



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 598 OF 2010

(Before Hon. Lady Justice Hellen S. Wasilwa on 8th October, 2015)

PETER MUSYOKA CLAIMANT

VERSUS

MASAKU LUCKY WHOLESALERS RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein Peter Musyoka filed his Claim against the Respondents on 28/5/2011 in person claiming unfair termination of employment and failure by the Respondents to pay him his terminal dues.
2. The Claimant's case is that he was employed by the Respondents on 15/1/1995 as general labourer earning a salary of 2,500/= without a house allowance on a verbal contract. He avers that he served the Respondents faithfully and honestly throughout the period until 17/4/2010 when the Respondents unlawfully, irregularly and prematurely terminated him from employment without any justifiable cause or reason whatsoever and without paying him his terminal dues.
3. The claim by the Claimant is for payment of 3 months salary in lieu of notice, leave allowance, off duty days, overtime, gratuity pay, travelling allowance and compensation for unlawful and unfair termination.
4. The Claimant has submitted that the termination was unlawful and unfair as he was not given any notice nor a hearing before the termination and neither was he given any reasons for the termination. At time of termination, the Claimant's salary was Kshs.6,000/= per month.
5. In his oral evidence in court the Claimant stated that on 13/4/2010 he took luggage to Kangundo and nothing got lost. He stated that there was no shortfall in the moneys he submitted to his boss.
6. The Respondents opposed this claim. They filed their Amended Statement of Defence and Counter Claim on 27/1/2011 through the firm of B. M. Mung'ata & Company Advocates. They agreed to have employed the Claimant in September 1996 at a salary of Kshs.2,450/= plus house allowance of Kshs.361.50/= as per the termination letter Appendix ML1. They however contend that the Claimant was not honest in his dealings and misappropriated the Respondent's money in that he failed to account for several goods supplied leading to customer complaints amounting to Kshs.50,000/= for week.
7. The Respondents have Counter Claimed Kshs.31,280/= being losses incurred by Respondents for

goods and moneys not accounted for. The defence at paragraph 5 states that the Claimant deserted employment after making losses on transit. However RW1 stated that he was summarily dismissed but was not issued with any letter of dismissal.

8. I have examined the evidence of both parties and issues for determination are as follows:

1. ***Whether there were valid reasons to warrant dismissal of Claimant.***
2. ***Whether due process was followed before the said dismissal.***
3. ***What remedies if any the parties are entitled to.***

9. On 1st issue, the Respondents aver that the Claimant caused the Respondents loss amounting to 31,280/= on unaccounted for moneys for goods supplied. The Claimant denied this claim. The Respondents on their part however did not give any evidence on the goods supplied and signed for by the Claimant plus their value as against what the Claimant was able to remit back showing the shortfall.

10. In any case, RW1 stated that the Claimant caused loss of about 50,000/= every week but the defence lists a total of 31,280/= and this discrepancy is not explained. The claim that the Claimant caused loss to Respondents is therefore not valid.

11. Another reason advanced by the Respondents for dismissing the Claimant is that he absconded duty. This reason is also not valid given the contradiction in the Respondents evidence as to what really caused them to dismiss the Claimant whether it was due to the loss incurred or refusing to work on 13/4/2010.

12. I find that there was no valid reason warranting termination of the Claimant in the premises.

13. On the 2nd issue, there was no hearing given to the Claimant as envisaged under Section 41 of Employment Act which states:

“(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.”

14. Given that there was no valid reason to warrant termination of Claimant and given that due process was not followed before the dismissal, I find the dismissal of Claimant unjustified and unfair in terms of Section 45 of Employment Act 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.***

15.I therefore find for Claimant and award him as follows:

1. *1 month salary in lieu of notice = 6,000/=*
2. *12 months compensation for unlawful termination = 12 x 6,000/= 72,000/=*
3. *Service pay of 15 days salary for each year worked being 3,000 x 14 years = 42,000/=*

TOTAL = 120,000/=

Plus costs and interest on the amount.

The Defendants Counter Claim is also dismissed with costs to the Claimant.

Read in open Court this 8th day of October, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Musya holding brief for Nthiwa for Respondent

No appearance for Claimant