



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 782 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 29th October, 2015)

KARANJA KAHARA.....CLAIMANT

VERSUS

JARIBU MOTORS LIMITED..... RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed his Memorandum of Claim on 9/5/2012 through the firm of Gakoi Maina & Company Advocates. It is the Claimant's case that on 1/2/1995, he was employed by the Respondent as an ungraded artisan who rose up the ladder to be a welder unit his services were terminated by the Respondent.
2. He annexed his letter of appointment as Appendix 1. He also annexed Appendix 3 his termination letter where the Respondent stated that they had terminated his services for planning to steal some items from the Respondents premises whereby they throw them over the demolished wall and were caught in the act. At the time the Claimant was earning Kshs.9,520/= per month gross pay as per his Annexure 2.
3. It is the Claimant's case that he had worked for Respondents for 16 years and that the Respondents did not pay him his terminal dues and one months salary in lieu of notice. He contends that the termination was untimely, unlawful and unjustified as it was devoid of the laid down procedures of law.
4. The Claimant claims payment of his service pay and future earning all totaling 215,787. He contends that a colleague asked him to take an apron for cleaning purposes and he did so after the supervisor verified that it was only an apron leaving the premises. He continued with his work. The following day he was dismissed and it was alleged he had intended to steal.
5. The Respondent filed their response on 1/8/2012 through the firm of P.K. Mbabu & Company Advocates. They deny the Claimant's averments and submit that the Claimant's case is misconceived, frivolous and vexation and should be dismissed.
6. They aver that the Claimant was caught red handed at a hidden corner of Respondents premises throwing an overall over the wall to a construction site. He did not have permission to give the company overall and that Mohammed was not a store keeper and could not have authorized the Claimant to take the overall. They also aver that overalls were only permitted to be taken home for cleaning over the weekend.

7. They state that the Claimant was given a hearing and he apologized and was paid 1 months salary in lieu of notice, leave and salary for days worked in January. They aver that he was a member of the NSSF and hence service pay is not payable. They ask this court to dismiss this case accordingly.

8. I have considered the averments of both parties and their submissions. The issues for determination are as follows:

1. *Whether there were valid reasons to terminate the*

Claimant.

2. *Whether due process was followed.*

3. *What remedies to give in the circumstances?*

2. On the 1st issue, the reason given by the Respondent for terminating the Claimant's services is theft where they aver that he was caught red handed throwing an overall over the fence. The Claimant stated that he was taking the overall for cleaning having been so requested by a colleague who was away and that the security had actually checked the overall and ensured that it contained no other item. He denies stealing it.

3. Whether the Claimant was stealing or not remains a matter not so clear given the Claimant's own version of the story. Despite the doubt as to who is stating the truth, it is apparent that the Claimant was not given a hearing. The hearing envisaged would have to be in terms of Section 41 of Employment Act which states as follows:

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

9. A hearing of this nature would have caused the colleague who apparently sent the Claimant to state the position of things given that there was no hearing. It is clear that the termination was unfair and unjustified in terms of Section 45 of Employment Act 2007 which states as follows:

“(1) No employer shall terminate the employment of an

employee unfairly.

2. *A termination of employment by an employer is unfair if the employer fails to prove:*

a. *that the reason for the termination is valid;*

b. *that the reason for the termination is a fair reason:-*

i. *related to the employee's conduct, capacity or compatibility; or*

ii. *based on the operational requirements of the employer; and*

c. *that the employment was terminated in accordance with fair procedure.*

4. I therefore find for the Claimant and order that he be issued with a Certificate of Service. Having already been paid his 1 month salary in lieu of notice and leave due and being a member of NSSF, the only other remedy I award him is 12 months salary as compensation for unlawful termination.

$$= 12 \times 9,520 = 114,240/=$$

The Respondent should also pay costs of this suit.

Read in open Court this 29th day of October, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Oswera holding brief for Mr.Gakoi Maina for Claimant – Present

P.K. Mbabu for Respondents – Absent