursue the same until the time the claimant was terminated. This would have at least established when the relationship between the respondent and the claimant started. In the circumstances the only evidence the Court has is that produced by the respondent which was not refuted by the claimant. The Court will therefore deem it that the claimant was employed by the respondent in 2011.

12. It was in evidence by both parties that the claimant asked for two weeks leave and was due to resume work on 9th March, 2012. According to the respondent, the claimant never turned up yet according to the claimant he turned up but was asked to return the following week and this became the trend until he finally decided on 23rd July, 2012 that his services were terminated. Although the claimant was a general worker, it is not in dispute that he was in regular service of the respondent. If this was not the case, there would have been no need for the respondent to accuse him of absconding duty. To this extent the claimant's contract of service benefitted from the deeming provisions of section 37 (1) of the Employment Act.

13. The respondent claimed the claimant absconded duty but nothing was produced by way of notice to show cause or any attempt to contact the claimant to show cause why his services could not be terminated on account of unauthorized absence. In the circumstances the Court finds that the claimant services were terminated without valid or justifiable reasons and that the procedure for termination was unfair.

14. The Court therefore awards the claimant as follows:-

Kshs.

- a. One months' pay in lieu of notice.....11,805.00
- b. Service pay for 2011 at the rate of
 15 days per year.....5,902.50
- c. 7 months pay for unfair termination of
 Termination of services.....82,635.00

15. It is so ordered.

Dated at Nairobi thisday of 2015

Abuodha J. N.

Judge

Delivered this 30th day of October 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge