



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA

CAUSE NO.7 OF 2015

CRISPINE PETER ONYANGOCLAIMANT

VERSUS

MVITA CONTAINER DEPOT LTD....RESPONDENT

J U D G M E N T

Introduction

1. The claimant was employed by the respondent as a workshop welder earning a gross salary of Ksh 26,000 per month. On 8.11.2014, he worked his normal hours and while leaving the workshop, the supervisor confronted him for not accepting to work overtime. When the claimant called the manager to report the incident, the manager told him not to report to work again until he received a call from the respondent. On 11.11.2014, the respondent's administrator called the claimant to report to the depot and on arrival he was served with a dismissal letter dated 8.11.2014 by the manager. The claimant avers that the said dismissal was unfair and brings this suit claiming terminal dues plus compensation for unfair termination of his employment.

2. The respondent has denied liability for unfair termination of the claimant's services. She avers that the claimant had perpetually grossly misconducted himself despite verbal and written warnings. That on 8.11.2014, he insulted and refused to take instructions from the supervisor and as such his dismissal was lawful, fair and justified under the employment contract. That she paid the claimant all his terminal dues and was willing to issue him with a certificate of service.

3. The suit was heard on 28.7.2015 when the claimant testified as Cw1 and the respondent Mr Muhamed Ibrahim Hussein, Abdala Ogutu and Rajab Dzomob Dzua as Rw1, Rw2 and Rw3 respectively. Thereafter both parties filed written submissions.

Analysis and Determination.

4. There is no dispute that Cw1 was employed by the respondent as a welder from 1.3.2013 to 8.11.2014 when he was dismissed for gross misconduct. The issues for determination are whether dismissal was unfair and whether the reliefs sought should be granted.

Unfair Termination

5. Under section 47 (5) of the Employment Act (EA), the burden of proving unfair termination is upon the employee while the Burden of justifying the termination lies with the employer. Under section 45 (2) of the EA termination of employment is unfair if it is not founded on a valid and fair reason and if it is done without following a fair procedure. The procedure for termination is unfair if the employee is not

accorded a fair hearing and if he is not issued with a certificate of service.

Reason for Dismissal.

6. The dismissal letter dated 8.11.2014 cited the reason for the dismissal as follows:

“...On 8th November 2014 you proved that you are totally uncorrectable, when you verbally insulted the Depot Operations supervisor, who had instructed you to work overtime, and refused to adhere to his instructions.”

Under section 44 (4) of the EA, the misconduct cited in the dismissal letter justifies a summary dismissal.

7. There is however no independent witness to support the evidence by Rw2 that Cw1 insulted him in the presence of workmates and clients. Rw1 and Rw3 did not witness the alleged insults. The claimant has denied the same. The burden of proving the alleged insult lies with Rw2 but he has failed to prove the same on a balance of probability. As regards the refusal to take instructions to work overtime, Rw2 also never proved that he gave such instructions to the claimant before he sign out at the office. Rw3 was the fellow welder to the claimant and he never testified on that issue. Rw1 confirmed in his testimony that other workers sin off with the claimant on 8.11.2014. One wonders why the others were not also disciplined for refusing to work overtime.

8. The court finds on a balance of probability that Rw2 never gave the claimant prior notice that he was required to work over time. Even if the said notice had been given, which was not proved, such notice should only be a request subject to the employees consent. That overtime work should be mutually agreed between the employer and the employee.

Fair Procedure

9. Under section 41 of the EA, an employer is barred from dismissing his employee for misconduct under section 44 (3) and (4) of the EA without explaining to him the reason and according him a chance to defend himself in the presence of another employee or shop floor union official of his choice. There is no dispute that the claimant was dismissed without being heard as required under section 41 of the EA. The reason for dismissing Cw1 was that he insulted Rw2 and disobeyed his instructions. The dismissal was done by the Rw1 before telling him the reasons and giving him a chance to air his defence. Rw1 was not present when the alleged insults and disobedient was committed by the CW1. He only acted on the information from Rw2. That procedure of terminating an employee for misconduct is unfair within the meaning of section 41 of the EA.

10. The failure by the respondent to prove that she had a valid and fair reason to dismiss the claimant and the admission by Rw1 that he never accorded the claimant any hearing before his dismissal, the court makes a finding of fact and law that the termination of the claimant's employment contract was unfair and unjustified within the meaning of section 45 of the EA. In so finding the court has considered and dismissed as false the allegation by the respondent that she had

previously served the claimant with written warning dated 25.8.2014 and 15.9.2014. Although the said warning letters were exhibited in this case, the claimant denied service of the same. In addition, the respondent never proved that she indeed served the said warning letters on claimant. Finally the court has also considered that the respondent never issued the claimant with a certificate of service as required Under section 51 of the E.A.

Reliefs

11. The claimant has prayed for one month salary in lieu of notice, leave earned in eight months plus compensation of 12 months' salary for unfair termination totaling to Ksh 353,022.20. The court awards the claimant ksh 26000 being one month salary in lieu of notice as provided under clause 2 of the contract of employment. He is also awarded 4 months' salary for unfair and unjustified termination being

Ksh 104,000. The claim for leave for 8 months is however dismissed because the claimant was paid for the same alongside the salary for the 8 days worked in November 2014. Cw1 admitted that he was paid Ksh16,731 after dismissal. That is obviously more than the salary for 8 days worked. The court believes the defence evidence that Cw1 was

indeed paid for the 12 days leave earned in the last 8 months of his service.

Disposition

12. For the reasons stated above judgment is entered for the claimant for **Ksh 130,000** plus costs and interest.

Signed, Dated and Delivered at Mombasa this 27th day of November 2015.

ONESMUS MAKAU

JUDGE