



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA

CAUSE NO. 443 OF 2014

JUSTINE ABURI OKEMWACLAIMANT

VERSUS

SHEIKH ZAYED CHILDREN WELFARE CENTRE.....RESPONDENT

J U D G M E N T

Introduction

1 The claimant brought this suit on 12.9.2014 claiming Ksh 472,500 being terminal dues plus compensation for wrongful termination of his employment by the respondent on 31.7.2014. According to claimant he was summarily dismissed without being accorded any fair hearing and without any reason.

2 The respondent filed defence on 27.10.2014 denying liability for wrongful termination. She avers that the claimants' dismissal was lawful and justified because he performed his duties recklessly as a result of which he damaged a Lawn mower belonging to the respondent. That the claimant was given dismissal letter and was paid Ksh 15,000 being one month salary in lieu of notice.

3 The suit was heard on 28.7.2015 when the claimant testified as Cw1 but the respondent and her counsel never attended court despite the date having been fixed by consent. After the hearing claimant filed written submissions.

Analysis and Determination.

4 There is no dispute that Cw 1 was employee of the respondent from 2.1.2013 without 31.7.2014 when he was dismissed for damaging a Lawn mower through reckless use. The issue, for determination are whether the termination of the claimant's employment was wrongful and whether the reliefs sought should be granted.

Wrongful Termination.

5 The claimant was employed as a general worker doing the duties cleaning, gardening, mowing and any other duty assigned. He's working hours was 7.00 am to 4.30 pm Mondays to Fridays and 7.30 am to 1.00pm on Saturdays. He could however be required to work longer hours. On 29.7.2014, he was instructed by the Director Mr Mirkhan to cut grass using a new Lawn mower. The grass was big and the machine broke down. Cw1 reported the matter to the Director who inspected it and said he would return the machine for repairs. Cw1 was however served with a dismissal letter the following day at 4 pm. The reason for the dismissal was lack of diligence in operating the Lawn mower. He was never trained on how to operate the machine. He contended that he was not invited for a hearing in the company of a fellow worker mate despite there being 8 co-workers in the Cleaning and Gardening department. He was not also

not served with any notice before the dismissal and he had not received any previous warning or show cause letter.

6 The forgoing evidence was not rebutted by the defence. The termination letter alleged that Cw1 had been advised and warned to be extra careful with the new Lawn mower but he used it in a reckless manner. No evidence of such advice and warning was produced by the defence to support the allegations in the dismissal letter. There is also not evidence adduced that to prove that Cw1 used the machine in a reckless manner. The respondent also never called any witness to prove that Cw1 was invited to any hearing to defend himself in the company of a fellow employee of his choice.

7 Under section 45 (2) of the employment Act (EA), termination of employment is unfair if the employer fails to prove that it was founded on a valid and fair reason and that it was done after following fair procedure. A fair hearing under section 41 entailing explaining the reason for the intended dismissal to the employee in the company of a fellow employee or shop floor union representative of his choice and thereafter allowing them to air their representations in defence. Such proceedings must be conducted in a language of the employees understanding. As observed above the respondent called no witnesses to disprove the evidence by Cw1. Consequently the court finds on a balance of probability that the claimant has discharged his burden of proving that he was unfairly and wrongfully terminated as required under section 47 (5) of the E.A. The said termination was wrongful because it prematurely terminated the claimant's fixed term contract. The contract was for 17 months starting 1.8.2013 and scheduled to end on 31.12.2014.

Reliefs

8 In view of the foregoing finding that the termination of the contract was wrongful and premature, the court proceeds to assess and award damages to the claimant for breach of the fixed term contract. It is trite law that damages for breach of fixed contract is the total earnings for the unexpired period of the contract. In this case the claimant had 5 months remaining before his contract expired. He is therefore awarded ksh 15,000 x 5=Ksh 75,000. The claimant will also get pay in lieu of leave days for the period served from May 2013 to July 2014 which is equal to 14 months. The contract of employment provided for 21 annual leave days. He will also one and three quarters (1 3/4 leave days per month on pro rata basis for the 2 months to make a total of 24.5 leave days earned. He will therefore get ksh 15000x24.5/30= Ksh 12,250.

9 The claim for over time is dismissed for lack of particulars. Paragraph 5 of claim only stated that

“the claimant claims for overtime for the entire period the claimant served the respondent amounting to Ksh 180,000.”

He did not show how he arrived at the sum of Ksh 180,000. Likewise the claim for compensation and salary in lieu notice are dismissed. The reason for the foregoing is that the award of all the earning for the unexpired contract period made herein above has already put the claimant to the financial position he would have been had his contract of employment not been prematurely terminated. In addition he has a pension for his retirement.

Disposition.

10 For the reason stated above judgment is entered for the claimant for the sum of Ksh 87,250 plus costs and witnesses. He will also be issued with a certificate of service.

Signed, Dated and Delivered at Mombasa this 23rd day of October 2015.

ONESMUS MAKAU

JUDGE

23.10.2015

Coram

Before Justice Onesmus Makau

C/Assistant -

For the Claimant:

For the Respondent:

Court

Judgment delivered in their presence/absence in open court.

ONESMUS MAKAU

JUDGE