



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2221 OF 2012

SANJIVA VIDOLO MUSULWA.....CLAIMANT

VERSUS

KENYA BUILDERS & CONCRETE CO. LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant's memorandum of claim was filed 15th November 2012. The Claimant sought the resolution of a dispute he framed as unfair termination/dismissal and non-payment of terminal benefits and compensatory damages. He averred that he was employed by the Respondent as a turn boy from around early 2008 earning Kshs. 17,691/- per month. He averred that on 28th May 2012 while at work, the Respondent's Personnel Manager approached the Claimant and asked him to sign a document. He averred that he perused it and declined to sign it as signing it would have amounted to him acknowledging that he had refused to work according to instructions. He averred that upon his refusal to sign the document the Personnel Manager verbally dismissed him from employment by claiming the Claimant's services were no longer required. The Claimant averred that he was not offered a hearing, given an explanation or reasons for his dismissal and that this amounted to unfair labour practice as envisaged by the Constitution of Kenya, the Employment Act 2007 and that the general principles of natural justice were not adhered to by the Respondent. The Claimant sought one month salary Kshs. 17,691/- as notice, Kshs. 21,299/- as service gratuity, 12 month salary as compensation Kshs. 212,292/-, compensatory damages Kshs. 212,292/-, costs of the suit and interest thereon.

2. The Respondent filed a defence on 11th March 2013. In the defence, the Respondent averred that the Claimant was employed on casual terms on 22nd February 2010 and the employment was converted to a term contract on 1st November 2010 in the position of a turn boy earning Kshs. 7,633/- plus house allowance of 2,800/- until 27th August 2012 when the Claimant declined to be subjected to the Respondent's disciplinary process and absconded duty without any lawful course. The Respondent averred that at the time of the Claimant's desertion of employment on 27th August 2012 the Claimant was earning Kshs. 13,267/-. The Respondent averred that the Claimant's employment was subject to the Respondent's code of conduct and regulations and the CBA between the Respondent and the Kenya Quarry & Mine Workers Union. The Respondent averred that the Claimant was found by his supervisor Mr. Michael Otieno arranging paving blocks without cleaning the surface contrary to the basic safety and health rules. The Respondent averred that the Claimant and his colleague Mr. Nicholas Matheka acknowledged the anomaly but declined to acknowledge the warning letter from the supervisor who reported the matter to the Respondent's Human Resource & Administration Manager who upon listening to the Claimant, Mr. Matheka and the Supervisor advised the Claimant and his colleague to sign the warning letter and return to work. The Respondent averred that Mr. Matheka signed the warning and

returned to work but the Claimant walked out of the office and out of the Respondent's premises never to be seen again until after one week when the Claimant returned to seek payment of his dues. The Respondent averred that the Claimant terminated his services through desertion of duty on 27th August 2012. The Respondent made a counter claim for Kshs. 13,267/- and in the counter-claim averred that the Claimant deserted duty without lawful cause and failed to give notice of intention to cease working for the Respondent and thus demanded payment of one month's salary in lieu of notice from the Claimant. The Respondent averred that the Claimant is not entitled to any of the claims set out in his memorandum of claim and sought entry of judgment for Kshs. 13,267/- as sought in the counterclaim.

3. The Claimant filed an Amended Memorandum of Claim on 25th March 2013 and in the amendment averred that from the time he was employed until 1st November 2010 his contract of employment was not reduced into writing and that he continued to execute his duties earning a salary of Kshs. 315/- per day. He averred that it was on or about 28th August 2012 when he was approached by the Respondent's Personnel Manager with a document for him to sign. He also averred that despite his relentless efforts to be reinstated to work or at least he paid his terminal dues the Respondent ignored him and chased him away.

4. At the hearing of the case on 16th July 2015, the Claimant was present but the Respondent was absent. The Claimant testified that he worked for the Respondent and was given a document to sign in May 2012. He stated that he refused to sign because the document showed that he had refused to work. He testified that at the time he had been injured. He prayed for notice pay for one month as he was earning Kshs. 17,691/-. He sought payment of his dues as claimed, damages and costs of the suit.

5. The Claimant sought to file submissions within 14 days and Court gave the Claimant 14 days to file submissions. The Respondent appeared at the mention date on 29th July 2015 and advised that it too would file submissions. At the time of writing the judgment none were filed for the Respondent and the judgment is made in the absence of the same.

6. The Claimant filed submissions on 29th July 2015 and submitted that he had vehemently denied the truth of the allegations leading to his dismissal. He submitted that it was incumbent upon the Respondent to confirm and prove two salient factors to justify the dismissal – that the reason for the termination was valid and that due process was followed in arriving at the decision to dismiss the Claimant. The Claimant submitted that the allegation of desertion of duty and avoidance of disciplinary process were never justified by any witness from the Respondent's side. The Claimant submitted that the defence unsupported by evidence is meaningless. The Claimant submitted that fair procedure was not followed in the dismissal by the Personnel Manager. He submitted that the assertion of desertion of duty was an afterthought. It was submitted that the Claimant was not offered any chance of hearing as required by Section 41 of the Employment Act. He asserted that under Section 45 the employer has not only to prove that the reason for the termination is valid and fair but also that the employment was terminated in accordance with fair procedure. The Claimant submitted that the provisions of the Constitution and the Employment Act must be adhered to the letter and that the Claimant was entitled to compensation in terms of Section 12 of the Industrial Court Act and Section 49(1)(c) of the Employment Act. The Claimant submitted that an employee who is unfairly terminated/dismissed without one month's notice is entitled to one month's salary in lieu of notice pursuant to provisions of Section 35 as read together with Section 37 of the Employment Act. The Claimant submitted that the Respondent never submitted NSSF dues for the Claimant for 2 years. He submitted that was illegal and amounts to unfair labour practice. The Claimant thus sought service gratuity at the rate of 18 days for each completed year of service. The Claimant relied on the case of **Jacob Joseph Onyango v John Ndungu Mureithi & Another [2015] eKLR**. The Claimant also sought costs and interest.

7. The Claimant's case was that he was asked to sign a document and he declined to sign it because it would have meant an admission that he was not doing his job properly. The Respondent's case was that the Claimant after declining to sign the document abruptly left the premises and never returned. The Claimant averred that he had made spirited efforts to return but the Respondent was unwilling to permit his return. Curiously no evidence of the attempt to return to work was exhibited by the Claimant. The

Claimant testified and did not call any witness. The Respondent did not avail any witness but had filed a defence and counter claim. The defence also had attached to it the documents in respect of the Claimant's refusal to heed instructions.

8. The Claimant was from the testimony, documentary evidence and record before me warned severally about executing his work. He confirms the warning that was intended in August 2012 where his supervisor called him and wanted to give a warning but the Claimant declined. It is true that if he had signed it, the document would have shown he did not know how to perform his duties. The 5 warnings exhibited demonstrate the Claimant had issues executing his tasks. The Claimant had testified of an injury at his hearing and this is confirmed by the warning issued on 24th April 2012 when he raised a cabro pallet while stacking and that made the pallet fall down and injure him. This was stated to be in spite of being warned several times by his supervisor. On the issue that led to the termination of the contract of service, the Claimant was accused of failing to clean the surface before stacking and he declined to sign the warning. It was the 3rd and final warning in a series of warnings in 2012. The first warning issued in 2012 was failing to wear protective gloves followed by the warning following the injury and finally the failure to clean the area he was stacking the pallets. While no detailed job description was given, the warning that was final was in respect of an issue that could well have been the duty of another employee hired to clean the Respondent's premises. In the view of the Court, the final warning though recorded did not merit being on record. That said, the allegation that the Claimant absconded from work was not recorded. It would seem that the Claimant was constructively dismissed even if the allegations on the verbal dismissal by the Personnel Manager was disregarded. The Claimant was unable to continue working as there was pressure to admit to not cleaning the surface before stacking pallets. No witness was called by the Respondent to clarify the issues in the Claimant's case. It is the view of the Court that the dismissal of the Claimant was thus unfair within the meaning of Section 43 and 45 of the Employment Act. The Claimant sought notice pay. His pay was Kshs. 9,867/- basic plus house allowance of Kshs. 3,400/-. I would award him notice pay of Kshs. 13,267/-. He will also have compensation which I cap at 3 months for the dismissal. I do not agree that he is entitled to service pay for the 2 years the NSSF records he had presented show a gap for. He did not demonstrate that the Respondent was his employer at the material times. Regarding the few months there is a gap, I order the Respondent to issue a cheque for Kshs. 2,000/- payable to NSSF in respect of contributions for the Claimant and file a statement showing the amounts have been credited to the Claimant. In addition I fine the Respondent Kshs. 15,000/- for failing to remit NSSF dues for this employee. The fine to be paid within 14 days of today. The Claimant had been sued for failure to give notice and in view of the finding of the Court in his favour in regard to dismissal the Respondent's counterclaim is dismissed. The Claimant will also have costs of the suit.

9. In the final analysis the Court awards the Claimant the following:-

- a. Notice pay Kshs. 13,267/-.
- b. 3 months salary compensation Kshs. 39,801/-
- c. Costs of the suit

10. The Respondent to pay in addition to the above, Kshs. 2,000/- to NSSF and a fine of 15,000/- to the Employment & Labour Relations Court.

Orders accordingly.

Dated and delivered at Nairobi this 13th day of **October 2015**

Nzioki wa Makau

Judge